

**SUPPORTING STATEMENT
for the Paperwork Reduction Act
Information Collection Submission for
Rule 101 of Regulation M
Partial Revision
(OMB Control No. 3235-0464)**

A. Justification

1. Necessity of Information Collection

a. Background

Congress granted broad rulemaking authority to the Securities and Exchange Commission (“Commission”) in Sections 9(a), 10(b), and 15(c) under the Securities Exchange Act of 1934 (“Exchange Act”) to combat manipulative abuses in whatever form they may take. In exercising its authority, the Commission has focused on the market activities of persons participating in a securities offering and determined that securities offerings present special opportunities for manipulation that require specific regulatory attention. On December 20, 1996, the Commission adopted Regulation M, consisting of new Rules 100 through 105, which govern the activities of underwriters, issuers, selling security holders, and others in connection with a securities offering. Regulation M significantly eased regulatory burdens on offering participants by eliminating the trading restrictions for underwriters of actively traded securities; reducing the scope of coverage for other securities; reducing restrictions on issuer plans; providing a more flexible framework for stabilizing transactions; and deregulating rights offerings.

b. Overview of Rule 101

Rule 101 of Regulation M governs underwriters, prospective underwriters, participating broker-dealers, and their affiliated purchasers (distribution participants). Rule 101 applies only during a "restricted period," which commences one or five business days prior to the day of the pricing of the offered security and continues until the distribution is over. The length of the restricted period is based on the trading volume of the offered security. Rule 101 excludes from its coverage more actively-traded securities.

New Amendment: On June 7, 2023, the Commission adopted an amendment to except from Rule 101 of Regulation M nonconvertible debt securities and nonconvertible preferred securities (together, “Nonconvertible Securities”) of issuers for which the probability of default, estimated as of the sixth business day immediately preceding the determination of the offering price and over the horizon of 12 full calendar months from such day, is 0.055% or less, as determined and

documented, in writing, by the distribution participant acting as the lead manager (or in a similar capacity) of a distribution, as derived from a structural credit risk model.¹

c. Information Collection Requirements for Rule 101

Rule 101 requires persons participating in a distribution to collect certain information to determine whether the rule would apply, and if so, for what period of time. Regulation M incorporated many previously-existing requirements of the trading practices rules, together with their information collection requirements. However, by removing many categories of activities, securities, and persons from anti-manipulation regulation, Regulation M reduced the burdens of anti-manipulation regulation.

(i). Exceptions from Rule 101

(a). Exclusion of Actively-Traded Securities

Rule 101 excepts securities with an average daily trading volume (ADTV) valued at \$1 million or more. Rule 101 requires the ADTV to be calculated for the two full calendar months preceding the filing of the registration statement. To use this exception, a distribution participant must examine publicly available market data to calculate the ADTV.

(b). Other Securities

The ADTV of other securities remaining subject to the restrictions of Rule 101 determines the length of the restricted period for a particular security. As with excepted securities, distribution participants and issuer participants may obtain publicly available data to calculate ADTV of a particular security.

(c). “Affiliated Purchasers”

Rule 101 applies to any "affiliated purchaser" of a distribution participant, issuer, or selling security holder. Regulation M, however, provides an exception to the definition of affiliated purchaser where the distribution participant or issuer participant have certain information barriers in place. This exception requires the participant to establish, maintain, and enforce written policies and procedures to prevent the flow of information between itself and its affiliates. Such participants must also obtain an annual, independent assessment of the operation of such policies and procedures.

(d). De Minimis Exception

¹ See 17 CFR 242.101(c)(2)(i), as amended; see also *Removal of References to Credit Ratings From Regulation M*, Exchange Act Release No. 97657 (June 7, 2023), 88 FR 39962 (June 20, 2023) (“2023 Adopting Release”).

Rule 101 provides an exception for de minimis violations during the restricted period. This provision excepts purchases of less than two percent of the ADTV of the security in distribution. However, this exception is only available where the person making such bid or purchase subject to the exception has maintained and enforced written policies and procedures reasonably designed to achieve compliance with the other provisions of Rule 101.

(e). New Probability-of-Default-Based Exception

Prior to the June 7, 2023 amendments, Rule 101 excepted nonconvertible debt securities, nonconvertible preferred securities, and asset-backed securities, that were rated by at least one nationally recognized statistical rating organization, as that term is used in Rule 15c3-1 under the Securities Exchange Act of 1934 (“Exchange Act”), in one of its generic rating categories that signifies investment grade (“Investment Grade Exception”). Section 939A of the Dodd-Frank Wall Street Reform and Consumer Protection Act (“Dodd-Frank Act”) requires the Commission among other things, to “remove any reference to or requirement of reliance on credit ratings” and “substitute in such regulations such standard of credit-worthiness” as the Commission determines to be appropriate for those regulations.²

In accordance with the requirements of Section 939A(b), the Commission adopted an amendment to Rule 101 to remove the existing Investment Grade Exception for Nonconvertible Securities. For distributions of Nonconvertible Securities, the Commission adopted a new exception in Rule 101 for reliance by distribution participants and their affiliated purchasers that relates to the determination of an issuer’s probability of default as derived from a structural credit risk model.³

Under the amendment to Rule 101, the exception will be available to Nonconvertible Securities of issuers for which the probability of default, estimated as of the sixth business day immediately preceding the determination of the offering price and over the horizon of 12 full calendar months from such day, is 0.055% or less, as determined and documented, in writing, by the distribution participant acting as the lead manager (or in a similar capacity) of a distribution, as derived from a structural credit risk model.

2. Purpose and Use of the Information Collection

A distribution participant (i.e., the syndicate manager) performs ADTV calculations to determine whether a security is excepted from Rule 101, or to determine the applicable restricted period. This information is not used by the Commission.

A distribution participant may establish information barriers to segregate the activities of itself and its affiliates. Construction of these barriers permits the affiliates of a distribution participant, issuer or selling security holder to be excepted from Rule 101. The annual audit assures

² Pub. L. 111-203 sec. 939A(b), 124 Stat. 1376, 1872-90 (2010).

³ See 2023 Adopting Release, at 88 FR 39965.

such distribution participant that the policies are effective. The Commission only examines the policy and audit in investigations of potential violations of the rule.

A distribution participant may establish a written policy for the purpose of avoiding violations of Rule 101 and specifically to benefit from the provision of the rule that excepts *de minimis* violations. The Commission generally does not review a distribution participant's policy.

New Amendment: As discussed in the 2023 Adopting Release, the information collected under the new amendment will be used to ensure that Nonconvertible Securities that trade primarily based on their yield and creditworthiness, and are less susceptible to the type of manipulation that Rule 101 seeks to prevent, are excepted from Rule 101.

3. **Consideration Given to Information Technology**

Improvements in telecommunication and data processing technology reduce regulatory burdens that might otherwise result from Rule 101. The Commission is not aware of any technical or legal obstacles to reducing the burden through the use of improved information technology.

New Amendment: As discussed in the 2023 Adopting Release, the process for calculating the probability of default will likely be highly automated, and broker-dealers serving as lead managers will initially comply with this requirement by reprogramming systems to create a means to calculate electronically the probability of default based on manually gathered and entered inputs for financial modeling.⁴ The Commission also assumes that broker-dealers serving as lead managers already have the software and systems in place required to make the probability of default calculations.

4. **Duplication**

The information required by each of the rules described herein does not duplicate that required by any other federal regulation. At the time Regulation M and related amendments were proposed, the Commission solicited and received comments without receiving any reference to federal regulations that may duplicate the requirements mandated by Regulation M. The Commission continues to believe that there is no duplication of the information required by the rules described herein.

5. **Effect on Small Entities**

The information requirements of Rule 101 apply equally to all entities engaging in an offering, regardless of the entity's size. The Commission believes that the requirements of Rules 101 are not unduly burdensome on small entities.

New Amendment:

⁴ See 2023 Adopting Release, at 88 FR 39992.

As discussed in the 2023 Adopting Release, the Commission does not believe that any of the persons that will be impacted by the amendments are small entities under the relevant definitions. Small entities include broker-dealers with total capital (net worth plus subordinated liabilities) of less than \$500,000 on the date in the prior fiscal year as of which its audited financial statements were prepared pursuant to Rule 17a-5(d) under the Exchange Act,⁵ or, if not required to file such statements, a broker-dealer who had total capital (net worth plus subordinated liabilities) of less than \$500,000 on the last day of the preceding fiscal year (or in the time it has been in business, if shorter), and is not affiliated with any person (other than a natural person) who is not a small business or small organization.⁶ A small business or small organization, for purposes of “issuers” or “person” other than an investment company, is defined as a person who, on the last day of its most recent fiscal year, had total assets of \$5 million or less.⁷

Based on the Commission’s analysis of the existing information relating to broker-dealers who are subject to Rule 101, Rule 102, and Rule 17a-4, it is unlikely that any broker-dealer categorized as a “small business” or “small organization” under Rule 0-10⁸ could serve as an underwriter or other distribution participant, as they would almost certainly have insufficient capital to participate in underwriting activities. In addition, the Commission continues to believe that none of the various persons affected by the amendments would qualify as a small entity under the Rule 0-10 definition as it is unlikely that any issuer of that size had investment grade securities that were eligible for the Investment Grade Exception. Accordingly, the Commission believes it is unlikely that, in the future, a small entity may become impacted by the amendments because broker-dealers who enter this market are likely to have at least \$500,000 in total capital, as described above, or to be affiliated with a person who is not a small business or small organization as defined under Rule 0–10, and because issuers of securities that are eligible for the new exceptions provided in Rule 101(c)(2) and in Rule 102(d)(2) are likely to have total assets greater than \$5 million.

For the foregoing reasons, the Commission certified, in the Adopting Release, pursuant to Section 605(b) of Title 5 of the U.S. Code, that the amendments to Rule 100, Rule 101, Rule 102, and Rule 17a-4 will not have a significant economic impact on a substantial number of small entities.

6. Consequences of Not Conducting Collection

Regulation M is designed to preserve the integrity of the securities trading market as an independent pricing mechanism by prohibiting activities that could artificially influence the market

⁵ See 17 CFR 240.17a-5(d).

⁶ See 17 CFR 240.0-10(c).

⁷ 17 CFR 240.0-10(a).

⁸ 17 CFR 240.0-10.

for an offered security. Subject to exceptions, Rule 101 prohibits distribution participants and their affiliated purchasers from directly or indirectly bidding for, purchasing, or attempting to induce another person to bid for or purchase, a covered security during a restricted period.

New Amendment: In regards to the probability-of-default-based exception, the information collection is necessary so that only Nonconvertible Securities that trade primarily based on their yield and creditworthiness, and are less susceptible to the type of manipulation that Rule 101 seeks to prevent, are excepted from Rule 101 of Regulation M.

7. Inconsistencies With Guidelines in 5 CFR 1320.5(d)(2)

There are no special circumstances. This collection is consistent with the guidelines in 5 C.F.R.1320.5(d)(2).

8. Consultations Outside the Agency

In regards to the probability-of-default-based exception, the Commission issued a release soliciting comment on the new “collection of information” requirements and associated paperwork burdens.⁹ A copy of the release is attached. The Commission received comments from industry groups, investors, and other market participants. In addition, the Commission and staff participated in ongoing dialogue with representatives of various market participants through meetings. Any comments received on this rulemaking are posted on the Commission’s public website, and made available through <https://www.sec.gov/comments/s7-11-22/s71122.htm>. The Commission considered all comments received prior to publishing the final rule, and explained in the 2023 Adopting Release how the final rule responded to such comments, in accordance with 5 C.F.R. 1320.11(f).

9. Payment or Gift

Not applicable.

10. Confidentiality

No assurance of confidentiality is provided.

11. Sensitive Questions

The information collected pursuant to Rule 101 is obtained and used by syndicate managers to determine whether a security is excepted from the rule or to determine the applicable restricted period; however, the information is not directly collected by, or submitted to the SEC, and therefore does not constitute a Privacy Act system of records.

⁹ See *Removal of References to Credit Ratings From Regulation M*, Exchange Act Release No. 94499 (Mar. 22, 2022) [87 FR 18312 (Mar. 30, 2023)] (“Proposal”).

New Amendment: In regards to the probability of default exception, the Information Collection does not collect information about individuals, but rather only business contact information; therefore, a PIA, SORN, and PAS are not required.

12. Burden of Information Collection

a. Restricted Periods

The syndicate manager of each secondary offering calculates the ADTV to determine the restricted period, if any, that must be observed under Rule 101. In 2019, there were 805 firm commitment offerings. For each of these, the Commission estimates it takes approximately one hour to calculate the ADTV and determine the applicable restricted period. Thus, in 2019, approximately 805 hours in the aggregate are required for these calculations under Rule 101. In addition, the Commission estimates that in approximately 50 self-underwritten offerings per year the issuer would calculate the ADTV. Approximately 50 hours are required annually for these calculations by issuers. In many circumstances, however, the collection of information is unnecessary because the ADTV is self-evident (*i.e.*, the ADTV is extremely high or extremely low). This collection is a recordkeeping type of collection.

b. Information Barriers

The Commission estimates that approximately 100 broker-dealers acting as distribution participants in offerings covered by Regulation M seek to exempt the activities of an affiliate from the regulations of Rule 101. The Commission estimates that the annual audit of the written policies and procedures concerning information barriers takes approximately 10 hours, therefore approximately 1,000 hours (10 hours times 100 broker-dealers) are required by this exemption. This collection is a recordkeeping type of collection.

c. De Minimis Exception

The Commission estimates that approximately 634 broker-dealers annually act as distribution participants in distributions covered by Regulation M. The FOCUS reports filed with the Commission as of 9/31/2019 indicate that 634 broker-dealers were involved in activities that could qualify them as distribution participants in distributions covered by Regulation M. The Commission estimates that the written policy required for the *de minimis* exception from Rule 101 takes 40 hours to draft. Approximately 25,360 hours (40 hours times 634 broker-dealers) is required by this exemption. This collection is a recordkeeping type of collection.

d. Probability-of-Default-Based Exception

The amendment to Rule 101 related to the probability of default calculations will result in two new information collections: an initial burden and an ongoing burden. These are PRA

recordkeeping burdens related to gathering data and performing the analysis to calculate the probability of default pursuant to the amendment to Rule 101.

Under Rule 101, lead managers who choose to make a probability of default determination in order to rely on the exception for Nonconvertible Securities will incur burdens, as discussed below. There were 201 lead managing underwriters of Nonconvertible Securities in 2021. The Commission assumes that, on balance, this number will remain consistent given the capital, expertise, and relationships needed to serve as the lead underwriter of a Nonconvertible Securities offering. The Commission, therefore, is estimating that 201 respondents will be subject to PRA burdens under the amendment to Rule 101 related to the probability of default.

i. Initial Burden

Broker-dealers who are lead managers relying on the probability of default exception to Rule 101 of Regulation M for Nonconvertible Securities will need to establish a system to gather the data serving as the inputs and perform the analysis necessary to calculate the probability of default of the issuer whose securities are the subject of the distribution. This process will likely be highly automated, and respondents will initially comply with this requirement by reprogramming systems to create a means to calculate electronically the probability of default based on manually gathered and entered inputs for financial modeling. The respondents who make probability of default determinations will be broker-dealers serving as lead managers and are likely to have experience using their own proprietary version of a publicly available structural credit risk model. The Commission also assumes that broker-dealers serving as lead managers already have the software and systems in place required to make the calculations.¹⁰ The Commission estimated in the Adopting Release that the initial configuration of systems will be handled internally and take 3 hours per respondent, resulting in **a total annual industry-wide initial burden for the proposed amendment to Rule 101 of 301 hours.**¹¹

ii. Ongoing Burden

An issuer's probability of default is forward-looking and changes over time, so the Commission believes that respondents will manually gather the inputs required to calculate an

¹⁰ The Commission recognizes that some respondents may choose to utilize the probability of default estimates that are calculated and made available by a third-party vendor rather than make the determination themselves. In the Proposal, the Commission noted that the Commission's burden estimates were based on respondents gathering the required data and calculating the probability of default, internally, without the use of third-party vendors, because the Commission lacks granular information from which to base an estimate of the proportion of respondents that would use vendors. The Commission requested comment on the extent to which respondents may use third-party vendors, as well as the costs and time burdens of using such services. See Proposal, 87 FR at 18326 n.129. However, the Commission did not receive comments in response to this request. For purposes of estimating the PRA burdens under the final rules as amended, the Commission continues to assume that all respondents will make the probability of default determination internally with data they have gathered, rather than use third party vendors.

¹¹ 201 respondents x 3 hours = 603 hours for the total initial burden. As we plan to request a three-year approval period, we divide 603 by 3 to get 301 hours per year.

issuer's probability of default each time it participates in a distribution of Nonconvertible Securities. There were 33,798 offerings of Nonconvertible Securities in 2021.¹² As discussed in the 2023 Adopting Release, because financial modeling generally, and the probability of default calculation more specifically, is well-known by industry participants, the Commission believes that respondents have employees who are familiar with how to gather the required model inputs. The Commission, therefore, estimates that it will take lead manager respondents roughly one hour per distribution of Nonconvertible Securities to determine and document, in writing, the probability of default determination. Accordingly, **the Commission estimates that the amendments to Rule 101 will result in an aggregate annual ongoing industry-wide burden of 33,798 hours.**¹³

i. Total Respondent Burden

Based on the above calculations, the Commission estimates that a total of 1,790 respondents collect information pursuant to Rule 101 (805 firm commitment respondents plus 50 self-underwritten offering respondents plus 100 affiliate exemption respondents plus 634 *de minimus* exemption respondents plus 201 proposed probability of default exemption respondents). The Commission estimates that the total annual burden under Rule 101 is 61,214 hours (805 firm commitment hours plus 50 hours for self-underwritten offerings plus 1,000 hours to audit policies concerning affiliate information barriers plus 25,360 hours to draft policies concerning *de minimus* exemptions plus 201 hours initial burden and 33,798 hours ongoing burden related to the probability-of-default-based exception). All hours in this collection are the recordkeeping type of collection.

Burden Type	Respondents	Responses per Year	Approximate Annual Burden Hours Per Response	Total Burden Hours
Restricted Period ADTV Calculation	1,211	1	1	1,211 ¹⁴
Self-Underwritten Offering ADTV Calculation	50	1	1	50
Audit of WSPs for Info Barriers with Affiliates	100	1	10	1,000

¹² This number was obtained from Mergent, a financial data provider.

¹³ 33,798 offerings of Nonconvertible Securities x 1 hour per distribution = 33,798 hours.

¹⁴ This estimate was modified in a recent extension, approved by OMB in August 2023, to increase the number of respondents (and the annual burden) from 805 to 1,211.

Firm Commitment Underwritten Offerings de minimis policy drafting	641	1	40	25,640 ¹⁵
Gathering data and performing analysis to calculate the probability of default (Rule 101)-- Initial	201	1	1	201
Gathering data and performing analysis to calculate the probability of default (Rule 101)-- Ongoing	201	168.15 ¹⁶	1	33,798
<i>Total Aggregate Burden Hours</i>				61,900

In addition, there are internal labor compliance cost burdens associated with this rule. The Commission estimates that a typical employee of a broker-dealer charged to ensure compliance with Commission regulations receives compensation of \$70.00 per hour. The \$70.00 per hour figure for a Compliance Clerk is from SIFMA's Office Salaries in the Securities Industry 2013, modified by Commission staff to account for an 1800-hour work-year and multiplied by 2.93 to account for bonuses, firm size, employee benefits and overhead. Based on that estimate, the Commission estimates that the annual internal compliance cost to comply with Rule 101 is \$1,905,050.00 (\$70.00 per hour times 27,215 hours).

Lead managers may incur costs related to determining the probability of default. The Commission estimates that it will take a lead manager 3 hours to establish a system to gather the data serving as the inputs and then perform the analysis necessary to calculate the probability of default of the issuer whose securities are the subject of the distribution, for an aggregate cost of

¹⁵ This estimate was modified in a recent extension, approved by OMB in August 2023, to increase the number of respondents from 634 to 641 and the annual burden from 25,360 to 25,640.

¹⁶ For purposes of creating a submission for the ROCIS system, the number of responses per respondent per year was calculated by dividing the total number of estimated responses per year by the number of responses (33,798/201). This provides the same number of responses (168.15) for each respondent. In actuality, however, each respondent may have a different number of responses.

\$218,889.¹⁷ The Commission also estimates that it will take a lead manager one hour to gather the inputs required to calculate probability of default each time it participates in a distribution of Nonconvertible Securities. There were 33,798 offerings of Nonconvertible Securities in 2021. Therefore, it is estimated that annually lead managers will spend maximum of \$12,268,674¹⁸ in the aggregate complying with this requirement if all lead managers choose to estimate the probability of default internally.

13. Costs to Respondents

There are no external capital, start-up, maintenance or operational cost burdens associated with this rule.

14. Costs to the Federal Government

The government does not experience significant costs based on the recordkeeping required pursuant to Rule 101. The information collected by the respondents is normally reviewed only pursuant to an investigation, not as a matter of routine.

15. Changes in Burden

New Amendment: The probability-of-default-based exception will increase the estimated hour burdens, by adding the following two new ICs, which were previously proposed:

- Gathering data and performing analysis to calculate the probability of default (Rule 101)—Initial (this new IC would add a burden of 201 hours per year. This is lower than the estimated 237 hours per year that was estimated in the Proposal due to a decrease in the estimated number of respondents from 237 respondents to 201 respondents); and
- Gathering data and performing analysis to calculate the probability of default (Rule 101)—Ongoing (this new IC would add a burden of 33,798 hours. This is higher than the estimated 19,076 hours per year that was estimated in the Proposal due to an increase in

¹⁷ The Commission estimates the wage rate based on salary information for the securities industry compiled by SIFMA. *See* Management & Professional Earnings in the Securities Industry—2013, SIFMA (Oct. 7, 2013). These estimates are modified by the Commission staff to account for an 1800 hour work-year and multiplied by 5.35 (professionals) or 2.93 (office) to account for bonuses, firm size, employee benefits and overhead. These figures have been adjusted for inflation through Jan. 2023 using data published by the Bureau of Labor Statistics' Consumer Price Index inflation calculator, *available at* https://www.bls.gov/data/inflation_calculator.htm. 201 lead managers x 3 hours x \$363 hour for a compliance manager = \$218,889.

¹⁸ Cost estimated is based on the sum of 33,798 offerings multiplied by 1 burden hour multiplied by \$363, for a compliance manager. *See* Management & Professional Earnings in the Securities Industry—2013, SIFMA (Oct. 7, 2013). These estimates are modified by the Commission staff to account for an 1800 hour work-year and multiplied by 5.35 (professionals) or 2.93 (office) to account for bonuses, firm size, employee benefits and overhead. These figures have been adjusted for inflation through Jan. 2023 using data published by the Bureau of Labor Statistics' Consumer Price Index inflation calculator, *available at* https://www.bls.gov/data/inflation_calculator.htm.

the estimated number of offerings of Nonconvertible Securities from 19,076 in 2020 to 33,798 in 2021).

Information Collection Requirement	Proposed Annual Industry Burden for Adoption of the Probability of Default Exception	Annual Industry Burden Previously Approved for Proposed Probability of Default Exception	Change in Burden	Reason for Change
Gathering data and performing analysis to calculate the probability of default (Rule 101)—Initial	603 hours for 201 respondents at 3 hours per respondent	711 hours for 237 respondents at 3 hours per respondent	-108 hours	Lower estimated number of respondents for Adopted Rule
Gathering data and performing analysis to calculate the probability of default (Rule 101)-- Ongoing	19,076 hours at 1 hour per distribution of Nonconvertible Securities, with an estimated 19,076 offerings of Nonconvertible Securities in 2020	33,798 hours at 1 hour per distribution of Nonconvertible Securities, with an estimated 33,798 offerings of Nonconvertible Securities in 2021	14,722 hours	Higher estimated number of offerings of Nonconvertible Securities for Adopted Rule

16. Information Collection Planned for Statistical Purposes

Not applicable. The information collection is not used for statistical purposes.

17. Approval to Omit OMB Expiration Date

The Commission is not seeking approval to omit the expiration date.

18. Exceptions to the Certification for Paperwork Reduction Act Submissions

This collection complies with the requirements in 5 CFR 1320.9.

B. Collections of Information Employing Statistical Methods

This collection does not involve statistical methods.