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The Code of Federal Regulations is sold by the Superintendent of Documents. Prices of new books are listed in the first FEDERAL REGISTER issue of each week.

DEPARTMENT OF AGRICULTURE

Food and Nutrition Service

7 CFR Parts 271 and 274

[FNS–2012–0028]

RIN 0584–AE26

Supplemental Nutrition Assistance Program: Trafficking Controls and Fraud Investigations

AGENCY: Food and Nutrition Service (FNS), USDA.

ACTION: Final rule, Interim Final Rule.

SUMMARY: The Food and Nutrition Service (FNS) is issuing a final rule to amend Supplemental Nutrition Assistance Program (SNAP or Program) regulations to allow State agencies to deny a request for a replacement card until contact is made by the household with the State agency, if the requests for replacement cards are determined to be excessive. State agencies which elect to exercise this authority will be required to protect vulnerable persons, such as individuals with disabilities, homeless individuals or the elderly, who may repeatedly lose their Electronic Benefit Transfer (EBT) cards but are not committing fraud.

FNS is also changing the EBT card replacement timeframes in the same section to require State agencies to make replacement cards available for pick up or to place the card in the mail within two business days following notice by the household to the State agency that the card has been lost or stolen. FNS is further amending its regulations to define the term ''trafficking'' to include the attempt to buy or sell SNAP benefits in cases where an individual makes the offer to sell SNAP benefits and/or EBT card online or in person.

Finally, FNS is issuing an interim final rule (with a request for additional comment) that requires State agencies to monitor EBT card replacement requests and send notices to those clients who have requested four cards within a 12-month period. The State agency shall be exempt from sending this Excessive Replacement Card Notice if it adopts the card withholding option in accordance with this final rule and sends the requisite Withhold Replacement Card Warning Notice on the 4th replacement card request.

DATES: *Effective dates:* This final rule is effective November 19, 2013. The addition of § 274.6(b)(6) is being issued as an interim final rule and is effective December 19, 2013.

Comment date: FNS will consider comments from the public on the addition of § 274.6. Comments must be received at one of the addresses provided below on or before October 21, 2013.

ADDRESSES: The Food and Nutrition Service, USDA, invites interested persons to submit comments on the interim rule provision § 274.6(b)(6). Comments may be submitted by one of the following methods:

- *Federal e-Rulemaking Portal:* Go to *http://www.regulations.gov.* Preferred method; follow the online instructions for submitting comments on docket 2012–0028.
- *Fax: Submit comments by facsimile transmission to:* Jane Duffield, Chief, State Administration Branch, Fax number 703–305–0928.
- *Mail:* Comments should be addressed to Jane Duffield, State Administration Branch, 3101 Park Center Drive, Room 818, Alexandria, VA 22302.
- *Hand Delivery or Courier:* Deliver comments to Jane Duffield, State Administration Branch, 3101 Park Center Drive, Alexandria, VA 22302, Room 818, Monday–Friday, 8:30 a.m.–5:00 p.m.

All comments submitted in response to the interim rule provision will be included in the record and will be made available to the public. Please be advised that the substance of the comments and the identity of the individuals or entities submitting the comments will be subject to public disclosure. FNS will make the comments publicly available on the Internet via *http://www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: Jane Duffield, Chief, State Administration Branch, Food and Nutrition Service, USDA, 3101 Park Center Drive, Alexandria, Virginia, 22302. Ms. Duffield may be reached by telephone at 703–605–4385.

SUPPLEMENTARY INFORMATION:

Background

In this final rule, FNS is amending the SNAP regulations at 7 CFR 274.6, to give State agencies an option for handling requests for multiple replacement cards. Current regulations do not allow State agencies to require clients requesting multiple replacement cards to contact the agency and provide an explanation before a new card is issued, even though such requests may indicate fraudulent activity. Under this rule, State agencies may choose to withhold the benefit card when the client has requested an excessive number of replacements, until the client makes contact with the State agency to provide an explanation for the request. State agencies taking this option would be expected to establish a threshold beyond which the individual must make contact. That threshold may not be fewer than four cards in a 12-month period prior to the request, except in limited circumstances.

Although the intent of the rule is not to systematically affect clients requesting fewer than four cards in a 12-month period, FNS recognizes that State agencies may obtain additional evidence indicating that a household is suspected of potential fraud that may warrant initiating the process sooner. For example, if a State agency receives a complaint that an individual sold their EBT card to another party, the State agency shall initiate an investigation and may promptly provide a notice to the client, requiring the individual or household to contact the State agency to provide an explanation prior to receiving a subsequent replacement card.

FNS established the minimum threshold of four cards within a 12-month period on the basis of an analysis of SNAP EBT electronic transaction records. FNS found that shopping behavior appeared consistent when compared to the average until a household requested its fourth replacement card. Transaction activity indicates that, after the fourth replacement card, a household's shopping behavior is three times more likely to be flagged as potential

trafficking by FNS' fraud detection system. Trafficking is the exchange of benefits for cash or other consideration, as defined at 7 CFR 271.2, and is the most egregious Program violation. Furthermore, FNS found during the period of January 2012 through December 2012, approximately 98 percent of participating households had three or fewer EBT cards, with most (79 percent) utilizing only one card throughout the year. This further reinforces that most requests for replacement cards are legitimate and when they occur, it is most likely to replace a lost or damaged card. Since so few households request four or more replacement cards and those that do have such markedly different transaction activity as to indicate a higher likelihood of potential trafficking, FNS chose to define a minimum threshold, and to consider requests beyond four cards within a 12-month period to be considered excessive and a potential indicator of trafficking.

Under this option, the State agency must notify the household when the threshold for excessive card replacements is reached, as determined by the State agency, and indicate that if a member of the household requests another card replacement, the State agency will withhold the card until contact is made. The State agency would be expected to contact the fraud investigation unit regarding clients who contact the agency but do not provide an appropriate explanation. The State agency must issue a replacement card during an ongoing investigation. In all cases, States would be required to protect vulnerable persons who lose EBT cards but are not committing fraud.

FNS is further amending 7 CFR 274.6, to change the EBT card replacement timeframes, requiring State agencies to make replacement cards available for pick up or to place the card in the mail within two business days following notice by the client that the card has been lost, stolen, or damaged. Currently, State agencies must ensure clients receive replacement EBT cards within two business days (or five business days if using a centralized mail issuance system) after the client notifies the State agency that the card has been lost or stolen. This change places the requirement on the State agency issuance end instead of the on receiving end of the replacement card process, and alleviates State agencies' responsibility for mail delays beyond their control, while allowing FNS to hold State agencies more accountable for delays within their control.

Additionally, this final rule amends the definition of trafficking to include actions that clearly express the attempt to sell or buy SNAP benefits or EBT cards in person or online through Web sites and social media.

Finally, FNS is issuing an interim final rule provision at 7 CFR 274.6(b)(6), that requires State agencies to monitor card replacement requests and issue Excessive Replacement Card Notices to clients who have requested four card replacements in a 12-month period. The State agency shall be exempt from sending this notice if it chooses to exercise the card withholding option, in accordance with 7 CFR 274.6(b)(5), and sends the Withhold Replacement Card Warning Notice upon the household's fourth card replacement request, indicating that the State agency will withhold a fifth replacement card until the household contacts the State agency.

FNS' decision to issue the interim final rule is based on a comment received in response to the proposed rule. The commenter suggested that the Department propose a method for handling multiple card requests similar to that initiated by North Carolina and recently implemented by the majority of States. The commenter added that the process has proven to be efficient and cost effective for State agencies. FNS agrees with this comment and is, therefore, amending the regulations in the same section, requiring States to monitor and send warning notices to clients who request four card replacements in a 12-month period. Based on current data, the number of clients requesting five or more cards has decreased nationally since many States adopted this practice. Since the majority of States currently monitor EBT card replacement requests and subsequently issue warning notices for four or more requests, FNS does not believe this provision will create a substantial burden for States overall.

The proposed rule was published on May 30, 2012, at 77 FR 31738, and public comments were invited through July 30, 2012. All comments have been considered and adjustments have been made to the final and interim final rule. States administering SNAP are required to administer the Program in accordance with the provisions of the Act and regulations issued pursuant to the Act, including 7 CFR parts 271 and 274.

Failure to comply with the final rule and the interim final rule when they become effective would be subject to appropriate FNS action.

Summary of Comments and Explanation of Revisions

Thirty-six comments to the proposed regulations were received from various stakeholders and are available for public inspection online at *www.regulations.gov*. In general, most commenters supported the regulations but not as currently written. FNS received eight comments in full support of the rule in its entirety. FNS received one comment which did not offer any comments on the contents of this rule but focused on other areas, such as retailer issues, which is being addressed in other FNS rulemaking. FNS also received comments with suggestions for additional ways to reduce trafficking or ways of handling EBT cards. Examples of these suggestions include making benefit cards larger, using neon colors, having a photo on the card, and charging for the cards, as much as $50.00 from one commenter. These comments were reviewed and considered but will not be included in this final rulemaking as they were not directly related to the proposal for a State option to withhold the card upon excessive card replacement requests until the household makes contact. FNS received three comments which stated that allowing four replacements is too many and that FNS is being too lenient. This comment was considered but is not included in the final rulemaking as FNS utilized a statistical basis for establishing the minimum threshold, one that differentiates between typical behavior and activity that is more likely to indicate fraud, while allowing States to initiate the process sooner if the State is in possession of additional evidence of trafficking.

Allow States To Withhold Replacement Cards Until Contact Is Made With the State Agency

Several commenters suggested that the threshold for card replacements should be applied to individuals, not households, as some households contain more than one person with a card. These commenters further suggested that EBT cards that are never used should not count against the total for replacements. They pointed out that some clients may not use an EBT card because they request a card be mailed but then go to the office and pick up another card before receiving the card in the mail. Another commenter suggested that many first-time users do not understand how to use the card and a grace period in the beginning would benefit those clients. Multiple commenters felt that individuals must be provided notice before reaching the

threshold, as well as receiving a notice once they have exceeded the threshold. Two commenters stated the notice should clarify a reasonable timeframe for the individual to respond. Multiple commenters stated that the notice to the individual must contain contact information for individuals who would like to get more information or need help with their card. Some commenters further noted that the notice should contain information about what it means to be referred to the fraud unit and to meet with a fraud investigator. One commenter stated the rule is not clear that the contact can be made by phone or in person, and that it should be made clear that this is the client's choice. FNS received two comments regarding limited English proficiency, which suggested that notices must be sent in the individual's chosen language.

The terms ''individual'' and ''household'' are both used in this rule and serve different purposes. FNS does not intend for this rule to require all members of the household make contact with the State agency before a replacement card can be issued. However, the household must receive the proper notification when the card will be withheld. The household must be aware of why the card is being withheld and understand what they are required to do in order to receive their card replacement. The term ''individual'' is used regarding the required contact by an individual member of the household. Further, only an individual who has been found guilty through an administrative or court hearing may be disqualified from SNAP, not the entire household, per regulations at 7 CFR 273.16(b)(11). FNS will retain in the final rule that all card replacement requests will count towards the threshold, regardless of the reason for the request.

Some clients may not understand the State's process for how to request replacement cards or how long to expect the card replacement to take. For example, they may not understand that a replacement card is not needed every time the benefits are spent down or that once a card is requested, it may take a few days to receive the replacement. This may create situations where clients request additional cards while they are waiting for a replacement card to arrive. In such cases, the State would be able to determine that there is no suspicious activity and thus no reason to refer the case for a fraud investigation. In these situations, States have an opportunity to follow up with these cases and educate the clients about the appropriate replacement card process or otherwise intercede, such as appointing an authorized representative to help the household manage the EBT card.

FNS believes that it is sufficient to notify the client once when they have reached the excessive card replacement threshold, prior to the State agency withholding the EBT card, and then once they exceed the threshold, at the times the State agency withholds the EBT card. The final rule requires that States implementing the card withholding option must send notices to the most recent address on file for all households who have reached or exceeded the excessive card replacement threshold. The State agency may only request an explanation, provide a 5th replacement card, and if deemed appropriate, refer the case for investigation, after the State agency has sent the written notice to the household that the State agency is withholding the household's EBT card. If the State agency has an over-the counter issuance system in place, and the client comes in to request a 5th replacement card, the State agency must document that the client has first received the written warning notice to withhold the 5th replacement card prior to requesting an explanation from the client, replacing the card, and if deemed appropriate, referring the case for investigation.

States are not required to include a timeframe in the notice because the State can continue to hold the card until the client contacts the State agency. It is up to the client to make the contact in order to receive their replacement card. If the client never makes contact with the agency, the card may be held indefinitely, likely until the client is up for recertification or benefits are expunged according to FNS regulations at 7 CFR 274.2(h).

FNS has also clarified that the notices include information about how the client is to contact the State agency, including a telephone number. It is up to the State agency to determine how the contact should be made, such as in person or by phone, and the State agency must take into consideration those with special circumstances and make accommodations for compliance. FNS feels that notice requirements are adequate for their intended purpose and the notice does not require a statement about what it means to be referred for a fraud investigation. Not all households receiving these notices will be referred for an investigation; some are likely candidates for receiving educational information regarding the proper use of their card. State agencies should provide information on proper EBT card use on the notices. FNS will retain in the final rule the requirement that the State ensures that notices meet language requirements described at 7 CFR 272.4(b).

FNS received several comments suggesting that any explanation provided by the individual that is not evidence of fraud is a satisfactory explanation. Commenters stated that FNS should make clear that the State may only initiate an investigation for fraud when the explanation provides evidence of fraud. One commenter stated that the language is too vague and permissive, and allows eligibility workers to interpret many legitimate explanations as suspicious. Another commenter points to 7 CFR 273.16(a), which states that the disqualification or prosecution process cannot be initiated unless the State agency has sufficient documentary evidence to substantiate fraud.

The final regulation does not specify which client explanations for needing card replacements are suspicious and which are satisfactory. FNS requires States to refer individuals for fraud investigations and conduct investigations on all cases that the State agency has determined suspicious. The State is not required to have evidence in order to conduct an investigation. The purpose of the investigative process is for the State agency to determine if fraudulent behavior occurred, and to gather evidence in order to pursue a disqualification and/or criminal charges where appropriate. If the State cannot gather enough evidence, then the case would not be taken through the administrative disqualification hearing (ADH) process or prosecuted, and no disqualification penalty will be assigned. If the State has gathered enough evidence of an Intentional Program Violation (IPV), the case will be heard by the appropriate authority, who will make a determination as to whether the individual committed an IPV. 7 CFR 273.16(a) does not preclude a State agency from conducting an investigation to collect evidence, rather it specifies that the case may not be taken to an ADH or prosecuted without sufficient documentary evidence—which is gathered during the investigation.

One commenter stated that, if the State provides a replacement card to a household that has made contact but has not provided an explanation for the need to replace the card, the State has rewarded the household for non-cooperation. Another commenter stated that clients will not cooperate or show up because there is no reason to do so, and FNS should revise the rule to allow the State agency to close the case if the recipient fails to keep the interview

appointment or refuses to cooperate during investigations.

FNS does not view the release of the EBT replacement card upon contact with the State agency as rewarding the household for failing to cooperate. This process provides the State agency an opportunity to address the issue with the client to determine if the behavior may be indicative of fraud. In cases where the client does not provide a reasonable explanation for the requests, the State agency must refer the case to the State's fraud investigation unit. This final rule is intended to provide a tool for States to use as a means of assessing these cases of multiple card replacements. It is not intended as a means for a State agency to terminate or close a case.

State agencies may not terminate or close a case where the client has not been found guilty of an IPV through an ADH or a court hearing. Clients have the right to remain silent and have their cases heard by the appropriate authority. Until the client has been found to have committed an IPV, the case may not be closed. This final rule allows the State agency to hold the card until the household makes contact in order to help the State agency determine why they are requesting so many cards. If the client refuses to cooperate by not providing an explanation, this should be taken into consideration and the case must be turned over for an investigation. However, withholding the card until contact is made, regardless of client cooperation, does not affect the client's eligibility for the Program.

One commenter stated that the rule should ensure that States replace cards without any undue delays, such as lengthy waits in State agency offices, lack of access to in-person appointments or inability to reach someone at the State agency by phone. FNS agrees that the State agency must ensure they have a process in place to handle these cases and there is not a delay in issuing the card when the client complies with the requirement to contact the State agency after reaching the excessive card threshold for replacement cards. The regulation has been modified to require State agencies to mail or make the replacement card available for pick up within two business days after the client contacts the State agency to provide an explanation.

FNS received 11 comments requesting guidance be provided for States that use EBT cards for both SNAP and cash assistance. One commenter expressed concerns as some States use EBT cards for SNAP, cash benefits and Medicaid. The commenter stated that if the card is also used to deliver cash aid, such as Temporary Assistance for Needy Families (TANF), it cannot be withheld or delayed unless the cash assistance program provides for this. FNS recognizes the challenge where EBT cards are used for multiple programs and reiterates that the process for withholding the card in these cases is a State agency's option and not a requirement. FNS has conferred with the United States Department of Health and Human Services (HHS), which has responsibility for the TANF Program, and determined there are no TANF rules preventing States from invoking this option. FNS urges State agencies to work with other assistance programs delivered on the State's EBT card, such as Medicaid, to determine solutions that may address this issue. FNS is willing to assist States in this process.

FNS received four comments regarding the increased workload issues, costliness and requirement of massive system changes to implement this rule. These comments expressed that this option will create a lot of work for State agencies, and the agencies will not get much in return for the extra effort. State agencies may choose not to implement this process because they decide it is not a good use of limited State resources.

One commenter is concerned with implementing this rule timely, and the ability or willingness of EBT contractors to make the necessary changes for reports on card replacements. This section of the final rule, allowing State agencies to withhold the EBT card until contact is made, is an agency option designed to provide States with a tool to assist in identifying and disqualifying those who are committing IPVs against SNAP, as well as to educate those who do not understand how to properly use their EBT card. FNS is not requiring State agencies to implement this option and therefore has no requirement for agencies to comply in a timely manner. FNS encourages State agencies that want to exercise this option to meet with their EBT processors to discuss which reports will be useful and identify their needs so that the EBT processors can determine the best way to support this process. Identifying and disqualifying anyone who commits an IPV by requesting multiple card replacements and trafficking SNAP benefits sends a strong message that abuse of the Program will not be tolerated.

FNS received one comment stating that the rule should direct State agencies to inquire whether an individual who repeatedly requests card replacements needs some accommodation and to investigate the feasibility of allowing restrictions on recipients with disabilities to only use their EBT cards in certain stores. FNS received five comments that the rule should provide much more detail about what the State agency should do to protect victims of crime, the homeless and persons with disabilities. One commenter was concerned that a State agency may require only in-person meetings to get information about excessive card replacements, thus placing severe hardship on the elderly and disabled. Another commenter was concerned about the noticing requirements to the homeless population, making this difficult and impractical to apply equitably to them. Another commenter stated that the homeless should not be excluded from providing an explanation for excessive requests for card replacements. These comments suggested that FNS should provide guidance on specific steps to protect vulnerable populations and the definition of vulnerable population should be expanded to include other groups, such as illiterate populations and victims of domestic violence.

FNS expects that State agencies will work to ensure no undue hardships are placed on the elderly or disabled and the accommodations State agencies typically make available to comply with federal regulations will also be made available for them if a State agency invokes this option. The Agency thinks the rule is sufficiently clear in this regard. FNS does not have the legal authority to restrict or limit card usage to certain authorized retailers. This option to withhold the card is a tool for State agencies to monitor the integrity of the Program and FNS expects State agencies will follow all existing requirements and regulations if they choose to exercise this option.

The State agency should make every effort to reach those clients who are known to be homeless and to take that circumstance into consideration when these clients reach their card threshold. For example, if a State agency suspects that the client is in a vulnerable status group such as the elderly, disabled, or homeless and needs additional accommodation, the State agency may choose to contact the client for purposes of collecting information for the card replacement option; however, the State agency must still send a warning notice to the most recent address on file prior to requesting an explanation and providing the 5th EBT card replacement. Some State agencies also allow clients who do not list an address to pick up their notices in the local office. State agencies may opt to give written notice to homeless clients and

discuss excessive card replacements when homeless clients come into the State agency office to request a card that exceeds the threshold. Those clients which are part of the vulnerable populations are not excluded from providing an explanation but may need accommodations to assist them in providing the explanation.

State agencies should take the household's circumstances into account when considering their explanation for needing multiple replacements. The regulation, as written, encompasses other vulnerable populations, such as those who are illiterate, those with language barriers and victims of domestic violence, which allows for State agencies to make a determination as they become aware of a client's circumstance. FNS has removed references that suggest that contact must be made by phone or in-person. While phone and in-person contact is acceptable, this will provide State agencies the flexibility to offer other contact options to those with special circumstances.

Several comments asked for FNS to clarify what sufficient additional evidence they would need to provide to warrant withholding a card sooner than the threshold. A commenter also stated that the evidence be specific to the individual, rather than a characteristic that they may share with others, such as residency or the food store where they shop. There are many circumstances a State may become aware of that would make them want to take action sooner. State agencies may in fact receive evidence that direct them to a particular household based on activity by one household member or transactions conducted at a store under suspicion of trafficking. A State agency may receive a complaint indicating that a client is selling their card for cash and then requesting a replacement card. Or a State agency may flag a client based on suspicious transaction activity that is indicative of trafficking. Some clients may already be under investigation and the State agency may already have additional evidence in their case when the client makes another card request. These are examples of cases where the State agency has additional evidence that may warrant noticing the client sooner than the determined threshold. By determining four cards within a 12-month period as excessive, FNS is providing State agencies with its expectation of how to respond systematically. The minimum threshold is not intended to preclude a State agency from initiating the process sooner for individual households if they have additional evidence that warrants doing so, to ensure that potential trafficking situations are identified and acted upon quickly.

FNS received four comments that interrupting the household's access to benefits by delaying or denying a replacement card would deny the household its right to a predetermination hearing under 7 CFR 273.15, section 11(e)(10) of the Act, and due process clauses as interpreted by *Goldberg* v. *Kelly,* 397 US 254 (1970). Another commenter stated that, since these are adverse actions, if the client does not contact the State agency, the regulation must provide that the notice include information about fair hearing rights.

FNS does not agree that the rule fails to provide due process. FNS currently allows State agencies the choice to make cards available to clients either by coming to the office to pick them up or by mail. While most State agencies use a central mail process to issue cards, there are agencies which only use the over-the-counter method for issuing cards to clients. Other State agencies use the over-the-counter method but will mail cards in special circumstances. This has always been a State agency's option and FNS does not consider the over-the-counter method as interrupting a household's access to benefits or violating due process requirements. The cards and benefits are available for the client once the card is made available pursuant to current regulations at 7 CFR 274.6(b). Similarly, when the State agency chooses to withhold the card until the client makes contact, those agencies must make the card available, pursuant to 7 CFR 274.6(b) in this final rule, to the client once the client makes the required contact. Furthermore, as stated earlier, eligibility remains unaffected by this process. The benefits the household has been determined eligible to receive are made available on the EBT card as long as the household remains eligible and the client has access to the card by making the required contact with the State agency. Therefore, because the withholding of a replacement card in accordance with this final rule is not an adverse action, Section 11(e)(10) of the Act and 7 CFR 273.15 do not apply.

Commenters also stated that there is the possibility of coercion because the threat of delay of benefits forces someone to incriminate themselves. FNS does not believe that this would be coercion because the client is not required to provide an explanation in order to receive their card. The card will be given to the client regardless of their willingness to answer questions or otherwise cooperate beyond making contact. State agencies are expected to clearly explain in their notice to clients that clients must contact the State agency but that they are not required to provide an explanation in order to receive a replacement card. Notices to clients should explain that the process is being used to yield useful, accurate information and will not be used in a way that might harass or coerce clients into making false statements.

FNS received one comment stating that the commenter was unclear how withholding the card improves trafficking prevention if FNS has the ability to track EBT data. By withholding the card, FNS believes it provides the State agency with the necessary tools to obtain sufficient information from a household in order to determine the nature of the excessive card replacement requests. This information allows the State agency to better determine whether the request is legitimate and indicates a need to educate the household on how to better manage their EBT card, or that an explanation is suspicious and warrants a referral for investigation.

Another commenter asked that further clarification should be provided concerning the analysis used to determine the four card threshold. FNS determined the minimum threshold of four cards within a 12-month period based on the fact that 98 percent of households use three or fewer cards within a year, with most (79 percent) using only one card.

Also, for those that exceed the fourth replacement card, their transaction activity is three times more likely to be flagged as trafficking by FNS' fraud detection system.

FNS received one comment that the rule is restrictive since State agencies are unable to make contact for subsequent replacement requests beyond the threshold level unless the pattern has changed. The commenter suggests that each person is limited to one call or visit to explain the circumstances for the request and this does not do much to deter fraud. If the State agency has spoken with the client or conducted an investigation and found no evidence of fraud, the agency may not continue to withhold that card. However, the State agency should continue to monitor additional card requests, and if the household continues to request additional cards and the pattern of card activity changes to indicate possible trafficking behavior, the State agency may notify the household that the State agency is withholding the EBT card and that the household must contact the State

agency to provide an explanation before receiving another card.

FNS received multiple comments referencing the rule is too lenient and allowing four cards is too many. As noted above, the minimum threshold is based on an analysis by FNS of electronic transaction data, which demonstrates a statistically significant difference when a household requests a fourth replacement card indicating that transaction activity is three times more likely to be flagged as potential trafficking, compared to clients with three or fewer replacement cards. As the intent of the rule is to further strengthen program integrity, FNS believes that the threshold of four cards within a 12-month period is appropriate. However, FNS acknowledges that State agencies may want to initiate the process sooner if they have additional evidence that a household is suspected of trafficking, thus the final rule maintains this provision.

Required Excessive Replacement Card Notice

In new paragraph 7 CFR 274.6(b)(6), FNS has included a requirement in this interim rule that State agencies monitor requests for EBT card replacements and send a Excessive Replacement Card Notice to clients who request four cards in a 12-month period. If a client requests a fifth replacement card, the State agency shall refer the case to the State's fraud investigation unit, if they suspect the client is trafficking. If the State agency suspects the client's lack of understanding of how to manage an EBT card is the reason for requesting excessive replacement cards, no referral for investigation is warranted and, therefore, should not be made.

If the State agency chooses to exercise the option to withhold the replacement card until it is contacted by the client, and as long as the threshold used for the initial Withhold Replacement Card Warning Notice is on the fourth card replacement request, the State agency shall be exempt from sending the Excessive Replacement Card Notice, in accordance with 7 CFR 274.6(b)(6)(i). If the State agency chooses the option to withhold the replacement card and uses a threshold higher than the fourth card replacement request for the initial notice, the State agency must send the Excessive Replacement Card Notice upon the fourth card request in accordance with 7 CFR 274.6(b)(6). This interim rule provides a minimum requirement for the contents of the required Excessive Replacement Card Notice. States may contact FNS for specific examples. Paragraph 274.6(b)(6) is being published as an interim final rule in order to provide the opportunity for comment.

The decision to include paragraph 274.6(b)(6) as an interim rule is based on a comment received on the proposed regulation. The comment notes that FNS has touted the North Carolina agency's approach to handling multiple card replacements the State agency sends a letter to any household requesting four or more cards in a 12-month period and if another request is made, refers the case to the State's fraud investigation unit. The commenter added that the model to use a letter to deter excessive card replacements has proven to be very effective and less burdensome for State agencies and should have been reflected in the proposed regulation. FNS agrees with the commenter that the North Carolina agency's model is a reasonable and simple process and is aware that the majority of State agencies are currently issuing notices based on this model.

FNS believes that all State agencies should be monitoring card replacement activity and that the requirement to issue an Excessive Replacement Card Notice, as set forth in this interim final rule, along with the option to withhold a replacement card until the client contacts the State agency, as set forth in the final rule, provide important tools for State agencies to use in monitoring and preventing trafficking of EBT cards. Since the majority of States currently send warning notices to households with four or more replacement card requests, FNS does not believe the noticing requirement will substantially increase the burden for State agencies overall.

Card Replacement Timeframes

Thirteen commenters addressed the provision prescribing a one business day timeframe when State agencies must make a replacement card available for pick up or place a replacement EBT card in the mail instead of when the client must actually receive the EBT card.

Some commenters believed the proposed change is unwarranted and would result in delaying benefits to needy households. Other commenters wanted FNS to require that State agencies replace EBT cards within 7 days when mailing cards instead of requiring that State agencies place the card in the mail within one business day.

Because State agencies do not have control over the length of time it takes the United States Postal Service (USPS) to get replacement EBT cards into the hands of SNAP households, FNS believes that prescribing when States must act on a card replacement request is a better approach to minimize possible delays that are beyond the States' control. In the end, FNS expects that the new provision will better ensure that SNAP households receive their replacement cards within a reasonable amount of time, while also giving FNS greater ability to hold State agencies accountable for delays within their control.

Another commenter felt the proposed requirement for placing the card in the mail within one day is too restrictive because State agencies need more days to investigate and verify instances of identity theft or other possible abuses. Another commenter felt State agencies should be able to determine their own timeframes for mailing or making replacement cards available, depending on the number of replacement cards requested, the reason for the request, and other factors. The commenter added that if the replacement is questionable, but does not prove fraud, the State agency would then be able to extend the timeframe to a longer period so the household is penalized. The proposed rule specifically provides State agencies the opportunity for further investigation, if there have been multiple card replacement requests before having to provide another card. As a result, State agencies now have the ability to delay a card replacement until contact is made for an individual household that meets the threshold for excessive card replacements or whose request is questionable based on available evidence. At the same time, FNS continues to believe clients who have legitimately lost their card or had it stolen must receive a replacement card within a reasonable amount of time to ensure they have access to benefits necessary to meet their dietary needs. Therefore, in an effort to take the different perspectives into consideration, FNS has decided to extend the timeframe by when State agencies must act on card replacement requests that do not meet the criteria for further investigation to two business days instead of one.

Several commenters also requested FNS specifically prohibit the use of bulk mail, indicating that many State agencies use bulk mail postage to reduce costs, which results in delayed mailings as a State agency waits to amass enough items to reach the bulk rate minimum. As a result, bulk mail may not be delivered for several weeks, in contrast to the typical delivery time of 5 days for regular mail. Under the new provision, State agencies must meet the required two-day timeframe for acting on card replacement requests. Therefore, they cannot wait to amass enough

replacement cards to reach the minimum requirement for bulk rate mailings. Furthermore, the use of first class mail for issuing cards is already required under 7 CFR 274.2(b). However, FNS is convinced of the importance of specifically requiring first class mail when mailing replacement cards in order to prevent excessive delays in getting clients the access they need to their benefits. Therefore, under § 274.6, we are specifically requiring that State agencies issue replacement cards in accordance with the requirement under § 274.2 to use first-class mail and sturdy non-forwarding envelopes when mailing EBT cards.

One commenter requested that FNS specifically prohibit mailing Personal Identification Numbers (PINs) with EBT cards, while another commenter asked that both the card and PIN be mailed within one business day. The proposed provision required that State agencies mail EBT cards and PINs in accordance with industry standards. In general, States agencies no longer mail assigned PINs and all provide clients with the ability to select their own PIN through an automated response unit. However, FNS understands that PINs must be mailed separately from EBT cards to prevent theft and fraudulent use of the card and that clients cannot access their benefits without the PIN. Therefore, for those State agencies that mail assigned PINs or provide that option, we are specifically requiring that PINs and cards be mailed separately and PINs be mailed one business day after the card is mailed. This requirement applies to both initial issuance and card replacements.

Several other commenters felt State agencies should be required to explain to the household their options for mailing or picking up a replacement card and the timeframe associated with both. FNS wishes to clarify that State agencies are not required to provide both mailing and pick-up options, nor did FNS propose all State agencies should now offer both options. In general, State agencies rely mostly on one method or the other, providing the alternative option in only special circumstances. Because there are both advantages and disadvantages associated with each option, FNS continues to believe that State agencies are in the best position to decide which option better meets the needs of their SNAP population. Furthermore, training requirements in 7 CFR 274.2(e) already require State agencies to inform all households of the card replacement policies. Therefore, FNS will continue to rely on the existing provision for informing clients of the card replacement timeframes and possible options.

Finally, in response to a comment regarding the timeframes for cards other than those that are lost or stolen, FNS is including damaged cards in the card replacement provision in order to be consistent with related language in other provisions.

Clarify the Definition of Trafficking

In the proposed rule, FNS clarified the definition of trafficking to include the intent to sell SNAP benefits. FNS received numerous comments that the definition of trafficking should use the word ''attempt'' instead of ''intent.'' Commenters state that the word ''intent'' permits State agencies to take action based on what people are thinking and not what they are doing. ''Attempt'' consists of the intent to do an act, an overt action beyond mere preparation, and the failure to complete the act. FNS also received numerous comments that the definition of ''trafficking'' should include the word ''buy'' as well as the word ''sell''. FNS agrees with both of these comments and has made this change in the final regulation language.

FNS received one comment that the rule should make clear that the party found to have committed an IPV is the individual who violates, or attempts to violate, the Program. Other members of the household, including the head of household, should not be found to have committed an IPV if they are not involved in the activity. FNS agrees with this comment. FNS regulations under 7 CFR 273.16(b)(11) are clear that IPVs are assigned to individuals who are found guilty and not the entire household. FNS expects State agencies to comply with FNS regulations and only the household member who committed the IPV is disqualified from the Program. As this perspective is already clear in regulation, no additional modifications are being made.

FNS received one comment that adding to a definition that already prohibits this behavior is an expansion, not a clarification. The comment further states that USDA already clarified in a policy memo that the regulations already prohibit this behavior. FNS agrees that it is amending the definition of ''trafficking'' to include the attempt to buy and sell benefits, thus giving State agencies expanded means to target both retailers and recipients who attempt to buy or sell SNAP benefits online or in person.

FNS received five comments regarding eliminating the reference to ''coupons.'' FNS also received one comment that the definition should include both recipients and retailers. A final rule titled, *Supplemental Nutrition Assistance Program (SNAP): Updated Trafficking Definition and Supplemental Nutrition Assistance Program—Food Distribution Program on Indian Reservations Dual Participation,* 78 FR 11967 (Feb. 21, 2013) eliminates coupon terminology from the trafficking definition and applies the trafficking definition to both clients and retailers.

Procedural Matters

Executive Order 12866

This rule has been determined to be not significant and was reviewed by the Office of Management and Budget (OMB) in conformance with Executive Order 12866.

Regulatory Flexibility Act

This rule has been reviewed with regard to the requirements of the Regulatory Flexibility Act (RFA) of 1980, 5 U.S.C. 601–612. Pursuant to that review, it has been certified this rule would not have a significant impact on a substantial number of small entities. State agencies that distribute Supplemental Nutrition Assistance Program benefits are the entities affected by this change.

Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), Public Law 104–4, establishes requirements for Federal agencies to assess the effects of their regulatory actions on State, local and Tribal governments and the private sector. Under section 202 of the UMRA, the Department generally must prepare a written statement, including a cost benefit analysis, for proposed and final rules with ''Federal mandates'' that may result in expenditures by State, local or Tribal governments, in the aggregate, or the private sector, of $100 million or more in any one year. When such a statement is needed for a rule, Section 205 of the UMRA generally requires the Department to identify and consider a reasonable number of regulatory alternatives and adopt the most cost effective or least burdensome alternative that achieves the objectives of the rule.

This final rule does not contain Federal mandates (under the regulatory provisions of Title II of the UMRA) for State, local and Tribal governments or the private sector of $100 million or more in any one year. Thus, the rule is not subject to the requirements of sections 202 and 205 of the UMRA.

Executive Order 12372

The Supplemental Nutrition Assistance Program is listed in the

Catalog of Federal Domestic Assistance Programs under 10.551. For the reasons set forth in the final rule in 7 CFR part 3015, subpart V, and related Notice (48 FR 29115, June 24, 1983), this program is included in the scope of Executive Order 12372, which requires intergovernmental consultation with State and local officials.

Federalism Summary Impact Statement

Executive Order 13132, requires Federal agencies to consider the impact of their regulatory actions on State and local governments. Where such actions have federalism implications, agencies are directed to provide a statement for inclusion in the preamble to the regulations describing the agency's considerations in terms of the three categories called for under Section (6)(b)(2)(B) of Executive Order 13132. FNS has considered this rule's impact on State and local agencies and has determined that because the majority of States currently send warning notices to households with four or more replacement card requests, this rule does not have federalism implications under Executive Order 13132. This rule does not impose substantial or direct compliance costs on State and local governments. Therefore, under Section (6)(b) of the Executive Order, a federalism summary impact statement is not required.

Executive Order 12988

This final rule has been reviewed under Executive Order 12988, Civil Justice Reform. This final rule is intended to have preemptive effect with respect to any State or local laws, regulations or policies which conflict with its provisions or which would otherwise impede its full and timely implementation. This rule is not intended to have retroactive effect unless so specified in the Dates section of the final rule. Prior to any judicial challenge to the provisions of the final rule, all applicable administrative procedures must be exhausted.

Civil Rights Impact Analysis

FNS has reviewed this final rule in accordance with the Department Regulation 4300–4, ''Civil Rights Impact Analysis,'' to identify and address any major civil rights impacts the rule might have on minorities, women and persons with disabilities. After a careful review of the rule's intent and provisions, FNS has determined that this rule will not in any way limit or reduce the ability of protected classes of individuals to receive SNAP benefits on the basis of their race, color, national origin, sex, age, disability, religion or political belief nor will it have a differential impact on minority owned or operated business establishments, and women owned or operated business establishments that participate in SNAP.

Executive Order 13175

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. In November of 2011 and May of 2013, USDA engaged in a series of consultative sessions to obtain input by Tribal officials or their designees concerning the impact of this rule on the tribe or Indian Tribal governments, or whether this rule may preempt Tribal law. Reports from these sessions for consultation will be made part of the USDA annual reporting on Tribal Consultation and Collaboration.

Paperwork Reduction Act

The Paperwork Reduction Act of 1995 (44 U.S.C. Chap. 35; see 5 CFR part 1320) requires the Office of Management and Budget (OMB) approve all collections of information by a Federal agency before they can be implemented. Respondents are not required to respond to any collection of information unless it displays a current valid OMB control number. This final and interim final rule contains information collections that are subject to review and approval by OMB. Therefore, FNS has submitted an information collection under 0584–NEW, which contains the burden information in the rule for OMB's review and approval. The new provisions in this rule, which increase current burden hours by 8,336 hours, will be merged into Supplemental Nutrition Assistance Program (SNAP) Forms: Applications, Periodic Reporting, Notices, OMB Control Number #0584–0064, expiration date 4/30/2016. These changes are contingent upon OMB approval under the Paperwork Reduction Act of 1995. When the information collection requirements have been approved, the Department will publish a separate action in the **Federal Register** announcing OMB's approval.

Comments on the information collection in this final and interim final rule must be received by October 21, 2013. Send comments to the Office of Information and Regulatory Affairs, OMB, Attention: Desk Officer for FNS, Washington, DC 20503. Please also send a copy of your comments to Jane Duffield, State Administration Branch, 3101 Park Center Drive, Alexandria, VA 22302. For further information, or for copies of the information collection requirements, please contact Jane Duffield at the address indicated above. Comments are invited on: (1) Whether the proposed collection of information is necessary for the proper performance of the Agency's functions, including whether the information will have practical utility; (2) the accuracy of the Agency's estimate of the proposed information collection burden, 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 those who are to respond, including use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology.

All responses to this request for comments will be summarized and included in the request for OMB approval. All comments will also become a matter of public record.

Title: Supplemental Nutrition Assistance Program: Trafficking Controls and Fraud Investigations.

OMB Number: 0584–NEW.

Expiration Date: Not Yet Determined.

Type of Request: New Collection.

Abstract:

This rule codifies provisions for State Agencies to issue warning notices to withhold replacement cards or a notice for excessive replacement cards.

Withhold Replacement Card Warning Notice: State agencies may require an individual member of a household to contact the State agency to provide an explanation in cases where the number of requests for card replacements is determined excessive. The State agency must notify the household in writing when it has reached the threshold, indicating that the next request for card replacement will require the client to contact the State agency to provide an explanation for the requests, before the replacement card will be issued. The State agency must also notify the household in writing once the threshold has been exceeded and the State agency is withholding the card until contact is made.

Excessive Replacement Card Notice: State agencies must monitor all client requests for EBT card replacements and send a notice, upon the fourth request

in a 12-month period, alerting the household their account is being monitored for potential, suspicious activity. The State agency is exempt from sending this notice if they have chosen to exercise the option to withhold the replacement card until contact is made with the State agency.

The average burden per response and the annual burden hours are explained below and summarized in the charts which follow.

Respondents for This Rule: State and Local Agencies; Households

Estimated Number of Respondents for This Rule: 23,864

Estimated Number of Responses per Respondent for This Rule: 2.49

Estimated Total Annual Responses: 59,528

Estimated Total Annual Burden on Respondents for This Rule: 8,336

ESTIMATED ANNUAL BURDEN FOR 0584–NEW SUPPLEMENTAL NUTRITION ASSISTANCE PROGRAM: TRAFFICKING CONTROLS AND FRAUD, 7 CFR 274

CFR	Title	Number of respondents	Annual reports	Total annual responses	Burden hours per response	Total burden hours
Affected Public: State and Local Agencies						
274.6(b)(5)	Withhold Replacement Card Warning Notice.	26.5	449.26	11,905.5	0.0334	397.64
274.6(b)(5)	Replacement Card Withheld Notice	26.5	449.26	11,905.5	0.0334	397.64
274.6(b)(6)	Excessive Replacement Card Notice	26.5	449.26	11,905.5	0.0334	397.64
Subtotal		53	673.896	35,716.5	0.0334	1,193
Affected Public: Households						
274.6(b)(5)	Withhold Replacement Card Warning Notice.	11,905.5	1	11,905.5	0.3	3,571.65
274.6(b)(5)	Replacement Card Withheld Notice	11,905.5	1	11,905.5	0.3	3,571.65
Subtotal		23,811	1	23,811	0.3	7,143.30
Grand Total		23,864	2.494	59,527.5	0.1400	8,336

The 8,336 burden hours will be merged with OMB #0584–0064.

List of Subjects in 7 CFR Parts 271 and 274

Food stamps, Grant programs-social programs, Reporting and recordkeeping requirements.

For the reasons set forth in the preamble, 7 CFR parts 271 and 274 are amended as follows:

■ 1. The authority citation for 7 CFR parts 271 and 274 continue to read as follows:

Authority: 7 U.S.C. 2011–2036.

PART 271—GENERAL INFORMATION AND DEFINITIONS

■ 2. In § 271.2, add paragraph (6) to the definition of ''trafficking'' to read as follows:

§ 271.2 Definitions.

* * * * *

Trafficking means: * * *

(6) Attempting to buy, sell, steal, or otherwise affect an exchange of SNAP benefits issued and accessed via Electronic Benefit Transfer (EBT) cards, card numbers and personal identification numbers (PINs), or by manual voucher and signatures, for cash or consideration other than eligible food, either directly, indirectly, in complicity or collusion with others, or acting alone.

* * * * *

PART 274—ISSUANCE AND USE OF PROGRAM BENEFITS

■ 3. In § 274.2, amend paragraph (b) by removing the last sentence and by revising paragraph (f) to read as follows:

§ 274.2 Providing benefits to participants.

* * * * *

(f) *EBT cards and Personal Identification Numbers (PINs).* (1) State agencies which issue EBT cards by mail shall, at a minimum, use first class mail and sturdy nonforwarding envelopes or packages to send EBT cards to households.

(2) The State agency shall permit SNAP households to select their PIN.

(i) PIN assignment procedures shall be permitted in accordance with industry standards as long as PIN selection is available to clients if they so desire and clients are informed of this option.

(ii) If assigning a PIN by mail in conjunction with card issuance, State agencies shall mail the PIN separate from the card one business day after the card is mailed.

* * * * *

■ 4. In § 274.6:

■ a. Revise paragraph (b) introductory text and add paragraphs (b)(4) and (5); and

■ b. Effective December 19, 2013, add paragraph (b)(6).

The revision and additions read as follows:

§ 274.6 Replacement issuances and cards to households.

* * * * *

(b) *Providing replacement EBT cards or PINs.* The State agency shall make replacement EBT cards available for pick up or place the card in the mail within two business days following notice by the household to the State agency that the card has been lost, stolen or damaged unless the State agency implements a replacement procedure pursuant to paragraph (b)(5) of this section.

* * * * *

(4) *Replacement card.* The State agency shall issue replacement cards and PINs in accordance with § 274.2(f) of this chapter.

(5) *State option to withhold replacement card.* The State agency may require an individual member of a household to contact the State agency to provide an explanation in cases where the number of requests for card replacements is determined excessive. If they so require, the State agency must

establish a threshold for the number of card replacements during a specified period of time to be considered excessive. That threshold shall not be less than four cards requested within 12 months prior to the request, unless the State agency has additional evidence indicating a suspected trafficking violation, as defined at § 271.2 of this chapter. If a trafficking violation is suspected prior to the fourth card request, the State agency shall refer the client for investigation and, if deemed appropriate, may provide a notice to the client, requiring the individual or household to contact the State agency to provide an explanation prior to receiving a subsequent replacement card.

(i) The State agency shall notify the household in writing when it has reached the threshold, indicating that the next request for card replacement will require contact with the State agency to provide an explanation for the requests, before the replacement card will be issued. The State agency shall also notify the household in writing once the threshold has been exceeded that the State agency is withholding the card until contact is made. These notices must:

(A) Be written in clear and simple language;

(B) Meet the language requirements described at § 272.4(b) of this chapter;

(C) Specify the number of cards requested and over what period of time;

(D) Explain that the next request, or the current request if the threshold has been exceeded, requires contact with the State agency before another card is issued;

(E) Provide all applicable information on how contact is to be made in order for the client to comply, such as whom to contact, a telephone number and address;

(F) Include a statement that explains what is considered a misuse or fraudulent use of benefits and the possibility of referral to the fraud investigation unit for suspicious activity.

(ii) Following notification, should another card be requested, the State agency shall require that the household contact the State agency to provide an explanation for the requests. If the client makes contact, the State agency shall make the replacement EBT card available for pick up or place the card in the mail in accordance with § 274.2(f) of this chapter within two business days following household contact with the State agency, regardless of whether or not an explanation was provided.

(A) If a household does not contact the State agency in response to the State agency's notice, the State agency shall not issue a replacement card to the household and the case must be referred for investigation.

(B) The State agency shall educate the client on the proper use of the card if the explanation is deemed appropriate and the State agency shall not require contact upon subsequent requests, unless the pattern of card activity has changed since the initial contact and indicates possible trafficking activity.

(C) The State agency shall refer the individual for investigation in cases where the individual contacts the State agency but refuses to explain the card losses or the explanation provided appears to be indicative of trafficking in accordance with § 271.2 of this chapter. The State agency shall issue a replacement card to any household that makes the required contact so that the household has access to benefits in its EBT account while the investigation is underway and while awaiting a hearing, in accordance with § 273.16(e)(5).

(iii) In all cases, a State agency shall act to protect households containing homeless persons, elderly or disabled members, victims of crimes and other vulnerable persons who may lose EBT cards but are not committing fraud.

(6) *Excessive Replacement Card Notice.* The State agency shall monitor all client requests for EBT card replacements and send a notice, upon the fourth request in a 12-month period, alerting the household that their account is being monitored for potential, suspicious activity. If another replacement card is subsequently requested and trafficking is suspected, the State agency shall refer that case to the State's fraud investigation unit.

(i) The State agency shall be exempt from sending the Excessive Replacement Card Notice if they have chosen to exercise the option to withhold the replacement card until contact is made with the State agency, in accordance with paragraph (b)(5) of this section, as long as the State agency has chosen to use the minimum threshold, which requires sending the first warning notice on the fourth card replacement request within 12 months. If the State agency chooses to use a threshold higher than the fourth card replacement request, the State agency must send the Excessive Replacement Card Notice on the fourth card request in accordance with this section.

(ii) The State agency shall notify the household in writing upon their fourth card request that their case is being monitored. This notice shall, at a minimum:

(A) Be written in clear and simple language;

(B) Meet the language requirements described at § 272.4(b) of this chapter;

(C) Specify the number of cards requested and over what period of time;

(D) Explain that the transactions of the cardholder's account are being monitored for potential trafficking activity;

(E) Include a statement that explains what is considered a misuse or fraudulent use of benefits and the possibility of referral to the State's fraud investigation unit for suspicious activity.

(F) Provide contact information, including a telephone number, should the household have questions or concerns regarding the notice.

Dated: August 7, 2013.

Audrey Rowe,

Administrator, Food and Nutrition Service.

[FR Doc. 2013–20245 Filed 8–20–13; 8:45 am]

BILLING CODE 3410–30–P

DEPARTMENT OF AGRICULTURE

Grain Inspection, Packers and Stockyards Administration

9 CFR Part 201

RIN 0580–AA99

Weighing, Feed, and Swine Contractors

AGENCY: Grain Inspection, Packers and Stockyards Administration, USDA.

ACTION: Final rule.

SUMMARY: The Department of Agriculture's (USDA) Grain Inspection, Packers and Stockyards Administration (GIPSA) is amending the regulations issued under the Packers and Stockyards Act, 1921, as amended and supplemented (P&S Act), to ensure that payments by live poultry dealers and swine contractors to poultry and swine production contract growers are based on accurate weighing of both inputs and outputs. Specifically, we are amending a regulation about scale tickets to reduce redundant wording and to clarify weighing procedures. In addition, we are amending a regulation about reweighing to add swine contractors to the list of firms that must comply, and adding feed to the list of items for which reweighing may be requested. We are also amending two other regulations about weighing livestock and poultry to add weighing processes for feed, to add a specific time limit for weighing poultry, and to add swine contractors to the list of firms that must comply with care and promptness requirements.

DATES: *Effective Date:* September 20, 2013.

FOR FURTHER INFORMATION CONTACT: S. Brett Offutt, Director, Policy and Litigation Division, P&SP, GIPSA, 1400 Independence Ave. SW., Washington, DC 20250, (202) 720–7363, *s.brett.offutt@usda.gov.*

SUPPLEMENTARY INFORMATION:

Background

GIPSA administers and enforces the P&S Act (7 U.S.C. 181–229, 229c.). Under authority delegated to us by the Secretary of Agriculture (Secretary), we are authorized (7 U.S.C. 228) to make those regulations necessary to carry out the provisions of the P&S Act.

This final rule clarifies existing requirements involving scale tickets and live poultry weighing. Currently, § 201.49 of the regulations issued under the P&S Act, ''Requirements regarding scale tickets evidencing weighing of livestock, live poultry, and feed,'' contains redundant wording about scale tickets issued when weighing livestock, live poultry and feed. Because the requirements for numbering scale tickets and executing sufficient copies are largely the same for livestock, live poultry, and feed, we are consolidating in this final rule these general requirements into a new § 201.49(a), which is followed by separate specific requirements for livestock, live poultry, and feed. This final rule will require that a zero balance of a scale be recorded and that the time the zero balance was determined be printed on the scale ticket, which is consistent with other weighing regulations involving scale tickets. Additionally, we are removing regulatory language in § 201.108–1, ''Instructions for weighing live poultry,'' regarding scale tickets that duplicates language in § 201.49. GIPSA believes that these revisions will clarify the requirements that are unique to each commodity and thus prevent confusion caused by the redundant language contained in the current regulations.

In this final rule, we are also clarifying that the ''number of the person'' who performed the weighing service means the identification number of that individual, not that person's telephone number. In addition, we are clarifying that the regulatory requirement for recording the license number of the truck and trailer applies to situations involving weighing separately the truck or the trailer, or both together. We are also making consistent throughout § 201.49 language about license numbers or other identification numbers of trucks and/or trailers.

We are adding ''swine contractors'' to the list of firms required to comply with § 201.76, ''Reweighing'' We are also adding ''feed'' to the list of items that must be reweighed upon request by any authorized representative of the Secretary.

We are amending § 201.82(a), ''Care and Promptness in Weighing and Handling Livestock and Live Poultry'', to add ''swine contractors'' in the list of firms required to comply with this regulation. Presently, § 201.82(b) requires that live poultry dealers purchasing poultry under growout contracts obtain the gross weight for each load of poultry immediately upon arrival at the processing plant. This final rule will add a sentence to the end of § 201.82(b) to require that the weighing process begin without delay, and to establish the time period within which live poultry dealers must complete the weighing process. We are also amending § 201.82(b) to clarify that this section applies whenever the weight of live poultry is a factor in calculating payment to the grower. Finally, we are adding a new paragraph (c) to § 201.82 to prohibit the use of split transport trailer loads by live poultry dealers. Split loads of live poultry are loads containing flocks from more than one grower. We believe that prohibiting split loads will prevent live poultry dealers from failing to weigh each grower's flock promptly. The failure by a live poultry dealer to weigh poultry promptly can result in weight loss, injury, death or other avoidable losses to a poultry grower.

We are amending § 201.108–1 of the regulations, ''Instructions for Weighing Live Poultry'', to require additional procedures to ensure accurate weighing. We are also adding the term ''feed'' to the title of this section. In addition, we are amending § 201.108–1 to include the weighing of picked up feed in addition to the weighing of live poultry. In this final rule, we are also adding new procedures for weighing unused feed picked up from one or more poultry growers in a single load, including requirements for operating and maintaining onboard weighing systems and onboard weighing tickets. This final rule will ensure that unused feed is accurately weighed. GIPSA has found that failure to weigh unused feed by the live poultry dealer, or failure to use appropriately calibrated equipment, can result in inaccurate estimates of weight and inaccurate payment to the grower. Both feed (inputs) and live poultry (outputs) must be weighed accurately in order to ensure that growers are compensated fairly.

GIPSA believes that this final rule will ensure the fair and accurate weighing of feed, poultry, and livestock. There will be less potential for live poultry dealers and swine contractors to engage in unfair and deceptive practices by delaying the weighing of livestock, using scales incorrectly or inaccurately, or denying requests for reweighing.

Discussion of Comments and Final Action

On February 11, 2008, GIPSA published a notice of proposed rulemaking in the **Federal Register** (73 FR 7686). While the initial comment period for the proposed rule ended on April 11, 2008, we subsequently extended the comment period to May 21, 2008 (73 FR 21286). After careful review and consideration of the 33 comments received, we are modifying the proposed amendments in the final rule as noted below.

We received seven letters from commenters that supported our proposed amendments and asked that we help protect poultry growers' investments. Specifically, the commenters asked that we ensure (1) that poultry and feed are weighed properly and (2) that poultry growers are allowed to watch as their birds are being weighed without fear of retaliation by the live poultry dealer. We believe that the first issue raised by the commenters was addressed adequately in our proposed amendments to § 201.49, § 201.76, § 201.82, and § 201.108–1. The second issue raised by these commenters is addressed in § 201.108–1(e)(4) of the current regulations, which has been redesignated as § 201.108–1(e)(3) in this final rule. Currently, § 201.108–1(e)(4) states, in part, that poultry growers, live poultry dealers, sellers, or others having legitimate interest in a load of poultry are entitled to observe the balancing, weighing, and recording procedures. A weigher shall not deny such persons that right or withhold from them any information pertaining to the weight.

It is GIPSA's position that the phrase ''others having a legitimate interest in a load of poultry'' includes (but is not limited to) members of the poultry grower's immediate family, agent(s), representative(s), employee(s), or business associate(s). Because we did not propose an amendment to the language of current § 201.108–1(e)(4) of the regulations, however, we are making no changes to this final rule based on these comments.

We received an additional 13 comments from poultry growers and

agricultural associations in response to GIPSA's proposed rule. All 13 comments included the suggestion that we require that live poultry dealers obtain the tare weight of the poultry trailer immediately after unloading. The commenters stated that this tare weight reading could be compared to the tare weight reading taken prior to loading and would account for possible snow or ice buildup underneath the trailer and/or any maintenance work performed on the trailer before or after loading.

Sections 201.49, 201.76, 201.82 and 201.108–1 of the current regulations do not address the number of tare weights that must be taken for each load or when tare weights must be taken. Because we did not propose changes to the number of tares taken for each load or the time-frame within which tares are taken, the issue raised by these comments is beyond the scope of our proposed rulemaking. The last sentence of proposed § 201.82(b), however, referred to the ''completion of the weighing process'' when describing the process of obtaining the gross load weight and not the entire weighing process for a load. We believe that this sentence may have led some people to believe that we were referring to the process of obtaining the net load weight. We will therefore clarify our requirement for ''immediately'' obtaining the gross weight for poultry in § 201.82(b) of the final rule to mean that the process of obtaining the gross weight must not exceed 30 minutes following arrival at the scale normally used for such weighing. To make clear that the last sentence of § 201.82(b) pertains only to obtaining the gross weight of loads and not the entire weighing process, GIPSA will modify this sentence in this final rule to read as set forth in the regulatory text of this rule.

Twelve of the 13 commenters agreed that copies of scale tickets must actually be provided to all parties to the transaction. To clarify the final rule, we are replacing the language requiring growers, purchasers, sellers, and live poultry dealers ''be furnished'' with scale tickets currently in § 201.49(b)(11) and § 201.49(c)(2) with language in § 201.49(a) ''Sufficient copies must be executed and provided to all parties to the transaction.'' This retains requirements that livestock producers and poultry growers be provided hard copies of their scale tickets.

One of the 12 commenters also suggested that GIPSA require that all parties be provided scale ticket copies immediately, before any change occurred in the weight due to fluctuations in temperature or truck/trailer maintenance. Sections 201.73–1(e)(4) and 201.108–1(e)(4) of the current regulations under the P&S Act require that weighers permit anyone having a legitimate interest in livestock or poultry to observe the balancing, weighing, and recording procedures for the livestock or poultry. Livestock or poultry producers may request that the weigher provide them with a copy of the scale ticket for their livestock or poultry at the time of weighing. Since the temperature would primarily affect the weight of the animals, we believe that our requirement for obtaining the gross weight within 30 minutes of arrival adequately addresses concerns regarding loss in animal weight due to temperature.

With regard to the comments on maintenance work, except for emergencies, live poultry dealers do not perform maintenance or repair work on trucks or trailers in the time between taking the tare and gross weights. Typically, truck repair and fabrication work does not take place near areas where live poultry is handled. Because unscheduled maintenance and repair work on trucks and trailers can result in costly delays to the operations of the processing plants, we do not believe that this is either a significant or a recurring problem in the industry, and are therefore making no change to this final rule based on this comment.

The 13 of these commenters further recommended that we require live poultry dealers to disconnect trailers from the trucks before obtaining gross and net weights. Many live poultry dealers weigh trucks and trailers before leaving the plant, prior to loading the poultry, and use a mathematical formula to account for fuel use during the trip. The commenters said that they would accept weighing of the truck and trailer together if differences in fuel levels were accounted properly. Since our investigators routinely examine fuel formulas to verify proper fuel adjustments, and we have not found that a significant or recurring problem exists in this area, we are making no change to the final rule based on these comments.

The 13 commenters also requested that, for the accurate weighing of poultry, we require that scales be balanced before every load, instead of once per day. Our proposed amendment to § 201.108–1(a) requires that scales be balanced each day before weighing begins and then verified throughout the day prior to each weighing of poultry or feed. Our proposal also requires that the weigher verify that the scales register a zero balance upon returning to the scales following his/her absence from the scale. We believe that our use of the word ''verified'' may have been understood to mean a visual check of the balance condition of the scale made without documentation of the balance condition. Therefore, in this final rule, we are deleting the word ''verified'' from the second sentence of § 201.108–1(a)(1), and revising it to state that the scale is to be balanced at the time any poultry or feed is weighed. We are also merging the third sentence with the contents of the second sentence in the same section to make clear that documentation of the zero balance and the time and date of balancing must be done at the time any poultry or feed is weighed. By adding the contents of the third sentence to the second sentence, we are deleting the phrase ''or its zero balance shall be verified'' to make it clear that we are requiring scales be balanced and that the balance condition be documented for every instance that a load of poultry or feed is weighed, and not just once per day. We are also making similar revisions to § 201.108–1(c)(1)(v)–(c)(1)(vi) in this final rule for the same reason.

All 13 commenters asked that we not permit the delivery of split loads of feed (feed for more than one grower on a single truck) unless the truck has an on-board scale and weighing system, specifically when feed is taken from one farm directly to another. Currently, § 201.55(a) of the regulations requires that the actual weight be obtained for all feed delivered to a livestock or poultry grower. This means that live poultry dealers and swine contractors may either weigh and place feed on a truck in a separate bin for each producer or grower, or use a truck with an on-board scale and weighing system, when delivering feed to multiple producers or growers. Although the current regulations allow mutually agreed upon estimated weights be applied to feed that is picked up from a grower, that same feed may not be delivered to another farm on the basis of estimated weight according to § 201.55(a) and (b) because actual weight is required. Feed picked up from one livestock producer or poultry grower must be weighed on a certified scale (via an on-board system or otherwise) before being delivered to another producer or grower. Because we are not requiring that live poultry dealers or swine contractors use on-board systems, we are making no change to this final rule based on these comments.

Thirteen additional individuals representing four poultry companies, four poultry associations and one lending institution responded to the proposed rule. The following discussion addresses their comments.

Two commenters stated that their firm would have to employ someone to program the firm's computer system to print a zero balance scale ticket. They also stated that their poultry firm would need to hire a dispatcher if a zero balance had to be printed prior to loading. Presently, the company's feed truck drivers confirm visually that a feed scale registers a zero balance on a ''scoreboard'' before driving the truck onto a scale. The driver then immediately records in writing his/her visual observation of the scale's zero balance.

In the proposed rule, we added a sentence to § 201.108–1(a)(1) requiring that the time and date the empty poultry or feed scale was balanced be mechanically printed on the scale ticket or other basic transaction record along with the zero balance. We are adding similar wording to § 201.49, which provides the requirements for recording evidence of livestock, live poultry, and feed weighing. GIPSA believes that hand recorded notes used to verify the zero balance of weight scales are undependable and should not be relied upon in determining payment to a livestock producer or poultry grower.

One live poultry dealer argued that documenting the time and date of zero balances was sufficient and did not see the need to print a zero balance on the scale tickets. As we stated previously, hand written notes used to verify the zero balance of weight scales are undependable and should not be relied upon when determining payment to a livestock producer or poultry grower. GIPSA believes that livestock producers and poultry growers cannot reasonably be assured that a scale was balanced properly prior to the start of the weighing process unless a zero balance is printed mechanically on the scale ticket. We estimate there are about 230 feed scales in the U.S. that are used to weigh feed for delivery to livestock producers or poultry growers. Based on GIPSA's industry experience, 30 percent or more of all feed scales can print a zero balance on the same scale ticket as the tare and gross weight amounts.

Costs involved in bringing the other 70 percent of printers into compliance may vary. Some systems may require minor alteration to permit the printer to print a zero balance on the scale ticket along with the tare and gross weight. Other systems may require a reprogramming of the computer system controlling the printer. In these cases, an independent scale company will likely have to do the reprogramming. In some cases the manufacturer will likely have to do the reprogramming. In researching this issue, we contacted six scale manufacturers, two scale software program developers and two scale dealers that also upgrade and service existing livestock, poultry and feed scales. All are prominent in their field and operate on at least a national, if not international level. They estimated that the cost to modify scale settings or alter a scale program would generally vary in a range of a few hundred dollars for the time and effort involved in having a scale dealer make on-site adjustments. If individual scales require new programming to print the zero balance on the same ticket as the tare and gross, the scale manufacturers estimated that the costs could range from $1,000 to $3,000. Software developers estimated that costs could range from $2,000 for a partial reprogramming to $5,000 to $10,000 for a full reprogramming. Among all the firms as a whole, $1,500 appeared to be a reasonable overall average cost. If this is the case, GIPSA estimates that the total cost to the industry would be approximately $362,250. We believe that this cost is negligible in comparison to the overall annual volume of poultry produced in the U.S. (more than 43 billion pounds in 2012).[1] GIPSA believes that printing a zero balance on the scale ticket along with the gross, and if appropriate, tare weight, will ensure that the poultry grower receives documentation showing the verification of the zero balance condition of the scale at the time of weighing.

Another live poultry dealer stated that it would not be feasible to print zero balances between obtaining the tare weight and the gross weight for feed placed on a load. In addition, a swine trade association asked that we clarify what we mean by ''zero balance for both the tare and gross weights'' for feed scale tickets. In our proposed rule, we proposed amending § 201.49(d)(5) to require that scale tickets showing the weighing of feed include ''the zero balance for both the gross and tare, when applicable.'' In our proposal, we did not intend to require separate zero balances between obtaining each tare weight and each gross weight, nor did we intend to require a zero balance between obtaining tare and gross weights of feed when the truck and trailer do not move off the scale once the tare weight is obtained and loading begins. Weighers must ensure that the certified scale registers a zero balance prior to beginning the weighing process. Typically, one zero balance documented on a scale ticket along with the tare and gross weight for the grower or truckload is sufficient. If the truck is moved from one scale to another scale to complete the weighing process a separate zero balance must be recorded for the tare and gross weights. Once the scale registers a zero balance, a truck/trailer may be driven onto the scale to obtain the tare or gross weights of the truck/trailer and the load. Again, GIPSA believes that the beginning zero balance, along with the tare and gross weights of the load, must be printed on the scale ticket so that livestock producers and poultry growers have documentation of the zero balance condition of the scale at the time that the weighing process occurred.

Given the preceding discussion, GIPSA will delete the phrase ''for both the gross and tare'' from § 201.49(d)(5) in this final rule, stating only that a zero balance must be printed on the scale ticket or other basic transaction record. There will be one exception made in this final rule, however, for vehicle scales when feed for more than one producer or grower is loaded into a multi-compartment feed truck. In this case, the gross weight of the feed for the initial producer or grower may be used as the tare weight for the feed loaded for the next grower. This process must be repeated until the loading of feed into the truck is complete. A zero balance must appear on the scale ticket or basic transaction record for the first load of feed, but not on the ticket or record for subsequent loads of feed on the same truck. We will add wording to § 201.49(d)(5) in this final rule to address this exception. Since these changes address all the situations where printing the zero balance for both the tare and gross might not be applicable, we are also deleting the phrase ''when applicable'' from § 201.49(d)(5) and § 201.49(d)(6) in this final rule.

In § 201.49(a) of the proposed rule, we required that unused and partially executed scale tickets be secured under lock or made inaccessible to other parties, which is a general rule applicable to livestock, poultry and feed scales. One comment received from a poultry company stated, however, that feed truck drivers are often weighers and must weigh their own loads. Drivers come and go from feed mills at any time of day and therefore, the scale tickets must be readily accessible to those drivers each day. The commenter stated that unused tickets secured in a locked compartment or in an area inaccessible to other parties is impractical. We believe that unused scale tickets must be secured to prevent unauthorized access and/or theft. Feed mills, however, typically restrict access to

[1] World Agricultural Supply and Demand Estimates, World Agricultural Outlook Board, USDA, WASDE–518, pg. 32.

both the weighing controls and scale tickets so that only authorized individuals are weighing and loading feed. We believe that in a feed mill setting, unused and partially executed scale tickets are typically kept in a secure environment. We will therefore revise § 201.49(a) in this final rule in response to this comment to exempt feed mills from the requirement that they keep scale tickets under lock when the weigher is not at the scale.

We received a comment submitted by a trade association that focused on our proposal to amend § 201.49 to require that scale tickets for feed weight also show the name and address of a livestock producer. The trade association said that swine contractors often use assumed names for producers on the scale tickets that do not identify the producer by name. Because the true name of a producer can be determined from the swine contractor's business records, the trade association preferred that we allow the use of common names. We currently allow the use of assumed names, codes or numbers on scale tickets that reveal the identity of sellers and buyers of livestock, provided that the formal names can be accessed from the records of the issuer of the tickets. Under these circumstances, we will therefore revise § 201.49(d)(2) in the final rule by adding the phrase ''. . . or a designation by which they may be readily identified.'' For consistency, we will also add this same phrase to the end of § 201.49(c)(3) in the final rule.

The trade association also stated that the requirement that scale tickets contain the location of the scale (proposed § 201.49(c)(5) & (d)(4)) is imprecise. They suggested we specify that we meant the address and physical location of a scale, especially if there is more than one scale at that address. To address this concern, we will modify § 201.49(d)(4) in this final rule to require that scale tickets show ''The city and state in which the scale is located, and, if a facility has more than one scale on which feed is weighed, the identity of the scale.'' For consistency, we will revise similarly proposed § 201.49(c)(5) in this final rule. We believe these revisions sufficiently allow GIPSA personnel to locate the scale that produced a specific scale ticket.

The trade association further stated that some automated pork slaughtering plants do not have employees present to physically operate the monorail scale. They stated that the slaughtering plant employee who checks for the producer identification number tattooed on the carcass is the closest to a scale operator that many automated pork plants have. Section 201.49(a)(7) of the current regulations requires that weighers be identified on scale tickets. This requirement pertains to the weighing of all livestock when being weighed for purchase or sale, etc., whether in automated pork plants or elsewhere. We agree with this comment, however, and will add wording to § 201.49(b)(7) in this final rule exempting automated livestock slaughtering plants from the requirement that scale tickets show the name, initials, or identification number of a weigher.

In the proposed rule, GIPSA added the terms ''swine contractors'' and ''feed'' to § 201.76 of the regulations. The trade association said that it would not be feasible to reweigh picked-up feed, feeder and weaner pigs and hog carcasses. They cited the impractical aspects of reweighing feed and pigs picked up from a grower's farm as well as bio-security concerns involved with hog carcasses in packing plants. Our proposed amendment to § 201.76 requires that swine contractors reweigh only feed and hog carcasses upon the request of GIPSA personnel, not feeder and weaner pigs from a grower's farm. Anytime the weight of delivered or returned feed is determined using a scale or by estimating, and the weight of feed is a factor in determining payment or settlement, GIPSA periodically requires that feed be reweighed to verify contract compliance and ensure proper payment to swine and poultry growers. We have requested the reweighing of hog carcasses at slaughter plants for many years. The carcasses are returned by rail to the hot weight scale before entering the cooler, or the chain is stopped and carcasses are transported back for placement on the hot weight scale for reweighing. This process does not require that carcasses be transported from the coolers to the hot weight scale. We believe that this process therefore eliminates the bio-security concerns raised by the trade association. Because the established reweighing procedures allow our personnel to verify that the weighing procedures used by swine contractors to weigh pigs and feed typically report weights accurately, we are making no change to the final rule based on the comment.

Further, in the preamble of our proposed rule, we also stated that ''. . . feed for each grower be weighed on a certified scale and that a scale ticket be generated at the time the feed is picked up from each grower, before proceeding to another grower to pick up unused feed.'' (73 FR 7687) While this statement was correct, the statement caused commenters to question whether we were changing the procedures for collecting and weighing unused feed returned from poultry growers, which is covered by § 201.55 of the current regulations. In the preamble of our proposed rule, we addressed general procedures for weighing feed and for weighing feed being delivered to poultry growers. The only proposed amendment that specifically concerned unused feed is § 201.108–1(d)(3) and pertains to the printing of scale tickets when onboard weighing systems are used to pick up unused feed. Because the comments did not take issue with the proposed amendments to § 201.108–1(d)(3), however, we are making no changes in this final rule.

While there were several comments from poultry company representatives regarding the handling of unused feed that is not picked-up from growers, there are no regulations under the P&S Act that cover the handling of unused feed that is left on a farm. Because this issue is not addressed in our proposed amendments to the regulations, we are making no change to the final rule.

In § 201.108–1(a) of the final rule, we are also replacing the term ''shall'' with the term ''must'' everywhere the term ''shall'' appears in to make the terminology in § 201.108–1(b)(5) consistent with plain language guidelines. We are also deleting from the final rule the last sentence of proposed § 201.108–1(c)(1)(v), which reads ''Further, the hopper must be empty and balanced at zero prior to each weighment.'' With a hopper scale, it is possible that as many as 8 different printed weights can exist for an individual grower; therefore, there is no need for a zero balance between individual hopper loads for one grower. This sentence was part of an original draft of the regulatory text and inadvertently published as part of the proposed rule when it should not have been. In addition, in the first sentence of proposed § 201.49(b), the phrase ''live or'' was inadvertently deleted and will be added to the final rule for clarity. In proposed § 201.49(b), the word ''by'' in the phrase ''by designation'' is being deleted from the final rule for clarity since it redundant. Finally, in the third sentence of proposed § 201.82, the phrase ''the gross weight includes, but is not limited to'' is being revised in the final rule for clarity to read ''the gross weight, which may include, but is not limited to . . . .''

Executive Order 12866 and Regulatory Flexibility Act

The Office of Management and Budget designated this rule as not significant for the purposes of Executive Order 12866.

We have determined that this final rule will not have a significant economic impact on a substantial number of small entities as defined in the Regulatory Flexibility Act (5 U.S.C. 601–612). An initial regulatory flexibility analysis as described in 5 U.S.C. 605 of the Regulatory Flexibility Act is not required or provided here. This final rule directly affects companies in contractual relationships with swine production contract growers and poultry growers. Most of these entities are slaughterers and processors of swine or poultry with more than 500 employees and do not meet the applicable size standards for small entities presented in the Small Business Administration regulations (13 CFR 121.201). To the extent that this final rule does affect small entities, it will not impose substantial new expenses or changes to routine operations.

GIPSA believes that small swine production contract growers and poultry growers will benefit directly from this final rule, which will provide accurate and fair weighing of their inputs and outputs.

We have considered the effects of this final rule under the Regulatory Flexibility Act and we believe that it will not have a significant impact on a substantial number of small entities.

Executive Order 12988

This final rule has been reviewed under Executive Order 12988, Civil Justice Reform. This final rule is not intended to have a retroactive effect. This final rule will not pre-empt State or local laws, regulations, or policies, unless they present an irreconcilable conflict with the amendments in this rule. The provisions of this final rule will not require administrative procedures be exhausted prior to judicial challenges.

Executive Order 13175

This final rule has been reviewed with the requirements of Executive Order 13175, Consultation and Coordination with Indian Tribal Governments. This rule will not have substantial and direct effects on Tribal governments and will not have significant Tribal implications.

Paperwork Reduction Act

This final rule does not contain new information collection requirements or changes to existing information collection requirements subject to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*).

E-Government Act Compliance

GIPSA is committed to complying with the E-Government Act, to promote the use of the Internet and other information technologies to provide increased opportunities for citizen access to Government information and services, and for other purposes.

List of Subjects in 9 CFR Part 201

Reporting and recordkeeping requirements, Poultry and poultry products, Trade practices.

For the reasons set forth in the preamble, we are amending 9 CFR part 201 to read as follows:

PART 201—[AMENDED]

■ 1. The authority citation for part 201 continues to reads as follows:

Authority: 7 U.S.C. 181–229, 229c.

■ 2. Revise § 201.49 to read as follows:

§ 201.49 Requirements regarding scale tickets evidencing weighing of livestock, live poultry, and feed.

(a) When livestock, poultry or feed is weighed for the purpose of purchase, sale, acquisition, or settlement, a scale ticket must be issued which must be serially numbered and used in numerical sequence. Sufficient copies must be executed and provided to all parties to the transaction. Unused and partially executed scale tickets must not be left exposed or accessible to other parties and, except in feed mills, must be kept under lock when the weigher is not at the scale. In instances where the weight values are automatically recorded directly on the account of purchase, account of sale, or other basic transaction record, this record may serve in place of a scale ticket.

(b) *Livestock.* When livestock is weighed for the purpose of purchase or sale, or when livestock is purchased on a carcass weight or carcass grade and weight basis, the live or hot carcass weights must be recorded using a scale equipped with a printing device, and such printed weights must be retained as part of the person or firm's business records to substantiate settlement on each transaction. In instances where the weight values are automatically recorded directly on the account of purchase, account of sale, or other basic transaction record, this record may serve in place of a scale ticket. Scale tickets or other basic transaction records issued under this section must show:

(1) The name and location of the agency performing the weighing service;

(2) The date of the weighing;

(3) The name of the buyer and seller or consignor, or a designation by which they may be readily identified;

(4) The number of head;

(5) Kind of livestock;

(6) Actual weight of each draft of livestock; and

(7) The name, initials, or identification number of the person who weighed the livestock, or if required by State law, the signature of the weigher, except for an automated weighing system where a weigher is not stationed at the scale.

(c) *Poultry.* When live poultry is weighed for the purpose of purchase, sale, acquisition, or settlement by a live poultry dealer, the scale ticket or other basic transaction record must show:

(1) The name of the agency performing the weighing service;

(2) The name of the live poultry dealer;

(3) The name and address of the grower or seller, and purchaser, or a designation by which they may be readily identified;

(4) The name, initials, or identification number of the person who weighed the poultry, or if required by State law, the signature of the weigher;

(5) The city and state in which the scale is located, and, if more than one scale is used to obtain the weight of poultry within the same facility, the identity of the scale;

(6) The zero balance for both the gross weight and tare weight;

(7) The date and time zero balance was determined;

(8) The gross weight, tare weight, and net weight;

(9) The date and time gross weight and tare weight are determined;

(10) The number of poultry weighed;

(11) The weather conditions;

(12) Whether the driver was on or off the truck at the time of weighing, if applicable; and

(13) The license number or other identification numbers on the truck and trailer, if weighed together, or trailer if only the trailer is weighed; *provided,* that when live poultry is weighed on a scale other than a vehicle scale, the scale ticket or other basic transaction record need not show the information specified in paragraphs (c)(11) and (c)(12) of this section.

(d) *Feed.* Whenever feed is weighed and the weight of the feed is a factor in determining payment or settlement to a livestock producer or poultry grower, the scale ticket or other basic transaction record must show:

(1) The name of the agency performing the weighing service, or the name and location of the firm responsible for supplying the feed;

(2) The name and address of the livestock producer or poultry grower, or a designation by which they may be readily identified;

(3) The name, initials or identification number of the person who weighed the feed, or if required by State law, the signature of the weigher;

(4) The city and state in which the scale is located, and, if a facility has more than one scale on which feed is weighed, the identity of the scale;

(5) The zero balance; *provided* that when using a vehicle scale to weigh feed for more than one producer or grower on the same multi-compartment truck, the preceding producer's or grower's gross weight can be used for the next producer's or grower's tare weight without printing a zero balance, and repeated until the unit is full;

(6) The date and time zero balance was determined;

(7) The gross weight, tare weight, and net weight of each lot assigned to an individual producer or grower, if applicable;

(8) The date and time gross weight and, if applicable, tare weight, are determined;

(9) The identification of each lot assigned to an individual producer or grower by vehicle or trailer compartment number and seal number, if applicable;

(10) Whether the driver was on or off the truck at the time of weighing, if applicable; and

(11) The license number or other identification numbers on the truck and trailer, if weighed together, or trailer if only the trailer is weighed, if applicable.

■ 3. Revise § 201.76 to read as follows:

§ 201.76 Reweighing.

Stockyard owners, market agencies, dealers, packers, swine contractors and live poultry dealers must reweigh livestock, livestock carcasses, and live poultry or feed on request of any authorized representative of the Secretary.

■ 4. Revise § 201.82 to read as follows:

§ 201.82 Care and promptness in weighing and handling livestock and live poultry.

(a) Each stockyard owner, market agency, dealer, packer, swine contractor and live poultry dealer must exercise reasonable care and promptness with respect to loading, transporting, holding, yarding, feeding, watering, weighing, or otherwise handling livestock, or live poultry to prevent waste of feed, shrinkage, injury, death or other avoidable loss.

(b) Whenever live poultry is obtained under a poultry growing arrangement and the weight of the live poultry is a factor in calculating payment to the grower, the poultry must be transported promptly after loading. The process of obtaining the gross weight must commence immediately upon arrival at the processing plant, holding yard, or other scale normally used for such purpose. The process of obtaining the gross weight which may include, but is not limited to, fueling, uncoupling the trailer, changing the road tractor to a yard tractor or weighing the trailer only, must be conducted without delay; *specifically,* the time period between arrival and completion of the process of obtaining the gross weight must not exceed thirty (30) minutes.

(c) Live poultry dealers must not place poultry from multiple growers on a single live poultry transport trailer or other live poultry transport equipment, creating what is commonly referred to as a ''split load.''

■ 5. Amend § 201.108–1 to:

■ a. Revise the heading;

■ b. Revise the first sentence of the introductory text;

■ c. Revise paragraph (a)(1);

■ d. Remove paragraph (a)(7);

■ e. Add paragraphs (c)(1)(v) and (vi);

■ f. Add paragraph (d)(3);

■ g. Remove paragraph (e)(2) and redesignate paragraphs (e)(3) and (4) as paragraphs (e)(2) and (3).

§ 201.108–1 Instructions for weighing live poultry or feed.

Live poultry dealers who operate scales on which live poultry or feed is weighed for purposes of purchase, sale, acquisition, or settlement are responsible for the accurate weighing of such poultry or feed. * * *

(a) * * * (1) The scale must be maintained in zero balance at all times. The empty scale must be balanced each day before weighing begins and thereafter the scale must be balanced; and the zero balance, the time and date the empty scale was balanced must be mechanically printed on the scale ticket or other basic transaction record before any poultry or feed is weighed. In addition, the zero balance of the scale must be verified whenever a weigher resumes weighing duties after an absence from the scale.

* * * * *

(c) * * *

(1) * * *

(v) A feed hopper attached to an electronic digital scale must be empty of feed and the electronic digital scale must be balanced at zero prior to first weighment for each grower or per truckload, whichever is applicable. The date and time that the empty hopper scale is balanced with proof of the zero balance must be mechanically printed on the scale ticket or other permanent record that must be attached to the grower's copy of the scale ticket.

(vi) An onboard weighing system must be level and locked in position and zero balanced prior to weighing. The date and time the onboard scale is balanced with proof of the zero balance must be mechanically printed on the scale ticket or other permanent record that must be attached to the grower's copy of the scale ticket. When more than one grower's feed is weighed, the preceding grower's gross weight can be used for the next grower's tare weight, and can be repeated until the unit is full.

* * * * *

(d) * * *

(3) When returned feed from a contract poultry grower is picked up and weighed on an onboard weighing system, the weight of the feed must be recorded and a ticket printed. That weight must be used as the tare weight when feed from another contract poultry grower is picked up on the same load. The procedure must be followed each time another grower's feed is added to the load.

* * * * *

Marianne Plaus,

Acting Administrator, Grain Inspection, Packers and Stockyards Administration.

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DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 161

[Docket No. USCG–2011–1024]

RIN 1625–AB81

Vessel Traffic Service Updates, Including Establishment of Vessel Traffic Service Requirements for Port Arthur, Texas and Expansion of VTS Special Operating Area in Puget Sound

AGENCY: Coast Guard, DHS.

ACTION: Final rule.

SUMMARY: The Coast Guard is revising and updating the Vessel Traffic Service (VTS) regulations in 33 CFR Part 161. The revision makes participation in the VTS in Port Arthur, TX mandatory and expands it to include Lake Charles, LA; consolidates and expands a VTS Special Area in Puget Sound, WA; adds the designated frequencies for the Maritime Mobile Service Identifiers (MMSIs) for Louisville, KY and Los Angeles/Long Beach, CA; and updates the definitions and references in Sailing Plan requirements. The changes made by this rule will align regulations with the current operating procedures of the

VTSs affected, with the benefit of creating regulatory efficiency.

DATES: This final rule is effective September 20, 2013.

ADDRESSES: Comments and material received from the public, as well as documents mentioned in this preamble as being available in the docket, are part of docket USCG–2011–1024 and are available for inspection or copying at the Docket Management Facility (M–30), U.S. Department of Transportation, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE., Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. You may also find this docket on the Internet by going to *http://www.regulations.gov,* inserting USCG–2011–1024 in the ''Search'' box, and then clicking ''Search.''

FOR FURTHER INFORMATION CONTACT: If you have questions on this rule, call or email Mr. Mike Sollosi, Office of Navigation Systems (CG–NAV), Coast Guard; telephone 202–372–1545, email *Mike.M.Sollosi@uscg.mil.* If you have questions on viewing the docket, call Ms. Barbara Hairston, Program Manager, Docket Operations, telephone 202–366–9826.

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I. Abbreviations

AIS Automatic Identification System
FR Federal Register
MMSI Maritime Mobile Service Identifier
NDG National Dialogue Group
NPRM Notice of Proposed Rulemaking
PAWSA Port and Waterway Safety Assessment
PAWSS Port and Waterways Safety System
PWSA Ports and Waterways Safety Act
SOLAS International Convention for the Safety of Life at Sea
U.S.C. United States Code
SNPRM Supplemental notice of proposed rulemaking
VMRS Vessel Movement Reporting System
VTM Vessel Traffic Management
VTS Vessel Traffic Service

II. Basis and Purpose

This final rule is issued, pursuant to the Ports and Waterways Safety Act (PWSA) (33 U.S.C. 1221 *et seq.*), to establish VTSs in the United States. Title I of the PWSA authorizes the Secretary of Homeland Security (Secretary) to promulgate regulations to establish and maintain VTSs consisting of measures for controlling or supervising vessel traffic to protect the marine environment. As amended by section 4107(a)(1) and (2) of the Oil Pollution Act of 1990 (33 U.S.C. 1223(a)(1) and (2)), the PWSA gives the Secretary the authority to create, operate and expand VTSs and to make participation in the VTS mandatory for appropriate vessels.

This final rule changes VTS Port Arthur from a voluntary compliance system to a mandatory compliance system and also expands the VTS Port Arthur area to include Lake Charles, LA. The Coast Guard decided on this course of action due to the findings of the Port and Waterways Safety Assessments (PAWSAs) that were conducted in Port Arthur, TX in 1999 and in Lake Charles, LA in 2000, which indicated that a VTS is a necessary risk mitigation tool.

Additionally, due to increased vessel traffic in Puget Sound, WA, this final rule modifies and expands the current VTS Special Area to include the waters of Bellingham Bay, western Padilla Bay and the Saddlebag route that is located east of Guemes Island, in the vicinity of Vendovi Island. Those categories of vessels, defined in 33 CFR 161.16 and 161.55, that operate in this single consolidated VTS Special Area will be subject to the VTS Special Area operating requirements of 33 CFR 161.13.

Finally, this rule makes two minor updates to the VTS regulations in 33 CFR 161.12 and 161.19, respectively. The first update adds Marine Mobile Service Identifier (MMSI) numbers for VTSs Los Angeles/Long Beach and Louisville. As described in footnote 1 of Table 161.12(c), an MMSI is a unique nine-digit number assigned to ship stations, ship earth stations, coast stations, coast earth stations, and group calls for use by a digital selective calling (DSC) radio, an INMARSAT ship earth station, or Automatic Identification System (AIS). In short, an MMSI number is essentially a call sign that mariners use to identify those stations. The first update also amends footnote 1 of Table 161.12(c) for the purpose of establishing that the addition of MMSI numbers to VTSs Louisville and Los Angeles-Long Beach does not, through this rulemaking, impose AIS equipment carriage requirements for vessels operating in those areas for the reasons explained under the ''Regulatory History'' of this preamble. The second update, an edit to Sailing Plan requirements in 33 CFR 161.19, replaces an outdated reference to Dangerous cargo with an updated reference to Certain dangerous cargo, as defined in 33 CFR 160.204.

III. Background

In the late 1990s, the Coast Guard convened a national dialogue group (NDG) comprised of maritime and waterway community stakeholders to identify the needs of waterway users with respect to Vessel Traffic Management (VTM) and VTS systems. Those stakeholders, representing port authorities, pilots, environmental conservationists, the Coast Guard, and all major sectors of the U.S. and foreign flag shipping industry were tasked to identify the information needs of waterway users to help ensure safe passage, help establish a process to identify candidate waterways for VTM improvements and VTS installations, and identify the basic elements of a VTS. The intent of the NDG was to provide the foundation for an approach to VTM that would meet the stakeholders' shared objective of improving vessel traffic safety in U.S. ports and waterways in a technologically sound and cost-effective way.

A major outcome of the NDG was the development of the PAWSA process, which the Coast Guard established to open a dialogue with waterway users and port stakeholders to help identify needed VTM improvements, and to determine candidate VTS waterways. The PAWSA process provides a formal structure for identifying risk factors and evaluating potential mitigation measures. The process requires the participation of experienced waterway users having local expertise in navigation, waterway conditions, and port safety. In addition, the Coast Guard includes non-maritime industry stakeholders in the process to ensure that important environmental, public safety, and economic considerations are given appropriate attention as risk-mitigation measures are selected.

The Coast Guard has conducted 47 PAWSA workshops in U.S. ports since 1999, when the PAWSA process was developed, including one in Port Arthur, TX, on September 21–23, 1999, and one in Lake Charles, LA, on April 25–26, 2000. The Port Arthur, TX and Lake Charles, LA PAWSA reports are publicly available on the NAVCEN Web

site at *http://www.navcen.uscg.gov/?pageName=pawsaFinalReports* and in the docket for this rulemaking (USCG–2011–1024). Based on the mitigation recommendations contained in these PAWSA reports, as well as the existence of port infrastructure to support VTS efforts, the Coast Guard determined that Port Arthur, TX and Lake Charles, LA have a valid need for a Coast Guard-operated VTS.

As a result of the Port Arthur PAWSA workshop, which determined that a VTS would provide the greatest potential to mitigate risk in the port, the Coast Guard added Port Arthur to the Port and Waterways Safety System (PAWSS) acquisition project. The PAWSS project's goal was to install a computer-based VTM system in VTS ports. Installation of the VTS system in Port Arthur, TX began in 2004 and finished in February 2006.

Although this rule changes VTS Port Arthur from a voluntary system to a mandatory compliance system for vessels transiting VTS Port Arthur, it does not alter vessel operations nor impose new costs on industry or the Coast Guard because, under 33 CFR 164.46(a)(3), all vessels which would be affected by changing VTS Port Arthur to a mandatory VTS system are already required to be equipped with AIS. Because AIS carriage requirements are the sole cost item for vessels to comply with VTS requirements; have been in force since December 31, 2004; and currently include the VTS Port Arthur area under Table 161.12(c) in 33 CFR 161.12; we have determined that changing VTS Port Arthur to a mandatory VTS will not alter current vessel operations or impose new costs on either the industry or the Coast Guard. This final rule also expands the currently voluntary VTS Port Arthur area to include Lake Charles, LA. The 2000 Lake Charles PAWSA study supported the establishment of a VTS in Lake Charles, LA. Coast Guard data pertaining to commercial vessel activities indicate that commercial vessels that transit the expansion area of Lake Charles, LA also satisfy the AIS carriage requirements established under 33 CFR 164.46(a)(3).

In addition to making participation in VTS Port Arthur mandatory, this final rule consolidates and expands the two VTS Special Areas in Puget Sound, WA. A VTS Special Area is defined in 33 CFR 161.2 as ''a waterway within a VTS area in which special operating requirements apply.'' The Coast Guard typically institutes a VTS Special Area when geographic or other conditions, such as a concentration of vessels or vessels carrying particularly hazardous cargoes, make a portion of the waterway an inherently dangerous navigational area.

When the federal regulations for vessel traffic services were first implemented in 1994 (59 FR 36316, July 15, 1994), the Coast Guard instituted two VTS Special Areas within VTS Puget Sound. These VTS Special Areas serve to avoid having large vessels impeding, meeting, overtaking or crossing each other in the constricted waters between the San Juan Islands in Puget Sound, WA. In addition to the two existing VTS Special Areas in Puget Sound, special operating requirements have traditionally been issued in the expansion area by VTS Puget Sound due to the relatively restricted nature of these waters. This final rule incorporates the waters of the two existing VTS Special Areas and the waters currently covered by these special operating requirements into a single consolidated VTS Special Area. Because this final rule consolidates existing vessel operating procedures within VTS Puget Sound, the Coast Guard does not anticipate that the expansion of this VTS Special Area will alter current vessel operations or impose new regulatory costs on industry. The consolidation simplifies compliance with these traffic management requirements by consolidating them into one.

IV. Regulatory History

On September 10, 2012, the Coast Guard published a notice of proposed rulemaking (NPRM) in the **Federal Register** entitled, ''Vessel Traffic Service Updates, Including Establishment of Vessel Traffic Service Requirements for Port Arthur, Texas and Expansion of VTS Special Operating Area in Puget Sound'' (77 FR 55439). The Coast Guard followed the publication of the NPRM with a correction on October 18, 2012 with the same title (77 FR 64076). In the correction, we explained that because adding MMSI designations to VTS Louisville and VTS Los Angeles-Long Beach would prematurely [1] impose AIS equipment costs for owners and operators of the vessel types identified in 33 CFR 164.46(a)(3), the Coast Guard was issuing a correction in order to remove AIS carriage equipment requirements for vessels operating in those two Vessel Traffic Service (VTS) areas. AIS carriage equipment requirements are set forth in §§ 161.21 and 164.46 of this subchapter and generally apply in those areas denoted with an MMSI number. However, because we did not intend to impose AIS carriage requirements through this rulemaking for VTS Louisville and VTS Los Angeles/Long Beach, we amended footnote 1 of Table 161.12(c) to specifically remove AIS requirements for vessels operating in those VTS areas. We received no comments on the NPRM or on the correction. No public meeting was requested and none was held.

[1] On December 16, 2008, the Coast Guard published a NPRM entitled Vessel Requirements for Notices of Arrival and Departure, and Automatic Identification System. In this NPRM, the Coast Guard proposes to expand AIS applicability to all U.S. navigable waters. (73 FR 76295).

V. Discussion of Comments and Changes

We did not receive any comments or requests for a public meeting during the NPRM's 90-day comment period that ended on December 10, 2012. After publication of the NPRM, we noticed that the coordinates of the monitoring areas printed in regulations at Table 161.12(c), and §§ 161.55 and 161.70 are formatted inconsistently. In this final rule, therefore, we are reformatting the coordinates contained in Table 161.12(c) and §§ 161.55 and 161.70 so that all coordinates are consistently represented in a format that includes ''degree-minute-decimal.'' Additionally, we are reformatting an entry in Table 161.12(c) specific to the St. Mary's River for greater clarity. This reformatting does not alter the location or position of the monitoring area specific to the St. Mary's River. As an example to show this, we have uploaded a chart of the St. Mary's River from De Tour Passage to Munuscong Lake to the public docket. Because none of the changes to the coordinates in Table 161.12(c) and §§ 161.55 and 161.70 alter the location or position of any of the monitoring areas set forth in regulation, the changes are not substantive. A supplemental notice of proposed rulemaking (SNPRM) is, therefore, unnecessary and would delay completion of this rulemaking. Thus, we find good cause under 5 U.S.C. 552(b)(B) to proceed with publication of this final rule without an SNPRM. Other than these formatting corrections to the coordinates listed in the monitoring areas under Table 161.12(c) and §§ 161.55 and 161.70, no changes to the rule have been made and the text of the final rule is the same as the text in the NPRM and in the correction to the NPRM. For a complete discussion of the rule, please see the discussion included in the NPRM at 77 FR 55439.

VI. Regulatory Analyses

We developed this rule after considering numerous statutes and executive orders related to rulemaking. Below we summarize our analyses

based on several of these statutes or executive orders.

A. Regulatory Planning and Review

Executive Orders 12866 (''Regulatory Planning and Review'') and 13563 (''Improving Regulation and Regulatory Review'') direct agencies to assess the costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This final rule has not been designated a ''significant regulatory action'' under section 3(f) of Executive Order 12866. Accordingly, the final rule has not been reviewed by the Office of Management and Budget.

We received no public comments, additional information, or data that would alter our assessment of the NPRM. Therefore, we adopt the Preliminary Regulatory Analysis for the NPRM as final. A summary of the analysis follows:

This final rule establishes mandatory participation for the VTS area in Port Arthur, TX, and includes Lake Charles, LA as part of this VTS area. This rule also consolidates and expands the VTS Special Areas in the area of Puget Sound, WA to include Bellingham Channel, western Padilla Bay and the Saddlebag route east of Guemes Island.

The VTS in Port Arthur, TX was installed in 2004 and became fully operational in February 2006. Currently VTS Port Arthur operates as a voluntary system. This rule makes participation in the VTS mandatory for all vessels that are required to carry AIS equipment.

Because AIS carriage is required by regulation under 33 CFR 164.46 for commercial vessels, including those vessels that would be affected by this rule, we expect that there would not be additional costs to either industry or government resulting from this rule. A list of the categories of commercial vessels and the dates of compliance for AIS carriage are shown in Table 1.

TABLE 1—COMMERCIAL VESSELS: AIS CARRIAGE REQUIREMENTS

Class of vessel	AIS currently required	Compliance date
Self-propelled vessels 65 feet or more in length in commercial service and on an international voyage (excludes passenger and fishing vessels).	Yes	December 31, 2004.
Passenger vessels of 150 gross tons or more on an international voyage	Yes	July 1, 2003.
Tankers on international voyages, regardless of tonnage	Yes	July 1, 2003.
Vessels of 50,000 gross tons or more, other than tankers or passenger ships, on international voyages.	Yes	July 1, 2004.
Vessels of 300 gross tons or more but less than 50,000 gross tons, other than tankers or passenger ships, on international voyages.	Yes	December 31, 2004.
Self-propelled vessels of 65 feet or more in length in commercial service (excludes fishing vessels and passenger vessels certificated to carry less than 151 passengers for hire).	Yes, when operating in a VTS or Vessel Movement Reporting System (VMRS).	December 31, 2004.
Towing vessels of 26 feet or more in length and more than 600 horsepower in commercial service.	Yes, when operating in a VTS or VMRS.	December 31, 2004.
Passenger vessels certificated to carry more than 150 passengers for hire	Yes, when operating in a VTS or VMRS.	December 31, 2004.
Fishing vessels	No.	

The principal benefits of changing VTS participation from voluntary to mandatory will be to codify current practices and to provide VTS Port Arthur with full VTS authorities to direct and manage traffic.

The final rule also consolidates and slightly expands the current VTS Special Area in the VTS Puget Sound area. This rule expands the zone in which VTS personnel control entry into and movement within the Special Area. VTS Puget Sound has imposed operating conditions in this consolidated VTS Special Area since the VTS national regulations were established in 1994. The final rule simply codifies into regulation the current practices already in place in the consolidated VTS Special Area and will not result in additional requirements for vessels.

Due to the constricted waters within the San Juan Islands, special operating requirements have been instituted since the VTS national regulations were first implemented in 1994 to avoid the risk of large vessels meeting, overtaking or crossing in this area. VTS Puget Sound has consistently issued measures or directions to enhance navigation and vessel safety by imposing special operating requirements for all vessels operating in Bellingham Channel, western Padilla Bay, and the Saddlebag route east of Guemes Island and in the vicinity of Vendovi Island due to the relatively restricted nature of these waters. Therefore, we do not expect that the expansion of this VTS Special Area will alter vessel operations.

Other minor administrative changes include updating the table in 33 CFR 161.12(c) to include the MMSI numbers for VTS Los Angeles/Long Beach and VTS Louisville. Updating the table to add these MMSI numbers will not result in any costs for vessel owners or operators, because this final rule revises Note 1 to Table 161.12(c) to specifically exclude users of VTS Louisville and VTS Los Angeles/Long Beach from AIS carriage equipment requirements. This final rule also amends 33 CFR 161.19(f) by changing the reference from ''Dangerous cargo . . . as defined in 33 CFR 160.203'' to ''Certain dangerous cargo . . . as defined in 33 CFR 160.204.'' The final rule also removes the references to §§ 160.211 and 160.213 because these sections no longer exist in the CFR. We expect these administrative changes to result in no additional costs to the public or industry.

B. Small Entities

Under the Regulatory Flexibility Act (5 U.S.C. 601–612), we have considered whether this rule would have a significant economic impact on a substantial number of small entities. 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 AIS carriage requirements were implemented by a prior regulation in 33 CFR 164.46, and all vessels which will

be required to participate in the VTS are currently equipped to follow the regulations of their individual VTS areas. In addition, the consolidation and slight expansion of the VTS Special Area in Puget Sound, WA merely codifies current operational practices, and will result in no additional equipment requirements. As a result, we expect that this final rule will not impose additional costs on vessel owners and operators transiting within the VTS areas of either Port Arthur, TX or Puget Sound, WA.

Therefore, the Coast Guard certifies under 5 U.S.C. 605(b) that this final rule will not have a significant economic impact on a substantial number of small entities.

C. Assistance for Small Entities

Under section 213(a) of the Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L. 104–121), we offered to assist small entities in understanding the rule so that they could better evaluate its effects on them and participate in the rulemaking. 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.

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).

D. Collection of Information

This rule calls for no new collection of information under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520). Vessels affected by this rule will already be covered under OMB collection of information 1625–0112.

E. Federalism

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 the Executive Order. Our analysis follows.

Title I of the Ports and Waterways Safety Act (PWSA) (33 U.S.C. 1221 *et seq.*) authorizes the Secretary to issue regulations to establish and maintain vessel traffic services consisting of measures for controlling or supervising vessel traffic to protect the marine environment. By enacting the PWSA in 1972, Congress declared that advance planning and consultation with the affected States and other stakeholders is necessary when developing measures for the control or supervision of vessel traffic or for protecting navigation or the marine environment. Throughout the development of each of the subject VTSs the Coast Guard has consulted with the pertinent State and/or local government entities as well as the affected pilots' associations, vessel operators, VTS users, and all affected stakeholders, using Port and Waterways Safety Assessments. This interaction is more fully described elsewhere in this document.

The Coast Guard has determined, after considering the factors developed by the Supreme Court in the consolidated cases of *United States* v. *Locke and Intertanko* v. *Locke,* 529 U.S. 89, 120 S.Ct. 1135 (March 6, 2000), that by enacting Chapter 25 of the PWSA, Congress intended to preempt the field of vessel traffic services in United States ports and waterways. Therefore, the regulations in this rulemaking have preemptive impact over any State laws or regulations that may be enacted on the same subject matter. The preemptive impact of this final rule is codified in 33 CFR 161.6.

While it is well settled that States may not regulate in categories in which Congress intended the Coast Guard to be the sole source of a vessel's obligations, the Coast Guard recognizes the key role that State and local governments may have in making regulatory determinations. Additionally, Sections 4 and 6 of Executive Order 13132 require that for any rules with preemptive effect, the Coast Guard will provide elected officials of affected State and local governments and their representative national organizations, notice and opportunity for appropriate participation in any rulemaking proceedings, and to consult with such officials early in the rulemaking process.

The Coast Guard invited affected State and local governments and their representative national organizations to indicate their desire for participation and consultation in this rulemaking process by submitting comments. We received no comments.

F. 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.

G. Taking of Private Property

This rule will not cause a taking of private property or otherwise have taking implications under Executive Order 12630, Governmental Actions and Interference with Constitutionally Protected Property Rights.

H. Civil Justice Reform

This rule meets applicable standards in sections 3(a) and 3(b)(2) of Executive Order 12988, Civil Justice Reform, to minimize litigation, eliminate ambiguity, and reduce burden.

I. Protection of Children

We have analyzed this rule under Executive Order 13045, Protection of Children from Environmental Health Risks and Safety Risks. This rule is not an economically significant rule and does not create an environmental risk to health or risk to safety that may disproportionately affect children.

J. Indian Tribal Governments

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.

K. Energy Effects

We have analyzed this rule under Executive Order 13211, Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use. We have determined that it is not a ''significant energy action'' under that order because it is not a ''significant regulatory action'' under Executive Order 12866 and is not likely to have a significant adverse effect on the supply, distribution, or use of energy.

L. Technical Standards

The National Technology Transfer and Advancement Act (15 U.S.C. 272 note) directs agencies to use voluntary consensus standards in their regulatory activities unless the agency provides Congress, through the Office of Management and Budget, with an explanation of why using these standards would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (e.g., specifications of materials, performance, design, or operation; test methods; sampling procedures; and related management systems practices) that are developed or adopted by voluntary consensus standards bodies.

This rule does not use technical standards. Therefore, we did not consider the use of voluntary consensus standards.

M. Environment

We have analyzed this rule under Department of Homeland Security Management Directive 023–01 and Commandant Instruction M16475.lD, which guide the Coast Guard in complying with the National Environmental Policy Act of 1969 (42 U.S.C. 4321–4370f), and have concluded that this action is one of a category of actions which do not individually or cumulatively have a significant effect on the human environment. This rule is categorically excluded under section 2.B.2, figure 2–1, paragraphs (34)(a) and (i) of the Instruction. This rule involves administrative changes, changing regulations in aid of navigation, and updating vessel traffic services. An environmental analysis checklist and a categorical exclusion determination are available in the docket where indicated under **ADDRESSES**.

List of Subjects in 33 CFR Part 161

Harbors, Navigation (water), Reporting and recordkeeping requirements, Vessels, Waterways.

For the reasons discussed in the preamble, the Coast Guard amends 33 CFR part 161 as follows:

PART 161—VESSEL TRAFFIC MANAGEMENT

■ 1. The authority citation for part 161 continues to read as follows:

Authority: 33 U.S.C. 1223, 1231; 46 U.S.C. 70114, 70119; Pub. L. 107–295, 116 Stat. 2064; Department of Homeland Security Delegation No. 0170.1.

■ 2. In § 161.12, revise Table 161.12(c) to read as follows:

§ 161.12 Vessel operating requirements.

* * * * *

TABLE 161.12(C)—VTS AND VMRS CENTERS, CALL SIGNS/MMSI, DESIGNATED FREQUENCIES, AND MONITORING AREAS

Center MMSI [1] Call Sign	Designated frequency (Channel designation)—purpose [2]	Monitoring Area [3 4]
Berwick Bay—003669950:		
Berwick Traffic	156.550 MHz (Ch. 11)	The waters south of 29°45.00′ N., west of 91°10.00′ W., north of 29°37.00′ N., and east of 91°18.00′ W.
Buzzards Bay:		
Buzzards Bay Control [5]	156.600 MHz (Ch. 12)	The waters east and north of a line drawn from the southern tangent of Sakonnet Point, Rhode Island, in approximate position latitude 41°27.20′ N., longitude 70°11.70′ W., to the Buzzards Bay Entrance Light in approximate position latitude 41°23.50′ N., longitude 71°02.00′ W., and then to the southwestern tangent of Cuttyhunk Island, Massachusetts, at approximate position latitude 41°24.60′ N., longitude 70°57.00′ W., and including all of the Cape Cod Canal to its eastern entrance, except that the area of New Bedford harbor within the confines (north of) the hurricane barrier, and the passages through the Elizabeth Islands, is not considered to be ''Buzzards Bay''.
Houston-Galveston—003669954		The navigable waters north of 29°00.00′ N., west of 94°20.00′ W., south of 29°49.00′ N., and east of 95°20.00′ W.
Houston Traffic	156.550 MHz (Ch. 11) 156.250 MHz (Ch. 5A). —For Sailing Plans only.	The navigable waters north of a line extending due west from the southernmost end of Exxon Dock #1 (20°43.37′ N., 95°01.27′ W.).
Houston Traffic	156.600 MHz (Ch. 12) 156.250 MHz (Ch. 5A). —For Sailing Plans only.	The navigable waters south of a line extending due west from the southernmost end of Exxon Dock #1 (29°43.37′ N., 95°01.27′ W.).
Los Angeles-Long Beach—03660465:		
San Pedro Traffic	156.700 MHz (Ch. 14)	*Vessel Movement Reporting System Area:* The navigable waters within a 25 nautical mile radius of Point Fermin Light (33°42.30′ N., 118°17.60′ W.).
Louisville—003669732:		
Louisville Traffic	156.650 MHz (Ch. 13)	The waters of the Ohio River between McAlpine Locks (Mile 606) and Twelve Mile Island (Mile 593), only when the McAlpine upper pool gauge is at approximately 13.0 feet or above.
Lower Mississippi River—0036699952:		
New Orleans Traffic	156.550 MHz (Ch. 11)	The navigable waters of the Lower Mississippi River below 29°55.30′ N., 89°55.60′ W. (Saxonholm Light) at 86.0 miles Above Head of Passes (AHP), extending down river to Southwest Pass, and, within a 12 nautical mile radius around 28°54.30′ N., 89°25.70′ W. (Southwest Pass Entrance Light) at 20.1 miles Below Head of Passes.
New Orleans Traffic	156.600 MHz (Ch. 12)	The navigable waters of the Lower Mississippi River bounded on the north by a line drawn perpendicular on the river at 29°55.50′ N., 90°12.77′ W. (Upper Twelve Mile Point) at 109.0 miles AHP and on the south by a line drawn perpendicularly at 29°55.30′ N., 89°55.60′ W. (Saxonholm Light) at 86.0 miles AHP.

TABLE 161.12(C)—VTS AND VMRS CENTERS, CALL SIGNS/MMSI, DESIGNATED FREQUENCIES, AND MONITORING AREAS—Continued

Center MMSI [1] Call Sign	Designated frequency (Channel designation)—purpose [2]	Monitoring Area [3 4]
New Orleans Traffic	156.250 MHz (Ch. 05A)	The navigable waters of the Lower Mississippi River below 30°38.70′ N., 91°17.50′ W. (Port Hudson Light) at 254.5 miles AHP bounded on the south by a line drawn perpendicular on the river at 29°55.50′ N., 90°12.77′ W. (Upper Twelve Mile Point) at 109.0 miles AHP.
New York—003669951:		
New York Traffic	156.550 MHz (Ch. 11) —For Sailing Plans only. 156.600 MHz (Ch. 12). —For vessels at anchor.	The area consists of the navigable waters of the Lower New York Bay bounded on the east by a line drawn from Norton Point to Breezy Point; on the south by a line connecting the entrance buoys at the Ambrose Channel, Swash Channel, and Sandy Hook Channel to Sandy Hook Point; and on the southeast including the waters of Sandy Hook Bay south to a line drawn at latitude 40°25.00′ N.; then west in the Raritan Bay to the Raritan River Railroad Bridge, then north into waters of the Arthur Kill and Newark Bay to the Lehigh Valley Draw Bridge at latitude 40°41.90′ N.; and then east including the waters of the Kill Van Kull and the Upper New York Bay north to a line drawn east-west from the Holland Tunnel ventilator shaft at latitude 40°43.70′ N., longitude 74°01.60′ W., in the Hudson River; and then continuing east including the waters of the East River to the Throgs Neck Bridge, excluding the Harlem River.
New York Traffic	156.700 MHz (Ch. 14)	The navigable waters of the Lower New York Bay west of a line drawn from Norton Point to Breezy Point; and north of a line connecting the entrance buoys of Ambrose Channel, Swash Channel, and Sandy Hook Channel, to Sandy Hook Point; on the southeast including the waters of the Sandy Hook Bay south to a line drawn at latitude 40°25.00′ N.; then west into the waters of Raritan Bay East Reach to a line drawn from Great Kills Light south through Raritan Bay East Reach LGB #14 to Comfort PT, NJ; then north including the waters of the Upper New York Bay south of 40°42.40′ N. (Brooklyn Bridge) and 40°43.70′ N. (Holland Tunnel Ventilator Shaft); west through the KVK into the Arthur Kill north of 40°38.25′ N. (Arthur Kill Railroad Bridge); then north into the waters of the Newark Bay, south of 40°41.95′ N. (Lehigh Valley Draw Bridge).
New York Traffic	156.600 MHz (Ch. 12)	The navigable waters of the Raritan Bay south to a line drawn at latitude 40°26.00′ N.; then west of a line drawn from Great Kills Light south through the Raritan Bay East Reach LGB #14 to Point Comfort, NJ; then west to the Raritan River Railroad Bridge; and north including the waters of the Arthur Kill to 40°28.25′ N. (Arthur Kill Railroad Bridge); including the waters of the East River north of 40°42.40′ N. (Brooklyn Bridge) to the Throgs Neck Bridge, excluding the Harlem River.
Port Arthur—003669955:		
Port Arthur Traffic	156.050 MHz (Ch. 01A)	The navigable waters of the Sabine-Neches Canal south of 29°52.70′ N.; Port Arthur Canal; Sabine Pass Channel; Sabine Bank Channel; Sabine Outer Bar Channel; the offshore safety fairway; and the ICW from High Island to its intersection with the Sabine-Neches Canal.
Port Arthur Traffic	156.275 MHz (Ch. 65A)	The navigable waters of the Neches River; Sabine River; and Sabine-Neches Waterway north of 29°52.70′ N.; and the ICW from its intersection with the Sabine River to MM 260.
Port Arthur Traffic	156.675 MHz (Ch. 73) [6]	The navigable waters of the Calcasieu Channel; Calcasieu River Channel; and the ICW from MM 260 to MM 191.
Prince William Sound—003669958:		
Valdez Traffic	156.650 MHz (CH. 13)	The navigable waters south of 61°05.00′ N., east of 147°20.00′ W., north of 60°00.00′ N., and west of 146°30.00′ W.; and, all navigable waters in Port Valdez.
Puget Sound: [7]		
Seattle Traffic—003669957	156.700 MHz (Ch. 14)	The waters of Puget Sound, Hood Canal and adjacent waters south of a line connecting Nodule Point and Bush Point in Admiralty Inlet and south of a line drawn due east from the southernmost tip of Possession Point on Whidbey Island to the shoreline.
Seattle Traffic—003669957	156.250 MHz (Ch. 5A)	The waters of the Strait of Juan de Fuca east of 124°40.00′ W. excluding the waters in the central portion of the Strait of Juan de Fuca north and east of Race Rocks; the navigable waters of the Strait of Georgia east of 122°52.00′ W.; the San Juan Island Archipelago, Rosario Strait, Bellingham Bay; Admiralty Inlet north of a line connecting Nodule Point and Bush Point and all waters east of Whidbey Island north of a line drawn due east from the southernmost tip of Possession Point on Whidbey Island to the shoreline.
Tofino Traffic—003160012	156.725 MHz (Ch. 74)	The waters west of 124°40.00′ W. within 50 nautical miles of the coast of Vancouver Island including the waters north of 48°00.00′ N., and east of 127°00.00′ W.

TABLE 161.12(C)—VTS AND VMRS CENTERS, CALL SIGNS/MMSI, DESIGNATED FREQUENCIES, AND MONITORING AREAS—Continued

Center MMSI [1] Call Sign	Designated frequency (Channel designation)—purpose [2]	Monitoring Area [3 4]
Victoria Traffic—003160010	156.550 MHz (Ch. 11)	The waters of the Strait of Georgia west of 122°52.00′ W., the navigable waters of the central Strait of Juan de Fuca north and east of Race Rocks, including the Gulf Island Archipelago, Boundary Pass and Haro Strait.
San Francisco—003669956:		
San Francisco Traffic	156.700 MHz (Ch. 14)	The navigable waters of the San Francisco Offshore Precautionary Area, the navigable waters shoreward of the San Francisco Offshore Precautionary Area east of 122°42.00′ W. and north of 37°40.00′ N. extending eastward through the Golden Gate, and the navigable waters of San Francisco Bay and as far east as the port of Stockton on the San Joaquin River, as far north as the port of Sacramento on the Sacramento River.
San Francisco Traffic	156.600 MHz (Ch. 12)	The navigable waters within a 38 nautical mile radius of Mount Tamalpais (37°55.80′ N., 122°34.60′ W.) west of 122°42.00′ W. and south of 37°40.00′ N. and excluding the San Francisco Offshore Precautionary Area.
St. Mary's River—003669953:		
Soo Traffic	156.600 MHz (Ch. 12)	The waters of the St. Mary's River and lower Whitefish Bay from 45°57.00′ N. (De Tour Reef Light) to the south, to 46°38.70′ N. (Ile Parisienne Light) to the north, except the waters of the St. Mary's Falls Canal and to the east along a line from La Pointe to Sims Point, within Potagannissing Bay and Worsley Bay.

Notes:

[1] Maritime Mobile Service Identifier (MMSI) is a unique nine-digit number assigned that identifies ship stations, ship earth stations, coast stations, coast earth stations, and group calls for use by a digital selective calling (DSC) radio, an INMARSAT ship earth station or AIS. AIS requirements are set forth in §§ 161.21 and 164.46 of this subchapter. The requirements set forth in §§ 161.21 and 164.46 of this subchapter apply in those areas denoted with an MMSI number, except for Louisville and Los Angeles/Long Beach.

[2] In the event of a communication failure, difficulties or other safety factors, the Center may direct or permit a user to monitor and report on any other designated monitoring frequency or the bridge-to-bridge navigational frequency, 156.650 MHz (Channel 13) or 156.375 MHz (Channel 67), to the extent that doing so provides a level of safety beyond that provided by other means. The bridge-to-bridge navigational frequency, 156.650 MHz (Ch. 13) is used in certain monitoring areas where the level of reporting does not warrant a designated frequency.

[3] All geographic coordinates (latitude and longitude) are expressed in North American Datum of 1983 (NAD 83).

[4] Some monitoring areas extend beyond navigable waters. Although not required, users are strongly encouraged to maintain a listening watch on the designated monitoring frequency in these areas. Otherwise, they are required to maintain watch as stated in 47 CFR 80.148.

[5] In addition to the vessels denoted in Section 161.16 of this chapter, requirements set forth in subpart B of 33 CFR part 161 also apply to any vessel transiting VMRS Buzzards Bay required to carry a bridge-to-bridge radiotelephone by part 26 of this chapter.

[6] Until otherwise directed, full VTS services will not be available in the Calcasieu Channel, Calcasieu River Channel, and the ICW from MM 260 to MM 191. Vessels may contact Port Arthur Traffic on the designated VTS frequency to request advisories, but are not required to monitor the VTS frequency in this sector.

[7] A Cooperative Vessel Traffic Service was established by the United States and Canada within adjoining waters. The appropriate Center administers the rules issued by both nations; however, enforces only its own set of rules within its jurisdiction. Note, the bridge-to-bridge navigational frequency, 156.650 MHz (Ch. 13), is not so designated in Canadian waters, therefore users are encouraged and permitted to make passing arrangements on the designated monitoring frequencies.

* * * * *

■ 3. In § 161.19, revise paragraph (f) to read as follows:

§ 161.19 Sailing Plan (SP).

* * * * *

(f) Certain dangerous cargo on board or in its tow, as defined in § 160.204 of this subchapter.

■ 4. In § 161.55, revise paragraph (b) and paragraph (c) introductory text to read as follows:

§ 161.55 Vessel Traffic Service Puget Sound and the Cooperative Vessel Traffic Service for the Juan de Fuca Region.

* * * * *

(b) VTS Special Area: The Eastern San Juan Island Archipelago VTS Special Area consists of all waters of the eastern San Juan Island Archipelago including: Rosario Strait bounded to the south by latitude 48°26.40′ N. (the center of the Precautionary Area ''RB'') extending from Lopez Island to Fidalgo Island, and to the north by latitude 48°40.57′ N. (the center of the Precautionary Area ''C'') extending from Orcas Island to Lummi Island; Guemes Channel; Bellingham Channel; Padilla Bay and southern Bellingham Bay (Samish Bay) south of latitude 48°38.42′N.

Note: The center of precautionary area ''RB'' is not marked by a buoy. All precautionary areas are depicted on National Oceanic and Atmospheric Administration (NOAA) nautical charts.

(c) Additional VTS Special Area Operating Requirements. The following additional requirements are applicable in the Eastern San Juan Island Archipelago VTS Special Area:

* * * * *

■ 5. Add § 161.70 to read as follows:

§ 161.70 Vessel Traffic Service Port Arthur.

(a) The VTS area consists of the navigable waters of the United States to the limits of the territorial seas bound by the following points: 30°10.00′ N., 92°37.00′ W.; then south to 29°10.00′ N., 92°37.00′ W.; then west to 29°10.00′ N., 93°52.25′ W.; then northwest to 29°33.70′ N., 94°21.25′ W.; then north to 30°10.00′ N., 94°21.25′ W.; then east along the 30°10′ N. latitude to the origination point.

Note: Although mandatory participation in VTS Port Arthur is limited to the area within the navigable waters of the United States, prospective users are encouraged to report at the safe water marks in order to facilitate vessel traffic management in the VTS Area and to receive advisories or navigational assistance.

(b) *Precautionary areas.*

TABLE 161.70(B)—VTS PORT ARTHUR PRECAUTIONARY AREAS

Precautionary area name	Radius	Center point latitude	Center point longitude
Petco Bend [1]	2000 yds	30°00.80′ N.	93°57.60′ W.
Black Bayou [1]	2000 yds	30°00.00′ N.	93°46.20′ W.
Orange Cut [1]	2000 yds	30°03.25′ N.	93°43.20′ W.
Neches River Intersection [1]	2000 yds	29°58.10′ N.	93°51.25′ W.
Texaco Island Intersection [1]	2000 yds	29°49.40′ N.	94°57.55′ W.
Sabine-Neches Waterway	N/A	All waters of the Sabine-Neches Waterway between the Texaco Island Precautionary Area and the Humble Island Precautionary Area.	

[1] Precautionary Area encompasses a circular area of the radius denoted around the center point with the exception of the Sabine-Neches Waterway.

(c) *Reporting points (Inbound).*

TABLE 161.70(C)—INBOUND

Designator	Geographic name	Geographic description	Latitude/ longitude	Notes
1	Sabine Bank Channel "SB" Buoy	Sabine Bank Sea Buoy	29°25.00′ N. 93°40.00′ W.	Sailing Plan Report
2	Sabine Pass Buoys "29/30"	Sabine Pass Buoys "29/30"	29°35.90′ N. 93°48.20′ W.	
3	Port Arthur Canal Light "43"	Keith Lake	29°46.50′ N. 93°56.47′ W.	
4	North Forty GIWW Mile 279	North Forty	29°56.40′ N. 93°52.10′ W.	
5	FINA Highline Neches River Light "19"	FINA Highline	29°59.10′ N. 93°54.30′ W.	
6	Ready Reserve Fleet Highline	Channel at Cove Mid-Point	30°00.80′ N. 93°59.90′ W.	
7	Sabine River MM 268	268 Highline	30°02.20′ N. 93°44.30′ W.	

(d) *Reporting points (Outbound).*

TABLE 161.70(D)—OUTBOUND

Designator	Geographic name	Geographic description	Latitude/ longitude	Notes
1	Sabine River Light "2"	Black Bayou	30°00.00′ N. 93°46.25′ W.	
2	Ready Reserve Fleet Highline	Channel at Cove Mid-Point	30°00.80′ N. 93°59.90′ W.	
3	FINA Highline Neches River Light "19"	FINA Highline	29°59.09′ N. 93°54.30′ W.	
4	GIWW Mile 285	The School House	29°52.70′ N. 93°55.55′ W.	*Sector Shift*
5	Port Arthur Canal Light "43"	Keith Lake	29°46.50′ N. 93°56.47′ W.	
6	Sabine Pass Buoys "29/30"	Sabine Pass Buoys "29/30"	29°35.90′ N. 93°48.20′ W.	
7	Sabine Bank Channel "SB" Buoy	Sabine Bank Sea Buoy	29°25.00′ N. 93°40.00′ W.	Final Report

(e) *Reporting points (Eastbound).*

TABLE 161.70(e)—EASTBOUND (ICW)

Designator	Geographic name	Geographic description	Latitude/ longitude	Notes
1	GIWW Mile 295	ICW MM 295	29°47.25′ N. 94°01.10′ W.	Sailing Plan Report.
2	North Forty GIWW Mile 279	North Forty	29°56.40′ N. 93°52.10′ W.	
3	Sabine River MM 268	268 Highline	30°02.20′ N. 93°44.30′ W.	
4	GIWW Mile 260	260 Highline	30°03.50′ N. 93°37.50′ W.	Final Report.

(f) *Reporting points (Westbound).*

TABLE 161.70(f)—WESTBOUND (ICW)

Designator	Geographic name	Geographic description	Latitude/ longitude	Notes
1	GIWW Mile 260	260 Highline	30°03.50′ N. 93°37.50′ W.	Sailing Plan Report.
2	Sabine River Light "2"	Black Bayou	30°00.03′ N. 93°46.18′ W.	
3	GIWW Mile 285	The School House	29°52.71′ N. 93°55.55′ W.	Sector Shift.
4	GIWW Mile 295	ICW MM 295	29°46.20′ N. 94°02.60′ W.	Final Report.

(g) *Reporting points (Offshore Safety Fairway).*

TABLE 161.70(g)—OFFSHORE SAFETY FAIRWAY

Designator	Geographic name	Geographic description	Latitude/ longitude	Notes
1	Sabine Pass Safety Fairway—East	East Dogleg	29°35.00′ N. 93°28.00′ W.	
2	Sabine Pass Safety Fairway—West	West Dogleg	29°28.00′ N. 93°58.00′ W.	

Dated: August 14, 2013.

Scott J. Smith,

Captain, U.S. Coast Guard, Acting Director, Marine Transportation Systems.

[FR Doc. 2013–20399 Filed 8–20–13; 8:45 am]

BILLING CODE 9110–04–P

DEPARTMENT OF VETERANS AFFAIRS

38 CFR Parts 51, 52, and 58

RIN 2900–AO69

Technical Changes To Remove Forms

AGENCY: Department of Veterans Affairs.

ACTION: Final rule.

SUMMARY: The Department of Veterans Affairs (VA) is making technical changes to remove from its regulations a series of forms related to VA payments for care provided to veterans at State homes. Official forms are not required to be reproduced in the Code of Federal Regulations (CFR), and all VA forms are more readily available on VA Web sites. Removing these forms from the CFR is an administrative action and will not impact the ability of the public to comment on any amendments to the information collections contained in these forms.

DATES: *Effective Date:* This final rule is effective August 21, 2013.

FOR FURTHER INFORMATION CONTACT: Jo Anne Parker, Geriatrics and Extended Care Service (10NC4), Veterans Health Administration, 810 Vermont Avenue NW., Washington, DC 20420, (202) 461–1785. (This is not a toll-free number.)

SUPPLEMENTARY INFORMATION: On January 6, 2000, VA added 38 CFR part 58 to the Code of Federal Regulations (CFR) for the express purpose of making it easier to find the forms required by 38 CFR part 51, Per Diem for Nursing Home Care of Veterans in State Homes. 65 FR 962, Jan. 6, 2000. Since that time, VA, State home program participants and administrators, and the general public have increasingly come to rely on VA's Publications Web site (*http://www.va.gov/vaforms*) as the primary resource for VA forms. Most of the forms in part 58 are used by the State homes in order to comply with VA regulations in 38 CFR parts 51 and 52. All of these State homes have Internet access, and the forms are also available at all VA medical centers.

In addition, several forms currently found in part 58 have been superseded, and the current forms are readily available for printing, downloading, or online submission on the VA Publications Web site. Updated versions are available on the Web site immediately—whereas the CFR is updated only once per year. Removing the forms from the CFR will ensure that the CFR does not reference and depict outdated forms. We are, therefore,

removing 38 CFR part 58 and marking it as reserved for future use.

The cross references to part 58 in parts 51 and 52 will become obsolete with this rulemaking, and we are, therefore, amending parts 51 and 52 to remove the cross-references to part 58.

Administrative Procedure Act

In accordance with 5 U.S.C. 553(b)(A), the Secretary of Veterans Affairs finds that notice and public comment is not required for this rulemaking as it relates to agency procedure or practice. The forms being removed from the regulation are more readily available on the VA Publications Web site (*http://www.va.gov/vaforms*). Additionally, the Secretary finds good cause pursuant to 5 U.S.C. 553(d)(3) to dispense with the delayed effective date requirement. The Secretary finds that a delayed effective date is unnecessary because this rulemaking involves agency procedure or practice and because the public will continue to have access to the most updated version of the forms on the VA Publications Web site.

Paperwork Reduction Act

Although this action contains provisions constituting collections of information, at 38 CFR part 51, part 52, and part 58, under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3521), no new or proposed revised collections of information are associated with this final rule. The information collection requirements for part 51, part 52, and part 58 are currently approved by the Office of Management and Budget (OMB) and have been assigned OMB control numbers 2900–0091 and 2900–0160.

Regulatory Flexibility Act

The Secretary hereby certifies that this final rule will not have a significant economic impact on a substantial number of small entities as they are defined in the Regulatory Flexibility Act, 5 U.S.C. 601–612. This final rule is small business neutral as it removes forms that are outdated and more readily available elsewhere. The forms will continue to be required for part 51, Per Diem for Nursing Home Care of Veterans in State Homes, and for part 52, Per Diem for Adult Day Health Care of Veterans in State Homes, but removing them from the CFR will ensure that small businesses access the required forms from a common location and thereby minimize the likelihood of relying upon an outdated form. Ensuring reporting is accomplished on the current, correct forms will be cost-neutral or will save money by avoiding potential duplication of effort. On this basis, the Secretary certifies that the adoption of this final rule will not have a significant economic impact on a substantial number of small entities as they are defined in the Regulatory Flexibility Act, 5 U.S.C. 601–612. Therefore, under 5 U.S.C. 605(b), this rulemaking is exempt from the initial and final regulatory flexibility analysis requirements of sections 603 and 604.

Executive Orders 12866 and 13563

Executive Orders 12866 and 13563 direct agencies to assess the costs and benefits of available regulatory alternatives and, when regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, and other advantages; distributive impacts; and equity). Executive Order 13563 (Improving Regulation and Regulatory Review) emphasizes the importance of quantifying both costs and benefits, reducing costs, harmonizing rules, and promoting flexibility. Executive Order 12866 (Regulatory Planning and Review) defines a ''significant regulatory action,'' requiring review by OMB unless OMB waives such review, as ''any regulatory action that is likely to result in a rule that may: (1) Have an annual effect on the economy of $100 million or more 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, or tribal governments or communities; (2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency; (3) Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in this Executive Order.''

The economic, interagency, budgetary, legal, and policy implications of this regulatory action have been examined, and it has been determined not to be a significant regulatory action under Executive Order 12866. VA's impact analysis can be found as a supporting document at *http://www.regulations.gov*, usually within 48 hours after the rulemaking document is published. Additionally, a copy of the rulemaking and its impact analysis are available on VA's Web site at *http://www1.va.gov/orpm/,* by following the link for ''VA Regulations Published.''

Unfunded Mandates

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

Catalog of Federal Domestic Assistance

The Catalog of Federal Domestic Assistance numbers and titles for the programs affected by this final rule are 64.014, Veterans State Domiciliary Care, and 64.015, Veterans State Nursing Home Care.

Signing Authority

The Secretary of Veterans Affairs, or designee, approved this document and authorized the undersigned to sign and submit the document to the Office of the Federal Register for publication electronically as an official document of the Department of Veterans Affairs. Jose D. Riojas, Chief of Staff, Department of Veterans Affairs, approved this document on July 29, 2013, for publication.

List of Subjects

38 CFR Part 51

Administrative practice and procedure, Claims, Day care, Dental health, Government contracts, Grant programs-health, Grant programs-veterans, Health care, Health facilities, Health professions, Health records, Mental health programs, Nursing homes, Reporting and recordkeeping requirements, Travel and transportation expenses, Veterans.

38 CFR Part 52

Administrative practice and procedure, Claims, Day care, Dental health, Government contracts, Grant programs-health, Grant programs-veterans, Health care, Health facilities, Health professions, Health records, Mental health programs, Nursing homes, Reporting and recordkeeping requirements, Travel and transportation expenses, Veterans.

38 CFR Part 58

Administrative practice and procedure, Claims, Day care, Government contracts, Health facilities, Nursing homes, Reporting and recordkeeping requirements, Veterans.

Dated: August 16, 2013.

Robert C. McFetridge,

Director, Regulation Policy and Management, Office of the General Counsel, Department of Veterans Affairs.

For the reasons stated in the preamble, under the authority of 38 U.S.C. 501, the Department of Veterans Affairs amends 38 CFR parts 51, 52, and 58 as follows:

PART 51—PER DIEM FOR NURSING HOME CARE OF VETERANS IN STATE HOMES

■ 1. The authority citation for part 51 continues to read as follows:

Authority: 38 U.S.C. 101, 501, 1710, 1720, 1741–1743; and as stated in specific sections.

§ 51.30 [Amended]

■ 2. Amend § 51.30(c) by removing ''set forth at § 58.10 of this chapter'' and adding, in its place, ''which is available at any VA medical center and at *http://www.va.gov/vaforms.*''

■ 3. Amend § 51.43 by:

■ a. In paragraph (a), removing the second and third sentences and adding in their place a new sentence.

■ b. In paragraph (b), removing ''Claimed. This form is set forth in full at § 58.11 of this chapter.'' and adding, in its place ''Claimed, which is available at any VA medical center and at *http://www.va.gov/vaforms.''*

■ c. In paragraph (f), removing ''veteran. This form is set forth in full at § 58.18 of this chapter.'' and adding, in its place ''veteran, which is available at any VA medical center and at *http://www.va.gov/vaforms.''*

The addition reads as follows:

§ 51.43 Per diem and drugs and medicines—principles.

(a) * * * These VA Forms, which are available at any VA medical center and at *http://www.va.gov/vaforms*, must be submitted at the time of admission, with any request for a change in the level of care (domiciliary, hospital care or adult day health care), and any time the contact information has changed. * * *

* * * * *

§ 51.210 [Amended]

■ 4. Amend § 51.210 by:

■ a. In paragraph (c)(8), removing ''set forth at § 58.14 of this chapter'' and adding, in its place '', which is available at any VA medical center and at *http://www.va.gov/vaforms''*.

■ b. In paragraph (c)(9), removing ''set forth at § 58.15 of this chapter'' and adding, in its place '', which is available at any VA medical center and at *http://www.va.gov/vaforms''*.

■ c. In paragraph (c)(10), removing ''set forth at § 58.16 of this chapter'' and adding, in its place '', which is available at any VA medical center and at *http://www.va.gov/vaforms''*.

■ d. In paragraph (c)(11), removing ''located at § 58.17 of this chapter'' and adding, in its place '', which is available at any VA medical center and at *http://www.va.gov/vaforms''*.

PART 52—PER DIEM FOR ADULT DAY HEALTH CARE OF VETERANS IN STATE HOMES

■ 5. The authority citation for part 52 continues to read as follows:

Authority: 38 U.S.C. 101, 501, 1741–1743; unless otherwise noted.

§ 52.30 [Amended]

■ 6. Amend § 52.30(c) by removing ''set forth at 38 CFR 58.10.'' and adding, in its place ''which is available at any VA medical center and at *http://www.va.gov/vaforms.''*

§ 52.40 [Amended]

■ 7. Amend § 52.40 by:

■ a. In paragraph (a)(3), removing ''set forth in full at 38 CFR 58.11.'' and adding, in its place ''available at any VA medical center and at *http://www.va.gov/vaforms.''*

■ b. In paragraph (a)(5), removing ''set forth in full at 38 CFR 58.12 and 58.13, respectively.'' and adding, in its place ''available at any VA medical center and at *http://www.va.gov/vaforms.''*

§ 52.10 [Amended]

■ 8. Amend § 52.210 by:

■ a. In paragraph (c)(8), removing ''set forth at 38 CFR 58.14'' and adding, in its place '', which is available at any VA medical center and at *http://www.va.gov/vaforms''*.

■ b. In paragraph (c)(9), removing ''set forth at 38 CFR 58.15'' and adding, in its place '', which is available at any VA medical center and at *http://www.va.gov/vaforms''*.

■ c. In paragraph (c)(10), removing ''set forth at 38 CFR 58.16'' and adding, in its place '', which is available at any VA medical center and at *http://www.va.gov/vaforms''*.

■ d. In paragraph (c)(11), removing ''located at 38 CFR 58.17'' and adding, in its place '', which is available at any VA medical center and at *http://www.va.gov/vaforms''*.

PART 58 [REMOVED AND RESERVED]

■ 9. Remove and reserve part 58, consisting of §§ 58.10 through 58.18.

[FR Doc. 2013–20357 Filed 8–20–13; 8:45 am]

BILLING CODE 8320–01–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 679

[Docket No. 120918468–3111–02]

RIN 0648–XC818

Fisheries of the Exclusive Economic Zone Off Alaska; Thornyhead Rockfish in the Western Regulatory Area of the Gulf of Alaska

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

ACTION: Temporary rule; closure.

SUMMARY: NMFS is prohibiting retention of thornyhead rockfish in the Western Regulatory Area of the Gulf of Alaska (GOA). This action is necessary because the 2013 total allowable catch of thornyhead rockfish in the Western Regulatory Area of the GOA has been reached.

DATES: Effective 1200 hours, Alaska local time (A.l.t.), August 17, 2013, through 2400 hours, A.l.t., December 31, 2013.

FOR FURTHER INFORMATION CONTACT: Josh Keaton, 907–586–7228.

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

The 2013 total allowable catch (TAC) of thornyhead rockfish in the Western Regulatory Area of the GOA is 150 metric tons as established by the final 2013 and 2014 harvest specifications for groundfish of the GOA (78 FR 13162, February 26, 2013).

In accordance with § 679.20(d)(2), the Administrator, Alaska Region, NMFS (Regional Administrator), has determined that the 2013 TAC of thornyhead rockfish in the Western Regulatory Area of the GOA has been reached. Therefore, NMFS is requiring that thornyhead rockfish caught in the Western Regulatory Area of the GOA be treated as prohibited species in accordance with § 679.21(b).

Classification

This action responds to the best available information recently obtained from the fishery. The Acting Assistant Administrator for Fisheries, NOAA (AA), finds good cause to waive the requirement to provide prior notice and opportunity for public comment pursuant to the authority set forth at 5 U.S.C. 553(b)(B) as such requirement is impracticable and contrary to the public interest. This requirement is 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 prohibiting the retention of thornyhead rockfish in the Western Regulatory Area of the GOA. NMFS was unable to publish a notice providing time for public comment because the most recent, relevant data only became available as of August 15, 2013.

The AA 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.

This action is required by §§ 679.20 and 679.21 and is exempt from review under Executive Order 12866.

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

Dated: August 16, 2013.

Kelly Denit,

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

[FR Doc. 2013–20405 Filed 8–16–13; 4:15 pm]

BILLING CODE 3510–22–P

Proposed Rules

Federal Register
Vol. 78, No. 162
Wednesday, August 21, 2013

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 TRADE COMMISSION

16 CFR Part 312

RIN 3084–AB20

Children's Online Privacy Protection Rule Proposed Parental Consent Method; AssertID, Inc. Application for Approval of Parental Consent Method

AGENCY: Federal Trade Commission (FTC or Commission).

ACTION: Request for public comment.

SUMMARY: The Federal Trade Commission requests public comment concerning the proposed parental consent method submitted by AssertID, Inc. (''AssertID'') under the Voluntary Commission Approval Processes provision of the Children's Online Privacy Protection Rule.

DATES: Written comments must be received on or before September 20, 2013.

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 ''AssertID Application for Parental Consent Method, Project No. P–135415'' on your comment, and file your comment online at *https://ftcpublic.commentworks.com/ftc/copparuleassertidapp,* by following the instructions on the web-based form. If you prefer to file your comment on paper, mail or deliver your comment to the following address: Federal Trade Commission, Office of the Secretary, Room H–113 (Annex E), 600 Pennsylvania Avenue NW., Washington, DC 20580.

FOR FURTHER INFORMATION CONTACT: Kandi Parsons, Attorney, (202) 326–2369, or Peder Magee, Attorney, (202) 326–3538, Division of Privacy and Identity Protection, Federal Trade Commission, Washington, DC 20580.

SUPPLEMENTARY INFORMATION:

Section A. Background

On October 20, 1999, the Commission issued its final Rule[1] pursuant to the Children's Online Privacy Protection Act, 15 U.S.C. 6501 *et seq.,* which became effective on April 21, 2000.[2] On December 19, 2012, the Commission amended the Rule, and these amendments became effective on July 1, 2013.[3] The Rule requires certain Web site operators to post privacy policies and provide notice, and to obtain verifiable parental consent, prior to collecting, using, or disclosing personal information from children under the age of 13. The Rule enumerates methods for obtaining verifiable parental consent, while also allowing an interested party to file a written request for Commission approval of parental consent methods not currently enumerated.[4] To be considered, the party must submit a detailed description of the proposed parental consent method, together with an analysis of how the method meets the requirements for parental consent described in 16 CFR 312.5(b)(1).

Pursuant to Section 312.12(a) of the Rule, AssertID has submitted a proposed parental consent method to the Commission for approval. The full text of its application is available on the Commission's Web site at *www.ftc.gov.*

Section B. Questions on the Parental Consent Method

The Commission is seeking comment on the proposed parental consent method, and is particularly interested in receiving comment on the questions that follow. These questions are designed to assist the Commission's consideration of the petition and should not be construed as a limitation on the issues on which public comment may be submitted. Responses to these questions should cite the number of the question being answered. For all comments submitted, please provide any relevant data, statistics, or any other evidence, upon which those comments are based.

1. Is this method already covered by existing methods enumerated in Section 312.5(b)(1) of the Rule?

2. If this is a new method, provide comments on whether the proposed parental consent method meets the requirements for parental consent laid out in 16 CFR § 312.5(b)(1). Specifically, the Commission is looking for comments on whether the proposed parental consent method is reasonably calculated, in light of available technology, to ensure that the person providing consent is the child's parent.

3. Does this proposed method pose a risk to consumers' personal information? If so, is that risk outweighed by the benefit to consumers and businesses of using this method?

Section C. 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 September 20, 2013. Write ''AssertID Application for Parental Consent Method, Project No. P–135415'' 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 Commission Web site, at *http://www.ftc.gov/os/publiccomments.shtm.* As a matter of discretion, the Commission tries to remove individuals' home contact information from comments before placing them on the Commission Web site.

Because your comment will be made public, you are solely responsible for making sure that your comment doesn't include any sensitive personal information, such as 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 that your comment doesn't include any sensitive health information, including medical records or other individually identifiable health information. In addition, do not include any ''[t]rade secret or any commercial or financial information which is . . . privileged or confidential,'' as discussed 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). In particular, do not include competitively sensitive information such as costs, sales statistics, inventories, formulas, patterns, devices, manufacturing processes, or customer names.

If you want the Commission to give your comment confidential treatment, you must file it in paper form, with a request for confidential treatment, and

[1] 64 FR 59888 (1999).
[2] 16 CFR part 312.
[3] 78 FR 3972 (2013).
[4] 16 CFR 312.12(a); 78 FR at 3991–3992, 4013.

you have to follow the procedure explained in FTC Rule 4.9(c), 16 CFR 4.9(c).[5] Your comment will be kept confidential only if the FTC General Counsel, in his or her sole discretion, grants your request in accordance with the law and the public interest.

Postal mail addressed to the Commission is subject to delay due to heightened security screening. As a result, we encourage you to submit your comments online. To make sure that the Commission considers your online comment, you must file it at *https://ftcpublic.commentworks.com/ftc/copparuleassertidapp,* by following the instructions on the Web-based form. If this Notice appears at *http://www.regulations.gov/#!home,* you also may file a comment through that Web site.

If you file your comment on paper, write ''AssertID Application for Parental Consent Method, Project No. P–135415'' on your comment and on the envelope, and mail or deliver it to the following address: Federal Trade Commission, Office of the Secretary, Room H–113 (Annex E), 600 Pennsylvania Avenue NW., Washington, DC 20580. If possible, submit your paper comment to the Commission by courier or overnight service.

Visit the Commission Web site at *http://www.ftc.gov* to read this Notice 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 20, 2013. You can find more information, including routine uses permitted by the Privacy Act, in the Commission's privacy policy, at *http://www.ftc.gov/ftc/privacy.htm.*

By direction of the Commission.

Richard C. Donohue,

Acting Secretary.

[FR Doc. 2013–20243 Filed 8–20–13; 8:45 am]

BILLING CODE 6750–01–P

[5] 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), 16 CFR 4.9(c).

DEPARTMENT OF DEFENSE

32 CFR Part 68

[Docket No. DOD–2013–OS–0093]

RIN 0790–AJ06

Voluntary Education Programs; Correction

AGENCY: Office of the Under Secretary of Defense for Personnel and Readiness, DoD.

ACTION: Proposed rule; correction.

SUMMARY: On Wednesday, August 14, 2013 (78 FR 49382–49400), the Department of Defense published a proposed rule titled Voluntary Education Programs. Subsequent to the publication of the proposed rule in the **Federal Register**, DoD discovered an error in § 68.5(f)(1) on page 49388. This proposed rule corrects this error.

DATES: This correction is effective on August 21, 2013.

FOR FURTHER INFORMATION CONTACT: Patricia Toppings, 571–372–0485.

SUPPLEMENTARY INFORMATION: Section 68.5(f)(1) is corrected to read as follows:

§ 68.5 [Corrected]

On page 49388, in the second column, in § 68.5(f)(1), in the fourth line, ''paragraph (f) of this section'' should read ''paragraph (f) of § 68.6.''

Dated: August 16, 2013.

Aaron Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 2013–20366 Filed 8–20–13; 8:45 am]

BILLING CODE 5001–06–P

POSTAL REGULATORY COMMISSION

39 CFR Parts 3001 and 3035

[Docket No. RM2013–5; Order No. 1803]

Market Tests of Experimental Postal Products

AGENCY: Postal Regulatory Commission.

ACTION: Proposed rule.

SUMMARY: The Commission is proposing a set of rules to address Postal Service filings concerning market tests of experimental products. The proposed rules address the contents of market test filings, describe how the filings will be reviewed, and discuss related matters. The Commission invites public comments on the proposed rule.

DATES: Comments are due September 20, 2013. Reply comments are due October 10, 2013.

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: Stephen L. Sharfman, General Counsel, at 202–789–6820.

SUPPLEMENTARY INFORMATION:

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I. Introduction
II. Statutory Authority
III. Discussion of the Proposed Rules
IV. Section-by-Section Analysis
V. Opportunity to Comment
VI. Ordering Paragraphs
Attachment–Summary of Market Tests

I. Introduction

The Commission proposes to establish rules governing market tests of experimental products to implement the requirements of the standards for market tests established by Congress in 39 U.S.C. 3641.

II. Statutory Authority

The Postal Accountability and Enhancement Act (PAEA)[1] authorizes the Postal Service to conduct market tests of experimental products. *See* 39 U.S.C. 3641(a)(1). Such tests are not subject to 39 U.S.C. 3622, 3633, or 3642, or regulations promulgated thereunder. *Id.* 3642(a)(2). An experimental product may not be tested unless it satisfies each of the following conditions:

- Significantly different product: The product is, from the viewpoint of the mail users, significantly different from all products offered by the Postal Service within the 2-year period preceding the start of the test.
- Market disruption: The introduction or continued offering of the product will not create an unfair or otherwise inappropriate competitive advantage for the Postal Service or any mailer, particularly in regard to small business concerns.
- Correct categorization: The Postal Service identifies the product, for the purpose of a test, as either market-dominant or competitive.

39 U.S.C. 3641(b).

The Postal Service must file notice with the Commission and publish the notice in the **Federal Register** at least 30 days before initiating a market test. *Id.* 3641(c)(1). The notice must describe the nature and scope of the market test and explain why the Postal Service believes that the market test is covered by section 3641. *Id.* 3641(c)(1)(A) and (B). The duration of a market test of an

[1] Public Law 109–435, 120 Stat. 3198 (2006).

experimental product may not exceed 24 months unless the Commission grants an extension. *Id.* 3641(d). The Commission may, upon written application from the Postal Service filed no less than 60 days prior to the termination of the market test, extend the market test duration up to an additional 12 months ''[i]f necessary in order to determine the feasibility or desirability of a[n] [experimental] product.'' *Id.* 3641(d)(2).

In general, an experimental product may only be tested if ''total revenues that are anticipated, or in fact received, by the Postal Service do not exceed $10,000,000 in any year,'' subject to adjustments for inflation. *Id.* 3641(e)(1). The Commission may exempt the market test from this $10 million amount limitation (as adjusted for inflation) as long as revenues from the experimental product do not exceed $50 million in any year, subject to adjustments for inflation. *Id.* 3641(e)(2). The exemption request shall be approved if the Commission determines that the experimental product is: (1) Likely to benefit the public and meet an expected demand; (2) likely to contribute to the financial stability of the Postal Service; and (3) not likely to result in unfair or otherwise inappropriate competition. *Id.*

The PAEA authorizes the Commission to cancel a market test or take other appropriate action if it determines that the market test fails, with respect to any particular product, to meet one or more requirements of section 3641. *Id.* 3641(f). All dollar amounts contained in section 3641 must be adjusted by the change in the Consumer Price Index (CPI) for the applicable year, as determined under regulations of the Commission. *Id.* 3641(g). Lastly, section 3641(h) directs the Commission to define ''small business concern'' consistent with the requirements of section 3 of the Small Business Act.

The proposed rules balance the Commission's oversight authority over market tests with the Postal Service's need for flexibility to expand the scope of its products. The proposed rules also reflect the lessons learned since the passage of the PAEA, during which time the Postal Service has conducted eight market tests of experimental products.[2] The Commission reviewed and approved each one, finding each of them consistent with 39 U.S.C. 3641. A summary review of these tests is provided as an attachment to this order.

III. Discussion of the Proposed Rules

In this section, the Commission describes the proposed rules, including what each rule seeks to accomplish. The purpose of this discussion is to assist commenters in determining the nature of each proposed regulation and the rationale behind it. The discussion of the proposed rules fall under nine broad categories: (1) Use of fiscal year, (2) notice requirements, (3) Commission review and action, (4) duration and extension, (5) cancellation, (6) dollar amount limitation and exemption, (7) adjustment for inflation, (8) data collection and reporting requirements, and (9) definition of ''small business concern.''

A. Use of Fiscal Year

The PAEA states that except in subchapters I and IV of chapter 36, ''year,'' as used in chapter 36, means a fiscal year. 39 U.S.C. 102(10). 39 U.S.C. 3641 is located in subchapter III of title 39. Thus, the Commission interprets ''year'' in section 3641 and the proposed rules to mean ''fiscal year.'' This interpretation is consistent with the text of section 3641, which lists certain periods of time in months to distinguish them from fiscal years. For example, section 3641(d) states ''24 months'' and ''12 months'' instead of ''2 years'' and ''1 year,'' respectively.

Under this interpretation, ''the 2-year period preceding the start of the test'' in 39 U.S.C. 3641(b)(1) refers to the two fiscal years preceding the start of the market test. *See* proposed rule 3035.3(a)(1). For purposes of applying the $10 million and $50 million amount limitations in section 3641(e) and (g), revenues shall be measured for each fiscal year (or part thereof) following the date of implementation of the market test.

B. Notice Requirements

Proposed rule 3035.2 requires the Postal Service to provide advance notice of its intent to initiate a market test by filing notice with the Commission at least 30 days before the market test begins. This proposed rule codifies the statutory notice requirement in 39 U.S.C. 3641(c). Proposed rule 3035.3 sets forth the contents of the notice.

Over the past nine market tests, the Postal Service has developed filings that include most of the information required for the notice initiating a market test. For example, in Docket No. MT2013–1, the Postal Service submitted a notice that described the nature and scope of the experimental product and set forth the reasons why the market test was covered by section 3641.[3] It explained how the experimental product was significantly different from any recent Postal Service offering, would not create market disruption, and was correctly categorized as competitive (section 3641(b)). *Id.* at 5–6. It also provided a data collection plan. *Id.* at 6–8.

The items listed above are contained in proposed rule 3035.3. In general, the proposed rule does not require the Postal Service to provide more information than it currently does for market tests. The only additions are rules requiring the Postal Service to identify the beginning and end dates of the market test and estimate, for each fiscal year of the market test, the total revenue that is anticipated by the Postal Service. Proposed rule 3035.3(b)(2), (4). The rules also direct the Postal Service to describe the geographic market(s) in which the market test will be conducted.

These items are necessary to ensure compliance with 39 U.S.C. 3641(d) and (e). Identifying the beginning and end dates of the market test ensures that the market test will not exceed 24 months in duration, unless a request for extension is filed. 39 U.S.C. 3641(d). Describing the geographic market(s) in which the market test will be conducted is consistent with the Commission's authority to ''limit the amount of revenues the Postal Service may obtain from any particular geographic market as necessary to prevent market disruption . . . .'' *See id.* 3641(e)(1). Providing the total revenues anticipated by the Postal Service for each fiscal year of the market test will ensure that the revenues from the market test remain within applicable statutory dollar amount limitations. *See id.* 3641(e).

C. Commission Review and Action

Once the Postal Service files notice of a market test, the Commission will establish a docket, promptly publish a notice in the **Federal Register**, and post the filing on its Web site. Proposed rule 3035.4. The Commission will then review the notice for consistency with section 3641 and either allow it to proceed, provide the Postal Service an opportunity to cure any defects, order that the market test not go into effect, or direct other action as the Commission considers appropriate. Proposed rule 3035.5.

The Postal Service must keep the Commission apprised of any changes to

[2] A ninth market test is currently pending before the Commission. *See* Docket No. MT2013–2, Order No. 1771, Notice and Order Concerning Market Test of Experimental Product—International Merchandise Return Service—Non-Published Rates, July 3, 2013.

[3] Docket No. MT2013–1, Notice of the United States Postal Service of Market Test of Experimental Product-Metro Post-and Notice of Filing Material Under Seal, October 12, 2012, at 2–7.

the market test to ensure continued consistency with the requirements of 39 U.S.C. 3641. To that end, proposed rule 3035.6(a) requires the Postal Service to immediately notify the Commission of any material changes made to the market test. These changes may include adjustments to prices, geographic scope, or termination date. Depending on the nature of the change, the Commission may, in its discretion, notice the filing and provide interested persons with an opportunity for comment.

D. Duration and Extension

Proposed rules 3035.10 and 3035.11 set forth requirements regarding the duration of market tests. Market tests in general may not exceed 24 months in duration. Proposed rule 3035.10. Consistent with section 3641(d)(2), the Postal Service may request an extension for up to an additional 12 months, if necessary to determine the feasibility or desirability of a product being tested. Proposed rule 3035.11(a). A request for extension must be filed at least 60 days before the market test is scheduled to terminate. *Id.*; 39 U.S.C. 3641(d)(2).

The Postal Service previously filed requests for extensions in Docket Nos. MT2009–1, MT2011–1, MT2011–2, and MT2013–2.[4] In each case, the Postal Service failed to provide the requisite 60-day notice. The 60-day notice is a statutory requirement that provides time for the Commission to evaluate the merits of the request for extension. All future requests for extension must be filed in conformance with the 60-day deadline.

Proposed rule 3035.11(b) sets forth the filing requirements for requesting an extension. A request for extension must list the new end date for the market test and explain why an extension is necessary to determine the feasibility or desirability of the experimental product. The request for extension must both calculate the total revenue received by the Postal Service from the market test and estimate the additional revenue anticipated by the Postal Service for each fiscal year (or part thereof) prior to the conclusion of the extension period of the market test. These proposed rules will help ensure that the market test does not exceed applicable dollar amount limitations in 39 U.S.C. 3641(e).

E. Cancellation

39 U.S.C. 3641(f) provides the Commission with statutory authority to cancel a market test at any time if it ''determines that a market test under this section [3641] fails, with respect to any particular product, to meet 1 or more of the requirements of this section. . . .'' A cancellation of a market test must ''be made in accordance with such procedures as the Commission shall by regulations prescribe.'' 39 U.S.C. 3641(f). These procedures, which are set forth in proposed rule 3035.12, require the Postal Service to demonstrate a market test's continued compliance with the statute and Commission's rules. The proposed rule recognizes that the Postal Service may cancel a market test.

F. Dollar Amount Limitations and Exemption

Proposed rules 3035.15 and 3035.16 contain requirements regarding the dollar amount limitations for market tests set forth in 39 U.S.C. 3641(e) and 3641(g). Under 39 U.S.C. 3641(e)(1), an experimental product may only be tested if total revenues that the Postal Service anticipates or receives do not exceed $10 million in any fiscal year, as adjusted for inflation ($10 Million Adjusted Limitation). Proposed rule 3035.15(a) codifies this requirement.

Under 39 U.S.C. 3641(e)(2), the Commission may exempt a market test from the $10 Million Adjusted Limitation if total revenues anticipated or received do not exceed $50 million in any fiscal year, as adjusted for inflation ($50 Million Adjusted Limitation). Proposed rule 3035.16(a) codifies this requirement. Section III.G, below, explains how the $10 Million and $50 Million Adjusted Limitations are calculated.

The Postal Service previously filed requests for exemption from the $10 Million Adjusted Limitation in Docket Nos. MT2011–1, MT2011–3, and MT2013–1.[5] To ensure that the Commission has sufficient time to consider the request, the Postal Service must file its request for exemption at least 45 days before it expects to exceed the $10 Million Adjusted Limitation. Proposed rule 3035.16(e).

Proposed rule 3035.16(f) contains the filing requirements for the request for exemption. Consistent with 39 U.S.C. 3641(e)(2)(A)–(C), the request for exemption shall explain how the experimental product is likely to benefit the public, meet an expected demand, contribute to the Postal Service's financial stability, and not result in market disruption. Proposed rule 3035.16(f)(1). The requirements in proposed rules 3035.16(f)(2) and (3) help ensure that applicable dollar amount limitations will not be exceeded.

Under 39 U.S.C. 3641(e)(1), the Commission ''may limit the amount of revenues the Postal Service may obtain from any particular geographic market as necessary to prevent market disruption. . . .'' 39 U.S.C. 3641(e)(1). This authority is codified in proposed rule 3035.17. To carry out this authority, proposed rule 3035.20(c) authorizes the Commission to require the Postal Service to report the total revenue anticipated or received from the market test for specified geographic markets.

Proposed rule 3035.18 requires the Postal Service to file its request to offer the experimental product as a permanent product sufficiently in advance to preclude the possibility that the applicable Adjusted Limitation would be breached. The intent is to afford the Commission and interested persons sufficient time to consider the Postal Service's request, filed pursuant to 39 CFR 3020 subpart B, so that, in particular, the $50 Million Adjusted Limitation is not exceeded.

G. Adjustment for Inflation

39 U.S.C. 3641(g) requires the $10 million and $50 million amount limitations in 39 U.S.C. 3641(e) to be adjusted for inflation. The $10 million and $50 million amount limitations must be adjusted by the change in CPI ''[f]or purposes of each year following the year in which occurs the deadline for the Postal Service's first report to the Postal Regulatory Commission under section 3652(a)[.]'' 39 U.S.C. 3641(g). As noted in Section III.A, ''year'' is construed as ''fiscal year.'' The ''first report to the Postal Regulatory Commission under section 3652(a)'' refers to the Postal Service's Annual Compliance Report (ACR). The deadline for the first ACR was December 28, 2007, during fiscal year 2008.[6] Thus, the $10 million and $50 million amount

[4] Docket No. MT2009–1, Motion of the United States Postal Service for Temporary Extension of Collaborative Logistics Market Test, April 26, 2011; Docket No. MT2011–1, Motion of the United States Postal Service for Temporary Extension of Alternate Postage for Greeting Cards Market Test, November 21, 2012; Docket No. MT2011–2, Motion of the United States Postal Service for Temporary Extension of Gift Cards Market Test, June 18, 2013; Docket No. MT2013–2, IMRS–NPR Notice at 6.

[5] Docket No. MT2011–1, Notice of the United States Postal Service of Market Test of Experimental Product—Alternate Postage Payment Method for Greeting Cards, November 8, 2010, at 12; Docket No. MT2011–3, Request of the United States Postal Service for Exemption from Revenue Limitation on Market Test of Experimental Product—Every Door Direct Mail Retail, November 18, 2011; Docket No. MT2013–1, Notice of the United States Postal Service of Market Test of Experimental Product—Metro Post—and Notice of Filing Material Under Seal, October 12, 2012, at 7.

[6] Docket No. ACR2007, United States Postal Service FY 2007 Annual Compliance Report, December 28, 2007.

limitations must be adjusted by the change in CPI for each year beginning after fiscal year 2008.

The steps for calculating the $10 Million Adjusted Limitation and $50 Million Adjusted Limitation are listed in proposed rules 3035.15(d) and 3035.16(c). These proposed rules model the Commission's price cap rules regarding the calculation of the annual limitation. *See* 39 CFR 3010.21(b) and 3010.22(b). The first step in the proposed rules is to calculate a simple average Consumer Price Index—All Urban Consumers (CPI–U) index for fiscal year 2008. Fiscal year 2008 is used to meet the requirements of 39 U.S.C. 3641(g) as discussed above. A simple (moving) average is used rather than a point-to-point calculation to smooth out short-term fluctuations in the CPI–U. Because fiscal year 2008 runs from October 2007 through September 2008, the CPI–U values for those months are added together and divided by 12 to obtain the Base Average of 214.5.

The next step in proposed rules 3035.15(d) and 3035.16(c) also involves calculating a simple average CPI–U index for each subsequent fiscal year to obtain the Recent Average. For example, the simple average CPI–U to be applied in fiscal year 2015 would be calculated by summing the 12 monthly CPI–U values from October 2013 through September 2014 and dividing the sum by 12. Finally, the annual limitation for the current fiscal year is calculated by multiplying either $10 million or $50 million by the Recent Average divided by 214.5. Because these rules are designed to calculate dollar amount limitations, the resulting number is rounded to the nearest dollar.

H. Data Collection and Reporting Requirements

Proposed rule 3035.20 lists the data collection and reporting requirements for each market test. The Commission has required the Postal Service to report data on costs, revenues, and volumes periodically in each of the past eight market tests, and the Postal Service has suggested data collection plans in previously-submitted filings.[7]

Proposed rule 3035.20(a) requires that data collection reports include revenue by fiscal quarter, attributable costs incurred, and a quantification of start-up costs incurred. The Commission recently required the Postal Service to report some of this information in Docket Nos. MT2012–1 and MT2013–1. Order No. 1035 at 6–7; Order No. 1539 at 12. The Commission may require the Postal Service to provide other information in its data collection reports as appropriate. Proposed rule 3035.20(b).

39 U.S.C. 3641(e)(1) requires the Commission to ensure that total revenues that are anticipated or received by the Postal Service from an experimental product do not exceed the $10 Million Adjusted Limitation, unless an exemption is granted. In carrying out this responsibility, the Commission ''may limit the amount of revenues the Postal Service may obtain from any particular geographic area to prevent market disruption. . . .'' 39 U.S.C. 3641(e)(1). To that end, the Commission may require the Postal Service to report revenues for specified geographic markets to evaluate the potential impact of a market test in those areas. *See* proposed rule 3035.20(c).

Proposed rule 3035.20(d) requires the results of the market test data collection to be filed by the Postal Service within 40 days after each fiscal quarter ends. This requirement, which is consistent with current practice, informs the Commission and the public of the status of the market test.[8] Consistent with 39 U.S.C. 3652(c) and 39 CFR 3050.21(h), information on each market test conducted during the fiscal year must be filed in the ACR. Proposed rule 3035.20(e).

I. Definition of ''small business concern''

The Postal Service may conduct market tests of experimental products as long as the product offering does not ''create an unfair or otherwise inappropriate competitive advantage for the Postal Service or any mailer, particularly in regard to small business concerns. . . .'' 39 U.S.C. 3641(b)(2).[9] The PAEA requires the Commission to define ''small business concern'' in conformance with the requirements of section 3 of the Small Business Act. 39 U.S.C. 3641(h).

The Small Business Act states that a small business concern ''shall be deemed to be one which is independently owned and operated and which is not dominant in its field of operation. . . .'' 15 U.S.C. 632(a)(1). Small Business Administration regulations define ''business concern'' as ''a business entity organized for profit, with a place of business located in the United States, and which operates primarily within the United States or which makes a significant contribution to the U.S. economy through payment of taxes or use of American products, materials or labor.'' 13 CFR 121.105.

SBA regulations state that federal agencies promulgating regulations relating to small businesses usually use SBA size criteria. 13 CFR 121.903(a). Consistent with this practice and section 3641(h), the definition in proposed rule 3001.5(v) contains the requirements of section 3 of the Small Business Act as well as regulations promulgated by the SBA.[10] These requirements are listed in proposed rule 3001.5(v)(1) through (5).

To qualify as ''small,'' a business concern must, among other things, meet the criteria and size standards listed in the SBA's small business size regulations. *See* 13 CFR part 121. SBA's size standards determine whether a business concern is ''small'' based on the maximum number of employees or annual receipts. *Id.* 121.201. The SBA matches small business size standards to industries described in the North American Industry Classification System (NAICS), which classifies businesses according to the type of economic activity. *Id.* 121.101. For example, these industries include the Postal Service, Couriers and Express Delivery Services, and Local Messengers and Local Delivery. *Id.* 121.201. Further guidance on the types of businesses that comprise each industry and their primary activities or services is available on the NAICS Web site at *http:www.naics.com/search.htm.*

When determining the impact of a market test on small business concerns, the Postal Service would first identify the types of businesses that may be affected by the market test. Second, the Postal Service would determine whether these businesses qualify as ''small business concerns'' under proposed section 3001.5(v) based on SBA size standards. Third, the Postal Service would analyze the impact of the market test on qualifying small business concerns and provide that analysis in its notice initiating the market test to establish that ''[t]he introduction or continued offering of the experimental product will not create an unfair or otherwise inappropriate competitive advantage for the Postal Service or any mailer, particularly in regard to small business concerns. . . .'' 39 U.S.C. 3641(b)(2); proposed rule 3035.3(a)(2).

This framework was followed recently in Docket No. MT2013–1 involving the

[7] *See, e.g.,* Docket No. MT2013–2, IMRS–NPR Notice at 8.

[8] *See* Docket No. MT2012–1, Order Approving Market Test of First-Class Tracer, December 9, 2012, at 6–7 (Order No. 1035); Docket No. MT2013–1, Order Approving Metro Post Market Test, November 14, 2012, at 12 (Order No. 1539).

[9] Likewise, in proceedings to modify the market dominant and competitive product lists, due regard must be given to ''the likely impact of the proposed action on small business concerns. . . .'' 39 U.S.C. 3642(b)(3)(C).

[10] *See* 15 U.S.C. 632(a)(1); 13 CFR part 121.

Metro Post market test. Couriers and express delivery service companies were identified as the types of business that may be affected by the market test.[11] The SBA categorizes couriers and express delivery companies as ''small'' if they met the criteria in proposed rule 3001.5(v) and if they have 1,500 or fewer employees. 13 CFR 121.201. The Postal Service then analyzed the impact of the Metro Post market test on these small business concerns. *See* Response to CHIR No. 1 at 5.

IV. Section-by-Section Analysis

The following is a section-by-section analysis of the proposed rules that contains brief descriptions of the contents of each rule.

Section 3001.5 Definitions. This proposed rule creates a definition of ''small business concern'' consistent with the requirements of 39 U.S.C. 3641(h).

Section 3035.1 Applicability. This proposed rule states that the rules in this part apply to market tests of experimental products pursuant to 39 U.S.C. 3641.

Section 3035.2 Advance notice. This proposed rule requires the Postal Service to provide 30 days' advanced notice of its intent to initiate a market test.

Section 3035.3 Contents of notice. This proposed rule lists the items that must be included in the Postal Service's notice initiating a market test.

Section 3035.4 Review. This proposed rule requires the Commission to establish a docket for each market test initiated under part 3035, promptly publish a notice in the **Federal Register,** and post the filing on its Web site. The proposed rule lists the items that must be provided in the notice.

Section 3035.5 Commission action. This proposed rule provides for the Commission's review of the Postal Service notice for compliance with 39 U.S.C. 3641.

Section 3035.6 Changes in market test. This proposed rule requires the Postal Service to immediately notify the Commission of any material changes made to the market test. It authorizes the Commission, in its discretion, to notice the filing and provide an opportunity for comment.

Section 3035.10 Duration. This proposed rule states that a market test is limited to 24 months in duration unless the Postal Service requests an extension.

Section 3035.11 Extension of test. This proposed rule enables the Postal Service to request an extension of the duration of a market test. It lists the requirements for requesting an extension and provides for Commission review of the request for extension for consistency with 39 U.S.C. 3641.

Section 3035.12 Cancellation of market test. This proposed rule enables either the Postal Service or the Commission to cancel a market test. The proposed rule lists the options the Commission may pursue based upon its review.

Section 3035.15 Dollar amount limitation. This proposed rule states that an experimental product may only be tested if total revenues that are anticipated or received by the Postal Service do not exceed the $10 Million Adjusted Limitation in any fiscal year. The proposed rule lists the steps for calculating the $10 Million Adjusted Limitation.

Section 3035.16 Exemption from dollar amount limitation. This proposed rule enables the Postal Service to request an exemption from the $10 Million Adjusted Limitation as long as it does not exceed the $50 Million Adjusted Limitation in any fiscal year. The proposed rule lists the steps for calculating the $50 Million Adjusted Limitation, as well as the items that must be included in the request for exemption. It requires the Postal Service to file the request for exemption at least 45 days before it expects to exceed the $10 Million Adjusted Limitation. It provides for Commission review of the request for exemption for consistency with 39 U.S.C. 3641.

Section 3035.17 Prevention of market disruption. This proposed rule authorizes the Commission to limit the amount of revenues the Postal Service may obtain from any particular geographic market to prevent market disruption.

Section 3035.18 Filing product status. This proposed rule states that if the Postal Service decides to make an experimental product permanent, it must file a notice sufficiently in advance so that the market test does not exceed the $10 Million Adjusted Limitation or any authorized adjusted limitation in any fiscal year.

Section 3035.20 Data collection and reporting requirements. This proposed rule requires the Postal Service to describe plans for monitoring the performance of the market test. It identifies items that must be included in data collection reports. The proposed rule authorizes the Commission to request additional information or data and to require the Postal Service to report the revenues for specified geographic markets. It requires the Postal Service to file results of the market test data collection within 40 days (or such other time the Commission may prescribe) after the close of each fiscal quarter during which the market test is offered. Information on each market test conducted during the fiscal year must be filed in the ACR.

V. Opportunity to Comment

Interested persons may comment on the Commission's proposed rules governing market tests of experimental products. Comments are due within 30 days of the date of publication of this notice in the **Federal Register**. Reply comments are due within 20 days of the date for submission of initial comments.

Pursuant to 39 U.S.C. 505, Anne J. Siarnacki is designated as the Public Representative in this proceeding to represent the interests of the general public.

VI. Ordering Paragraphs

It is ordered:

1. Docket No. RM2013–5 is established for the purpose of receiving comments on the Commission's proposed rules governing market tests of experimental products.
2. Interested persons may submit comments no later than 30 days from the date of publication of this notice in the **Federal Register.**
3. Interested persons may submit reply comments no later than 20 days from the date for submission of initial comments.
4. Pursuant to 39 U.S.C. 505, Anne J. Siarnacki is appointed to serve as Public Representative in this proceeding.
5. The Secretary shall arrange for publication of this order in the **Federal Register**.

Attachment—Summary of Market Tests

A. Docket No. MT2009–1

In Docket No. MT2009–1, the Commission authorized a market test of Collaborative Logistics, an experimental product.[1] Collaborative Logistics involves the '' 'transportation of an article or multiple articles on a pallet or other unit load, on a space-available basis, in postal transportation.' '' *Id.* at 3. The market test began on May 6, 2009 and was set to expire on May 6, 2011.

On April 26, 2011, the Postal Service filed a motion for temporary extension.[2]

[11] Docket No. MT2013–1, Response of the United States Postal Service to Chairman's Information Request No. 1, October 25, 2012 (Response to CHIR No. 1).

[1] Docket No. MT2009–1, Order No. 211, Order Concerning Collaborative Logistics Market Test, May 7, 2009.

[2] Docket No. MT2009–1, Motion of the United States Postal Service for Temporary Extension of Collaborative Logistics Market Test, April 26, 2011, at 1.

The Commission granted in part the Postal Service's request to extend the Collaborative Logistics market test until September 2011, when the Postal Service would file a request to make Collaborative Logistics a permanent product.[3] Ultimately, the Postal Service did not file this request due to its financial condition, operations concerns, and changes in organizational structure.[4] It terminated the market test effective September 19, 2011. *Id.*

B. Docket No. MT2010–1

In Docket No. MT2010–1, the Commission approved the Samples Co-Op Box market test on May 5, 2010.[5] The Samples Co-Op Box is a parcel box containing an assortment of product samples from multiple consumer packaged goods companies. *Id.* at 2. The Postal Service partnered with a company that would prepare Samples Co-Op Boxes for mailing, execute the mailing, and conduct market research. *Id.* The Postal Service did not charge a fee for delivering the co-op boxes. *Id.* The market test consisted of ''one mailing of several hundred thousand co-op boxes to consumers in two test markets.'' *Id.* The market test was completed within one week. *Id.*

On December 23, 2010, the Postal Service filed a request to modify the Mail Classification Schedule by adding Parcel Select Contract 1 with StartSampling, Inc. to the competitive product list.[6] Parcel Select Contract 1 was for the licensing and distribution of the ''Sample Showcase'' co-op box, which was a follow up to the Samples Co-Op market test. *Id.* at 1. The Commission approved the request on March 1, 2011.[7]

C. Docket No. MT2011–1

In Docket No. MT2011–1, the Commission authorized a 24-month market test for Alternate Postage Payment Method for Greeting Cards.[8] This product enables individuals to mail greeting cards without affixing postage. *Id.* at 2. The Commission also granted the Postal Service an exemption from the $10 million amount limitation, as adjusted for inflation. *Id.* at 7.

The Alternate Postage Payment Method for Greeting Cards market test began on January 2, 2011 and was set to expire on January 2, 2013.[9] On November 21, 2012, the Postal Service moved to extend the market test for an additional 12 months.[10] The Commission granted the motion on December 13, 2012. *Id.* at 4.

D. Docket No. MT2011–2

In Docket No. MT2011–2, the Commission conditionally approved the Gift Cards market test on April 28, 2011.[11] The market test enabled customers to purchase a gift card loaded with a specified sum of money that may be sent through the mail. *Id.* at 1. The Commission authorized the market test to proceed subject to the condition that the sale of gift cards be limited to Postal Service retail facilities, including its Web site. *Id.* at 2.

The market test began on June 27, 2011, and was set to expire on June 27, 2013.[12] On June 18, 2013, the Postal Service moved to extend the market test through the end of January 2014. *Id.* The Commission granted the motion on July 19, 2013.[13]

E. Docket No. MT2011–3

The Postal Service began offering Every Door Direct Mail—Retail (EDDM–R) as an experimental product once the Commission authorized the market test in Docket No. MT2011–3.[14] EDDM is a Standard Mail product that removes barriers to entry for small- and medium-size businesses that would otherwise use the mail. Order No. 687 at 2. It includes, among other things, local entry and payment, a maximum number of 5,000 pieces per delivery unit, a waiver of all permit and mailing fees, and simplified qualification and preparation requirements. *Id.* at 1–2. Pieces are priced using the Standard Mail Commercial Saturation Flats pricing schedules. *Id.* at 2.

The EDDM–R market test began on March 31, 2011. Notice at 1. In January 2012, the Commission granted the Postal Service's request for an exemption from the $10 million amount limitation, as adjusted for inflation.[15] On July 10, 2012, the Postal Service filed a request to modify the Mail Classification Schedule by adding EDDM–R to the market dominant product list.[16] The Commission found that the Postal Service's request met the statutory requirements in 39 U.S.C. 3642 and approved the request on September 7, 2012.[17] The market test ended on January 26, 2013.[18]

F. Docket No. MT2011–4

In Docket No. MT2011–4, the Commission authorized the Mail Works Guarantee market test on May 16, 2011.[19] For this market test, the Postal Service and each participant jointly develop a unique set of metrics to measure the effectiveness of a particular direct mail campaign. *Id.* at 3. The Postal Service plans to provide assistance to the mailer in developing its direct mail and in benchmarking and measuring the test metric. *Id.* To safeguard participants, the Postal Service offers a postage back guarantee of up to $250,000 per participant if a campaign fails to achieve the pre-established metric, as verified by the Postal Service. *Id.*

[3] Docket No. MT2009–1, Order No. 742, Order Granting In Part Temporary Extension of Collaborative Logistics Market Test, June 3, 2011, at 2, 5.

[4] Docket No. MT2009–1, Notice of the United States Postal Service of Termination of Market Test, August 19, 2011, at 1.

[5] Docket No. MT2010–1, Order No. 452, Order Approving Samples Co-Op Box Market Test, May 5, 2010, at 2.

[6] Docket No. MC2011–16 and CP2011–53, Request of the United States Postal Service to Add Parcel Select Contract 1 to Competitive Product List and Notice of Filing (Under Seal) of Contract and Supporting Data, December 23, 2010.

[7] Docket No. MC2011–16 and CP2011–53, Order No. 686, Order Approving Parcel Select Contract 1 Negotiated Service Agreement, March 1, 2011. The Commission also approved an amendment to the prices for Parcel Select Contract 1. Docket No. MC2011–16 and CP2011–53, Order No. 699, Order Approving Amendment to Parcel Select Contract 1 Negotiated Service Agreement, March 18, 2011.

[8] Docket No. MT2011–1, Order No. 617, Order Approving Market Test of Alternate Postage Payment Method for Greeting Cards, December 21, 2010.

[9] Docket No. MT2011–1, Motion of the United States Postal Service for Temporary Extension of Alternate Postage for Greeting Cards Market Test, November 21, 2012, at 1.

[10] Docket No. MT2011–1, Order No. 1577, Order Granting Motion Concerning Market Test, December 13, 2012, at 2.

[11] Docket No. MT2011–2, Order No. 721, Order Authorizing Gift Card Market Test, April 28, 2011.

[12] Docket No. MT2011–2, Motion of the United States Postal Service for Temporary Extension of Gift Cards Market Test, June 18, 2013.

[13] Docket No. MT2011–2, Order No. 1781, Order Granting Extension of Gift Card Market Test, July 19, 2013.

[14] Docket No. MT2011–3, Order Approving Market Test of Experimental Product—Marketing Mail Made Easy, March 1, 2011 (Order No. 687). On April 1, 2011, the Postal Service notified the Commission that it changed the name of the experimental product to EDDM–R. Docket No. MT2011–3, Notice of Market Test Name Change from Marketing Mail Made Easy to Every Door Direct Mail Retail or EDDM Retail, April 1, 2011.

[15] Docket No. MT2011–3, Order No. 1164, Order Granting Request for Exemption from Annual Revenue Limitation, January 23, 2012.

[16] Docket No. MC2012–31, Request of the United States Postal Service to Add Every Door Direct Mail—Retail to the Mail Classification Schedule, July 10, 2012. On July 18, 2012, the Postal Service filed a correction to its request. United States Postal Service Notice of Errata to Request of the United States Postal Service to Add Every Door Direct Mail—Retail to the Mail Classification Schedule, July 18, 2012.

[17] Docket No. MC2012–31, Order No. 1460, Order Approving Addition of Postal Services to the Mail Classification Schedule Product Lists, September 7, 2012.

[18] Docket No. MT2011–3, EDDM–R Data Collection Report Fiscal Year 2013, Quarter 1 and Quarter 2 (through January 26, 2013), March 15, 2013 (EDDM–R FY 2013 Data Collection Report).

[19] Docket No. MT2011–4, Order No. 730, Order Approving Mail Works Guarantee Market Test, May 16, 2011.

The market test began on June 14, 2011.[20] During the first year of the test, no customers committed to using the mail in a way that would qualify for the market test guarantee. *Id.* at 1. The market test terminated effective January 8, 2013. *Id.*

G. Docket No. MT2012–1

The Commission approved the proposed experimental product identified as First-Class Tracer on December 9, 2011.[21] The market test consists of providing customers a means to track the transportation and processing of single-piece First-Class Mail. *Id.* at 1. The First-Class Tracer is a barcode that the mailer affixes to a single-piece of First-Class Mail. *Id.* at 3. The mailer keeps a portion of the label that includes a tracking number and a QR code. *Id.* This enables the mailer to check the status of the mail piece by either entering the tracking number on the USPS.com Web site or by scanning the QR code with a mobile device. *Id.* The market test began on December 10, 2011 with 50 test locations, and is ongoing.[22]

H. Docket No. MT2013–1

In Docket No. MT2013–1, the Commission approved the market test of the experimental product Metro Post on November 14, 2012.[23] Metro Post is ''a package delivery service that will provide customers with same-day delivery from participating locations within a defined metropolitan area.'' *Id.* at 1. The Postal Service plans to enter into relationships with up to ten qualifying online e-commerce companies to offer same-day local delivery. *Id.* at 2. Buyers may request same-day delivery by using a qualifying online e-commerce platform, purchasing items at participating retail stores, or visiting a participant's Web site to purchase items. *Id.* at 3. The daily cut-off times for making purchases will occur between 2:00 p.m. and 3:00 p.m., and same-day delivery will occur between 4:00 p.m. and 8:00 p.m. *Id.*

The Commission also granted the Postal Service an exemption from the $10 Million Adjusted Limitation. *Id.* at 10. The market test began on December 12, 2012 and is ongoing.

I. Docket No. MT2013–2

On July 1, 2013, the Postal Service filed a notice announcing its intent to conduct a market test of a competitive experimental product called International Merchandise Return Service—Non-Published Rates (IMRS–NPR).[24] IMRS–NPR items consist of returned merchandise that consumers purchased through online retailers in the United States. *Id.* at 2. IMRS–NPR will enable foreign consumers to create return labels and postage payment to return products back to the United States. *Id.* The consumer can create his or her own shipping label and send it to the merchant through the consumer's postal channel. *Id.* The market test proposal is currently pending before the Commission.

By the Commission.

Shoshana M. Grove,

Secretary.

List of Subjects

39 CFR Part 3001

Administrative practice and procedure, Freedom of information, Postal Service, Sunshine Act.

39 CFR Part 3035

Administrative practice and procedure, Postal Service.

For the reasons discussed in the preamble, the Commission proposes to amend chapter III of title 39 of the Code of Federal Regulations as follows:

PART 3001—RULES OF PRACTICE AND PROCEDURE

■ 1. The authority citation for 39 CFR part 3001 continues to read as follows:

Authority: 39 U.S.C. 404(d); 503; 504; 3661.

■ 2. In § 3001.5, add new paragraph (v) to read as follows:

§ 3001.5 Definitions.

* * * * *

(v) *Small business concern* means a for-profit business entity that:

(1) Is independently owned and operated;

(2) Is not dominant in its field of operation;

(3) Has a place of business located in the United States;

(4) Operates primarily within the United States or makes a significant contribution to the United States economy by paying taxes or using American products, materials, or labor; and

(5) Together with its affiliates, qualifies as ''small'' in its primary industry under the criteria and size standards established by the Small Business Administration in 13 CFR 121.201, as amended, based on annual receipts or number of employees.

■ 3. Add part 3035 to read as follows:

PART 3035—RULES FOR MARKET TESTS OF EXPERIMENTAL PRODUCTS

Sec.
3035.1 Applicability.
3035.2 Advance notice.
3035.3 Contents of notice.
3035.4 Review.
3035.5 Commission action.
3035.6 Changes in market test.
3035.7–3035.9 [Reserved]
3035.10 Duration.
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3035.12 Cancellation of market test.
3035.13–3035.14 [Reserved]
3035.15 Dollar amount limitation.
3035.16 Exemption from dollar amount limitation.
3035.17 Prevention of market disruption.
3035.18 Filing for permanent product status.
3035.19 [Reserved]
3035.20 Data collection and reporting requirements.

Authority: 39 U.S.C. 3641.

§ 3035.1 Applicability.

The rules in this part apply to market tests of experimental products pursuant to 39 U.S.C. 3641.

§ 3035.2 Advance notice.

The Postal Service shall file notice with the Commission of its determination to initiate a market test at least 30 days before initiating the market test.

§ 3035.3 Contents of notice.

Notices of proposed market tests shall include:

(a) The basis for the Postal Service's determination that the market test is governed by 39 U.S.C. 3641, which shall:

(1) Describe, from the viewpoint of mail users, how the experimental product is significantly different from all products offered by the Postal Service within the 2 fiscal years preceding the start of the market test;

(2) Establish that the introduction or continued offering of the experimental product will not create an unfair or otherwise inappropriate competitive advantage for the Postal Service or any mailer, particularly in regard to small business concerns; and

[20] Docket No. MT2011–4, Notice of the United States Postal Service of Termination of the Market Test, January 8, 2013.

[21] Docket No. MT2012–1, Order No. 1035, Order Approving Market Test of First-Class Tracer, December 9, 2011.

[22] Docket No. MT2012–1, First-Class Tracer Data Collection Report FY12, Q1–4 and FY13, Q1–2, April 19, 2013.

[23] Docket No. MT2013–1, Order No. 1539, Order Approving Metro Post Market Test, November 14, 2012.

[24] Docket No. MT2013–2, Notice of the United States Postal Service of Market Test of Experimental Product—International Merchandise Return Service—Non-Published Rates (IMRS–NPR) and Notice of Filing IMRS–NPR Model Contract and Application for Non-Public Treatment of Materials Filed Under Seal, July 1, 2013.

(3) Identify the experimental product as either market dominant or competitive for purposes of the market test.

(b) A description of the nature and the scope of the market test that:

(1) Demonstrates why the market test is not inconsistent with the requirements of 39 U.S.C. 3641;

(2) Identify the beginning and ending dates of the market test;

(3) Describes the geographic market(s) where the market test may be conducted;

(4) Estimates the total revenue that is anticipated by the Postal Service for each fiscal year of the market test, including available supporting documentation;

(5) Provides proposed Mail Classification Schedule Language; and

(6) Includes a plan for monitoring the performance of the market test, including a description of the specific data items to be collected, as required by § 3035.20.

§ 3035.4 Review.

The Commission will establish a docket for each market test initiated under this part, promptly publish a notice in the **Federal Register,** and post the filing on its Web site. The notice shall:

(a) Describe the general nature of the proceeding;

(b) Refer to the legal authority under which the proceeding is to be conducted;

(c) Identify an officer of the Commission to represent the interests of the general public in the docket;

(d) Specify a period for public comment; and

(e) Include such other information as the Commission deems appropriate.

§ 3035.5 Commission action.

The Commission shall review the Postal Service notice together with any comments for initial compliance with the statutory requirements of 39 U.S.C. 3641, and:

(a) Find that the market test is consistent with the requirements of 39 U.S.C. 3641; or

(b) Find that the market test is inconsistent with the requirements of 39 U.S.C. 3641 and provide an opportunity to correct the identified deficiencies; or

(c) Find that the market test is inconsistent with the requirements of 39 U.S.C. 3641 and order that the market test not go into effect; or

(d) Direct other action as the Commission may consider appropriate.

§ 3035.6 Changes in market test.

(a) The Postal Service shall immediately notify the Commission of any material changes made to the market test, including, without limitation, adjustments to prices, geographic scope, or termination date.

(b) The Commission may, in its discretion, notice the filing and provide an opportunity for comment.

§ 3035.7–3035.9 [Reserved]

§ 3035.10 Duration.

A market test may not exceed 24 months in duration unless the Postal Service requests an extension under § 3035.11.

§ 3035.11 Extension of test.

(a) The Postal Service may request an extension of the duration of a market test, not to exceed an additional 12 months, if necessary to determine the feasibility or desirability of a product being tested. The Postal Service must file a written request for extension with the Commission at least 60 days before the market test is scheduled to terminate.

(b) The request for extension shall:

(1) Explain why an extension is necessary to determine the feasibility or desirability of the experimental product;

(2) List the new end date for the market test;

(3) Calculate the total revenue received by the Postal Service from the market test for each fiscal year the market test has been in operation;

(4) Estimate the additional revenue that is anticipated by the Postal Service for each fiscal year prior to the conclusion of the extension period of the market test, including available supporting documentation; and

(5) Provide any additional information necessary for the Commission to evaluate the continued consistency with the requirements of 39 U.S.C. 3641.

(c) The Commission shall review the Postal Service request for extension to ensure that an extension is necessary in order to determine the feasibility or desirability of the experimental product and:

(1) Find that the extension is consistent with the requirements of 39 U.S.C. 3641; or

(2) Find that the extension is inconsistent with the requirements of 39 U.S.C. 3641 and provide an opportunity to correct the identified deficiencies;

(3) Find that the extension is inconsistent with the requirements of 39 U.S.C. 3641 and deny the extension; or

(4) Direct other action as the Commission considers appropriate.

§ 3035.12 Cancellation of market test.

(a) The Postal Service may cancel a market test at any time. It shall file notice of cancellation with the Commission within 10 days of cancelling the market test.

(b) Pursuant to 39 U.S.C. 3641(f), the Commission may direct the Postal Service to demonstrate that the market test continues to meet the requirements of 39 U.S.C. 3641 and the Commission's rules. The Commission, in its discretion, may provide an opportunity for comments.

(c) Based upon its review, the Commission may:

(1) Find that the market test is consistent with the requirements of 39 U.S.C. 3641; or

(2) Find that the market test is inconsistent with the requirements of 39 U.S.C. 3641 and provide an opportunity to correct the identified deficiencies; or

(3) Find that the market test is inconsistent with the requirements of 39 U.S.C. 3641 and cancel the market test; or

(4) Direct other action as the Commission may consider appropriate.

§§ 3035.13–3035.14 [Reserved]

§ 3035.15 Dollar amount limitation.

(a) An experimental product may only be tested if total revenues that are anticipated or received by the Postal Service do not exceed $10,000,000 in any fiscal year, as adjusted for the change in the Consumer Price Index, as specified in paragraph (d) of this section ($10 Million Adjusted Limitation). Total revenues anticipated or received may exceed the $10 Million Adjusted Limitation in any fiscal year if an exemption is granted pursuant to § 3035.16.

(b) The Consumer Price Index, as specified in §§ 3010.21(a) and 3010.22(a) of this chapter, is applicable for calculations under this part.

(c) For each fiscal year, the $10 Million Adjusted Limitation shall reflect the average CPI result during the previous fiscal year calculated as described in paragraph (d) of this section. The Commission shall publish this figure on its Web site at *http://www.prc.gov.*

(d) The calculation of the $10 Million Adjusted Limitation involves the following steps. First, a simple average CPI–U index was calculated for fiscal year 2008 by summing the monthly CPI–U values from October 2007 through September 2008 and dividing the sum by 12 (Base Average). The resulting Base Average is 214.5. Then, a second simple average CPI–U index is similarly calculated for each subsequent fiscal year by summing the 12 monthly CPI–U values for the previous fiscal year and dividing the sum by 12 (Recent

Average). Finally, the annual limitation for the current fiscal year is calculated by multiplying $10,000,000 by the Recent Average divided by 214.5. The result is expressed as a number, rounded to the nearest dollar.

(e) The formula for calculating the $10 Million Adjusted Limitation is as follows: $10 Million Adjusted Limitation = $10,000,000 * (Recent Average/214.5).

§ 3035.16 Exemption from dollar amount limitation.

(a) The Postal Service may request an exemption from the $10 Million Adjusted Limitation by filing a written request with the Commission. In no instance shall the request for exemption exceed the market test dollar amount limitation of $50,000,000 in any fiscal year, as adjusted for the change in the Consumer Price Index, as specified in paragraph (c) of this section ($50 Million Adjusted Limitation).

(b) For each fiscal year, the $50 Million Adjusted Limitation shall reflect the average CPI result during the previous fiscal year calculated as described in 39 CFR 3035.16(c). The Commission shall publish this figure on its Web site at *http://www.prc.gov.*

(c) The calculation of the $50 Million Adjusted Limitation involves the following steps. First, a simple average CPI–U index was calculated for fiscal year 2008 by summing the monthly CPI–U values from October 2007 through September 2008 and dividing the sum by 12 (Base Average). The Resulting Base Average is 214.5. Then, a second simple average CPI–U index is similarly calculated for each subsequent fiscal year by summing the 12 monthly CPI–U values for the previous fiscal year and dividing the sum by 12 (Recent Average). Finally, the annual limitation for the current fiscal year is calculated by multiplying $50,000,000 by the Recent Average divided by 214.5. The result is expressed as a number, rounded to the nearest dollar.

(d) The formula for calculating the $50 Million Adjusted Limitation is as follows: $50 Million Adjusted Limitation = $50,000,000 * (Recent Average/214.5).

(e) The Postal Service shall file its request for exemption at least 45 days before it expects to exceed the $10 Million Adjusted Limitation.

(f) The request for exemption shall:

(1) Explain how the experimental product will:

(i) Benefit the public and meet an expected demand;

(ii) Contribute to the financial stability of the Postal Service; and

(iii) Not result in unfair or otherwise inappropriate competition.

(2) Calculate the total revenue received by the Postal Service from the market test for each fiscal year the market test has been in operation; and

(3) Estimate the additional revenue that is anticipated by the Postal Service for each fiscal year prior to the conclusion of the extension period of the market test, including available supporting documentation;

(g) The Commission shall review the request for exemption for consistency with the statutory requirements of 39 U.S.C. 3641 and:

(1) Find that the exemption is consistent with the requirements of 39 U.S.C. 3641;

(2) Find that the exemption is inconsistent with the requirements of 39 U.S.C. 3641 and provide an opportunity to correct the identified deficiencies;

(3) Find that the exemption is inconsistent with the requirements of 39 U.S.C. 3641 and deny the exemption; or

(4) Direct other action as the Commission may consider appropriate.

§ 3035.17 Prevention of market disruption.

Notwithstanding the $10 Million Adjusted Limitation or any adjustment granted pursuant to § 3035.16, the Commission may limit the amount of revenues the Postal Service may obtain from any particular geographic market as necessary to prevent market disruption as defined in 39 U.S.C. 3641 (b)(2).

§ 3035.18 Filing for permanent product status.

If the Postal Service determines to make an experimental product permanent, it shall file a notice, pursuant to § 3020.30 of this chapter, sufficiently in advance so that the market test does not exceed the $10 Million Adjusted Limitation or any authorized adjusted limitation in any fiscal year.

§§ 3035.19 [Reserved]

§ 3035.20 Data collection and reporting requirements.

(a) A notice of a market test shall describe plans for monitoring the performance of the market test, including plans to collect volume, revenue, and other data. Data collection reports shall include, at a minimum:

(1) The revenue by fiscal quarter received to date by the Postal Service from the market test;

(2) Attributable costs incurred in conducting the market test, including administrative and ancillary costs;

(3) A quantification of start-up costs incurred to date associated with the market test.

(b) The Commission may request additional information or data as it deems appropriate.

(c) To assess the potential impact of a market test in a particular geographic market, the Commission may require the Postal Service to report the revenues from the market test for specified geographic markets.

(d) The Postal Service shall file the results of the market test data collection within 40 days after the close of each fiscal quarter during which the market test is offered, or such other period as the Commission may prescribe.

(e) The Postal Service shall file in its Annual Compliance Report information on each market test conducted during the fiscal year pursuant to § 3050.21(h) of this chapter.

[FR Doc. 2013–20178 Filed 8–20–13; 8:45 am]

BILLING CODE 7710–FW–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R06–OAR–2013–0227, FRL–9900–27–Region 6]

Approval and Promulgation of Implementation Plans; Oklahoma; Regional Haze and Interstate Transport Affecting Visibility State Implementation Plan Revisions; Withdrawal of Federal Implementation Plan for American Electric Power/Public Service Company of Oklahoma

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: The EPA is proposing to approve a revision to the Oklahoma Regional Haze State Implementation Plan (SIP) submitted on June 20, 2013 by the Oklahoma Secretary of Environment addressing the Best Available Retrofit Technology (BART) requirements for sulfur dioxide (SO_2) and oxides of nitrogen (NO_X) for Units 3 and 4 of the American Electric Power/Public Service Company (AEP/PSO) Northeastern Power Station in Rogers County, Oklahoma. The EPA is proposing to find that this revised BART determination meets the requirements of the Clean Air Act (CAA) and the Regional Haze Rule. We are also proposing to approve a related SIP revision submitted to address the impact of emissions of Northeastern Units 3 and 4 as required by CAA provisions concerning non-interference with programs to protect visibility in other states. In conjunction with these proposed approvals, we propose to

withdraw federal implementation plan (FIP) emission limits for SO_2 that would otherwise apply to Northeastern Units 3 and 4. The EPA is taking this action under section 110 of the CAA.

DATES: Written comments must be received on or before September 20, 2013.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA–R06–OAR–2013–0227 by one of the following methods:

- *www.regulations.gov.* Follow the online instructions for submitting comments.
- *Email:* Mr. Guy Donaldson at *donaldson.guy@epa.gov.* Please also send a copy by email to the person listed in the **FOR FURTHER INFORMATION CONTACT** section below.
- *Mail or delivery:* Mr. Guy Donaldson, Chief, Air Planning Section (6PD–L), Environmental Protection Agency, 1445 Ross Avenue, Suite 1200, Dallas, Texas 75202–2733. Deliveries are accepted only between the hours of 8 a.m. and 4 p.m. weekdays, and not on legal holidays. Special arrangements should be made for deliveries of boxed information.

Instructions: Direct your comments to Docket ID No. EPA–R06–OAR–2013–0227. The EPA's policy is that all comments received will be included in the public docket without change and may be made available online at *www.regulations.gov,* including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through *www.regulations.gov* or email. The *www.regulations.gov* Web site is an ''anonymous access'' system, which means the EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an email comment directly to EPA, without going through *www.regulations.gov,* your email address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, the EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD–ROM you submit. If the EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses.

Docket: All documents in the docket are listed in the *www.regulations.gov* index. Although listed in the index, some information is not publicly available (e.g., CBI or other information whose disclosure is restricted by statute). Certain other material, such as copyrighted material, will be publicly available only in hard copy form. Publicly available docket materials are available either electronically at *www.regulations.gov* or in hard copy at the Air Planning Section (6PD–L), Environmental Protection Agency, 1445 Ross Avenue, Suite 700, Dallas, Texas 75202–2733. The file will be made available by appointment for public inspection in the Region 6 FOIA Review Room between the hours of 8:30 a.m. and 4:30 p.m. weekdays except for legal holidays. Contact the person listed in the **FOR FURTHER INFORMATION CONTACT** paragraph below or Mr. Bill Deese at 214–665–7253 to make an appointment. If possible, please make the appointment at least two working days in advance of your visit. There will be a fee of 15 cents per page for making photocopies of documents. On the day of the visit, please check in at the EPA Region 6 reception area at 1445 Ross Avenue, Suite 700, Dallas, Texas.

The State submittal is also available for public inspection during official business hours, by appointment, at the Oklahoma Department of Environmental Quality (ODEQ), Air Quality Division, 707 North Robinson, P.O. Box 1677, Oklahoma City, Oklahoma 73101–1677.

FOR FURTHER INFORMATION CONTACT: Terry Johnson at telephone number (214) 665–2154, email: *johnson.terry@epa.gov,* or the above address for EPA's Region 6 office.

SUPPLEMENTARY INFORMATION: Throughout this document whenever ''we,'' ''us,'' or ''our'' is used, we mean the EPA. Information is organized as follows:

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I. Background on the Oklahoma Regional Haze SIP and FIP

The ODEQ submitted a Regional Haze SIP (Oklahoma RH SIP) on February 19, 2010 to address the requirements of the regional haze program at 40 CFR 51.308 for the first implementation period. In December 2011, we partially approved, partially disapproved, and took no action on various portions of this SIP submittal (76 FR 81727, December 28, 2011). Even as significant portions of the Oklahoma RH SIP submittal were approved, we disapproved ODEQ's BART determinations for SO_2 emissions from six coal-fired electric generating units (EGUs): Units 4 and 5 of the OG&E Muskogee plant, Units 1 and 2 of the OG&E Sooner plant, and Units 3 and 4 of the AEP/PSO Northeastern Power Station. Related to these disapprovals, we also disapproved a portion of a revision to the Oklahoma RH SIP that was submitted to address the requirements of CAA Section 110(a)(2)(D)(i)(II) as it applies to visibility for the 1997 8-hour ozone and 1997 fine particulate matter National Ambient Air Quality Standards (NAAQS). Specifically, this disapproval found that the SIP submittal had not prevented SO_2 emissions from above-named units from interfering with visibility programs in other states. Concurrent with these final disapprovals, we promulgated a FIP that requires SO_2 emission limits on the six above-named units to address deficiencies identified with the BART determinations of the SIP submittal.

Subsequent to this action, stakeholders, including AEP/PSO, ODEQ, and EPA, entered into discussions on the development and submittal of a revised SIP (Oklahoma RH SIP revision) designed to address BART requirements for Units 3 and 4 of the AEP/PSO Northeastern Power Station for SO_2 and NO_X and allow for withdrawal of FIP requirements for controls of SO_2 that are applicable to those units.[1] On June 20, 2013, ODEQ

[1] The state of Oklahoma and AEP/PSO filed petitions for review of the FIP, and the parties have separately entered into a settlement agreement which includes a timeline for preparing and processing the SIP revision submitted and reviewed in today's proposal. A copy of the settlement agreement may be found in Appendix I of the submitted SIP revision. The settlement agreement

Continued

submitted a revised BART determination for Units 3 and 4 of the Northeastern Power Station for SO_2 and NO_X and a related revision to the SIP addressing requirements to prevent interstate transport of emissions from interfering with other States' plans to address visibility impairment. The state's revised enforceable SO_2 and NO_X BART requirements for Units 3 and 4 of the Northeastern Power Station are contained in the submitted ''First Amended Regional Haze Agreement, DEQ Case No. 10–025 (March 2013)'' that revises the previously submitted ''PSO Regional Haze Agreement, DEQ Case No. 10–025 (February 10, 2010 [2])'' We find that the submitted SIP revision meets the completeness criteria in 40 CFR, Part 51, Appendix V, which must be met before formal EPA review.

This **Federal Register** notice concerns EPA's review and proposed approval of the Oklahoma RH SIP Revision affecting the SO_2 and NO_X BART emission limits applying to AEP/PSO's Northeastern Units 3 and 4 and the Interstate Transport SIP requirements, and our proposed withdrawal of source-specific regulatory requirements for Northeastern Units 3 and 4 that currently apply under the FIP.

II. Background for EPA's Proposed Action

In the CAA Amendments of 1977, Congress established a program to protect and improve visibility in the national parks and wilderness areas. See CAA section 169A. Congress amended the visibility provisions in the CAA in 1990 to focus attention on the problem of regional haze. See CAA section 169B. We promulgated regulations in 1999 to implement sections 169A and 169B of the Act. These regulations require states to develop and implement plans to ensure reasonable progress toward improving visibility in mandatory Class I Federal areas [3] (Class I areas) by reducing emissions that cause or contribute to regional haze.[4]

A. Definition of Regional Haze

Regional haze is impairment of visual range or colorization caused by emissions of air pollution produced by numerous sources and activities, located across a broad regional area. The sources include, but are not limited to, major and minor stationary sources, mobile sources, and area sources, including non-anthropogenic sources. Visibility impairment is primarily caused by fine particulate matter ($PM_{2.5}$) or secondary aerosols formed in the atmosphere from precursor gases (e.g., SO_2, NO_X, and in some cases, ammonia and volatile organic compounds). Atmospheric fine particulate matter reduces clarity, color, and visual range of scenic areas. Visibility-reducing fine particulate matter is primarily composed of sulfates, nitrates, organic carbon compounds, elemental carbon, and soil dust, and impairs visibility by scattering and absorbing light. Fine particulate matter can also cause serious health effects and mortality in humans, and contributes to environmental effects such as acid rain deposition and eutrophication.[5]

Data from the existing visibility monitoring network, the ''Interagency Monitoring of Protected Visual Environments'' (IMPROVE) monitoring network, show that visibility impairment caused by air pollution occurs virtually all the time at most national parks and wilderness areas. Average visual range in many Class I areas in the Western United States is 100–150 kilometers, or about one-half to two-thirds the visual range that would exist without man-made air pollution.[6] Visibility impairment also varies day-to-day and season-to-season depending on variations in meteorology and emission rates.

B. Regional Haze Rules and Regulations

In section 169A of the 1977 CAA Amendments, Congress created a program for protecting visibility in the nation's national parks and wilderness areas. This section of the CAA establishes as a national goal the ''prevention of any future, and the remedying of any existing, impairment of visibility in Class I areas, which impairment results from man-made air pollution.'' [7] On December 2, 1980, we promulgated regulations to address visibility impairment in Class I areas that is ''reasonably attributable'' to a single source or small group of sources, i.e., ''reasonably attributable visibility impairment.'' [8] These regulations represented the first phase in addressing visibility impairment. We deferred action on regional haze that results from emissions from a variety of sources until monitoring, modeling, and scientific knowledge about the relationships between pollutants and visibility impairment were improved.

Congress added section 169B to the CAA in 1990 to further address regional haze issues. We promulgated a rule to address regional haze on July 1, 1999 (64 FR 35713) (the Regional Haze Rule or RHR). The RHR revised the existing visibility regulations by adding provisions that address regional haze impairment and that establish a comprehensive visibility protection program for Class I areas. The requirements for regional haze, found at 40 CFR 51.308 and 51.309, are included in our visibility protection regulations at 40 CFR 51.300–309. Some of the main elements of the regional haze requirements are summarized in section III of this rulemaking. The requirement to submit a regional haze SIP applies to all 50 states, the District of Columbia, and the Virgin Islands.[9] Pursuant to 40 CFR 51.308(b), states were required to submit the first implementation plan addressing regional haze visibility impairment no later than December 17, 2007.

does not dictate what EPA will propose or finally determine with respect to the submitted SIP revision; today's proposal is based on our statutorily prescribed role of reviewing the submitted SIP revision for consistency with the requirements of the Clean Air Act.

[2] In our final action on the Oklahoma RH SIP on December 28, 2011, (76 FR 81727), we approved BART determinations and, where relevant, emission limitations (except those limitations proposed as SO_2 BART for Northeastern Units 3 and 4) for several AEP/PSO units: Comanche Power Station; Southwestern Power Station; and Northeastern Power Station. The pertinent emission limitations for these AEP/PSO units, including the revised BART limits for Northeastern Power Station Units 3 and 4 that we today propose to approve, are found in the PSO Regional Haze Agreement, DEQ Case No. 10–025 (February 10, 2010) *as amended by* the First Amended Regional Haze Agreement, DEQ Case No. 10–025 (March 2013). Consistent with today's proposal and to better clarify our past approvals and the federal enforceability of the limits for these AEP/PSO units and facilities, we today propose to codify our approval of the agreed upon order, as amended.

[3] Areas designated as mandatory Class I Federal areas consist of national parks exceeding 6,000 acres, wilderness areas and national memorial parks exceeding 5,000 acres, and all international parks that were in existence on August 7, 1977. 42 U.S.C. 7472(a). In accordance with section 169A of the CAA, EPA, in consultation with the Department of Interior, promulgated a list of 156 areas where visibility is identified as an important value. 44 FR 69122 (November 30, 1979). The extent of a mandatory Class I area includes subsequent changes in boundaries, such as park expansions. 42 U.S.C. 7472(a). Although states and tribes may designate as Class I additional areas which they consider to have visibility as an important value, the requirements of the visibility program set forth in section 169A of the CAA apply only to ''mandatory Class I Federal areas.'' Each mandatory Class I Federal area is the responsibility of a ''Federal Land Manager (FLM).'' 42 U.S.C. 7602(i). When we use the term ''Class I area'' in this action, we mean a ''mandatory Class I Federal area.''

[4] See 64 FR 35714 (July 1, 1999); see also 70 FR 39104 (July 6, 2005) and 71 FR 60612 (October 13, 2006).

[5] See 64 FR 35715.

[6] *Id.*

[7] See CAA section 169A(a)(1).

[8] See 45 FR 80084.

[9] Albuquerque/Bernalillo County in New Mexico must also submit a regional haze SIP to completely satisfy the requirements of section 110(a)(2)(D) of the CAA for the entire State of New Mexico under the New Mexico Air Quality Control Act (section 74–2–4).

C. 1997 NAAQS for Ozone and $PM_{2.5}$ and CAA Section 110(a)(2)(D)(i)

On July 18, 1997, we promulgated new NAAQS for 8-hour ozone and $PM_{2.5}$.[10] Section 110(a)(1) of the CAA requires states to submit SIPs to address a new or revised NAAQS within three years after promulgation of such standards, or within such shorter period as we may prescribe. Section 110(a)(2) of the CAA lists the elements that such new SIPs must address, as applicable, including section 110(a)(2)(D)(i), which pertains to the interstate transport of certain emissions.

On April 25, 2005, we published a ''Finding of Failure to Submit SIPs for Interstate Transport for the 8-hour Ozone and $PM_{2.5}$ NAAQS.'' [11] This action included a finding that Oklahoma and other states had failed to submit SIPs for interstate transport of air pollution affecting visibility and started a two-year clock for the promulgation of a FIP, unless a state made a submission to meet the requirements of section 110(a)(2)(D)(i) and we approved the submission before promulgating a FIP.

On August 15, 2006, we issued our ''Guidance for State Implementation Plan (SIP) Submissions to Meet Current Outstanding Obligations Under Section 110(a)(2)(D)(i) for the 8-Hour Ozone and $PM_{2.5}$ National Ambient Air Quality Standards'' (2006 Guidance). We developed the 2006 Guidance to make recommendations to states for making submissions to meet the requirements of section 110(a)(2)(D)(i) for the 1997 8-hour ozone standards and the 1997 $PM_{2.5}$ standards.

As identified in the 2006 Guidance, the ''good neighbor'' provisions in section 110(a)(2)(D)(i) of the CAA require each state to submit a SIP that prohibits emissions that adversely affect another state in the ways contemplated in the statute. Section 110(a)(2)(D)(i) contains four distinct requirements related to the impacts of interstate transport. The SIP must prevent sources in the state from emitting pollutants in amounts which will: (1) Contribute significantly to nonattainment of the NAAQS in other states; (2) interfere with maintenance of the NAAQS in other states; (3) interfere with provisions to prevent significant deterioration of air quality in other states; or (4) interfere with efforts to protect visibility in other states.

The 2006 Guidance stated that states may make a simple SIP submission confirming that it is not possible at that time to assess whether there is any interference with measures in the applicable SIP for another state designed to ''protect visibility'' for the 8-hour ozone and $PM_{2.5}$ NAAQS until Regional Haze SIPs are submitted and approved. These SIPs were required to be submitted by December 17, 2007.[12]

On May 10, 2007, we received a SIP revision submitted to address the interstate transport provisions of CAA 110(a)(2)(D)(i) for the 1997 ozone and 1997 $PM_{2.5}$ NAAQS (Oklahoma Interstate Transport SIP). We received a supplement to this SIP revision on December 10, 2007. In a prior action, we partially approved the submitted Oklahoma Interstate Transport SIP for the ''interfere with measures to prevent significant deterioration'' prong of section 110(a)(2)(D)(i) of the CAA.[13] On February 19, 2010, Oklahoma submitted the Oklahoma RH SIP to address interstate transport of emissions that could interfere with efforts to protect visibility in other states. Because we could only partially approve the Oklahoma RH SIP submittal, we issued a partial approval and partial disapproval of the Oklahoma Interstate Transport SIP that addressed the requirement that emissions from Oklahoma sources do not interfere with measures required in the SIP of any other state to protect visibility and concurrently issued a FIP to address defects in the Oklahoma Interstate Transport SIP submission.

III. Requirements for Regional Haze SIPs

A. The CAA and the Regional Haze Rule

Regional haze SIPs must assure reasonable progress towards the national goal of achieving natural visibility conditions in Class I areas. Section 169A of the CAA and EPA's implementing regulations require states to establish long-term strategies for making reasonable progress toward meeting this goal. Implementation plans must also give specific attention to certain stationary sources that were in existence on August 7, 1977, but were not in operation before August 7, 1962, and require these sources, where appropriate, to install BART controls for the purpose of eliminating or reducing visibility impairment.

B. Best Available Retrofit Technology

Section 169A of the CAA directs states to evaluate the use of retrofit controls at certain larger, often uncontrolled, older stationary sources in order to address visibility impacts from these sources. Specifically, section 169A(b)(2)(A) of the CAA requires States to revise their SIPs to contain such measures as may be necessary to make reasonable progress towards the natural visibility goal, including a requirement that certain categories of existing major stationary sources [14] built between 1962 and 1977 procure, install, and operate the ''Best Available Retrofit Technology'' as determined by the state. States are directed to conduct BART determinations for such sources that may be anticipated to cause or contribute to any visibility impairment in a Class I area. Rather than requiring source-specific BART controls, states also have the flexibility to adopt an emissions trading program or other alternative program as long as the alternative program provides greater reasonable progress towards improving visibility than BART.

On July 6, 2005, we published the *Guidelines for BART Determinations Under the Regional Haze Rule* at appendix Y to 40 CFR Part 51 (henceforth referred to as the ''BART Guidelines'') to assist states in determining which of their sources should be subject to the BART requirements and in determining appropriate emission limits for each applicable source.[15] In making a BART applicability determination for a fossil fuel-fired electric generating plant with a total generating capacity in excess of 750 megawatts, a state must use the approach set forth in the BART Guidelines. A State is encouraged, but not required, to follow the BART Guidelines in making BART determinations for other types of sources. Regardless of source size or type, however, a state must meet the CAA and regulatory requirements for selection of BART, and the state's BART analysis and determination must be reasonable in light of the overarching purpose of the regional haze program.

States must address all visibility-impairing pollutants emitted by a source in the BART determination process. The most significant visibility-impairing pollutants are SO_2, NO_X, and $PM_{2.5}$. The EPA has indicated that states should use their best judgment in determining whether emissions of volatile organic compounds or compounds of ammonia contribute to impairment of visibility in Class I areas.

Under the BART Guidelines, States may select and document an exemption threshold value to determine those BART-eligible sources not subject to

[10] See 62 FR 38652.

[11] See 70 FR 21147.

[12] See 74 FR 2392 (January 15, 2009).

[13] See 75 FR 72695 (November 26, 2010).

[14] The set of ''major stationary sources'' potentially subject to BART is listed in CAA section 169A(g)(7).

[15] 70 FR 39104.

BART. A BART-eligible source with an impact below the threshold value would not be expected to cause or contribute to visibility impairment in any Class I area. Any source with emissions great enough to result in a visibility impact above the threshold value would be subject to a BART determination review. The BART Guidelines acknowledge varying circumstances affecting different Class I areas. States should consider the number of emission sources affecting the Class I areas at issue and the magnitude of the individual sources' impacts. Generally, an exemption threshold set by the State should not be higher than 0.5 deciviews (dv).

In their SIPs, States must identify BART-eligible sources that have a visibility impact in any Class I area above the ''BART-subject'' exemption threshold established by the State and thus, are subject to BART. States must document their BART control analysis and determination for all sources subject to BART.

The term ''BART-eligible source'' used in the BART Guidelines means the collection of individual emission units at a facility that together comprises the BART-eligible source. In making a BART determination, section 169A(g)(2) of the CAA requires that States consider the following factors: (1) The costs of compliance, (2) the energy and non-air quality environmental impacts of compliance, (3) any existing pollution control technology in use at the source, (4) the remaining useful life of the source, and (5) the degree of improvement in visibility which may reasonably be anticipated to result from the use of such technology.[16]

Each state's regional haze SIP must include source-specific BART emission limits and compliance schedules for each source subject to BART. Once a state has made its BART determination, the BART controls must be installed and in operation as expeditiously as practicable, but no later than five years after the date the EPA approves the regional haze SIP.[17] In addition to what is required by the RHR, general SIP requirements mandate that the SIP must also include all regulatory requirements related to monitoring, recordkeeping, and reporting for the BART controls that pertain to a source. States have the flexibility to choose the type of control measures they will ultimately use to meet the BART emission limits.

[16] See 40 CFR 51.308(e)(1)(ii)(A).

[17] See CAA section 169(g)(4) and 40 CFR 51.308(e)(1)(iv).

IV. BART Determination for AEP/PSO Northeastern Power Station

A. Oklahoma's Revised BART Determination for the AEP/PSO Northeastern Power Station

In our prior review and action on the Oklahoma RH SIP, we agreed with Oklahoma's identification of sources that are BART-eligible and subject to BART, including Units 3 and 4 of the AEP/PSO Northeastern Power Station. 76 FR 81727 (December 28, 2011). We approved the State's PM and NO_X BART determinations and emission limits for these two units, with the pertinent emissions limitations contained in the PSO Regional Haze Agreement, DEQ Case No. 10–025 (February 10, 2010), while disapproving the State's SO_2 BART determinations and emission limits.[18] Specifically, we approved the NO_X BART emission limits of 0.15 lb/MMBtu (based on 30-day rolling averages) for Units 3 and 4 and disapproved the SO_2 BART determinations of no additional controls for Units 3 and 4. We promulgated an SO_2 BART emission limit of 0.06 lb/MMBtu for each unit (based on rolling 30 boiler operating day averages).

NO_X BART

The Oklahoma RH SIP Revision explains that it ''does not reopen [the prior and EPA-approved] NO_X technology determination, but does require earlier installation and compliance with reduced emission limits prior to the original SIP-imposed deadline.'' Oklahoma RH SIP Revision, Appendix 2 at 12. Our prior approval of NO_X BART for Unit 3 and 4 required that these units meet a NO_X emission limit of 0.15 lb/MMBtu (based on a 30-day rolling average) within five years from the effective date of EPA's approval, or by January 27, 2017. However, under the Oklahoma RH SIP Revision, both units are now required to meet an initial NO_X emission limit of 0.23 lb/MMBtu (based on a 30-day rolling average) by December 31, 2013, with additional limits of 1,098 lb/hr per unit on a 30-day rolling average basis and a 9,620 tpy combined cap for both units. By April 16, 2016, one unit is required to be permanently shut down, while the remaining unit is required to meet a NO_X emission limit of 0.15 lb/MMBtu (based on a 30-day rolling average), with an additional limit of 716 lb/hr on a 30-day rolling average basis and a cap of 3,137 tpy on a 12-month rolling basis. Finally, this second unit is required to shut down by December 31, 2026. These emission limits and shutdowns are made enforceable by the submitted ''First Amended Regional Haze Agreement, DEQ Case No. 10–025 (March 2013)'' that revises the previously submitted ''PSO Regional Haze Agreement, DEQ Case No. 10–025 (February 10, 2010). This revised NO_X BART determination is more stringent than the determination that we previously approved because it requires compliance with the 0.15 lb/MMBtu limit on a more expeditious schedule.

[18] We note again that with today's proposal that we propose to codify our approval of this agreed-upon order, as amended, because it will confirm and clarify our past approvals as well as the emission limitations and related schedules for the BART determinations we propose to approve today.

SO_2 BART

The Oklahoma RH SIP Revision also includes a new SO_2 BART determination for Units 3 and 4, which differs from both Oklahoma's original SO_2 BART determination of no new controls and our SO_2 BART emission limit of 0.06 lb/MMBtu, which can be met by the installation of Dry Flue Gas Desulfurization/Spray Dryer Absorber technology (DFGD/SDA). Oklahoma's new SO_2 BART determination contains several elements, including interim emission limits, the installation of Dry Sorbent Injection (DSI) technology and a fabric filter baghouse, phased reductions in capacity utilization, and enforceable deadlines by which Units 3 and 4 must be shut down entirely. As a consequence, the ''remaining useful life'' of Units 3 and 4 was an important consideration in Oklahoma's new SO_2 BART determination. Specifically, the Oklahoma RH SIP revision requires the following:

- By January 31, 2014, Units 3 and 4 must comply with an emission limit of 0.65 lb/MMBtu on a 30-day rolling average basis, to be met through the use of low-sulfur coal. An additional limit of 3,104 lb/hr on a 30-day rolling average basis will also apply to each unit;
- By December 31, 2014, Units 3 and 4 must comply with a reduced emission limit of 0.60 lb/MMBtu on a 12-month rolling average basis and a combined emissions cap of 25,097 tons/year on a 12-month rolling basis;
- By April 16, 2016, one of the two units must be permanently shut down, while the remaining unit must comply with a reduced emission limit of 0.4 lb/MMBtu [19] (based on DSI) [20] on a 30-day

[19] The company is also required to optimize the performance of the DSI through implementation of a testing protocol at varying operational parameters. If a lower limit is achievable, the company will have to revise its permit limits.

[20] ODEQ notes that the installation of DSI will necessitate the addition of a fabric filter baghouse to further control PM emissions. ODEQ explains

rolling average basis. Additional limits of 1,910 lb/hr on a 30-day rolling average basis and 8,366 tons per year on a 12-month rolling basis will also apply;

• The capacity utilization of the remaining unit will be capped at 70 percent by January 1, 2021; 60 percent by January 1, 2023; and 50 percent by January 1, 2025; and

• The remaining unit must be permanently shut down by December 31, 2026.

In its BART analysis, ODEQ identified its DSI/shutdown proposal as one control option and the FIP scenario of two DFGD/SDA systems as the second control option.[21] In accordance with section 169A of the CAA, the RHR, and the BART Guidelines, ODEQ weighed the five statutory factors in comparing its new proposal against our FIP. After factoring in a ten-year amortization period for DSI (due to the shutdown of the second unit in 2026), ODEQ determined that DSI would have an average cost-effectiveness of $1,005/ton, while the installation of two DFGD/SDA systems, as contemplated by EPA's FIP, had an average cost-effectiveness of $1,544/ton. ODEQ further noted that the incremental cost-effectiveness of the DSI/shutdown scenario versus the FIP scenario was $4,718/ton in the first year, with worsening incremental cost-effectiveness as the capacity utilization of the remaining unit decreased starting in 2021.

ODEQ also conducted a revised visibility modeling analysis using CALPUFF. ODEQ found that, while two DFGD/SDA systems provided the greatest visibility improvement across all Class I areas, the incremental visibility improvement between the DSI/shutdown scenario and the FIP scenario was small. ODEQ concluded that the FIP scenario would result in approximately 0.1 dv of additional visibility improvement compared with the DSI/shutdown scenario at each impacted Class I area, with a total additional improvement of approximately 0.27 dv across all four of the nearest Class I areas.

ODEQ noted that the DSI/shutdown scenario would result in additional reductions of NO_X beyond the NO_X FIP level and additional reductions of other air pollutants, such as PM, and CO_{2e}, thereby helping to address local formation and interstate transport of ozone and reducing Oklahoma's contribution to greenhouse gases. Finally, ODEQ considered the non-air quality impacts of DSI/shutdown scenario and found that it would require less water usage, reduce mercury deposition, and reduce approximately half of the energy consumption as the FIP scenario. Given the comparable visibility improvement, lower costs, and overall reduced environmental impact, ODEQ concluded that the DSI/shutdown scenario was SO_2 BART.

B. EPA's Assessment of the State's Revised BART Determinations for Units 3 and 4

NO_X BART

Oklahoma's revised NO_X BART determination for Units 3 and 4 does not require us to revisit our earlier approval of the State's NO_X BART determination for these units, but only to review a faster compliance schedule. Sources that are subject to BART must install and operate those controls ''as expeditiously as practicable but in no event later than five years after the date of approval of a plan revision . . .'' CAA section 169A(g)(4). Here, Oklahoma has determined that the NO_X BART limits for Units 3 and 4 that we previously approved can be complied with more expeditiously than previously required. Early implementation of the NO_X BART limits will provide improvements in visibility sooner, thus making the Oklahoma RH SIP more stringent. We therefore propose to approve this part of the Oklahoma RH SIP Revision and find that it meets the requirements of the CAA. We also propose to codify, in the approved SIP, the ''PSO Regional Haze Agreement, DEQ Case No. 10–025 (February 10, 2010)'' as amended by the ''First Amended Regional Haze Agreement, DEQ Case No. 10–025 (March 2013)'' because they contain NOx BART emission limitations and schedules for the AEP/PSO two units found therein.

SO_2 BART

The CAA defines a FIP as ''a plan (or portion thereof) promulgated by the Administrator to fill all or a portion of a gap or otherwise correct all or a portion of an inadequacy in a [SIP].'' CAA section 302(y). Because a FIP is intended as a gap-filling measure, EPA encourages states to submit approvable SIP revisions that correct the deficiencies that a given FIP remedied. Such a SIP revision need not adopt the same suite of control options and techniques as EPA's FIP, nor does it necessarily have to be as stringent as EPA's FIP in all instances. Rather, when a State submits a SIP revision to EPA with the intention of replacing a FIP, EPA must approve the SIP revision so long as the SIP revision does not ''interfere with any applicable requirement concerning attainment and reasonable further progress . . . or any other applicable requirement of [the Act].'' CAA section 110(l). In regards to regional haze SIPs and the statutory requirement to make BART determinations for certain older major stationary sources, EPA must approve a State's SIP revision so long as the State complies with the CAA's visibility protection provisions, the RHR, and the BART Guidelines, and makes a reasonable control determination based on the weighing of the five factors. We have analyzed Oklahoma's new SO_2 BART determination with these requirements in mind.

We propose to conclude that ODEQ has appropriately met the requirements of 40 CFR 308(e) and the BART Guidelines of Appendix Y in determining BART for emissions of SO_2 from AEP/PSO Northeastern Power Station Units 3 and 4. This conclusion is based on our review of ODEQ's SIP submittal, including the original February 19, 2010 Regional Haze Submittal and the June 2013 SIP revision.

ODEQ's revised BART determination includes the shutdown of one of the two units in April 2016 and the second unit in December 2026, so the controlling facts for the BART analysis are different than the facts that were presented with Oklahoma's 2010 SIP submission. As discussed previously, in the 2013 SIP revision ODEQ determined that the DSI/shutdown scenario was SO_2 BART for AEP/PSO Northeastern Power Station Units 3 and 4. ODEQ made this determination based on an analysis of the five BART factors and other information. Their analysis of the five BART factors included consideration of the high incremental cost-effectiveness and low incremental visibility improvement between the FIP and DSI/shutdown scenarios, as well as the additional non-air quality environmental and energy benefits of the latter. The energy and non-air quality environmental impacts, e.g., reductions in mercury deposition, water and energy usage, associated with the DSI/shutdown scenario support the conclusion that the shutdown/DSI

that, despite the installation of this baghouse for the purposes of accommodating DSI, ODEQ is not re-opening its determination in the original Oklahoma RH SIP that no further controls are required to satisfy PM BART. See Oklahoma RH SIP Revision, Appendix 2 at 3.

[21] ODEQ declined to re-evaluate wet scrubbers because EPA had previously determined that the emission limit achievable by this control option was not BART in our FIP. While the BART Guidelines require states to evaluate all technically feasible control options when making a BART determination, we believe that ODEQ was justified in eliminating wet scrubbers based on our prior analysis in this instance.

option is BART.[22] ODEQ also considered the additional air quality benefits associated with shutting down Units 3 and 4 which, while important, these other air quality benefits such as reduced ozone and PM formation and CO_{2e} are not among the BART factors.

Regarding the other BART factors, while BART determinations are typically made on a unit-by-unit basis, we believe that ODEQ's decision to evaluate BART on a facility-wide basis is a reasonable way to take into account the visibility and energy and non-air quality environmental benefits associated with unit shutdowns. While we believe ODEQ's facility wide approach to BART is reasonable, we have also analyzed BART on a unit by unit analysis. A unit by unit analysis includes the consideration of a scenario, not considered by ODEQ, in which the unit that remains in operation after April 16, 2016 installs DFGD/SDA. We also made adjustments to ODEQ's cost and visibility calculations to take into account more recent information regarding the facilities baseline ''uncontrolled'' emissions and the useful life of the facility. The adjustments were necessary to properly assess the cost and visibility factors on a unit by unit basis but were less important when the analysis was conducted, as ODEQ did, on a facility wide basis. First, we re-calculated cost-effectiveness assuming a baseline emission rate of 0.6 lb/MMBtu instead of the 0.9 lb/MMBtu rate used by ODEQ. The 0.6 lb/MMBtu emission rate takes into account more recent information regarding the actual emissions of Units 3 and 4 and it is more representative of the emission limits Oklahoma requires the two units to meet beginning January 31, 2014. In addition, based on the enforceable shutdown deadline, we assumed an amortization period of ten years for both DSI and DFGD/SDA. We used the same heat input of 4,775 MMBtu/hr and 85% capacity factor as ODEQ.

We calculated that the average cost-effectiveness of the DSI/shutdown scenario would be $1,758/ton, while the average cost-effectiveness of the DFGD/SDA/shutdown scenario would be $3,211/ton. The incremental cost-effectiveness of installing DFGD/SDA as the BART control on the remaining unit rather than DSI would be $7362/ton. See our TSD for more details of our cost analysis. A spreadsheet containing this EPA calculated cost effectiveness of DFGD/SDA is contained in the docket, and a summary of this information is presented in Table 1of the Technical Support Document accompanying this proposed action.

We reviewed the CALPUFF visibility modeling in the proposed SIP revision submittal and also performed additional analyses (including additional CALPUFF model runs). Please see the SIP's Appendix II and EPA's Technical Support Document for more details of AEP/PSO's modeling, ODEQ's evaluation, and EPA's modeling and evaluation. While, as described in the TSD, the Oklahoma's modeling has some differences from ours, the relative results are similar and the differences are not such that it changes our overall conclusions. In addition to the scenarios considered by Oklahoma, we also considered the scenario of one unit shutting down and one unit with DFGD/SDA. While we did not model this scenario, it is reasonable to approximate this scenario would result in one half the visibility impairment of the FIP scenario of two units operating with DFGD/SDA. Based on this assumption, this scenario results in an improvement of 0.19 deciviews at the most impacted Class I area and 0.64 deciviews cumulatively, when compared to DSI on the remaining operating unit. As discussed above, this visibility benefit is achieved at relatively high incremental cost effectiveness.

Oklahoma found, and we agree, that the DFGD/SDA scenario in the FIP would only result in slightly more visibility benefit than Oklahoma's chosen BART determination in which one unit operates until 2026 using DSI. A unit by unit analysis reveals that additional visibility benefit can be achieved if the unit that remains in operation were to implement DFGD/SDA, but this visibility benefit is achieved at a relatively high incremental cost.

In summary, we believe that when incremental costs, energy and non-air quality impacts, and the remaining useful life of the source are taken into consideration, ODEQ's determination that DSI is the proper BART control for the remaining unit is ultimately reasonable. We therefore propose to approve ODEQ's new SO_2 BART determination in full and propose to rescind the emission limits and compliance schedule contained in our FIP.

Previously, we disapproved the ''PSO Regional Haze Agreement, DEQ Case No. 10–025 (February 10, 2010),'' and its emission limitations for SO_2. With today's proposed approval of the state's BART determinations, as revised, we now propose to approve the ''PSO Regional Haze Agreement, DEQ Case No. 10–025 (February 10, 2010)'' as amended by the ''First Amended Regional Haze Agreement, DEQ Case No. 10–025 (March 2013),'' and the SO_2 BART emission limitations for the two AEP/PSO units found therein.

V. Oklahoma's Interstate Transport Visibility SIP Provisions

Oklahoma submitted its *Interstate Transport SIP for an Assessment of Oklahoma's Impact on Downwind Nonattainment for the National Ambient 8-hour Ozone and $PM_{2.5}$ Air Quality Standards* (''Transport SIP'') to EPA in May 2007 and submitted supplemental information in December 2007. Our December 28, 2011 action on the Oklahoma RH SIP also addressed the provisions of the Oklahoma Interstate Transport SIP relating to visibility protection. In that action, we partially approved and partially disapproved the Oklahoma Interstate Transport SIP, which relied in part upon the Oklahoma RH SIP to satisfy the requirements of CAA section 110(a)(2)(D)(i)(II), because we could only partially approve the Oklahoma RH SIP. We also promulgated an Interstate Transport FIP for visibility requiring source-specific SO_2 emission limitations.

As an initial matter, we note that CAA section 110(a)(2)(D)(i)(II) does not explicitly specify how we should ascertain whether a state's SIP contains adequate provisions to prevent emissions from sources in that state from interfering with measures required in another state to protect visibility. Thus, the statute is ambiguous on its face, and we must interpret that provision in a reasonable fashion. Our 2006 Guidance recommended that a state could meet the visibility prong of CAA section 110(a)(2)(D)(i)(II) by submitting a fully approvable regional haze SIP. We reasoned that the development of the regional haze SIPs involved collaboration among the states. In fact, in developing their respective reasonable progress goals, CENRAP states consulted with each other through CENRAP's work groups. As a result of this process, the common understanding was that each state would take action to achieve the emissions reductions relied upon by other states in their reasonable progress demonstrations. CENRAP states consulted in the development of reasonable progress goals, using the products of the technical consultation

[22] [T]he State must take into consideration the technology available, the costs of compliance, the energy and non-air quality environmental impacts of compliance, any pollution control equipment in use at the source, the remaining useful life of the source, and the degree of improvement in visibility which may reasonably be anticipated to result from the use of such technology. 40 CFR 51.308(e)(1)(ii)(A).

process to co-develop their reasonable progress goals. In developing their visibility projections using photochemical grid modeling, CENRAP states assumed a certain level of emissions from sources within Oklahoma. This modeling assumed SO_2 reductions from AEP/PSO Northeastern Power Station Units 3 and 4. We understand that the CENRAP states used the visibility projection modeling to establish their own respective reasonable progress goals. Thus, we believe that an implementation plan that provides for emissions reductions consistent with the assumptions used in those states' modeling will ensure that emissions from Oklahoma sources do not interfere with the measures designed to protect visibility in other states.

In the case of Northeastern Units 3 and 4, the CENRAP modeling assumed that each of these units would achieve the presumptive limit of 0.15 lb/MMBtu by 2018. Under the Oklahoma RH SIP Revision, one of the two units is required to shut down before that date, while the remaining unit is required to install DSI. To achieve emission levels equivalent to the levels assumed in other States' Regional Haze plans, the remaining unit must would have to meet an emission limit of 0.3 lb/MMBtu (0.15 + 0.15) by 2018. Currently, the First Amended Regional Haze Agreement in the submitted SIP revision only requires the remaining unit to meet an emission limit of 0.4 lb/MMBtu. However, the First Amended Regional Haze Agreement also requires the source operators to optimize the performance of DSI on the remaining unit to ensure that the best possible performance is achieved and adjust the limit accordingly. Further, if the remaining operating unit still cannot meet the emission limit of 0.3 lb/MMBtu, then the Oklahoma RH SIP Revision contains an enforceable commitment on behalf of ODEQ to ''obtain and/or identify additional SO_2 reductions within the State of Oklahoma to the extent necessary to achieve the anticipated visibility benefits estimated'' by CENRAP. For example, any additional SO_2 emissions reductions that can be obtained or identified from the northeast quadrant of the State will be presumed to count toward the emission reductions necessary to achieve the anticipated visibility benefits associated with a 0.30 lb/MMBtu emission limit at Northeastern. Emissions reductions obtained outside the northeast quadrant that are technically justified will also be counted. Finally, if necessary, additional emissions reductions shall be obtained via enforceable emission limits or control equipment requirements where necessary and submitted to EPA as a SIP revision as expeditiously as practicable, but in no event later than the end of the first full Oklahoma legislative session occurring subsequent to AEP/PSO's submission of the evaluation and report required by Paragraph 1(f) of Attachment A of the AEP/PSO Settlement Agreement presented in Appendix I of the 2013 SIP Submission. Moreover, any additional reductions that are obtained prior to the 2018 Regional Haze SIP revision required by 40 CFR § 51.308(f) but not accounted for in the above referenced modeling will be identified in the 2018 revision.

Therefore, if the SO_2 emission rate for the remaining coal-fired unit is not reduced to 0.30 lb/MMBtu after the implementation of the control requirements required by the First Amended Regional Haze Agreement, then there will not be the emissions reductions relied upon in the CENRAP modeling. These emission reductions must be obtained from elsewhere to meet the requirements of the Visibility Interstate Transport SIP/FIP. We are proposing to find that the state already has provided the majority of required emissions reductions for the Visibility interstate transport statutory requirement. The balance of the needed reductions is in the form of enforceable commitments from the ODEQ. We believe, consistent with past practice, that the CAA allows for the approval of enforceable commitments that are limited in scope where circumstances exist that warrant the use of such commitments in place of adopted measures.[23] Once we determine that circumstances warrant consideration of an enforceable commitment, we consider three factors in determining whether to approve the enforceable commitment: (a) Does the commitment address a limited portion of the statutorily-required program; (b) is the state capable of fulfilling its commitment; and (c) is the commitment for a reasonable and appropriate period of time.[24] Oklahoma has met these criteria because the enforceable commitment addresses only a small potential shortfall in the emission reductions necessary to ensure that the State's SIP will not interfere with other states' plans to protect visibility. Under the DSI/shutdown scenario, the Northeastern Power Station will achieve at least 70% of the approximately 75% reduction in SO_2 emissions necessary to meet the level projected in the CENRAP modeling (based on a baseline of 0.6 lb/MMBtu). Further, this is only a possible shortfall, as the facility is required to optimize the performance of the DSI and may well be able to achieve further reductions. Oklahoma is capable of fulfilling its commitment because it has the authority to adopt measures if necessary and likely will be able to identify federally enforceable reductions through other measures not anticipated in CENRAP modeling, such as EPA's Modeled Attainment Test Software (MATS). Finally, we believe that Oklahoma has committed to address any shortfall as expeditiously as practical given the time needed for the source to conduct the optimization study and for ODEQ to complete the State's SIP adoption process.

In conclusion, we propose to approve the enforceable commitments made in the Oklahoma RH SIP Revision as satisfying Oklahoma's interstate transport obligations for visibility. We also propose to find that the SO_2 emissions reductions associated with Northeastern Units 3 and 4, when combined with the enforceable commitments, will be consistent with the levels of control assumed in the

[23] Commitments approved by EPA under section 110(k)(3) of the CAA are enforceable by EPA and citizens under, respectively, sections 113 and 304 of the CAA. In the past, EPA has approved enforceable commitments and courts have enforced these actions against states that failed to comply with those commitments: *See, e.g., American Lung Ass'n of N.J.* v. *Kean,* 670 F. Supp. 1285 (D.N.J. 1987), *aff'd,* 871 F.2d 319 (3rd Cir. 1989); *NRDC, Inc.* v. *N.Y. State Dept. of Env. Conservation,* 668 F. Supp. 848 (S.D.N.Y. 1987); *Citizens for a Better Env't* v. *Deukmejian,* 731 F. Supp. 1448, recon. granted in par, 746 F. Supp. 976 (N.D. Cal. 1990); *Coalition for Clean Air* v. *South Coast Air Quality Mgmt. Dist.,* No. CV 97–6916–HLH (C.D. Cal. Aug. 27, 1999). Further, if a state fails to meet its commitments, EPA could make a finding of failure to implement the SIP under CAA Section 179(a), which starts an 18-month period for the State to correct the non-implementation before mandatory sanctions are imposed. CAA section 110(a)(2)(A) provides that each SIP ''shall include enforceable emission limitations and other control measures, means or techniques . . . as well as schedules and timetables for compliance, as may be necessary or appropriate to meet the applicable requirement of the Act.'' Section 172(c)(6) of the Act, which applies to nonattainment SIPs, is virtually identical to section 110(a)(2)(A). The language in these sections of the CAA is quite broad, allowing a SIP to contain any ''means or techniques'' that EPA determines are ''necessary or appropriate'' to meet CAA requirements, such that the area will attain as expeditiously as practicable, but no later than the designated date. Furthermore, the express allowance for ''schedules and timetables'' demonstrates that Congress understood that all required controls might not have to be in place before a SIP could be fully approved.

[24] The U.S. Court of Appeals for the Fifth Circuit upheld EPA's interpretation of CAA sections 110(a)(2)(A) and 172(c)(6) and the Agency's use and application of the three-factor test in approving enforceable commitments in the Houston-Galveston ozone SIP. *BCCA Appeal Group* v. *EPA,* 355 F.3d 817 (5th Cir. 2003).

CENRAP modeling and relied on by other states as part of their reasonable progress demonstrations.

VI. What action is EPA proposing?

A. Regional Haze

For the reasons explained above, we are proposing to approve ODEQ's revised SO_2 BART determination for Units 3 and 4 of the AEP/PSO Northeastern Power Station. This revised SO_2 BART determination (and related control measures) includes the following emission control requirements: (1) By January 31, 2014, the facility will comply with an interim SO_2 emission limit of 0.65 lb/MMBtu per unit on a 30-day rolling average basis, with an additional limit of 3,104 lb/hr per unit on a 30-day rolling average basis; (2) by December 31, 2014, the facility will comply with a reduced interim SO_2 emission limit of 0.60 lb/MMBtu per unit on a 12-month rolling average basis, with an additional 25,097 tpy combined cap for Units 3 and 4 on a 12-month rolling basis; (3) the facility will shut down one of the subject units (either Unit 3 or Unit 4) no later than April 16, 2016; (4) the facility will install and operate a dry sorbent injection (DSI) system on the unit that remains in operation past April 16, 2016; (5) the unit remaining in operation will comply with an SO_2 emission limit of 0.40 lb/MMBtu on a 30-day rolling average basis from April 16, 2016 through December 31, 2026, with additional limits of 1,910 lb/hr on a 30-day rolling average basis and 8,366 tpy on a 12-month rolling basis (this limit may be lowered pursuant to the results of an optimization study to be conducted by AEP/PSO); and (6) the facility will incrementally decrease capacity utilization for the remaining unit between 2021 and 2026, culminating with the complete shutdown of the remaining unit no later than December 31, 2026. Consequently, we are proposing to approve for SO_2, the ''PSO Regional Haze Agreement, DEQ Case No. 10–025 (February 10, 2010), as amended by the ''First Amended Regional Haze Agreement, DEQ Case No. 10–025 (March 2013).''

The newly submitted regional haze SIP revision also includes, and we are proposing to approve, an accelerated NO_X BART compliance schedule: (1) By December 31, 2013, the facility will comply with an emission limit of 0.23 lb/MMBtu on a 30-day rolling average basis with an additional limit of 1,098 lb/hr per unit on a 30-day rolling average basis and a 9,620 tpy combined cap for both units; and (2) the unit that remains in operation shall undergo further control system tuning and by April 16, 2016 comply with an emission limit of 0.15 lb/MMBtu on a 30-day rolling average basis with an additional limit of 716 lb/hr on a 30-day rolling average basis and a cap of 3,137 tpy on a 12-month rolling basis. For NOx, we are proposing to codify our approval of the PSO Regional Haze Agreement, DEQ Case No. 10–025 (February 10, 2010) *as amended by* the First Amended Regional Haze Agreement, DEQ Case No. 10–025 (March 2013), because it contains the NOx BART emission limitations and schedules for AEP/PSO's BART subject units in Oklahoma.

B. Interstate Transport and Visibility

Because we are proposing to approve the State's new SO_2 BART determination for AEP/PSO Northeastern Power Station Units 3 and 4, we accordingly propose to approve that portion of the Oklahoma RH SIP Revision concerning Oklahoma's interstate transport obligations, which we found were not appropriately addressed by the prior, disapproved submittal. We propose to find that the Oklahoma RH SIP Revision addresses the requirements of the interstate transport provisions of CAA section 110(a)(2)(D)(i)(II) as applied to this source and its associated impacts on other states' programs to protect visibility in Class I Areas. Relatedly, we propose to approve the ODEQ's enforceable commitment in the SIP Narrative at page 10.

C. FIP Amendments

We are proposing to withdraw those portions of the FIP at 40 CFR § 52.1923 that impose SO_2 requirements on AEP/PSO Northeastern Units 3 and 4.[25] We note that finalization of this portion of today's proposal may follow our finalized approval of the SIP revisions via a separate Administrator-signed action.

D. Clean Air Act Section 110(l)

Section 110(l) of the CAA states that ''[t]he Administrator shall not approve a revision of a plan if the revision would interfere with any applicable requirement concerning attainment and reasonable further progress or any other applicable requirement of this chapter.'' 42 U.S.C. 7410(l). EPA does not interpret section 110(l) to require a full attainment or maintenance demonstration before any changes to a SIP may be approved. Generally, a SIP revision may be approved under section 110(l) if EPA finds that it will at least preserve status quo air quality, particularly where the pollutants at issue are those for which an area has not been designated nonattainment.

We do not believe an approval, as proposed, will interfere with CAA requirements for BART or for preventing interference with other states' programs to protect visibility because our proposal is supported by an evaluation that those CAA requirements are met. An approval will not result in any substantive changes to the BART requirements or other CAA requirements, and the AEP/PSO units will continue to be subject to the CAA requirements for BART. The SIP replaces a federal determination that was based on different underlying facts. Because of this, the submitted SIP cannot be said to be less stringent than the determination in the FIP. We also believe that approval of the submitted SIP revision will not interfere with attainment and maintenance of the NAAQS within the state of Oklahoma. The submitted SIP revision, if approved, will reduce emissions from the current levels allowed to impact local air quality. The area where the Northeastern facility is located has not been designated nonattainment for any NAAQS pollutants nor have any nearby areas. The revision being approved here will result in reductions in NOx and SO_2 over existing levels, and therefore, we do not deem this to be an instance where a full attainment or maintenance demonstration is needed to bolster our determination that approval of the submitted SIP revision would not interfere with attainment and maintenance of the NAAQS. The FIP, were it to remain in place, would assuredly also preserve, if not improve upon, status quo air quality. However, the requirement for BART takes its form in future implemented emission reductions. We are not aware of any basis for concluding or demonstrating that the regional haze SIP revisions, when implemented, would interfere with the maintenance of the NAAQS in Oklahoma.

VII. Statutory and Executive Order Reviews

Under the CAA, the Administrator is required to approve a SIP submission that complies with the provisions of the Act and applicable Federal regulations. 42 U.S.C. 7410(k); 40 CFR 52.02(a). Thus, in reviewing SIP submissions, EPA's role is to approve state choices, provided that they meet the criteria of the CAA. Accordingly, this proposed

[25] The proposed amendatory language for this proposed revision of the earlier promulgated FIP is set forth at the end of this proposal. If the action is finalized as proposed, the final action will also present additional amendatory language reflecting our approval of the submitted SIP revision.

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 proposed action:

- Is not a ''significant regulatory action'' subject to review by the Office of Management and Budget under Executive Order 12866 (58 FR 51735, October 4, 1993);
- 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);
- 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; and
- does not provide EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898 (59 FR 7629, February 16, 1994).

In addition, this rule does not have tribal implications as specified by Executive Order 13175 (65 FR 67249, November 9, 2000) because the SIP is not approved to apply in Indian country located in the state, and EPA notes that it will not impose substantial direct costs on tribal governments or preempt tribal law.

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Intergovernmental relations, Nitrogen dioxide, Particulate matter, Regional haze, Reporting and recordkeeping requirements, Sulfur dioxide, Visibility, and Volatile organic compounds.

Dated: August 12, 2013.

Samuel Coleman,

P.E., Acting Regional Administrator, Region 6.

Title 40, chapter I, of the Code of Federal Regulations is proposed to be 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.*

■ 2. Section 52.1923 is amended by:

■ a. Revising the section heading; and

■ b. Revising paragraphs (a), (c), and (e)(1).

The revised text read as follows:

§ 52.1923 Best Available Retrofit Requirements (BART) for SO_2 and Interstate pollutant transport provisions; What are the FIP requirements for Units 4 and 5 of the Oklahoma Gas and Electric Muskogee plant; and Units 1 and 2 of the Oklahoma Gas and Electric Sooner plant affecting visibility?

(a) *Applicability.* The provisions of this section shall apply to each owner or operator, or successive owners or operators, of the coal burning equipment designated as: Units 4 or 5 of the Oklahoma Gas and Electric Muskogee plant; and Units 1 or 2 of the Oklahoma Gas and Electric Sooner plant.

* * * * *

(c) *Definitions.* All terms used in this part but not defined herein shall have the meaning given them in the CAA and in parts 51 and 60 of this chapter. For the purposes of this section:

24-hour period means the period of time between 12:01 a.m. and 12 midnight.

Air pollution control equipment includes selective catalytic control units, baghouses, particulate or gaseous scrubbers, and any other apparatus utilized to control emissions of regulated air contaminants that would be emitted to the atmosphere.

Boiler-operating-day means any 24-hour period between 12:00 midnight and the following midnight during which any fuel is combusted at any time at the steam generating unit.

Daily average means the arithmetic average of the hourly values measured in a 24-hour period.

Heat input means heat derived from combustion of fuel in a unit and does not include the heat input from preheated combustion air, recirculated flue gases, or exhaust gases from other sources. Heat input shall be calculated in accordance with 40 CFR part 75.

Owner or Operator means any person who owns, leases, operates, controls, or supervises any of the coal burning equipment designated as:

Unit 4 of the Oklahoma Gas and Electric Muskogee plant; or

Unit 5 of the Oklahoma Gas and Electric Muskogee plant; or

Unit 1 of the Oklahoma Gas and Electric Sooner plant; or

Unit 2 of the Oklahoma Gas and Electric Sooner plant.

Regional Administrator means the Regional Administrator of EPA Region 6 or his/her authorized representative.

Unit means one of the coal fired boilers covered under Paragraph (a), above.

* * * * *

(e) * * *

(1) No later than the compliance date of this regulation, the owner or operator shall install, calibrate, maintain and operate Continuous Emissions Monitoring Systems (CEMS) for SO_2 on Units 4 and 5 of the Oklahoma Gas and Electric Muskogee plant; and Units 1 and 2 of the Oklahoma Gas and Electric Sooner plant in accordance with 40 CFR 60.8 and 60.13(e), (f), and (h), and Appendix B of Part 60. The owner or operator shall comply with the quality assurance procedures for CEMS found in 40 CFR part 75. Compliance with the emission limits for SO_2 shall be determined by using data from a CEMS.

* * * * *

[FR Doc. 2013–20317 Filed 8–20–13; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 770

[EPA–HQ–OPPT–2012–0018; FRL–9397–2]

RIN 2070–AJ92

Formaldehyde Emissions Standards for Composite Wood Products; Extension of Comment Period

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule; extension of comment period.

SUMMARY: EPA issued a proposed rule in the **Federal Register** of June 10, 2013, concerning formaldehyde emissions standards for composite wood products. After receiving requests for an extension, EPA extended the comment period from August 9, 2013, to September 9, 2013. EPA received additional comments and believes it is appropriate to further extend the comment period in order to give

stakeholders additional time to assess the impacts of the proposal, review technical documents in the docket, and prepare comments. This document extends the comment period from September 9, 2013, to October 9, 2013.

DATES: Comments, identified by docket identification (ID) number EPA–HQ–OPPT–2012–0018, must be received on or before October 9, 2013.

ADDRESSES: Follow the detailed instructions as provided under **ADDRESSES** in the **Federal Register** document of June 10, 2013.

FOR FURTHER INFORMATION CONTACT: *For technical information contact:* Cindy Wheeler, National Program Chemicals Division (7404T), Office of Pollution Prevention and Toxics, Environmental Protection Agency, 1200 Pennsylvania Ave. NW., Washington, DC 20460–0001; telephone number: (202) 566–0484; email address: *wheeler.cindy@epa.gov.*

For general information contact: The TSCA-Hotline, ABVI-Goodwill, 422 South Clinton Ave., Rochester, NY 14620; telephone number: (202) 554–1404; email address: *TSCA-Hotline@epa.gov.*

SUPPLEMENTARY INFORMATION:

This document extends the public comment period established in the **Federal Register** of July 23, 2013 (78 FR 44089) (FRL–9394–1). EPA is hereby extending the comment period, which was set to end on September 9, 2013, to October 9, 2013.

To submit comments, or access the docket, please follow the detailed instructions as provided under **ADDRESSES** in the June 10, 2013 (78 FR 34820) (FRL–9342–3), **Federal Register** document. If you have questions, consult the technical person listed under **FOR FURTHER INFORMATION CONTACT**.

List of Subjects in 40 CFR Part 770

Environmental protection, Formaldehyde, Reporting and recordkeeping requirements, Toxic substances, Wood.

Dated: August 15, 2013.

Louise P. Wise,

Acting Assistant Administrator, Office of Chemical Safety and Pollution Prevention.

[FR Doc. 2013–20414 Filed 8–20–13; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 770

[EPA–HQ–OPPT–2011–0380; FRL–9397–3]

RIN 2070–AJ44

Formaldehyde; Third-Party Certification Framework for the Formaldehyde Standards for Composite Wood Products; Extension of Comment Period

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule; extension of comment period.

SUMMARY: EPA issued a proposed rule in the **Federal Register** of June 10, 2013, concerning a third-party certification framework for the formaldehyde standards for composite wood products. After receiving requests for an extension, EPA extended the comment period from August 9, 2013, to August 26, 2013. EPA received additional comments and believes it is appropriate to further extend the comment period in order to give stakeholders additional time to assess the impacts of the proposal, review technical documents in the docket, and prepare comments. This document extends the comment period from August 26, 2013, to September 25, 2013.

DATES: Comments, identified by docket identification (ID) number EPA–HQ–OPPT–2011–0380, must be received on or before September 25, 2013.

ADDRESSES: Follow the detailed instructions as provided under **ADDRESSES** in the **Federal Register** document of June 10, 2013.

FOR FURTHER INFORMATION CONTACT: *For technical information contact:* Erik Winchester, National Program Chemicals Division, Office of Pollution Prevention and Toxics (7404T), Environmental Protection Agency, 1200 Pennsylvania Ave. NW., Washington, DC 20460–0001; telephone number: (202) 564–6450; email address: *winchester.erik@epa.gov.*

For general information contact: The TSCA-Hotline, ABVI-Goodwill, 422 South Clinton Ave., Rochester, NY 14620; telephone number: (202) 554–1404; email address: *TSCA-Hotline@epa.gov.*

SUPPLEMENTARY INFORMATION: This document extends the public comment period established in the **Federal Register** of July 23, 2013 (78 FR 44090) (FRL–9393–9). EPA is hereby extending the comment period, which was set to end on August 26, 2013, to September 25, 2013.

To submit comments, or access the docket, please follow the detailed instructions as provided under **ADDRESSES** in the June 10, 2013, **Federal Register** document (78 FR 34796) (FRL–9342–4). If you have questions, consult the technical person listed under **FOR FURTHER INFORMATION CONTACT**.

List of Subjects in 40 CFR Part 770

Environmental protection, Composite wood products, Formaldehyde, Reporting and recordkeeping, Third-party certification.

Dated: August 15, 2013.

Louise P. Wise,

Acting Assistant Administrator, Office of Chemical Safety and Pollution Prevention.

[FR Doc. 2013–20409 Filed 8–20–13; 8:45 am]

BILLING CODE 6560–50–P

LEGAL SERVICES CORPORATION

45 CFR Part 1626

Restrictions on Legal Assistance to Aliens

AGENCY: Legal Services Corporation.

ACTION: Notice of proposed rulemaking with request for comments.

SUMMARY: This proposed rule updates the Legal Services Corporation (LSC or Corporation) regulation on legal assistance to aliens. The revisions are intended to implement three statutory changes on aliens eligible for legal assistance from LSC grant recipients that have been enacted since the pertinent provisions of the existing regulation were last revised in 1997. Those three changes are described in more detail in the Supplementary Information section of this preamble.

LSC seeks comments on the proposed changes to the rule. LSC also seeks comments on specific items that it has identified in this notice.

DATES: Comments must be submitted by October 21, 2013.

ADDRESSES: Written comments must be submitted to Mark Freedman, Senior Assistant General Counsel, Legal Services Corporation, 3333 K Street NW., Washington, DC 20007; (202) 337–6519 (fax) or *1626rulemaking@lsc.gov.* Electronic submissions are preferred via email with attachments in Acrobat PDF format. Written comments sent to any other address or received after the end of the comment period may not be considered by LSC.

FOR FURTHER INFORMATION CONTACT: Mark Freedman, Senior Assistant General Counsel, Legal Services Corporation, 3333 K Street NW.,

Washington, DC 20007, (202) 295–1623 (phone), (202) 337–6519 (fax), *1626rulemaking@lsc.gov.*

SUPPLEMENTARY INFORMATION: LSC's current appropriations restrictions, including those governing the assistance that may be provided to aliens, were enacted in 1996 and have been reincorporated annually with amendments. Section 504(a)(11) of the FY 1996 LSC appropriation prohibits the Corporation from providing funds to any person or entity (recipient) that provides legal assistance to ineligible aliens, subject to statutory exceptions. Public Law 104–134, Title V, section 504(a)(11), 110 Stat. 1321, 1321–54 (1996).

After the alienage restrictions were enacted in 1996, LSC adopted an interim rule to implement these statutory requirements. 61 FR 45750 (August 29, 1996). While this rule was pending for comment, Congress passed the Kennedy Amendment, which expanded eligibility for LSC recipients to use non-LSC funds to provide related assistance to aliens who have been battered or subjected to extreme cruelty in the United States by family members. Public Law 104–208, Div. A, Title V, section 502(a)(2)(C),110 Stat. 3009, 3009–60 (1996). The Kennedy Amendment was repeated in the FY 1998 modification of the LSC appropriation restrictions. Thereafter, LSC's annual appropriations have incorporated the FY 1998 restrictions by reference. Public Law 105–119, Title V, section 502(a)(2)(C), 111 Stat. 2440, 2511 (1997) incorporated by Public Law 113–6, Div. B, Title IV, 127 Stat. 198, 268 (2013) (LSC FY 2013 appropriation).

In 1997, LSC revised Part 1626 to implement the Kennedy Amendment. 62 FR 19409 (April 21, 1997), amended by 62 FR 45755 (August 29, 1997). The substantive provisions in Part 1626 have not been changed since 1997. In 2003, LSC added a list of documents establishing the eligibility of aliens for legal assistance from LSC grant recipients as an appendix to Part 1626. 68 FR 55540 (Sept. 26, 2003). The appendix has not been changed since 2003. This proposed rule makes three changes in Part 1626 to conform the regulation to statutory provisions.

The first proposed change would update the definition of aliens eligible for legal assistance under anti-abuse statutes. In the existing regulation, this definition appears in 45 CFR 1626.4, which in turn implements section 502(a)(2)(C) of the FY 1997 LSC appropriation. Public Law 104–208, 110 Stat. 3009 as repeated in FY 1998 and incorporated by reference in LSC's annual appropriations thereafter. Public Law 113–6, 127 Stat. 198 (2013) incorporating by reference FY 1998 appropriations. Since the last revision of the regulation in 1997, section 502(a)(2)(C) has been amended by anti-abuse statutes to expand the definition of eligible aliens. The anti-abuse statutes are the Victims of Trafficking and Violence Protection Act of 2000 (VTVPA), the Trafficking Victims Protection Reauthorization Act of 2003 (TVPRA), and the Violence Against Women and Department of Justice Reauthorization Act of 2005 (VAWA). These statutes permit LSC recipients to provide assistance to aliens who are direct victims of abuse and to other covered aliens who are not direct victims, such as family members and persons who may assist in law enforcement efforts. VTVPA and TVPRA create trafficking exceptions to the alienage prohibitions. VAWA amends section 502.

Because the amended text of section 502 is not codified, the pertinent portion is available at *www.lsc.gov/about/regulations-rules/open-rulemaking* to aid in understanding how the proposed rule implements that provision.

The second proposed rule change would implement the FY 2008 LSC appropriation expansion of eligibility for legal assistance to include alien forestry workers admitted to the United States as temporary workers under the H–2B program of the Immigration and Nationality Act (INA).

The third proposed rule change is technical. The statutory basis for an existing category of eligible aliens under the regulation, persons granted withholding of removal from the U.S., has been relocated to a new section of the INA.

The proposed rule also updates the definition of ''related legal services'' that may be provided to aliens because of abuse and related crimes to conform with statutory authority and previous LSC interpretations.

The existing regulation includes an appendix that lists examples of documents acceptable to establish the eligibility of aliens for legal assistance from LSC grant recipients. The proposed rule would modify the appendix in three respects. First, the Corporation proposes to move the list of example documents from an appendix to the alienage regulation to a program letter because updating the example documents as immigration forms change is a ministerial function that does not alter the substance of the regulation. Second, the list is updated to include documentation that would establish eligibility for the categories of eligible aliens added in the proposed rule. Third, the list has been updated to include new eligibility documents for aliens covered under the existing regulation.

The most extensive revisions in the proposed rule are to section 1626.4 of the regulation, and update that provision to conform to the statutory changes in alien eligibility that result from the trafficking statutes and VAWA.

The VTVPA and TVPRA require that LSC and Federal agencies ''shall expand benefits and services to victims of severe forms of trafficking in persons in the United States, and aliens classified as a nonimmigrant under section 1101 (a)(15)(T)(ii) of title 8 [family members of trafficking victims], without regard to the immigration status of such victims. 22 U.S.C. 7105, codifying VTVPA, Public Law 106–386, sections 107(b) and (e), 114 Stat. 1464, 1475, and 1477 (2000), and TVPRA, Public Law 108–193, section 4,117 Stat. 2875, 2877 (2003). In 2006, VAWA amended the LSC alienage eligibility provision in section 502(a)(2)(C) to expand the categories of aliens to whom recipients may provide related assistance by adding aliens who (1) are victims of sexual assault or trafficking in the United States or (2) qualify for ''U'' visas under section 101(a)(15)(U) of the INA. Public Law 105–119, Title V, section 502(a)(2)(C), amended by Public Law 109–162, section 104, 119 Stat. 2960, 2978 (2006). The U visa provision of the INA allows aliens to remain in the United States for a limited period who are victims of a variety of abuse crimes, who may assist in law enforcement related to such crimes, or who are family members of victims. 8 U.S.C. 1101(a)(15)(U). The VAWA amendments in 2006 incorporated the VTVPA and TVPRA provisions.

The two major changes resulting from the VAWA amendment of the LSC appropriations were that (1) LSC recipients are permitted to provide assistance to previously ineligible aliens who are entitled to remain in the U.S. under the anti-abuse statutes and (2) recipients may use LSC funds to assist these aliens.

LSC issued two program letters to provide guidance to recipients on implementing the VTVPA, TVPRA and VAWA eligibility changes. Program Letter 05–2 (October 6, 2005) (addressing VTVPA and TVPRA); Program Letter 06–2 (February 21, 2006) (addressing VAWA). However, the existing regulation has not been updated to include the extension of eligibility under the anti-abuse statutes.

In addition to the changes resulting from the anti-abuse statutes, the FY 2008 LSC appropriation amended section 504(a)(11) to extend eligibility for assistance from recipients to forestry workers admitted to the U.S. under the H–2B temporary worker provisions in section 101(a)(15)(H)(ii)(b) of the INA. Public Law 104–134, section 504(a)(11)(E), 110 Stat. at 1321–55, amended by Public Law 110–161, Div. B, Title V, section 540, 121 Stat. 1844, 1924 (2007). Section 1626.11 of the LSC alienage regulation establishes eligibility for H–2A agricultural temporary workers, but has not been amended to implement the statutory extension of eligibility to forestry workers.

On April 14, 2013, the Operations and Regulations Committee (the Committee) of the LSC Board of Directors (the Board) recommended that the Board authorize rulemaking to conform Part 1626 to statutory authorizations. On April 16, 2013, the Board authorized the initiation of rulemaking.

Pursuant to the LSC Rulemaking Protocol, LSC staff prepared a proposed rule amending Part 1626 with an explanatory rulemaking options paper. On July 22, 2013, the Committee recommended that the Board approve the proposed rule for notice and comment rulemaking. On July 23, 2013, the Board approved the proposed rule for publication in the **Federal Register** for notice and comment. A section by section discussion of the proposed rule is provided below.

Authority

Citations to the VTVPA, TVPRA, VAWA, the FY 2006 Appropriations Act, and the FY 2008 Appropriations Act are added.

1626.1 Purpose

No revisions have been made to this section.

1626.2 Definitions

Paragraphs (b) and (c) have been changed to add references to § 1626.4 to the definitions of ''eligible alien'' and ''ineligible alien.'' This revision, along with others discussed subsequently, reflects a change in how the two sections on alien eligibility, § 1626.4 and § 1626.5, are described in the proposed rule. In the existing regulation, aliens eligible under anti-abuse statutes (§ 1626.4) are described as persons to whom alienage restrictions do not apply, and aliens eligible because of immigration status (§ 1626.5) are described as eligible aliens. In the proposed rule, both § 1626.4 and § 1626.5 are described as establishing categories of aliens who are eligible for assistance. The Corporation believes that this adds clarity to the rule's identification of aliens who may be assisted by recipients.

Paragraph (d) has been revised to identify the Department of Homeland Security (DHS) as the governmental entity that makes status adjustment determinations in place of the Immigration and Naturalization Service.

Paragraph (f) of the existing regulation, the definition of persons ''battered or subjected to extreme cruelty'', has been moved to § 1626.4(c)(1). Paragraph (g) of the existing regulation, the definition of ''[l]egal assistance directly related to the prevention of, or obtaining relief from, the battery or cruelty'' has been moved to § 1626.4(b) and renamed with substantive revisions that are explained in the discussion of that section.

These moves are part of the proposed rule's consolidation of all terms exclusive to eligibility under anti-abuse statutes to § 1626.4. Existing definitions that apply to § 1626.4 and new definitions added in the interim rule appear in that section as revised. A new paragraph (f) is added that defines the term ''anti-abuse statutes,'' which is used to collectively describe the statutes that expand eligibility.

1626.3 Prohibition

Technical revisions have been made to this section.

1626.4 Aliens Eligible for Assistance Under Anti-Abuse Laws

This section is substantially rewritten to incorporate alien eligibility expansion under the VTVPA, TPVRA, VAWA, and resulting amendments to the LSC restrictions. The title of this section and of § 1626.5 have been revised to clearly state that these two sections of Part 1626 establish the two major categories of eligible aliens who are excepted from the restrictions on assistance: (1) aliens who are eligible for assistance under anti-abuse laws (covered in § 1626.4) and (2) aliens eligible for assistance based on immigration status (covered in § 1626.5).

Paragraph (a) of this provision has been rewritten to incorporate into the regulation (1) the current language of section 502(a)(2)(C) of the appropriations restrictions, which contains the VAWA amendment expanding alien eligibility, and (2) the language of 22 U.S.C. 7105(b)(1)(B) implementing VTVPA and TPVRA. The introductory clause before paragraph (a)(1) tracks that of § 1626.5. As is the case with the new titles, this is intended to clearly reflect that the two sections establish two distinct categories of aliens who are eligible for assistance.

Paragraph (a) allows recipients to assist aliens eligible under the anti-abuse statutes with any funds, including LSC funds, as permitted by those statutes. This replaces the superseded funding limitation in the existing § 1626.4, which requires that recipients use non-LSC funds to assist clients eligible under this provision.

Paragraph (a)(1) in the proposed rule adopts language identifying eligible aliens from the VAWA amendment to section 502(a)(2)(C) of the appropriations restrictions. Persons ''battered and subject to extreme cruelty'' are eligible under the existing Part 1626 language, which adopts the definition of that term from immigration regulations implementing the 1994 VAWA. *See* 8 CFR 204.2(c)(1)(vi); 8 CFR 216.5(e); 8 CFR 1216.5(c)(3)(i). The proposed rule implements two changes from the VAWA amendment. First, the proposed rule eliminates the existing, but superseded, regulatory requirement that the battering or cruelty take place in the United States, a territorial restriction which has been eliminated by the VAWA amendment. Second, the proposed amendment implements statutory language eliminating the existing superseded regulatory requirement that persons be battered or subjected to extreme cruelty by a family or a household member.

The proposed changes in paragraph (a)(1) also implement the VAWA amendment by adding two new groups of eligible aliens: (1) victims of sexual assault or trafficking in the United States and (2) persons qualified for ''U visa'' relief under section 101(a)(15)(U) of the INA. The existing limitation that only ''related legal assistance'' can be provided is retained in the VAWA amendment and the regulation.

Paragraph (a)(2) adds language implementing 22 U.S.C. 7105 (codifying provisions of the VTVPA and TVPRA), which requires that LSC expand all services to ''victims of severe forms of trafficking in the United States'' as well as to some relatives of such victims. Unlike the VAWA provision, the VTVPA and TVPRA do not limit recipients to providing ''related legal assistance.''

Paragraph (b) is a relocated and provides a revised definition of ''related legal assistance'' that may be provided to VAWA-eligible aliens under section 502(b)(2) of the FY 1998 LSC appropriation, as amended. The VAWA amendment limits assistance to aliens to ''related legal assistance.'' The definition of such assistance is relocated

from the general definitions in § 1626.2, into § 1624.4 establishing eligibility for aliens under the anti-abuse statutes because the definition applies only to VAWA-eligible aliens covered by § 1626.4.

The substance of the definition of related legal assistance is changed to use the same term for assistance, ''related legal assistance,'' as used in the VAWA amendment to the LSC appropriations. Paragraphs (1), (2), and (3) of the definition link the assistance to the three categories of aliens eligible under the anti-abuse laws, including the categories added by VAWA and included in the proposed rule.

The closing paragraph of the definition of ''related legal assistance,'' following the three paragraphs, adopts LSC's prior interpretation of permissible legal assistance for persons eligible under anti-abuse laws. The definition of ''related legal assistance'' in the proposed rule conforms to the interpretation of that term in the February 21, 2006 LSC Program Letter 06–2 providing guidance of the VAWA amendments. That program letter referenced LSC's interpretation on the existing Part 1626 regulation. 62 FR 45757 (preamble to final rule) (Aug. 29, 1997). In that interpretation, LSC concluded that related legal assistance for abused aliens could include representation on matters such as domestic and poverty law, employment, housing, and benefits, so long as such matters would assist in preventing, protecting from, or ameliorating abuse. *Id.* This same protection is necessary to fully protect persons in the added groups of aliens eligible for assistance, and accordingly the language added to the definition from prior LSC interpretations provides direction to recipients and other interested parties on the scope of assistance that is permissible.

Paragraph (c) adds definitions for the four groups of aliens eligible for assistance under the anti-abuse statutes. Paragraph (c)(1), the definition of persons ''battered or subjected to extreme cruelty,'' is part of the existing regulation and is relocated from the definitions in § 1626.2 to § 1626.4 on eligibility under the anti-abuse laws. The first sentence of paragraph (c) defines ''battered or subjected to extreme cruelty'' by cross-reference to that term as defined in DHS regulations. This will allow the definition to remain accurate if the DHS regulations change. The examples of prohibited abusive behavior that follow the cross-reference are taken directly from the language of existing DHS regulations. *See* 45 CFR 204.2(c)(1)(vi); 8 CFR 216.5(e); 8 CFR 1216.5(e)(3)(i). This language is the definition of ''battered or subjected to extreme cruelty'' in the existing regulation. Paragraph (c)(2), the definition of ''sexual assault or trafficking,'' derives from VAWA and the INA ''U visa'' provision and incorporates by cross-reference the definitions in those statutes.

Paragraph (c)(3) incorporates the definition of the term ''severe forms of trafficking'' from the INA ''T visa'' provision, VTVPA and TVPRA. This language differs from the VAWA term ''trafficking'' in that it adds the words ''severe forms.''

LSC specifically seeks comment on whether the VAWA term ''trafficking'' differs from the VTVPA/TVPRA/INA term ''severe forms of trafficking,'' and, if so, how the terms are different and what evidence LSC recipients should rely on in distinguishing between these two terms for prohibited trafficking.

Paragraph (c)(4) identifies persons ''qualified for relief'' under the U visa statute, section 101(a)(15)(U) of the INA. This includes persons who have been granted U visas, listed in paragraph (c)(3)(A). Because the term ''qualified for relief'' is not limited to persons who have been granted relief, the U visa paragraph also establishes eligibility for applicants for U visa relief and for persons who have not applied but who a recipient concludes are entitled to U visa relief. These latter two groups are included to permit recipients to represent aliens who have either applied for U visa relief or would, in the recipient's determination, qualify for U visas but have not applied.

The eligibility provisions for U visa qualified aliens who have not been granted U visa relief require that there be evidentiary support for a recipient's determination of U visa qualification and eligibility. This standard is adopted from Rule 11 of the Federal Rules of Civil Procedure and is used to require recipients to have a factual basis for eligibility determinations.

The last sentence of paragraph (c)(4) addresses the two categories of U visa relief, referred to in immigration forms as ''primary U visa status'' and ''derivative U visa'' status. Primary U visas are those sought by persons who are victims of abuse or who can assist with investigation or enforcement of such crimes, while derivative visas are those sought for family members of persons seeking primary U visas.

Derivative U visa applicants are qualified for relief based on the eligibility of their family members applying for primary U visa status. The clarification in the proposed rule confirms that all U visa seekers are eligible for assistance without exclusion of applicants seeking derivative U visa status. The Corporation determined that this clarification would be useful to incorporate the analysis and conclusions of a recent Advisory Opinion from the LSC Office of Legal Affairs on U visa eligibility. *See* LSC Advisory Opinion AO–2013–003 (June 13, 2013).

Paragraph (d) of the proposed rule addresses two issues regarding geographic location. As described below, LSC specifically requests comments on these issues. Generally, the 504(a)(11) provision regarding eligible aliens requires presence in the United States, a requirement set forth in § 1626.5. The anti-abuse laws enacted by Congress subsequent to the FY 1996 restrictions do not contain the same broad presence requirement.

The first geographic location issue is the geographic location of the criminal activity that gives rise to the eligibility of the alien, addressed in paragraph (d)(1). The prohibitions of VAWA and the trafficking acts are not limited to activity within the United States.

Similarly, the VAWA definition of ''battered and extreme cruelty'' was amended to eliminate the requirement that such conduct take place in the United States. The U visa provision in the INA requires that the criminal activity have ''violated the laws of the United States *or* occurred in the United States (including in Indian country and military installations) or the territories or possessions of the United States.'' 8 U.S.C. 1101 (a)(15)(U)(i)(IV)(emphasis added). The DHS United States Custom and Immigration Service (USCIS) has interpreted this ''as requiring that the predicate activity violate the laws of the United States *regardless of whether it occurred in the United States.''* 72 FR 53030 (September 17, 2007)(emphasis added).

The USCIS regulation makes clear that criminal activity violative of U.S. law sufficient for U visa eligibility *need not take place in the United States.* Similarly, because the geographic location restriction in the definition of ''battered and subjected to extreme cruelty'' has been eliminated, such conduct need not take place in the United States. The trafficking act definition does not state that trafficking activity must take place in the United States, though it refers to victims in the United States. 22 U.S.C. 7102(9); 7105(b). Similarly, the ''T visa'' provision of the INA requires that a person be physically present in the United States to obtain relief, but does

not require that the trafficking take place in the United States. 8 U.S.C. 1101(a)(15)(T). Moreover, the list of crimes for which a U visa may be granted includes trafficking. 8 U.S.C. 1101(a)(15)(U)(iii).

However, the VAWA amendment to section 502 of the appropriations legislation states that ''a victim of sexual assault or trafficking *in the United States''* is eligible for assistance. Public Law 109–162, section 104, 119 Stat. at 2979 (emphasis added). This is narrower than the other, related definitions of trafficking, which do not require that trafficking occur in the U.S. Similarly, the VTVPA and TVPRA refer to ''severe forms of sexual trafficking in the United States.'' 22 U.S.C. 7105(b)(1)(B). It is LSC's conclusion that the narrower VAWA, VTVPA, and TVPRA language controls on this issue and that trafficking and severe forms of trafficking must have occurred in the United States.

In sum, it is LSC's view that the predicate activity for eligibility under the anti-abuse statutes need not take place in the United States so long as the activity violates a law of the United States, with the exception of trafficking and severe forms of trafficking, which must occur in the United States as described above.

LSC specifically requests comment on this issue regarding where the predicate activity takes place.

The second geographic location issue is whether an alien must be physically present in the United States to be eligible, addressed in paragraph (d)(2). The U visa statutory provision does *not* impose a physical presence requirement. The USCIS interpretation states that its regulation ''does not require petitioners to file for relief within the U.S. The statute does not require petitioners to be physically present to qualify for U visa status.'' 72 FR 53021 (September 17, 2007).

VAWA does not address whether aliens must be physically present in the U.S. The trafficking acts themselves do not impose such a requirement, although they do reference victims in the United States and eligibility for services when victims are in the United States. 22 U.S.C. 7105(b). However, the T visa provision of the INA, which establishes visa eligibility for victims of trafficking, requires that victims be present in the United States. 8 U.S.C. 1101(a)(15)(T). The VAWA amendment to the appropriations legislation refers to eligibility for ''victims of sexual assault or trafficking in the United States.'' Public Law 109–162, section 104, 119 Stat. at 2979 (amending section 502(a)(2)(C)). Complicating this further, trafficking and VAWA violations are among the crimes that establish U visa eligibility, so a victim of trafficking who is not in the United States can obtain a U visa but not a T visa. 8 U.S.C. 1101(a)(15(U).

Reviewing these statutes collectively, it is the view of LSC that aliens should be eligible for assistance under the anti-abuse statutes regardless of whether they are present in the United States. Most significantly, this interpretation of the statutes comports with the USCIS interpretation of the U visa statute, under which victims of trafficking and VAWA violations may seek relief. Victims of sexual assault *and* trafficking are qualified for U visa relief and need not be physically present in the United States for such relief.

LSC specifically requests comment on this issue regarding presence in the United States.

Paragraph (e) of the proposed rule, ''evidentiary support'', establishes an evidentiary standard for determining eligibility for assistance under the anti-abuse statutes. The standard is adopted from Rule 11 of the Federal Rules of Civil Procedure, and permits a recipient to determine an alien is eligible if there is evidentiary support that the alien falls within any of the eligibility categories or if there is likely to be evidentiary support after reasonable opportunity for further investigation. The list of examples of evidence that would meet the standard is taken from VAWA, which allows consideration of ''any credible evidence'' of abuse. This standard is established in section 204(a)(1)(J) of the INA (8 U.S.C. 1154(a)(1)(J)), and has been adopted by DHS. 8 CFR 204.2(c)(1)(vi). Paragraph (e) of the proposed rule identifies the examples of credible evidence listed in VAWA and the DHS regulation.

In applying the evidentiary standard, LSC considered that recipients will be making eligibility determinations on whether aliens qualify for recipient assistance on pending and contested claims rather than making final decisions on the merits of the claims of aliens for relief. For that reason, LSC chose an evidentiary standard that was appropriate for assessing the validity of filing and proceeding with claims. The evidentiary support standard in the proposed rule addresses the issues that recipients will confront in assessing eligibility in several ways.

First, the rule adopts a standard based on Rule 11 of the Federal Rules of Civil Procedure for filing and continuing with claims. Second, the standard permits recipients to make a judgment that an alien who may not possess evidence at intake will be able to do so after further investigation. Third, the rule allows eligibility based on statements taken from an alien, which may in some cases be the only evidence available during intake. Fourth, the rule accounts for the reality that the facts underlying eligibility assessments in abuse cases will often be fluid by calling for recipient staff to continue to assess eligibility beyond the intake process and to reverse eligibility determinations when appropriate. Fifth, the rule does not permit a recipient to delay in making eligibility determinations in order to provide assistance to an ineligible alien.

Paragraph (f) of the proposed rule is a revision of paragraph (d) of the existing regulation, which states that recipients are not required to maintain records regarding the immigration status of clients represented under § 1626.4(a). The reason for this waiver of immigration status recordkeeping for clients eligible under § 1626.4 is that, under the existing regulation, clients are eligible under § 1626.4 because they are victims of abuse and not because of their immigration status.

For clients who are eligible because they are battered, subjected to extreme cruelty, victims of sexual abuse, or victims of trafficking or severe forms of trafficking, but who have not been granted visa, eligibility is based on abuse and not on immigration status. Paragraph (f)(2) of the proposed rule requires that evidence of the abuse must be maintained for such clients but does not require evidence of immigration status. When such clients have filed applications for U visas or T visas copies of those applications must be retained.

However, the eligibility of certain of the aliens eligible under the proposed rule does rest in part on immigration status. Specifically, the eligibility of aliens who have been granted U visas or T visas is based on their immigration status in the visa process. Accordingly, paragraph (f)(1) in the proposed rule requires that recipients maintain verification of U visa or T visa status for clients whose eligibility is based on their receiving such visas.

Paragraph (g) is a new provision that addresses aliens who qualify under both § 1626.4 and § 1626.5. Because recipients are limited to providing ''related legal assistance'' under § 1626.4 but may provide the full range of permissible assistance without this restriction under § 1626.5, the paragraph instructs recipients to treat ''dual eligible'' aliens as eligible under § 1626.5.

1626.5 Aliens Eligible for Assistance Based on Immigration Status

This section is substantively unchanged. As explained in the immediately preceding discussion, the titles for proposed § 1626.4 and § 1626.5, have been changed to describe more precisely the exceptions to the prohibition of assistance to aliens established in those sections.

The proposed rule includes a change in § 1626.5(e), which concerns persons granted withholding of deportation. Section 1626.5 of the regulation allows recipients to provide assistance to several categories of aliens who have been granted immigration status and are lawfully present or admitted to the United States. One category eligible under this section is ''alien[s] who [are] lawfully present in the United States as a result of the Attorney General's withholding of deportation pursuant to section 243(h) of the INA (8 U.S.C. 1253(h)).'' 45 CFR 1626.5(e).

The withholding provision has been relocated to another section of the INA, and is now codified at 8 U.S.C. 1231(b)(3). The relocated withholding provision prohibits the removal of an alien to a country if the life or freedom of the alien would be threatened in the country of removal. Section 1626.5(e) in the proposed regulation is amended to correctly identify the citation to the statutory basis for withholding relief, and to reflect that the relocated provisions refers to withholding of ''removal'' and not to withholding of ''deportation.''

1626.6 Verification of Citizenship

No substantive revisions have been made to this section. The proposed rule amends the section to reference internet, email, or other non-telephone communications.

1626.7 Verification of Eligible Alien Status

This section is revised to reflect that the list of eligibility documents presently published as an appendix to § 1626 will be subsequently published and revised in LSC program letters, or equivalent documents. The revision made to § 1626.6 on non-in-person communications also appears in this section.

1626.8 Emergencies

Section 1626.4 has been added to the list of provisions for which emergency service can be provided prior to compliance with eligibility provisions.

1626.9 Change in Circumstance

No revisions have been made to this section.

1626.10 Special Eligibility Questions

No revisions have been made to this section.

1626.11 H–2 Forestry and Agricultural Workers

This section establishes eligibility for assistance to certain workers admitted to the U.S. under temporary workers provisions in section 101(a)(15)(H)(ii) of the INA. Workers with immigration status under this section of the INA are often referred to as ''H–2A'' or ''H–2B'' visa holders, depending on the subsection of the H–2 provision they are admitted under.

The title of this section has been changed to add a reference to forestry workers, because statutory changes implemented in this section of the proposed rule add forestry workers authorized to be in the United States pursuant to the H–2B provision of the INA. The changes in paragraph (a) of this section conform the regulation's language on eligibility of agricultural workers to the statutory authority establishing this eligibility. The statutory authority establishing eligibility for agricultural workers, section 504(a)(11)(E) of the FY 1996 LSC appropriations legislation, permits recipients to provide assistance to ''an alien to whom section 305 of the Immigration Reform Act of 1986 [''IRCA''] (8 U.S.C. 1101 note) applies.'' Public Law 104–134, section 504(a)(11)(E), 110 Stat. at 1321–55, amended by Public Law 110–161, section 540, 121 Stat. at 1924. Section 305 of IRCA in turn establishes eligibility for ''non-immigrant worker[s] admitted or permitted to remain in the United States under section 101(a)(15)(H)(ii)(a) of the Immigration and Naturalization Act .'' 8 U.S.C. 1101, note. The existing § 1626.11 language refers generally to ''agricultural H–2 workers'' and eligibility ''under the provisions of 8 U.S.C. 1101(a)(15)(H)(ii).'' This general reference to H–2 could be confused as a broader authorization than that actually created by the statute, which establishes eligibility specifically for H–2*A* agricultural workers. The revised rule clarifies this by citing section H–2A rather than H–2.

The added paragraph (b) implements the FY 2008 amendment to section 504(a)(11)(E) of the FY 1996 LSC appropriations legislation, which extended eligibility for assistance from recipients to H–2B visa forestry workers. Public Law 104–134, section 504(a)(11)(E), 110 Stat. at 1321–55, amended by Public Law 110–161, section 540, 121 Stat. at 1924. The existing § 1626.11 provision on H–2 visa eligibility does not include forestry workers.

Paragraph (b) of the proposed rule also establishes that the existing limitations on assistance for H–2A agricultural workers apply as well to H–2B forestry workers. This conforms to the FY 2008 LSC appropriation, which limits the assistance for H–2B eligible forestry workers to that described in section 305 of IRCA. *Id.* Section 305 limits assistance to ''matters relating to wages, housing, transportation and other employment rights'' that arise under a temporary worker's specific H–2A contract. 8 U.S.C. 1101, note. The limitations, codified in the existing regulation at paragraph (b), appear without substantive revision in paragraph (c) of the proposed rule.

1626.12 Recipient Policies, Procedures and Recordkeeping

No revisions have been made to this section.

Appendix to Part 1626—Examples of Documents and Other Information Establishing Alien Eligibility for Representation by LSC Programs

The list of eligibility documents presently included in the regulation as an appendix to Part 1626 was last updated in 2003, and, like the regulation, it requires updates. Revisions to the list do not entail policy decisions, as they are limited to administrative updates to the list of examples of documents or information which satisfy eligibility. In view of the frequency with which immigration forms change, subjecting updates of the list to the process of repeated Board approval and the LSC rulemaking protocol would be unduly complicated. For that reason, the Corporation proposes that the information currently contained in the appendix be reclassified as a program letter posted on the LSC Web site, and emailed to grant recipients.

The initial revision of the appendix and reclassification as a program letter is a change in the regulation and is therefore being done pursuant to the LSC rulemaking protocol, which requires Board review and approval prior to publication for notice and comment. Legal Services Corporation Rulemaking Protocol, 67 FR 69762 (November 19, 2002). Subsequent revision of the program letter would allow for, but would not require, Board consideration and approval and thereafter notice and comment.

List of Subjects in 45 CFR Part 1626

Aliens, Grant programs—law, Legal services, Migrant labor, Reporting and recordkeeping requirements.

For the reasons discussed in the preamble, the Legal Services Corporation proposes to revise 45 CFR part 1626 to read as follows:

PART 1626—RESTRICTIONS ON LEGAL ASSISTANCE TO ALIENS

Sec.
1626.1 Purpose.
1626.2 Definitions.
1626.3 Prohibition.
1626.4 Aliens eligible for assistance under anti-abuse laws.
1626.5 Aliens eligible for assistance based on immigration status.
1626.6 Verification of citizenship.
1626.7 Verification of eligible alien status.
1626.8 Emergencies.
1626.9 Change in circumstances.
1626.10 Special eligibility questions.
1626.11 H–2 forestry and agricultural workers.
1626.12 Recipient policies, procedures and recordkeeping.

Authority: Pub. L. 104–208, 110 Stat. 1321; Pub. L. 104–134, 110 Stat. 3009; Pub. L. 105–119, 111 Stat. 2440; Pub. L. 106–386, 114 Stat. 1464; Pub. L. 108–193, 117 Stat. 2875; Pub. L. 109–162, 119 Stat. 2960; Pub. L. 110–161, 121 Stat. 1844.

§ 1626.1 Purpose.

This part is designed to ensure that recipients provide legal assistance only to citizens of the United States and eligible aliens. It is also designed to assist recipients in determining the eligibility and immigration status of persons who seek legal assistance.

§ 1626.2 Definitions.

(a) *Citizen* includes a person described or defined as a citizen or national of the United States in 8 U.S.C. 1101(a)(22) and Title III of the Immigration and Nationality Act (INA), Chapter 1 (8 U.S.C. 1401 *et seq.*) (citizens by birth) and Chapter 2 (8 U.S.C. 1421 *et seq.*) (citizens by naturalization) or antecedent citizen statutes.

(b) *Eligible alien* means a person who is not a citizen but who meets the requirements of § 1626.4 or § 1626.5.

(c) *Ineligible alien* means a person who is not a citizen and who does not meet the requirements of § 1626.4 or § 1626.5.

(d) *Rejected* refers to an application for adjustment of status that has been denied by the Department of Homeland Security (DHS) and is not subject to further administrative appeal.

(e) To provide legal assistance *on behalf of* an ineligible alien is to render legal assistance to an eligible client that benefits an ineligible alien and does not affect a specific legal right or interest of the eligible client.

(f) *Anti-abuse statutes* means the Violence Against Women Act of 1994, Public Law 103–322, 108 Stat. 1941, as amended, and the Violence Against Women and Department of Justice Reauthorization Act of 2005, Public Law 109–162, 119 Stat. 2960 (collectively referred to as ''VAWA''); the Victims of Trafficking and Violence Protection Act of 2000, Public Law 106–386, 114 Stat. 1464 (''VTVPA''); the Trafficking Victims Protection Reauthorization Act of 2003, Public Law 108–193, 117 Stat. 2875 (''TVPRA''); Section 101(a)(15)(T) of the Immigration and Naturalization Act (''INA''), 8 U.S.C. 1101(a)(15)(T); Section 101(a)(15)(U) of the INA, 8 U.S.C. 1101(a)(15)(U); and the incorporation of these statutory provisions in section 502(a)(2)(C) of LSC's FY 1998 appropriation, Public Law 105–119, Title V, 111 Stat. 2440, 2510 as incorporated by reference thereafter. *E.g.,* Public Law 113–6, 127 Stat. 198, 267 (2013) (LSC's FY 2013 appropriation).

(g) *United States,* for purposes of this part, has the same meaning given that term in 8 U.S.C. 1101(a)(38) of the INA.

§ 1626.3 Prohibition.

Recipients may not provide legal assistance for or on behalf of an ineligible alien. For purposes of this part, legal assistance does not include normal intake and referral services.

§ 1626.4 Aliens eligible for assistance under anti-abuse laws.

(a) Subject to all other eligibility requirements and restrictions of the LSC Act and regulations and other applicable law:

(1) A recipient may provide related legal assistance to an alien who is within one of the following categories:

(i) An alien who has been battered or subjected to extreme cruelty, or is a victim of sexual assault or trafficking in the United States, or qualifies for relief under section 101(a)(15)(U) of the INA (8 U.S.C. 1101(a)(15)(U)); or

(ii) An alien whose child, without the active participation of the alien, has been battered or subjected to extreme cruelty, or has been a victim of sexual assault or trafficking in the United States, or qualifies for immigration relief under section 101(a)(15)(U) of the INA (8 U.S.C. 1101(a)(15)(U)).

(2) A recipient may provide legal assistance, including but not limited to related leal assistance, to:

(i) an alien who is a victim of ''severe forms of trafficking'' of persons in the United States, or

(ii) an alien classified as a non-immigrant under section 101 (a)(15)(T)(ii) of the INA (8 U.S.C. 1101(a)(15)(T)(ii) regarding others related to the victim).

(b) (1) *Related legal assistance* means legal assistance directly related

(i) To the prevention of, or obtaining relief from, battery or cruelty, sexual assault or trafficking;

(ii) To the prevention of, or obtaining relief from, crimes listed in section 101(a)(15)(U)(iii) of the INA (8 U.S.C. 1101(a)(15)(U)(iii));

(iii) To an application for relief:

(A) Under Section 101(a)(15)(U) of INA (8 U.S.C. 1101(a)(15)(U)); or

(B) Under section 101(a)(15)(T) of INA (8 U.S.C. 1101(a)(15)(T)).

(2) Such assistance includes representation in matters that will assist a person eligible for assistance under this part to escape from the abusive situation, ameliorate the current effects of the abuse, or protect against future abuse, so long as the recipient can show the necessary connection of the representation to the abuse. Such representation may include immigration law matters, and domestic or poverty law matters (such as obtaining civil protective orders, divorce, paternity, child custody, child and spousal support, housing, public benefits, employment, abuse and neglect, juvenile proceedings and contempt actions).

(c) *Definitions of Categories of Eligible Aliens Under Anti-Abuse Statutes.* (1) A person *battered or subjected to extreme cruelty* includes any person who has been battered or subjected to extreme cruelty as that term is defined in regulations interpreting VAWA. Examples of battering or extreme cruelty include, but are not limited to, being the victim of any act or threatened act of violence, including any forceful detention, which results or threatens to result in physical or mental injury. Psychological or sexual abuse or exploitation, including rape, molestation, incest (if the victim is a minor), or forced prostitution may be considered acts of violence. Other abusive actions may also be acts of violence under certain circumstances, including acts that, in and of themselves, may not initially appear violent but that are a part of an overall pattern of violence.

(2) *A victim of sexual assault or trafficking* includes:

(i) *A victim of sexual assault* subjected to any conduct included in the definition of sexual assault or sexual abuse in VAWA, including but not limited to sexual abuse, aggravated

sexual abuse, abusive sexual contact, or sexual abuse of a minor or ward; and

(ii) *A victim of trafficking* subjected to any conduct included in the definition of ''trafficking'' under law, including, but not limited to VAWA and the INA.

(3) A *victim of severe forms of trafficking* includes any person subjected to such abuse under the VTVPA or TVPRA as codified at 22 U.S.C. 7105.

(4) A person who *qualifies for immigration relief under section 101(a)(15)(U) of the INA* includes:

(i) A person who has been granted relief under that section;

(ii) A person who has applied for relief under that section and who the recipient determines has evidentiary support for such application; or

(iii) A person who has not filed for relief under that section, but who the recipient determines has evidentiary support for filing for such relief.

A person who ''qualifies for immigration relief'' includes any person who may apply for primary U visa relief under subsection (i) of section 101(a)(15)(U) of the INA or for derivative U visa relief for family members under subsection (ii) of section 101(a)(15)(U) of the INA (8 U.S.C. 1101(a)(15)(U)). Recipients may provide assistance for any person who qualifies for derivative U visa relief regardless of whether such a person has been subjected to abuse.

(d) *Geographic location.* (1) *Location of activity giving rise to eligibility.* Except for aliens eligible because they are victims of trafficking or severe forms of trafficking, an alien is eligible under this section if the activity giving rise to eligibility violated a law of the United States, regardless of whether that conduct took place in the United States or a United States territory. Victims of trafficking must be subjected to illegal trafficking in the United States to be eligible for assistance.

(2) *Location of alien.* An alien need not be present in the United States or a United States territory to be eligible for assistance under this section.

(e) *Evidentiary support.* A recipient may determine that an alien is qualified for assistance under paragraphs (a) and (c) of this section if there is evidentiary support that the alien falls into any of the eligibility categories or if the recipient determines there will likely be evidentiary support after a reasonable opportunity for further investigation. Evidentiary support may include, but is not limited to, affidavits or unsworn written statements made by the alien; written summaries of statements or interviews of the alien taken by others, including the recipient; reports and affidavits from police, judges, and other court officials, medical personnel, school officials, clergy, social workers, other social service agency personnel; orders of protection or other legal evidence of steps taken to end abuse; evidence that a person sought safe haven in a shelter or similar refuge; photographs; documents or other evidence of a series of acts that establish a pattern of qualifying abuse. If the recipient determines that an alien is eligible because there will likely be evidentiary support, the recipient must obtain evidence of support as soon as possible and may not delay in order to provide continued assistance. Section 1626.9 applies for situations in which a previously eligible alien is determined to be ineligible, for example, if an alien's application for U visa relief is denied or if there is an official DHS determination that an alien whose eligibility is based on trafficking was not a victim of trafficking. Because the facts determinative of alien eligibility based on anti-abuse statutes may develop or change, eligibility determinations made by intake personnel should be reviewed by other recipient staff members involved in the representation of an alien.

(f) *Recordkeeping.* (1) For a client whose eligibility is based on a grant of relief under section 101(a)(15)(U) of the INA or section 101(a)(15)(T) of the INA, or any other grant of immigration status, recipients must maintain a copy of the visa or other official record of such relief from immigration authorities;

(2) For a client whose eligibility is based on other evidentiary support as described in paragraph (e) of this section, recipients are required to maintain originals or copies of such evidence. When such a client has filed an application for relief under section 101(a)(15)(U) of the INA or section 101(15)(T) of the INA, recipients must maintain a copy of the application for such relief filed with immigration authorities as well as copies of other evidentiary support.

(g) *Changes in basis for eligibility.* If, during the course of representing an alien eligible pursuant to § 1626.4, a recipient determines that the alien is also eligible under § 1626.5, the recipient should treat the alien as eligible under § 1626.5 and may provide all the assistance available pursuant to that section.

§ 1626.5 Aliens eligible for assistance based on immigration status.

Subject to all other eligibility requirements and restrictions of the LSC Act and regulations and other applicable law, a recipient may provide legal assistance to an alien who is present in the United States and who is within one of the following categories:

(a) An alien lawfully admitted for permanent residence as an immigrant as defined by section 1101(a)(20) of the INA (8 U.S.C. 1101(a)(20));

(b) An alien who is either married to a United States citizen or is a parent or an unmarried child under the age of 21 of such a citizen and who has filed an application for adjustment of status to permanent resident under the INA, and such application has not been rejected;

(c) An alien who is lawfully present in the United States pursuant to an admission under section 207 of the INA (8 U.S.C. 1157) (relating to refugee admissions) or who has been granted asylum by the Attorney General under section 208 of the INA (8 U.S.C. 1158).

(d) An alien who is lawfully present in the United States as a result of being granted conditional entry pursuant to section 203(a)(7) of the INA (8 U.S.C. 1153(a)(7), as in effect on March 31, 1980) before April 1, 1980, because of persecution or fear of persecution on account of race, religion, or political opinion or because of being uprooted by catastrophic natural calamity;

(e) An alien who is lawfully present in the United States as a result of the Attorney General's withholding of removal pursuant to section 241(b)(3) of the INA (8 U.S.C. 1231(b)(3); or

(f) An alien who meets the requirements of § 1626.10 or § 1626.11.

§ 1626.6 Verification of citizenship.

(a) A recipient shall require all applicants for legal assistance who claim to be citizens to attest in writing in a standard form provided by the Corporation that they are citizens, unless the only service provided for a citizen is brief advice and consultation by telephone, or by other non-in-person means, which does not include continuous representation.

(b) When a recipient has reason to doubt that an applicant is a citizen, the recipient shall require verification of citizenship. A recipient shall not consider factors such as a person's accent, limited English-speaking ability, appearance, race, or national origin as a reason to doubt that the person is a citizen.

(1) If verification is required, a recipient may accept originals, certified copies, or photocopies that appear to be complete, correct, and authentic of any of the following documents as evidence of citizenship:

(i) United States passport;

(ii) Birth certificate;

(iii) Naturalization certificate;

(iv) United States Citizenship Identification Card (INS Form 1–197 or I–197); or

(v) Baptismal certificate showing place of birth within the United States and date of baptism within two months after birth.

(2) A recipient may also accept any other authoritative document, such as a document issued by INS, by a court, or by another governmental agency, that provides evidence of citizenship.

(3) If a person is unable to produce any of the above documents, the person may submit a notarized statement signed by a third party, who shall not be an employee of the recipient and who can produce proof of that party's own United States citizenship, that the person seeking legal assistance is a United States citizen.

§ 1626.7 Verification of eligible alien status.

(a) An alien seeking representation shall submit appropriate documents to verify eligibility, unless the only service provided for an eligible alien is brief advice and consultation by telephone, or by other non-in-person means, which does not include continuous representation of a client.

(1) As proof of eligibility, a recipient may accept originals, certified copies, or photocopies that appear to be complete, correct, and authentic, of any documents establishing eligibility. LSC will publish a list of examples of such documents from time to time, in the form of a program letter or equivalent.

(2) A recipient may also accept any other authoritative document issued by the DHS, by a court, or by another governmental agency, that provides evidence of alien status.

(b) A recipient shall upon request furnish each person seeking legal assistance with a current list of documents establishing eligibility under this part as is published by LSC.

§ 1626.8 Emergencies.

In an emergency, legal services may be provided prior to compliance with § 1626.4, § 1626.6 and § 1626.7 if:

(a) An applicant cannot feasibly come to the recipient's office or otherwise transmit written documentation to the recipient before commencement of the representation required by the emergency, and the applicant provides oral information to establish eligibility which the recipient records, and the applicant submits the necessary documentation as soon as possible; or

(b) An applicant is able to come to the recipient's office but cannot produce the required documentation before commencement of the representation, and the applicant signs a statement of eligibility and submits the necessary documentation as soon as possible; and

(c) The recipient informs clients accepted under paragraph (a) or (b) of this section that only limited emergency legal assistance may be provided without satisfactory documentation and that, if the client fails to produce timely and satisfactory written documentation, the recipient will be required to discontinue representation consistent with the recipient's professional responsibilities.

§ 1626.9 Change in circumstances.

If, to the knowledge of the recipient, a client who was an eligible alien becomes ineligible through a change in circumstances, continued representation is prohibited by this part and a recipient must discontinue representation consistent with applicable rules of professional responsibility.

§ 1626.10 Special eligibility questions.

(a) (1) This part is not applicable to recipients providing services in the Commonwealth of the Northern Mariana Islands, the Republic of Palau, the Federated States of Micronesia, or the Republic of the Marshall Islands.

(2) All citizens of the Republic of Palau, the Federated States of Micronesia, and the Republic of the Marshall Islands residing in the United States are eligible to receive legal assistance provided that they are otherwise eligible under the Act.

(b) All Canadian-born American Indians at least 50% Indian by blood are eligible to receive legal assistance provided they are otherwise eligible under the Act.

(c) Members of the Texas Band of Kickapoo are eligible to receive legal assistance provided they are otherwise eligible under the Act.

(d) An alien who qualified as a special agricultural worker and whose status is adjusted to that of temporary resident alien under the provisions of the Immigration Reform and Control Act (''IRCA'') is considered a permanent resident alien for all purposes except immigration under the provisions of section 302 of 100 Stat. 3422, 8 U.S.C. 1160(g). Since the status of these aliens is that of permanent resident alien under section 1101(a)(20) of Title 8, these workers may be provided legal assistance. These workers are ineligible for legal assistance in order to obtain the adjustment of status of temporary resident under IRCA, but are eligible for legal assistance after the application for adjustment of status to that of temporary resident has been filed, and the application has not been rejected.

(e) A recipient may provide legal assistance to indigent foreign nationals who seek assistance pursuant to the Hague Convention on the Civil Aspects of International Child Abduction and the Federal implementing statute, the International Child Abduction Remedies Act, 42 U.S.C. 11607(b), provided that they are otherwise financially eligible.

§ 1626.11 H–2 agricultural and forestry workers.

(a) Nonimmigrant agricultural workers admitted under the provisions of 8 U.S.C. 1101(a)(15)(h)(ii)(a), commonly called H–2A agricultural workers, may be provided legal assistance regarding the matters specified in paragraph (c) of this section;

(b) Nonimmigrant forestry workers admitted under the provisions of 8 U.S.C. 1101(a)(15)(h)(ii)(b), commonly called H–2B forestry workers, may be provided legal assistance regarding the matters specified in paragraph (c) of this section.

(c) The following matters which arise under the provisions of the worker's specific employment contract may be the subject of legal assistance by an LSC-funded program:

(1) Wages;

(2) Housing;

(3) Transportation; and

(4) Other employment rights as provided in the worker's specific contract under which the nonimmigrant worker was admitted.

§ 1626.12 Recipient policies, procedures and recordkeeping.

Each recipient shall adopt written policies and procedures to guide its staff in complying with this part and shall maintain records sufficient to document the recipient's compliance with this part.

Dated: August 13, 2013.

Atitaya C. Rok,

Staff Attorney.

[FR Doc. 2013–20040 Filed 8–20–13; 8:45 am]

BILLING CODE 7050–01–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

[Docket No. FWS–R8–ES–2013–0080; 4500030114]

RIN 1018–AZ57

Endangered and Threatened Wildlife and Plants; Designation of Critical Habitat for Ivesia webberi (Webber's ivesia)

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Proposed rule; correction.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service), correct the public meeting dates published in the August 2, 2013, proposed rule to designate critical habitat for *Ivesia webberi.*

DATES: We will hold a public meeting on the proposed rule on September 10, 2013, in Reno, Nevada, from 4:00 to 6:00 p.m.

ADDRESSES: The public meeting will be held at the U.S. Department of the Interior Building, Great Basin Conference Room, 1340 Financial Blvd., Reno, NV 89502. People needing reasonable accommodations in order to attend and participate in the public hearing should contact Jeannie Stafford, Nevada Fish and Wildlife Office, as soon as possible (see **FOR FURTHER INFORMATION CONTACT**).

FOR FURTHER INFORMATION CONTACT: Edward D. Koch, State Supervisor, U.S. Fish and Wildlife Service, Nevada Fish and Wildlife Office, 1340 Financial Boulevard, Suite 234, Reno, NV 89502; by telephone 775–861–6300; or by facsimile 775–861–6301. Persons who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 800–877–8339.

SUPPLEMENTARY INFORMATION: In our August 2, 2013, proposed rule to designate critical habitat for *Ivesia webberi,* we included the wrong date for the public meeting we are holding to discuss the proposed rule. The correct date for the public meeting is listed above in the **DATES** section of this document.

Authority

The authority for this action is the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 *et seq.*).

Dated: August 9, 2013.

Patrick Leonard,

Acting Director, U.S. Fish and Wildlife Service.

[FR Doc. 2013–20190 Filed 8–20–13; 8:45 am]

BILLING CODE 4310–55–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 226

RIN 0648–BD27

Proposed Designation of Marine Critical Habitat for the Loggerhead Sea Turtle, Caretta caretta, Under the Endangered Species Act; Public Hearing

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

ACTION: Notice of public hearings.

SUMMARY: We, NMFS, will hold public hearings related to our Proposed Designation of Marine Critical Habitat for the Loggerhead Sea Turtle, *Caretta caretta,* under the Endangered Species Act (ESA).

DATES: The public hearings will be held on September 9 and 10, 2013, from 7 p.m. to 9 p.m., with doors opening at 6:30 p.m.

ADDRESSES: The hearings will be held at:

- University of North Carolina-Wilmington, Warwick Center, Ballroom 5, 629 Hamilton Drive, Wilmington, NC 28403 on September 9.
- Crystal Coast Civic Center, 3505 Arendell Street, Morehead City, NC 28557 on September 10.

FOR FURTHER INFORMATION CONTACT: Susan Pultz, NMFS Office of Protected Resources, Silver Spring, MD, telephone: 301–427–8472, email: *susan.pultz@noaa.gov;* or Therese Conant, NMFS Office of Protected Resources, Silver Spring, MD, telephone: 301–427–8456, or *therese.conant@noaa.gov.*

SUPPLEMENTARY INFORMATION:

Background

NMFS staff will present a brief overview of the Proposed Rule titled Designation of Critical Habitat for the Northwest Atlantic Ocean Loggerhead Sea Turtle Distinct Population Segment (DPS) and Determination Regarding Critical Habitat for the North Pacific Ocean Loggerhead DPS. Following this overview, members of the public will have the opportunity to go on record with comments on the proposed designation. Members of the public may also submit written comments at the hearing, or via the Federal e-Rulemaking Portal. To do the latter, go to *www.regulations.gov/#!docketDetail;D=NOAA-NMFS-2013-0079,* click the ''Comment Now!'' icon, complete the required fields, and enter or attach our comments. The proposed rule was published in the **Federal Register** on July 18, 2013 (78 FR 43006) and may be obtained at *https://www.federalregister.gov/articles/2013/07/18/2013–17204/endangered-and-threatened-species-designation-of-critical-habitat-for-the-northwest-atlantic-ocean.* More information and background documents can be found at *http://www.nmfs.noaa.gov/pr/species/turtles/loggerhead.htm.*

Speaker Sign Up

Doors will open for registration at 6:30 p.m. for sign-up and seating. Time allotted will depend upon the number of speakers but will likely be limited to 5 minutes each. Registered speakers will be asked to indicate their full name, contact information, and the identity of any organizations on whose behalf they may be speaking.

Special Accommodations

The meeting is physically accessible to people with disabilities. Requests for auxiliary aids should be directed to Susan Pultz (see **ADDRESSES**) 3 days prior to the meeting.

Authority: 16 U.S.C. 1531 *et seq.*

Dated: August 15, 2013.

P. Michael Payne,

Acting Deputy Director, Office of Protected Resources, National Marine Fisheries Service.

[FR Doc. 2013–20229 Filed 8–20–13; 8:45 am]

BILLING CODE 3510–22–P

Notices

Federal Register

Vol. 78, No. 162

Wednesday, August 21, 2013

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

Animal and Plant Health Inspection Service

[Docket No. APHIS–2012–0029]

Bayer CropScience LP; Determination of Nonregulated Status of Soybean Genetically Engineered for Herbicide Resistance

AGENCY: Animal and Plant Health Inspection Service, USDA.

ACTION: Notice.

SUMMARY: We are advising the public of our determination that a soybean line developed by Bayer CropScience LP (Bayer), designated as event FG72, which has been genetically engineered for resistance to the herbicides glyphosate and isoxaflutole, is no longer considered a regulated article under our regulations governing the introduction of certain genetically engineered organisms. Our determination is based on our evaluation of data submitted by Bayer in its petition for a determination of nonregulated status, our analysis of available scientific data, and comments received from the public in response to our previous notice announcing the availability of the petition for nonregulated status and its associated environmental assessment and plant pest risk assessment. This notice also announces the availability of our written determination and finding of no significant impact.

DATES: *Effective Date:* August 21, 2013.

ADDRESSES: You may read the documents referenced in this notice and the comments we received in our reading room. The reading room is located in room 1141 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. Those documents are also available on the Internet at *http://www.aphis.usda.gov/biotechnology/not_reg.html* under APHIS Petition Number 09–328–01p and are posted with the previous notice and the comments we received on the Regulations.gov Web site at *http://www.regulations.gov/#!docketDetail;D=APHIS-2012-0029.*

FOR FURTHER INFORMATION CONTACT: Dr. Rebecca Stankiewicz Gabel, Chief, Biotechnology Environmental Analysis Branch, Environmental Risk Analysis Programs, Biotechnology Regulatory Services, APHIS, 4700 River Road Unit 147, Riverdale, MD 20737–1236; (301) 851–3927, email: *rebecca.l.stankiewicz-gabel@aphis.usda.gov.* To obtain copies of the petition, contact Ms. Cindy Eck at (301) 851–3892, email: *cynthia.a.eck@aphis.usda.gov.*

SUPPLEMENTARY INFORMATION:

Background

The regulations in 7 CFR part 340, ''Introduction of Organisms and Products Altered or Produced Through Genetic Engineering Which Are Plant Pests or Which There Is Reason to Believe Are Plant Pests,'' regulate, among other things, the introduction (importation, interstate movement, or release into the environment) of organisms and products altered or produced through genetic engineering that are plant pests or that there is reason to believe are plant pests. Such genetically engineered organisms and products are considered ''regulated articles.''

The regulations in § 340.6(a) provide that any person may submit a petition to the Animal and Plant Health Inspection Service (APHIS) seeking a determination that an article should not be regulated under 7 CFR part 340. Paragraphs (b) and (c) of § 340.6 describe the form that a petition for a determination of nonregulated status must take and the information that must be included in the petition.

APHIS received a petition (APHIS Petition Number 09–328–01p) from Bayer CropScience LP (Bayer), seeking a determination of nonregulated status of soybean designated as event FG72, which has been genetically engineered for resistance to the herbicides glyphosate and isoxaflutole. The petition states that this soybean is unlikely to pose a plant pest risk and, therefore, should not be a regulated article under APHIS' regulations in 7 CFR part 340.

In a notice [1] published in the **Federal Register** on July 13, 2012 (77 FR 41358–41359, Docket No. APHIS–2012–0029), APHIS announced the availability of the Bayer petition, a plant pest risk assessment (PPRA), and a draft environmental assessment (EA) for public comment. APHIS solicited comments on the petition, whether the subject soybean is likely to pose a plant pest risk, the draft EA, and the PPRA for 60 days ending on September 11, 2012.

APHIS received 80 comments during the comment period. Several of these comments included electronic attachments consisting of a consolidated document of many identical or nearly identical letters, for a total of 5,096 comments. Issues raised during the comment period include the potential effects of FG72 on human health, animals, and nontarget organisms; herbicide use changes; and economic costs of herbicide-resistant weeds. APHIS has addressed the issues raised during the comment period and has provided responses to comments as an attachment to the finding of no significant impact.

National Environmental Policy Act

To provide the public with documentation of APHIS' review and analysis of any potential environmental impacts associated with the determination of nonregulated status of Bayer's soybean event FG72, an EA has been prepared. The EA was prepared in accordance with: (1) The National Environmental Policy Act (NEPA), as amended (42 U.S.C. 4321 *et seq.*), (2) regulations of the Council on Environmental Quality for implementing the procedural provisions of NEPA (40 CFR parts 1500–1508), (3) USDA regulations implementing NEPA (7 CFR part 1b), and (4) APHIS' NEPA Implementing Procedures (7 CFR part 372). Based on our EA, the response to public comments, and other pertinent scientific data, APHIS has reached a finding of no significant impact with regard to the preferred alternative identified in the EA.

[1] To view the notice, petition, draft EA, the PPRA, and the comments we received, go to *http://www.regulations.gov/#!docketDetail;D=APHIS-2012-0029.*

Determination

Based on APHIS' analysis of field and laboratory data submitted by Bayer, references provided in the petition, peer-reviewed publications, information analyzed in the EA, the PPRA, comments provided by the public, and information provided in APHIS' response to those public comments, APHIS has determined that Bayer's soybean event FG72 is unlikely to pose a plant pest risk. We have, therefore, determined that Bayer's soybean event FG72 is no longer subject to our regulations governing the introduction of certain genetically engineered organisms.

Copies of the signed determination document, as well as copies of the petition, PPRA, EA, finding of no significant impact, and response to comments are available as indicated in the **ADDRESSES** and **FOR FURTHER INFORMATION CONTACT** sections of this notice.

Authority: 7 U.S.C. 7701–7772 and 7781–7786; 31 U.S.C. 9701; 7 CFR 2.22, 2.80, and 371.3.

Done in Washington, DC, this 16th day of August 2013.

Michael Gregoire,

Acting Administrator, Animal and Plant Health Inspection Service.

[FR Doc. 2013–20380 Filed 8–20–13; 8:45 am]

BILLING CODE 3410–34–P

DEPARTMENT OF AGRICULTURE

Forest Service

Shasta County Resource Advisory Committee

AGENCY: Forest Service, USDA.

ACTION: Notice of meeting.

SUMMARY: The Shasta County Resource Advisory Committee (RAC) will meet in Redding, CA. The committee is authorized under the Secure Rural Schools and Community Self-Determination Act (Pub. L. 110–343) (the Act) and operates in compliance with the Federal Advisory Committee Act. The purpose of the committee is to improve collaborative relationships and to provide advice and recommendations to the Forest Service concerning projects and funding consistent with the title II of the Act. The meeting is open to the public. The purpose of the meeting is to discuss the monitoring of past projects, and to discuss and vote on recommendations for the use of funds from the Secure Rural Schools second one-year extension to the 2008–2011 RAC authorization.

DATES: The meeting will be held September 18, 2013 at 9:00 a.m.

ADDRESSES: The meeting will be held at the USDA Service Center, 3644 Avtech Parkway, Redding, California; in conference rooms A and B. Written comments may be submitted as described under **SUPPLEMENTARY INFORMATION**.

All comments, including names and addresses when provided, are placed in the record and are available for public inspection and copying. The public may inspect comments received at the USDA Service Center, 3644 Avtech Parkway, Redding, California. Please call ahead to facilitate entry into the building to view comments.

FOR FURTHER INFORMATION CONTACT: Mary St. John, RAC Assistant, at 530–351–3154 or *maryst.john@hotmail.com.*

Individuals who use telecommunication devices for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339 between 8:00 a.m. and 8:00 p.m., Eastern Standard Time, Monday through Friday. Please make requests in advance for sign language interpreting, assistive listening devices or other reasonable accomodation for access to the facility or procedings by contacting the person listed For Further Information.

SUPPLEMENTARY INFORMATION: The meeting agenda is available at *http://www.fs.usda.gov/main/stnf/workingtogether/advisorycommittees.* Anyone who would like to bring related matters to the attention of the committee may file written statements with the committee staff before or after the meeting. The agenda will include time for people to make oral statements of three minutes or less. Individuals wishing to make an oral statement should request in writing by September 2, 2013 to be scheduled on the agenda. Written comments and requests for time for oral comments must be sent to Donna Harmon, USDA Service Center, 3644 Avtech Parkway, Redding, California 96002 or by email to *dharmon@fs.fed.us* or via facsimile to 530–226–2486.

A summary of the meeting will be posted at the RAC Web site listed above within 21 days of the meeting.

Dated: August 15, 2013.

Donna F. Harmon,

Designated Federal Official, Shasta-Trinity National Forest.

[FR Doc. 2013–20364 Filed 8–20–13; 8:45 am]

BILLING CODE 3410–11–P

DEPARTMENT OF COMMERCE

Foreign-Trade Zones Board

[B–40–2013]

Foreign-Trade Zone 59—Lincoln, Nebraska; Authorization of Production Activity; CNH America, LLC; Subzone 59B (Agricultural Equipment Production); Grand Island, Nebraska

On April 17, 2013, the Lincoln-Foreign Trade Zone, Inc., grantee of FTZ 59, submitted a notification of proposed production activity to the Foreign-Trade Zones (FTZ) Board on behalf of CNH America, LLC, within Subzone 59B, in Grand Island, Nebraska.

The notification was processed in accordance with the regulations of the FTZ Board (15 CFR part 400), including notice in the **Federal Register** inviting public comment (78 FR 27953, 05–13–2013). The FTZ Board has determined that no further review of the activity is warranted at this time. The production activity described in the notification is authorized, subject to the FTZ Act and the Board's regulations, including Section 400.14.

Dated: August 15, 2013.

Andrew McGilvray,

Executive Secretary.

[FR Doc. 2013–20445 Filed 8–20–13; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–580–839]

Certain Polyester Staple Fiber From the Republic of Korea: Rescission of Antidumping Duty Administrative Review; 2012–2013

AGENCY: Import Administration, International Trade Administration, Department of Commerce

SUMMARY: The Department of Commerce (the Department) is rescinding the administrative review of the antidumping duty order on certain polyester staple fiber (polyester staple fiber) from the Republic of Korea (Korea) for the period May 1, 2012, through April 30, 2013, based on the withdrawal of requests for review.

DATES: *Effective Date:* August 21, 2013.

FOR FURTHER INFORMATION CONTACT: Joseph Shuler, AD/CVD Operations, Office 1, Import Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue NW., Washington, DC 20230; telephone: (202) 482–1293.

SUPPLEMENTARY INFORMATION:

Background

On June 28, 2013, the Department initiated an administrative review of the antidumping duty order on polyester staple fiber from Korea for the period May 1, 2012, through April 30, 2013,[1] based on requests by Petitioners and Huvis Corporation (Huvis).[2] Petitioners requested a review of Huvis and Woongjin Chemical Company, Ltd. (Woongjin), and Huvis requested a review of itself. Petitioners withdrew their request for an administrative review of Woongjin on July 8, 2013, and of Huvis on July 17, 2013. Huvis withdrew its own request for review on July 23, 2013.

Rescission of Review

Pursuant to 19 CFR 351.213(d)(1), the Department will rescind an administrative review, in whole or in part, if the party that requested the review withdraws its request within 90 days of the publication of the notice of initiation of the requested review. In this case, Petitioners and Huvis withdrew their respective requests within the 90-day deadline, and no other parties requested an administrative review of the antidumping duty order. Therefore, in accordance with 19 CFR 351.213(d)(1), we are rescinding the administrative review of the antidumping duty order on polyester staple fiber from Korea covering the period May 1, 2012, through April 30, 2013, in its entirety.

Assessment

The Department will instruct U.S. Customs and Border Protection (CBP) to assess antidumping duties on all entries of polyester staple fiber from Korea. Antidumping duties shall be assessed at rates equal to the cash deposit of estimated antidumping duties required at the time of entry, or withdrawal from warehouse, for consumption, in accordance with 19 CFR 351.212(c)(1)(i). The Department intends to issue appropriate assessment instructions to CBP 15 days after the date of publication of this notice of rescission of administrative review.

Notifications

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

This notice also serves as a final reminder to parties subject to administrative protective order (APO) of their responsibility concerning the return or destruction of proprietary information disclosed under APO in accordance with 19 CFR 351.305(a)(3). Timely written notification of the return or destruction of APO materials, or conversion to judicial protective order, is hereby requested. Failure to comply with the regulations and terms of an APO is a violation that is subject to sanction.

This notice is issued and published in accordance with sections 751(a)(1) and 777(i)(1) of the Tariff Act of 1930, as amended, and 19 CFR 351.213(d)(4).

Dated: August 14, 2013.

Christian Marsh,

Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations.

[FR Doc. 2013–20444 Filed 8–20–13; 8:45 am]

BILLING CODE 3510–DS–P

[1] *See Initiation of Antidumping and Countervailing Duty Administrative Reviews and Request for Revocation in Part,* 78 FR 38924, 38925 (June 28, 2013).

[2] Petitioners are DAK Americas LLC and Auriga Polymers, Inc.

DEPARTMENT OF COMMERCE

International Trade Administration

North American Free-Trade Agreement (NAFTA), Article 1904 Binational Panel Reviews

AGENCY: NAFTA Secretariat, United States Section, International Trade Administration, Department of Commerce.

ACTION: Notice of Decision of Panel.

SUMMARY: On August 6, 2013, the NAFTA Chapter 19 binational panel issued its decision in the review of the final results of the 2008–2009 antidumping administrative review made by the U.S. Department of Commerce, with respect to Light-Walled Rectangular Pipe and Tube from Mexico, NAFTA Secretariat File Number USA–MEX–2011–1904–02. The panel affirmed the U.S. Department of Commerce's Final Determination regarding this matter. Copies of the panel's decision are available from the U.S. Section of the NAFTA Secretariat.

FOR FURTHER INFORMATION CONTACT: Ellen M. Bohon, United States Secretary, NAFTA Secretariat, Suite 2061, 14th and Constitution Avenue, Washington, DC 20230, (202) 482–5438.

SUPPLEMENTARY INFORMATION: Chapter 19 of the North American Free-Trade Agreement (''Agreement'') establishes a mechanism to replace domestic judicial review of final determinations in antidumping and countervailing duty cases involving imports from a NAFTA country with review by independent binational panels. When a Request for Panel Review is filed, a panel is established to act in place of national courts to review expeditiously the final determination to determine whether it conforms with the antidumping or countervailing duty law of the country that made the determination.

Under Article 1904 of the Agreement, which came into force on January 1, 1994, the Government of the United States, the Government of Canada and the Government of Mexico established Rules of Procedure for Article 1904 Binational Panel Reviews (''Rules''). These Rules were published in the **Federal Register** on February 23, 1994 (59 FR 8686). The panel review in this matter has been conducted in accordance with these Rules.

Panel Decision: On December 5, 2012, the binational panel affirmed in part and remanded in part the matter of Light-Walled Rectangular Pipe and Tube from Mexico (NAFTA Secretariat File Number USA–MEX–2011–1904–02). The panel remanded to the U.S. Department of Commerce to provide a thorough explanation of its interpretation of 19 U.S.C. 1677 (35) to apply ''zeroing'' methodology in connection with administrative reviews, but not in antidumping investigations. The panel directed Commerce to provide such explanation within 90 days of the date of issue of the panel's order. (March 5, 2013) On March 4, 2013, the Department of Commerce issued in response its Final Results of Redetermination Pursuant to the Remand. The Complainant, Maquilacero, filed its Comments on the Remand Results on May 1, 2013, and the Department of Commerce filed its related Response on June 17, 2013. On August 6, 2013, in accordance with Article 1904.8 of NAFTA, and for reasons set out in the panel's written decision and related Order, the panel affirmed the March 4, 2013, Final Results of Redetermination Pursuant to Remand of the Department of Commerce.

Dated: August 6, 2013.

Ellen M. Bohon,

U.S. Secretary, NAFTA Secretariat.

[FR Doc. 2013–20130 Filed 8–20–13; 8:45 am]

BILLING CODE 3510–GT–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XC711

Notice of Availability of Draft Environmental Assessment on the Effects of Issuing an Incidental Take Permit No. 18102

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

ACTION: Notice of 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 (No. 18102) to the North Carolina Division of Marine Fisheries for the Incidental Take of Atlantic Sturgeon Distinct Population Segments in the North Carolina Inshore Gillnet Fishery.'' 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. 18102 to the North Carolina Division of Marine Fisheries (NCDMF) for the incidental take of Atlantic sturgeon (*Acipenser oxyrinchus oxyrinchus*) Gulf of Maine, New York Bight, Chesapeake, Carolina, and South Atlantic Distinct Population Segments (DPSs) associated with the otherwise lawful commercial and recreational fisheries operating in estuarine waters and deploying anchored gill nets (i.e., passive gill net sets deployed with an anchor or stake at one or both ends of the nets). All comments received will become part of the public record and will be available for review. An electronic copy of the revised application and proposed conservation plan may be obtained by contacting NMFS Office of Protected Resources (see **FOR FURTHER INFORMATION CONTACT**) or visiting the Internet at *www.nmfs.noaa.gov/pr/permits/esa_review.htm*.

DATES: Written comments must be received at the appropriate address or fax number (see **ADDRESSES**) on or before September 20, 2013.

ADDRESSES: The EA is available for download and review at *http://www.nmfs.noaa.gov/pr/permits/esa_review.htm* under the section heading ESA Section 10(a)(1)(B) Permits and Applications. The application is also available upon written request or by appointment in the following office: Endangered Species Conservation Division, Office of Protected Resources, NMFS, 1315 East-West Highway, Room 13535, Silver Spring, MD 20910; phone (301)427–8403; fax (301) 713–4060.

You may submit comments, identified by ''NOAA–NMFS–2013–0104'', by any of the following methods:

- *Electronic Submissions:* Submit all electronic public comments via the Federal eRulemaking Portal. Go to *www.regulations.gov/#!docketDetail;D=NOAA-NMFS-2013-0104.* Click the ''Comment Now'' icon, complete the required fields, and enter or attach your comments.
- *Fax:* (301) 713–4060; Attn: Therese Conant or Angela Somma.
- *Mail:* Submit written comments to Endangered Species Conservation Division, Office of Protected Resources, NMFS, 1315 East-West Highway, Room 13535, Silver Spring, MD 20910; Attn: Therese Conant or Angela Somma.

Instructions: You must submit comments by one of the above methods to ensure that we receive, document, and consider them. 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 and will generally be posted for public viewing on *http://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. We will accept anonymous comments (enter ''N/A'' in the required fields if you wish to remain anonymous). Attachments to electronic comments will be accepted in Microsoft Word, Excel, or Adobe PDF file formats only.

FOR FURTHER INFORMATION CONTACT: Therese Conant or Angela Somma, (301) 427–8403.

SUPPLEMENTARY INFORMATION: Section 9 of the ESA and Federal regulations prohibits 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 for authorizing incidental take of listed species. The regulations for issuing incidental take permits for threatened and endangered species are promulgated at 50 CFR 222.307.

NMFS received a draft permit application from NCDMF on April 5, 2012. Based on our review of the draft application, we requested further information and clarification. On December 19, 2012, NCDMF submitted an updated draft application. Based on review of the updated draft, NMFS and NCDMF held further discussions on a monitoring program to gather improved estimates of Atlantic sturgeon bycatch and a better understanding of population impacts. On June 28, 2013, NCDMF submitted a revised complete application for the take of ESA-listed Atlantic sturgeon Gulf of Maine, New York Bight, Chesapeake, Carolina, and South Atlantic DPSs that may be caught in gill net fisheries operating in estuarine waters and deploying anchored gill nets (i.e., passive gill net sets deployed with an anchor or stake at one or both ends of the nets).

On July 9, 2013, we published a notice of application receipt and requested review and comment on the application and conservation plan in the **Federal Register** (78 FR 41034, July 9, 2013). The public comment period for the application and conservation plan ends August 8, 2013.

Through this notice, we are making the Draft EA available for comment and review. The EA analyzes the effects to the human and natural environment caused by the issuance of ITP No. 18102 to NCDMF for the incidental take of Atlantic sturgeon Gulf of Maine, New York Bight, Chesapeake, Carolina, and South Atlantic DPSs during management of North Carolina inshore gillnet fisheries. As required by regulations implementing section 10(a)(1)(B) of the ESA, the conservation plan must specify, based on the best scientific and commercial data available:

- The impact which will likely result from the taking;
- How the applicant will minimize and mitigate those impacts, and the funding available to implement;
- What alternative actions the applicant considered, and why those actions are not being pursued;
- Other measures the Secretary of Commerce may require; and
- All sources of data relied on in preparing the plan.

The conservation plan prepared by NCDMF describes measures designed to monitor, minimize, and mitigate the incidental take of ESA-listed Atlantic Sturgeon. The conservation plan includes managing inshore gill net fisheries by dividing estuarine waters into 5 management units. Each of the

management units would be monitored seasonally and by fishery (i.e., large mesh and small mesh gillnet).

Alternatives Considered

In preparing the Draft EA, NMFS considered the following 3 alternatives for the action.

Alternative 1—No Action. Under the No Action alternative no ITP would be issued for the incidental take of Atlantic sturgeon Gulf of Maine, New York Bight, Chesapeake, Carolina, and South Atlantic DPSs. NCDMF would not receive an exemption for the commercial inshore gillnet fishery from the ESA prohibitions against take.

Alternative 2—(Proposed) Issue ITP as Requested in Application. Under Alternative 2, an ITP would be issued to exempt NCDMF from the ESA prohibition on taking Atlantic sturgeon Gulf of Maine, New York Bight, Chesapeake, Carolina, and South Atlantic DPSs during the otherwise lawful recreational and commercial inshore gillnet fishery.

Alternative 3—Issue Permit with Reductions in Large and Small Mesh (Alternatives 3 and 5 in the Conservation Plan) and Expansion of Weekly Closures (Alternative 4 in the Conservation Plan). Under Alternative 3, a permit would be issued to exempt NCDMF from the ESA prohibition on taking Atlantic sturgeon Gulf of Maine, New York Bight, Chesapeake, Carolina, and South Atlantic DPSs during the otherwise lawful recreational and commercial gill net fishery operating in inshore waters and deploying anchored gill nets. But it would require further reductions in large and small mesh gill net effort and expand the soak time prohibitions to all inshore waters.

Environmental Consequences of Alternatives

The Draft EA presents the scientific and analytic basis for comparison of the direct, indirect, and cumulative effects of the alternatives. Regulations for implementing NEPA (42 U.S.C. 4331 *et seq.*) require considerations of both the context and intensity of a proposed action (40 CFR 1508.27). Each of the alternatives is expected to result in both live captures (non-lethal take) and mortalities (lethal take) of Atlantic sturgeon. Although Alternative 1 is no action, or denial of the ITP request, in this analysis NMFS assumes that the status quo would largely be maintained for the fishery. No take authorization would be provided; however, it is likely that if the state continues to operate the fishery without an ITP, both live captures and mortalities would occur. For Alternatives 2 and 3, incidental take of Atlantic Sturgeon would be authorized for both live captures and mortalities. Alternative 3 would likely result in fewer live captures and mortalities than Alternatives 1 and 2.

NMFS is currently preparing a biological opinion, pursuant to section 7(b) of the ESA, evaluating the effects of the issuance of the ITP on listed species under NMFS' purview. The biological opinion will assess the potential impacts of the action and determine if the issuance of the ITP is likely to jeopardize the continued existence of Atlantic sturgeon Gulf of Maine, New York Bight, Chesapeake, Carolina, and South Atlantic DPSs.

Incidental Take of Other Species

NMFS determined that the issuance of Permit 18102 to NCDMF is not likely to adversely affect the West Indian manatee, Roseate Tern, Wood Stork, or the loggerhead, green, Kemp's ridley, and leatherback sea turtles (terrestrial life stage) and requested concurrence with the United States Fish and Wildlife Service (FWS) on July 16, 2013. A final determination from FWS will be considered and incorporated in the final permit and EA.

Social and Economic Impacts

NMFS assumes for the No Action Alternative (Alternative 1) that the status quo would largely be maintained for the fishery. Because no incidental take permit would be issued, NCDMF would not receive an exemption from the ESA prohibitions against take; therefore, any incidental takes of Atlantic sturgeon resulting from the recreational and commercial gill net fishery deploying anchored sets and operating in inshore waters would not be exempted. To the extent that this alternative would limit additional burdens on recreational and commercial gill net fishermen (e.g., allowing more yardage, net shots, avoiding additional reporting requirements, education etc.), the No Action Alternative would have less of a socio-economic impact than the two action alternatives.

The issuance of the Permit as Requested in the Application (Alternative 2 Proposed Action) would result in additional burdens to recreational and commercial gill net fishermen deploying anchored sets and operating in inshore waters, NCDMF could potentially close areas or further restrict fisheries practices and effort in areas and times identified as a high potential for Atlantic sturgeon bycatch. This would result in socio-economic costs to the fishing community and ancillary businesses that are greater than the no action alternative (Alternative 1).

The issuance of the Permit with Reductions in Large and Small Mesh and Expansion of Weekly Closures (Alternative 3) would result in additional burdens to recreational and commercial gill net fishermen deploying anchored sets and operating in inshore waters. NCDMF would further limit gill net fishing in all inshore waters to a 3-day closure and limit yardage and soak times and require attendance in certain areas and times. This would result in socio-economic costs to the fishing community and ancillary businesses that are greater than the No Action (Alternative 1) and Proposed Action (Alternative 2) alternatives.

Implementing Agreement

NMFS and NCDMF are developing an implementing agreement to define roles and responsibilities of each party and provide a common understanding of actions to be undertaken to minimize and mitigate the effects of anchored gillnet fishing in inshore waters on Atlantic sturgeon Gulf of Maine, New York Bight, Chesapeake, Carolina, and South Atlantic DPSs. The agreement describes obligations of both parties, including how changed and unforeseen circumstances will be addressed, as well as the responsibilities of each party in implementing the conservation plan. Additionally, the agreement describes the process for initiating and implementing adaptive management as needed to achieve the Plan's biological objectives or respond to new information (e.g., observer data).

Next Steps

This notice is provided pursuant to section 10(c) of the ESA. The application, supporting documents, public comments, and views already received by the agency, as well as those submitted in response to this notice, will be fully considered and evaluated as we prepare the final EA and determine whether to issue a Finding of No Significant Impact. The final NEPA document and ITP determinations will not be completed until after the 30-day comment period ends. NMFS will publish a record of its final action in the **Federal Register**. We will also make any final NEPA documents available to the public.

Dated: August 16, 2013.

Angela Somma,

Chief, Endangered Species Conservation Division, Office of Protected Resources, National Marine Fisheries Service.

[FR Doc. 2013–20363 Filed 8–20–13; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

National Climate Assessment and Development Advisory Committee (NCADAC)

AGENCY: Office of Oceanic and Atmospheric Research (OAR), National Oceanic and Atmospheric Administration (NOAA), Department of Commerce (DOC).

ACTION: Notice of open meeting.

SUMMARY: This notice sets forth the schedule of a forthcoming meeting of the DoC NOAA National Climate Assessment and Development Advisory Committee (NCADAC).

Time and Date: The meeting will be held Monday, September 9, 2013 from 3:00 p.m.–5:00 p.m. Eastern time.

Place: This meeting will be a conference call. Public access and materials will be available at the office of the U.S. Global Change Research Program, Conference Room A, Suite 250, 1717 Pennsylvania Avenue NW., Washington, DC 20006. The public will not be able to dial into the call. Please check the National Climate Assessment Web site for additional information at *http://www.globalchange.gov/what-we-do/assessment.*

Status: The meeting will be open to public participation with a 10-minute public comment period from 4:45–4:55 p.m. The NCADAC expects that public statements presented at its meetings will not be repetitive of previously submitted verbal or written statements. In general, each individual or group making a verbal presentation will be limited to a total time of two minutes. Written comments should be received in the NCADAC DFO's office by Tuesday, September 3, 2013 to provide sufficient time for NCADAC review. Written comments received by the NCADAC DFO after Tuesday, September 3, 2013 will be distributed to the NCADAC, but may not be reviewed prior to the meeting date.

Special Accommodations: These meetings are physically accessible to people with disabilities. Requests for special accommodations may be directed no later than 12 p.m. on Tuesday, September 3, 2013 to Dr. Cynthia Decker, SAB Executive Director, SSMC3, Room 11230, 1315 East-West Hwy., Silver Spring, MD 20910.

Matters To Be Considered: Please refer to the Web page *http://www.nesdis.noaa.gov/NCADAC/Meetings.html* for the most up-to-date meeting agenda, when available.

FOR FURTHER INFORMATION CONTACT: Dr. Cynthia Decker, Designated Federal Officer, National Climate Assessment and Development Advisory Committee, NOAA, Rm. 11230, 1315 East-West Highway, Silver Spring, Maryland 20910. (Phone: 301–734–1156, Fax: 301–713–1459, Email: *Cynthia.Decker@noaa.gov.*

SUPPLEMENTARY INFORMATION: The National Climate Assessment and Development Advisory Committee was established in December 2010. The committee's mission is to synthesize and summarize the science and information pertaining to current and future impacts of climate change upon the United States; and to provide advice and recommendations toward the development of an ongoing, sustainable national assessment of global change impacts and adaptation and mitigation strategies for the Nation. Within the scope of its mission, the committee's specific objective is to produce a National Climate Assessment.

Dated: August 14, 2013.

Jason Donaldson,

Chief Financial Officer/Chief Administrative Officer, Office of Oceanic and Atmospheric Research, National Oceanic and Atmospheric Administration.

[FR Doc. 2013–20383 Filed 8–20–13; 8:45 am]

BILLING CODE 3510–KD–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XC820

North Pacific Fishery Management Council (NPFMC); Public Meetings

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

ACTION: Notice of public meetings.

SUMMARY: The North Pacific Fishery Management Council's (Council) Gulf of Alaska (GOA) and Bering Sea/Aleutian Islands (BS/AI) groundfish plan teams will meet in Seattle, WA.

DATES: The meetings will be held September 10–13, 2013. The meetings will begin at 9 a.m. on Tuesday, September 10, and continue through Friday September 13, 2013.

ADDRESSES: The meetings will be held at the Alaska Fisheries Science Center, 7600 Sand Point Way NE., Building 4, National Marine Mammal Lab Room 2039 (GOA Plan Team) and Traynor Room 2076 (BS/AI Plan Team, Joint meeting), Seattle, WA.

Council address: North Pacific Fishery Management Council, 605 W. 4th Ave., Suite 306, Anchorage, AK 99501–2252.

FOR FURTHER INFORMATION CONTACT: Jane DiCosimo or Diana Stram, NPFMC; telephone: (907) 271–2809.

SUPPLEMENTARY INFORMATION: Agenda: Principal business is to recommend proposed groundfish catch specifications for 2014/15. The teams also will review status reports on various management actions, review the draft Ecosystems Considerations Chapter, review the draft BSAI forage fish chapter, review proposed changes to Bering Sea/Aleutian Island and Gulf of Alaska groundfish stock assessment models, as well as other reports. The Agenda is subject to change, and the latest version is posted at *http://www.alaskafisheries.noaa.gov/npfmc/PDFdocuments/meetins/GPTagenda912*.

Although non-emergency issues not contained in this agenda may come before this group for discussion, those issues may not be the subject of formal action during these meetings. 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 Fishery Conservation and Management Act, provided the public has been notified of the Council's intent to take final action to address the emergency.

Special Accommodations

These meetings are physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should be directed to Gail Bendixen, (907) 271–2809, at least 5 working days prior to the meeting date.

Dated: August 16, 2013.

William D. Chappell,

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

[FR Doc. 2013–20391 Filed 8–20–13; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XC813

New England Fishery Management Council; Public Meeting

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

ACTION: Notice; public meeting.

SUMMARY: The New England Fishery Management Council (Council) is scheduling a public meeting of its Joint Groundfish/Habitat Committees on September 5, 2013 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 meeting will be held on Thursday, September 5, 2013 at 9 a.m.

ADDRESSES: The meeting will be held at the Sheraton Harborside Hotel, 250 Market Street, Portsmouth, NH 03801; telephone: (603) 431–2300; fax: (603) 433–5649.

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: The Council's Habitat and Groundfish Oversight Committees will meet jointly to discuss alternatives under development in Omnibus Essential Fish Habitat Amendment 2. Specifically, the Committees will discuss information collected during a series of interviews between staff and industry members, including a technical review conducted by the Council's Habitat Plan Development and Closed Area Technical Teams. Based on the industry information and the associated technical guidance, the Committee may recommend that the Council adjust some of the management alternatives prior to completion of the draft environmental impact statement. In addition, the Committees will discuss and approve a framework adjustment and data collection process related to groundfish management areas. The Committees will also review the amendment timeline and discuss 2014 management priorities. The Groundfish Committee may also address issues under development for Framework 51 to the Northeast Multispecies (Groundfish) fishery management plan. A closed session will be used to review advisory panel appointments.

Although non-emergency issues not contained in this agenda may come before this group for discussion, those issues may not be the subject of formal action during this meeting. 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.

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: August 16, 2013.

William D. Chappell,

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

[FR Doc. 2013–20389 Filed 8–20–13; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XC819

New England Fishery Management Council; Public Meeting

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

ACTION: Notice; public meeting.

SUMMARY: The New England Fishery Management Council (Council) is scheduling a public meeting of its Whiting Advisory Panel on September 9, 2013 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 meeting will be held on Monday, September 9, 2013 at 10 a.m.

ADDRESSES:

Meeting address: The meeting will be held at the Hilton Garden Inn, One Thurber Street, Warwick, RI 02886; telephone: (401) 734–9600; fax: (401) 734–9700.

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: The advisors will develop recommendations for Georges Bank yellowtail flounder accountability measures to be considered as alternatives in Multispecies Framework Adjustment 51. Since combined discards are estimated for small mesh gears, rather than fisheries, industry advisors for the squid fishery may have interest in this meeting. These recommendations will be presented to the Groundfish Oversight Committee on September 17, 2013 in Portsmouth, NH. Framework Adjustment 51 will be approved by the Council at the November 2013 Council meeting and implemented on or before May 1, 2014. Other small mesh fishery issues may also be discussed as time permits, such as adjustments to management measures in a 2015–17 specifications package to be prepared in 2014.

Although non-emergency issues not contained in this agenda may come before this group for discussion, those issues may not be the subject of formal action during this meeting. 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.

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: August 16, 2013.

William D. Chappell,

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

[FR Doc. 2013–20390 Filed 8–20–13; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XC253

Endangered Species; File No. 16733

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

ACTION: Issuance of permit.

SUMMARY: Notice is hereby given that NMFS Southeast Fisheries Science Center (SEFSC; Responsible Party: Bonnie Ponwith), 75 Virginia Beach Dr., Miami, FL 33149 has been issued a permit to take loggerhead (*Caretta caretta*), green (*Chelonia mydas*),

Kemp's ridley (*Lepidochelys kempii*), hawksbill (*Eretmochelys imbricata*), leatherback (*Dermochelys coriacea*), and olive ridley (*L. olivacea*) sea turtles for purposes of scientific research.

ADDRESSES: The permit and related documents are available for review upon written request or by appointment in the following offices:

Permits and Conservation Division, Office of Protected Resources, NMFS, 1315 East-West Highway, Room 13705, Silver Spring, MD 20910; phone (301) 427–8401; fax (301) 713–0376;

Northeast Region, NMFS, 55 Great Republic Drive, Gloucester, MA 01930; phone (978) 281–9328; fax (978) 281–9394; and

Southeast Region, NMFS, 263 13th Ave South, St. Petersburg, FL 33701; phone (727) 824–5312; fax (727) 824–5309.

FOR FURTHER INFORMATION CONTACT: Amy Hapeman or Kristy Beard, (301) 427–8401.

SUPPLEMENTARY INFORMATION: On September 24, 2012, notice was published in the **Federal Register** (77 FR 58812) that a request for a scientific research permit to take loggerhead, green, Kemp's ridley, hawksbill, leatherback, and olive ridley sea turtles had been submitted by the above-named organization. The requested permit has been issued under the authority of the Endangered Species Act of 1973, as amended (ESA; 16 U.S.C. 1531 *et seq.*) and the regulations governing the taking, importing, and exporting of endangered and threatened species (50 CFR parts 222–226).

The permit authorizes aerial, vessel, and acoustic surveys on sea turtles in the North Atlantic Ocean, Gulf of Mexico, Caribbean Sea and their embayments. Sea turtles may be directly captured by hand or using nets or alternatively, sea turtle may be obtained from other legal sources. Authorized procedures for captured sea turtles include: measurements, laboratory experiments, biological sampling, temporary marking, tracking, ultrasound, and/or attachment of transmitters before release back to the wild. Up to six sea turtles may accidentally die over the five-year life of the permit.

Issuance of this permit, as required by the ESA, was based on a finding that such permit (1) was applied for in good faith, (2) will not operate to the disadvantage of such endangered or threatened species, and (3) is consistent with the purposes and policies set forth in section 2 of the ESA.

Dated: August 16, 2013.

P. Michael Payne,

Chief, Permits and Conservation Division, Office of Protected Resources, National Marine Fisheries Service.

[FR Doc. 2013–20367 Filed 8–20–13; 8:45 am]

BILLING CODE 3510–22–P

CONSUMER PRODUCT SAFETY COMMISSION

Sunshine Act Meeting

TIME AND DATE: Wednesday, August 21, 2013, 10 a.m.–11 a.m.

PLACE: Room 420, Bethesda Towers, 4330 East West Highway, Bethesda, Maryland.

STATUS: Commission Meeting—Open to the Public

MATTERS TO BE CONSIDERED *Decisional Matter:* Bassinets and Cradles—Final Rule.

A live Webcast of the Meeting can be viewed at *www.cpsc.gov/webcast.*

For a recorded message containing the latest agenda information, call (301) 504–7948.

CONTACT PERSON FOR MORE INFORMATION: Todd A. Stevenson, Office of the Secretary, U.S. Consumer Product Safety Commission, 4330 East West Highway, Bethesda, MD 20814, (301) 504–7923.

Dated: August 16, 2013.

Todd A. Stevenson,

Secretary.

[FR Doc. 2013–20470 Filed 8–19–13; 11:15 am]

BILLING CODE 6355–01–P

DEPARTMENT OF DEFENSE

Office of the Secretary

Strategic Environmental Research and Development Program, Scientific Advisory Board; Notice of Federal Advisory Committee Meeting

AGENCY: Department of Defense.

ACTION: Notice.

SUMMARY: 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), and 41 CFR 102–3.150, the Department of Defense announces an open meeting of the Strategic Environmental Research and Development Program, Scientific Advisory Board (SAB). This notice is published in accordance with Section 10(a)(2) of the Federal Advisory Committee Act (Pub. L. 92–463).

DATES: Wednesday, September 11, 2013, from 9:00 a.m. to 5:00 p.m. and Thursday, September 12, 2013, from 9:00 a.m. to 4:25 p.m.

ADDRESSES: Potomac Institute for Policy Studies, 901 North Stuart Street, Suite 200, Arlington, VA 22203.

FOR FURTHER INFORMATION CONTACT: Mr. Jonathan Bunger, SERDP Office, 4800 Mark Center Drive, Suite 17D08, Alexandria, VA 22350–3600; or by telephone at (571) 372–6384.

SUPPLEMENTARY INFORMATION: Pursuant to 5 U.S.C. 552b and 41 CFR 102–3.140 through 102–3.165, and the availability of space, this meeting is open to the public. Seating is on a first-come basis.

The purpose of the September 11–12, 2013 meeting is to review new start research and development projects requesting Strategic Environmental Research and Development Program funds in excess of $1 million over the proposed length of the project as required by the SERDP Statute, U.S. Code—Title 10, Subtitle A, Part IV, Chapter 172, § 2904. The full agenda follows:

Wednesday, September 11, 2013

9:00 a.m	Convene/Opening Remarks Approval of June 2013 Minutes	Mr. Joseph Francis, Chair.
9:10 a.m	Program Update	Dr. Anne Andrews, Acting Executive Director.
9:25 a.m	Unexploded Ordnance Workshop and Munitions Response Overview.	Dr. Herb Nelson, Munitions Response Program Manager.
9:55 a.m	14 MR01–007 (MR–2409): Empirical Investigation of the Factors Influencing Marine Applications of EMI (FY14 New Start).	Dr. Thomas Bell, SAIC, Arlington, VA.
10:40 a.m	Break.	
10:55 a.m	14 MR01–006 (MR–2408): Finite Element Modeling of Scattering from Underwater Proud and Buried Military Munitions (FY14 New Start).	Dr. Ahmad Abawi, Heat, Light, and Sound Research, Inc., La Jolla, CA.
11:40 a.m	Chlorinated Solvents Workshop	Dr. Andrea Leeson, Environmental Restoration Program Manager.

12:00 p.m	Lunch.	
1:00 p.m	Environmental Restoration Overview	Dr. Andrea Leeson, Environmental Restoration Program Manager.
1:10 p.m	14 ER01–018 (ER–2419): High Resolution Delineation of Contaminant Concentrations, Biogeochemical Processes, and Microbial Communities in Saturated Subsurface Environments (FY14 New Start).	Dr. William Jackson, Texas Tech University, Lubbock, TX.
1:55 p.m	14 ER01–037 (ER–2420): A High Resolution Passive Flux Meter Approach Based on Colorimetric Responses (FY14 New Start).	Dr. Michael Annable, University of Florida, Gainesville, FL.
2:40 p.m	Break.	
2:55 p.m	14 ER01–039 (ER–2421): Investigating the Sensitivity of Emerging Geophysical Technologies to Immobile Porosity and Isolated DNAPL and Dissolved/Sorbed VOC Mass in Fractured Media (FY14 New Start).	Dr. Lee Slater, Rutgers University-Newark, Newark, NJ.
3:40 p.m	Environmental Restoration Overview	Dr. Andrea Leeson, Environmental Restoration Program Manager.
3:50 p.m	14 ER05–001 (ER–2217): Robust Antifouling Membranes for Sustainable Wastewater Treatment by Forward Osmosis in FOBs (FY14 Follow-On).	Dr. Menachem Elimelech, Yale University, New Haven, CT.
4:35 p.m	Strategy Session	Dr. Anne Andrews, Acting Executive Director.
5:00 p.m	Public Discussion/Adjourn for the day.	
Thursday, September 12, 2013		
9:00 a.m	Convene	Mr. Joseph Francis, Chair.
9:10 a.m	Weapons Systems and Platforms Overview	Dr. Robin Nissan, Weapons Systems and Platforms Program Manager.
9:20 a.m	14 WP02–003 (WP–2402): Novel Chemistries for Replacement of Methylene Dianiline in Polyimide Composites (FY14 New Start).	Dr. John La Scala, Army Research Laboratory, Aberdeen Proving Ground, MD.
10:05 a.m	Break.	
10:20 a.m	Resource Conservation and Climate Change Overview	Dr. John Hall, Resource Conservation and, Climate Change, Program Manager.
10:30 a.m	14 RC01–008 (RC–2432): The Impact of Non-Native Predators on Pollinators and Native Plant Pollination Services: a Case Study in an Invaded Dryland Hawaiian Ecosystem (FY14 New Start).	Dr. Christina Liang, USDA Forest Service, Hilo, HI.
11:15 a.m	14 RC01–009 (RC–2433): Recovery of Native Plant Communities and Ecological Processes Following Removal of Non-Native, Invasive Ungulates from Pacific Island Forests (FY14 New Start).	Dr. Creighton Litton, University of Hawaii at Manoa, Honolulu, HI.
12:00 p.m	Lunch.	
1:00 p.m	14 RC01–015 (RC–2434): Seed Dispersal Networks and Novel Ecosystem Functioning in Hawaii (FY14 New Start).	Dr. Jeffrey Foster, Northern Arizona University, Flagstaff, AZ.
1:45 p.m	Resource Conservation and Climate Change Overview	Dr. John Hall, Resource Conservation and, Climate Change, Program Manager.
1:55 p.m	14 RC02–005 (RC–2435): Effect of Arctic Amplification on Design Snow, Loads in Alaska (FY14 New Start).	Ms. Kathleen Jones, Cold Regions Research and Engineering Laboratory, Hanover, NH.
2:40 p.m	Break.	
2:55 p.m	14 RC02–017 (RC–2436): Improving Design Methodologies and Assessment Tools for Building on Permafrost in a Warming Climate (FY14 New Start).	Mr. Kevin Bjella, Cold Regions Research and, Engineering Laboratory , Ft. Wainwright, AK.
3:40 p.m	14 RC02–020 (RC–2437): Developing Smart Infrastructure for a Changing Arctic Environment using Distributed Fiber-Optic Sensing Methods, (FY14 New Start).	Dr. Jonathan Ajo-Franklin, Lawrence Berkeley National Laboratory, Berkeley, CA.
4:25 p.m	Public Discussion/Adjourn.	

Pursuant to 41 CFR 102–3.105(j) and 102–3.140, and section 10(a)(3) of the Federal Advisory Committee Act of 1972, the public or interested organizations may submit written statements to the Strategic Environmental Research and Development Program, Scientific Advisory Board. Written statements to the committee may be submitted to the committee at any time or in response to an approved meeting agenda.

All written statements shall be submitted to the Designated Federal Officer (DFO) for the Strategic Environmental Research and Development Program, Scientific Advisory Board. The DFO will ensure that the written statements are provided to the membership for their consideration. Contact information for the DFO can be obtained from the GSA's FACA Database at *http://facasms.fido.gov/.*

Time is allotted at the close of each meeting day for the public to make comments. Oral comments are limited to 5 minutes per person.

Dated: August 16, 2013.

Aaron Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 2013–20397 Filed 8–20–13; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Department of the Navy

[Docket ID: USN–2013–0032]

Proposed Collection; Comment Request

AGENCY: Department of the Navy, DoD.

ACTION: Notice.

In compliance with Section 3506(c)(2)(A) of 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: (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 information collection; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) 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 October 21, 2013.

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:* Federal Docket Management System Office, 4800 Mark Center Drive, East Tower, Suite 02G09, Alexandria, VA 22350–3100.

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.

Any associated form(s) for this collection may be located within this same electronic docket and downloaded for review/testing. Follow the instructions at *http://www.regulations.gov* for submitting comments. Please submit comments on any given form identified by docket number, form number, and title.

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 Commandant of Midshipmen, Operations Office, United States Naval Academy, 101 Buchanan Road, Annapolis, MD 21402–5101, or contact Commandant's Operations Officer, telephone (410) 293–7125.

Title; Associated Form; and OMB Number: United States Naval Academy Sponsor Application contained within the USNA Admission's Web site; OMB Control Number 0703–0054.

Needs and Uses: This collection of information is necessary to determine the eligibility and overall compatibility between sponsor applicants and Fourth Class Midshipmen at the United States Naval Academy. An analysis of the information collection is made by the Sponsor Program Director during the process in order to best match sponsors with Midshipmen.

Affected Public: Individuals or households; Federal Government.

Annual Burden Hours: 800.

Number of Respondents: 800.

Responses per Respondent: 1.

Average Burden per Response: 1 hour.

Frequency: Annually.

SUPPLEMENTARY INFORMATION:

Summary of Information Collection

The sponsor program matches first year students with families in the community for a semblance of home away from the rigors of the academy. The application is used to evaluate and match sponsor families with incoming midshipmen of similar interests.

Dated: August 15, 2013.

Aaron Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 2013–20323 Filed 8–20–13; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF EDUCATION

Advisory Committee on Student Financial Assistance: Meeting

AGENCY: Advisory Committee on Student Financial Assistance, Education.

ACTION: Notice of an opening meeting/hearing.

SUMMARY: This notice sets forth the schedule and proposed agenda of a forthcoming open hearing/meeting of the Advisory Committee on Student Financial Assistance. This notice also describes the functions of the Advisory Committee. Notice of an advisory committee meeting is required under Section 10(a)(2) of the Federal Advisory Committee Act. This document is intended to notify the general public of their opportunity to attend.

DATES: *Date and Time:* Thursday, September 19, 2013, beginning at 9:00 a.m. and ending at approximately 3:00 p.m. (EDT).

ADDRESSES: DoubleTree by Hilton Washington, DC—Crystal City, Salon A & B, North Tower, 300 Army Navy Drive, Arlington, VA 22202.

FOR FURTHER INFORMATION CONTACT: Ms. Janet Chen, Director of Programs, Advisory Committee on Student Financial Assistance, Capitol Place, 80 F Street NW., Suite 413, Washington, DC 20202–7582, (202) 219–2099.

SUPPLEMENTARY INFORMATION: The Advisory Committee on Student Financial Assistance is established under Section 491 of the Higher Education Act of 1965 as amended by Public Law 100–50 (20 U.S.C. 1098). The Advisory Committee serves as an independent source of advice and counsel to the Congress and the Secretary of Education on student financial aid policy. Since its inception, the congressional mandate requires the Advisory Committee to conduct objective, nonpartisan, and independent analyses on important aspects of the student assistance programs under Title IV of the Higher Education Act. In addition, Congress expanded the Advisory Committee's mission in the Higher Education Opportunity Act of 2008 to include several important areas: access, Title IV modernization, early information and needs assessment and review and analysis of regulations. Specifically, the Advisory Committee is to review, monitor and evaluate the Department of Education's progress in these areas and report recommended improvements to Congress and the Secretary.

The one-day hearing will consist of two main sessions. The morning session will be a discussion among representatives from the higher education community of the Advisory Committee's forthcoming report for HEA reauthorization scheduled to be released in September. The afternoon session will provide the public with an opportunity to comment on issues related to student aid for HEA reauthorization. To make public comments during the afternoon session, please email *ACSFA@ed.gov* with your name, contact information, and a brief summary of your comments by August 30, 2013. A limited number of speakers will be provided the opportunity to speak. Speakers will have up to five minutes to comment. Advisory Committee staff will contact presenters *prior to the hearing* to confirm participation.

Space for the hearing is limited and you are encouraged to register early. You may register on the Advisory Committee's Web site, *http://www2.ed.gov/ACSFA* or by sending an email to the following address: *ACSFA@ed.gov* or *Tracy.Deanna.Jones@ed.gov*. Please include your name, title, affiliation, mailing and email addresses, and telephone and fax numbers. If you are unable to register electronically, you may fax your registration information to the Advisory Committee staff office at (202) 219–3032. The registration deadline is Monday, September 9, 2013.

Individuals who will need accommodations for a disability in order to attend the hearing (i.e., interpreting

services, assistive listening devices, and/or materials in alternative format) should notify the Advisory Committee no later than Monday, September 9, 2013 by contacting Ms. Tracy Jones at (202) 219–2099 or via email at *tracy.deanna.jones@ed.gov*. We will attempt to meet requests after this date, but cannot guarantee availability of the requested accommodation. The hearing site is accessible to individuals with disabilities. Individuals who use a telecommunications device for the deaf (TTY) may call the Federal Information Relay Service (FRS) toll free at 1–800–877–8339.

Records are kept for Advisory Committee proceedings, and are available for inspection at the Office of the Advisory Committee on Student Financial Assistance, Capitol Place, 80 F Street NW., Suite 413, Washington, DC from the hours of 9:00 a.m. to 5:30 p.m. Eastern Standard Time, Monday through Friday, except Federal holidays. Information regarding the Advisory Committee is available on the Committee's Web site, *www2.ed.gov/ACSFA*.

Dated: August 14, 2013.

William J. Goggin,

Executive Director, Advisory Committee on Student Financial Assistance.

[FR Doc. 2013–20313 Filed 8–20–13; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. CP13–528–000]

Northern Natural Gas Company; Notice of Application

Take notice that on August 1, 2013, Northern Natural Gas Company (Northern), 1111 South 103rd Street, Omaha, Nebraska 68124, filed an application pursuant to section 7(c) of the Natural Gas Act and part 157 of the Commission's regulations to construct and operate certain compression, pipeline and meter station facilities, with appurtenances, located in Nebraska and Iowa. The estimated cost for the facilities proposed herein is $70,880,412. Northern states that the installation of the proposed facilities will allow it to serve up to 88,430 dekatherms per day of incremental peak day capacity, all as more fully set forth in the application which is on file with the Commission and open to public inspection. The filing may also be viewed on the web at *http://www.ferc.gov* using the ''eLibrary'' link. Enter the docket number excluding the last three digits in the docket number field to access the document. For assistance, contact FERC at *FERCOnlineSupport@ferc.gov* or call toll-free, (866) 208–3676 or TTY, (202) 502–8659.

Any questions regarding this application should be directed to Michael T. Loeffler, Senior Director, Certificates and External Affairs for Northern, 1111 South 103rd Street, Omaha, Nebraska 68124, or call (402) 398–7103, or by email *mike.loeffler@nngco.com.*

Pursuant to section 157.9 of the Commission's rules, 18 CFR 157.9, within 90 days of this Notice the Commission staff will either: Complete its environmental assessment (EA) and place it into the Commission's public record (eLibrary) for this proceeding; or issue a Notice of Schedule for Environmental Review. If a Notice of Schedule for Environmental Review is issued, it will indicate, among other milestones, the anticipated date for the Commission staff's issuance of the final environmental impact statement (FEIS) or EA for this proposal. The filing of the EA in the Commission's public record for this proceeding or the issuance of a Notice of Schedule for Environmental Review will serve to notify federal and state agencies of the timing for the completion of all necessary reviews, and the subsequent need to complete all federal authorizations within 90 days of the date of issuance of the Commission staff's FEIS or EA.

There are two ways to become involved in the Commission's review of this project. First, any person wishing to obtain legal status by becoming a party to the proceedings for this project should, on or before the comment date stated below file with the Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426, a motion to intervene in accordance with the requirements of the Commission's Rules of Practice and Procedure (18 CFR 385.214 or 385.211) and the Regulations under the NGA (18 CFR 157.10). A person obtaining party status will be placed on the service list maintained by the Secretary of the Commission and will receive copies of all documents filed by the applicant and by all other parties. A party must submit 7 copies of filings made in the proceeding with the Commission and must mail a copy to the applicant and to every other party. Only parties to the proceeding can ask for court review of Commission orders in the proceeding.

However, a person does not have to intervene in order to have comments considered. The second way to participate is by filing with the Secretary of the Commission, as soon as possible, an original and two copies of comments in support of or in opposition to this project. The Commission will consider these comments in determining the appropriate action to be taken, but the filing of a comment alone will not serve to make the filer a party to the proceeding. The Commission's rules require that persons filing comments in opposition to the project provide copies of their protests only to the party or parties directly involved in the protest.

Persons who wish to comment only on the environmental review of this project should submit an original and two copies of their comments to the Secretary of the Commission. Environmental commentors will be placed on the Commission's environmental mailing list, will receive copies of the environmental documents, and will be notified of meetings associated with the Commission's environmental review process. Environmental commentors will not be required to serve copies of filed documents on all other parties. However, the non-party commentors will not receive copies of all documents filed by other parties or issued by the Commission (except for the mailing of environmental documents issued by the Commission) and will not have the right to seek court review of the Commission's final order.

The Commission strongly encourages electronic filings of comments, protests and interventions in lieu of paper using the ''eFiling'' link at *http://www.ferc.gov.* Persons unable to file electronically should submit an original and 5 copies of the protest or intervention to the Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426.

Comment Date: September 4, 2013.

Dated: August 14, 2013.

Kimberly D. Bose,

Secretary.

[FR Doc. 2013–20347 Filed 8–20–13; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 12613–004]

Tygart, LLC; Notice of Application Accepted for Filing, Soliciting Motions to Intervene and Protests, Ready for Environmental Analysis, and Soliciting Comments, Recommendations, Preliminary Terms and Conditions, and Preliminary Fishway Prescriptions

Take notice that the following hydroelectric application has been filed with the Commission and is available for public inspection.

a. *Type of Application:* Original Major License.

b. *Project No.:* 12613–004.

c. *Date Filed:* April 30, 2013.

d. *Applicant:* Tygart, LLC.

e. *Name of Project:* Tygart Hydroelectric Project.

f. *Location:* The proposed project would be located at the U.S. Army Corps of Engineers' (Corps) Tygart Dam on the Tygart River in Taylor County, West Virginia. The project would occupy 1 acre of federal land managed by the Corps.

g. *Filed Pursuant to:* Federal Power Act, 16 U.S.C. 791 (a)–825(r).

h. *Applicant Contact:* David Sinclair, President, Advanced Hydro Solutions, 3000 Auburn Drive, Suite 430, Beachwood, OH 44122–4340 or by email at *David.Sinclair@advancedhydrosolutions.com.*

i. *FERC Contact:* Allyson Conner, (202) 502–6082 or *allyson.conner@ferc.gov*.

j. *Deadline for filing motions to intervene and protests, comments, recommendations, preliminary terms and conditions, and preliminary prescriptions:* 60 days from the issuance date of this notice; reply comments are due 105 days from the issuance date of this notice.

The Commission strongly encourages electronic filing. Please file motions to intervene, protests, comments, recommendations, preliminary terms and conditions, and preliminary fishway prescriptions using the Commission's eFiling system at *http://www.ferc.gov/docs-filing/efiling.asp.* Commenters can submit brief comments up to 6,000 characters, without prior registration, using the eComment system at *http://www.ferc.gov/docs-filing/ecomment.asp.* You must include your name and contact information at the end of your comments. For assistance, please contact FERC Online Support at *FERCOnlineSupport@ferc.gov,* (866) 208–3676 (toll free), or (202) 502–8659 (TTY). In lieu of electronic filing, please send a paper copy to: Secretary, Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426. The first page of any filing should include docket number P–12613–004.

The Commission's Rules of Practice require all intervenors filing documents with the Commission to serve a copy of that document on each person on the official service list for the project. Further, if an intervenor files comments or documents with the Commission relating to the merits of an issue that may affect the responsibilities of a particular resource agency, they must also serve a copy of the document on that resource agency.

k. This application has been accepted for filing and is now ready for environmental analysis.

l. *The proposed project would utilize the Corps' existing Tygart Dam, and would consist of the following new facilities:* (1) A 15-foot-wide by 21-foot-high steel intake structure; (2) a 270-foot-long penstock which would bifurcate into a 110-foot-long and a 150-foot-long penstock; (3) a 121-foot-long by 99-foot-wide concrete powerhouse; (4) two unequal-sized turbines with a combined capacity of 30 megawatts; (5) an excavated 60-foot-wide by 160-foot-long tailrace; (6) a 1.54-mile-long transmission line; and (7) a switchyard with appurtenant facilities. The average annual generation is estimated to be 108,600 megawatt-hours.

The proposed project would operate in a run-of-release mode using flows made available by the Corps.

The proposed project boundary would enclose all of the generating facilities located on 1 acre of Corps' land as well as the transmission line located on 7 acres of privately owned land.

m. A copy of the application is available for review at the Commission in the Public Reference Room or may be viewed on the Commission's Web site at *http://www.ferc.gov* using the ''eLibrary'' link. Enter the docket number excluding the last three digits in the docket number field to access the document. For assistance, contact FERC Online Support. A copy is also available for inspection and reproduction at the address in item h above.

Register online at *http://www.ferc.gov/docs-filing/esubscription.asp* to be notified via email of new filings and issuances related to this or other pending projects. For assistance, contact FERC Online Support.

n. Anyone may submit comments, a protest, or a motion to intervene in accordance with the requirements of Rules of Practice and Procedure, 18 CFR 385.210, .211, and .214. In determining the appropriate action to take, the Commission will consider all protests or other comments filed, but only those who file a motion to intervene in accordance with the Commission's Rules may become a party to the proceeding. Any comments, protests, or motions to intervene must be received on or before the specified comment date for the particular application.

All filings must (1) bear in all capital letters the title ''PROTEST'', ''MOTION TO INTERVENE'', ''COMMENTS,'' ''REPLY COMMENTS,'' ''RECOMMENDATIONS,'' ''PRELIMINARY TERMS AND CONDITIONS,'' or ''PRELIMINARY FISHWAY PRESCRIPTIONS;'' (2) set forth in the heading the name of the applicant and the project number of the application to which the filing responds; (3) furnish the name, address, and telephone number of the person protesting or intervening; and (4) otherwise comply with the requirements of 18 CFR 385.2001 through 385.2005. All comments, recommendations, terms and conditions or prescriptions must set forth their evidentiary basis and otherwise comply with the requirements of 18 CFR 4.34(b). Agencies may obtain copies of the application directly from the applicant. A copy of any protest or motion to intervene must be served upon each representative of the applicant specified in the particular application. A copy of all other filings in reference to this application must be accompanied by proof of service on all persons listed in the service list prepared by the Commission in this proceeding, in accordance with 18 CFR 4.34(b) and 385.2010.

o. *Procedural Schedule:* The application will be processed according to the following revised Hydro Licensing Schedule. Revisions to the schedule may be made as appropriate.

Milestone	Target date
Filing of recommendations, preliminary terms and conditions, and preliminary fishway prescriptions	October 13, 2013.
Commission issues EA	February 10, 2014.
Comments on EA	March 12, 2014.

Milestone	Target date
Modified terms and conditions	May 11, 2014.

p. Final amendments to the application must be filed with the Commission no later than 30 days from the issuance date of this notice.

q. *A license applicant must file no later than 60 days following the date of issuance of the notice of acceptance and ready for environmental analysis provided for in 5.22:* (1) A copy of the water quality certification; (2) a copy of the request for certification, including proof of the date on which the certifying agency received the request; or (3) the evidence of waiver of water quality certification.

r. Any qualified applicant desiring to file a competing application must submit to the Commission, on or before the specified intervention deadline date, a competing development application, or a notice of intent to file such an application. Submission of a timely notice of intent allows an interested person to file the competing development application no later than 120 days after the specified intervention deadline date. Applications for preliminary permits will not be accepted in response to this notice.

A notice of intent must specify the exact name, business address, and telephone number of the prospective applicant, and must include an unequivocal statement of intent to submit a development application. A notice of intent must be served on the applicant(s) named in this public notice.

Dated: August 14, 2013.

Kimberly D. Bose,

Secretary.

[FR Doc. 2013–20348 Filed 8–20–13; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings

Take notice that the Commission has received the following Natural Gas Pipeline Rate and Refund Report filings:

Filings Instituting Proceedings

Docket Numbers: RP10–149–000.

Applicants: Great Lakes Gas Transmission Limited Par.

Description: Petition to Amend Settlement and Motion for Shortened Answer Period and Expedited Action.

Filed Date: 8/13/13.

Accession Number: 20130813–5099.

Comments Due: 5 p.m. ET 8/20/13.

Docket Numbers: RP13–1245–000.

Applicants: Gulf South Pipeline Company, LP.

Description: New No Notice Service (NNS–A)—In compliance with App to Aband Capacity by Lease to be effective 2/1/2014.

Filed Date: 8/13/13.

Accession Number: 20130813–5036.

Comments Due: 5 p.m. ET 8/26/13.

The filings are accessible in the Commission's eLibrary system by clicking on the links or querying the docket number.

Any person desiring to intervene or protest in any of the above proceedings must file in accordance with Rules 211 and 214 of the Commission's Regulations (18 CFR 385.211 and 385.214) on or before 5:00 p.m. Eastern time on the specified comment date. Protests may be considered, but intervention is necessary to become a party to the proceeding.

eFiling is encouraged. More detailed information relating to filing requirements, interventions, protests, service, and qualifying facilities filings can be found at: *http://www.ferc.gov/docs-filing/efiling/filing-req.pdf.* For other information, call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Dated: August 14, 2013.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2013–20404 Filed 8–20–13; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings #2

Take notice that the Commission received the following electric rate filings:

Docket Numbers: ER13–2147–000.

Applicants: Frontier Utilities New York LLC.

Description: Normal filing name change to be effective 8/14/2013.

Filed Date: 8/13/13.

Accession Number: 20130813–5049.

Comments Due: 5 p.m. ET 9/3/13.

Docket Numbers: ER13–2148–000.

Applicants: Southern California Edison Company.

Description: Agmt for Additional SCE Connection to Eldorado System with LADWP SRP NPC to be effective 8/13/2013.

Filed Date: 8/13/13.

Accession Number: 20130813–5087.

Comments Due: 5 p.m. ET 9/3/13.

Docket Numbers: ER13–2149–000.

Applicants: ISO New England Inc.

Description: EL13–72–000 to be effective 6/25/2013.

Filed Date: 8/13/13.

Accession Number: 20130813–5098.

Comments Due: 5 p.m. ET 9/3/13.

Docket Numbers: ER13–2150–000.

Applicants: Southern California Edison Company.

Description: Southern California Edison Company submits Notice of Cancellation of Interim Agmt to be effective 8/13/2013.

Filed Date: 8/13/13.

Accession Number: 20130813–5114.

Comments Due: 5 p.m. ET 9/3/13.

The filings are accessible in the Commission's eLibrary system by clicking on the links or querying the docket number.

Any person desiring to intervene or protest in any of the above proceedings must file in accordance with Rules 211 and 214 of the Commission's Regulations (18 CFR 385.211 and 385.214) on or before 5:00 p.m. Eastern time on the specified comment date. Protests may be considered, but intervention is necessary to become a party to the proceeding.

eFiling is encouraged. More detailed information relating to filing requirements, interventions, protests, service, and qualifying facilities filings can be found at: *http://www.ferc.gov/docs-filing/efiling/filing-req.pdf.* For other information, call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Dated: August 13, 2013.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2013–20402 Filed 8–20–13; 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: ER10–2848–003; ER11–1939–005; ER11–2754–005; ER12–

999–003; ER12–1002–003; ER12–1005–003; ER12–1006–003; ER12–1007–004.

Applicants: AP Holdings, LLC, AP Gas & Electric (PA), LLC, AP Gas & Electric (TX), LLC, AP Gas & Electric (MD), LLC, AP Gas & Electric (NJ), LLC, AP Gas & Electric (IL), LLC, AP Gas & Electric (OH), LLC, AP Gas & Electric (NY), LLC.

Description: Notification of Non-Material Change in Status of AP Holdings Subsidiaries.

Filed Date: 8/12/13.

Accession Number: 20130812–5233.

Comments Due: 5 p.m. ET 9/3/13.

Docket Numbers: ER10–2985–013; ER10–3049–014; ER10–3051–014.

Applicants: Champion Energy Marketing LLC, Champion Energy Services, LLC, Champion Energy, LLC.

Description: Notice of Change in Status for Champion Energy Marketing LLC, et al.

Filed Date: 8/12/13.

Accession Number: 20130812–5234.

Comments Due: 5 p.m. ET 9/3/13.

Docket Numbers: ER12–1566–003.

Applicants: Copper Mountain Solar 2, LLC.

Description: Notice of Non-Material Change in Status of Copper Mountain Solar 2, LLC.

Filed Date: 8/12/13.

Accession Number: 20130812–5238.

Comments Due: 5 p.m. ET 9/3/13.

Take notice that the Commission received the following electric securities filings:

Docket Numbers: ES13–38–000.

Applicants: MDU Resources Group, Inc.

Description: MDU Resources Group, Inc.'s Amendment to July 30, 2013 Application to increase its short term borrowings.

Filed Date: 8/13/13.

Accession Number: 20130813–5046.

Comments Due: 5 p.m. ET 8/23/13.

The filings are accessible in the Commission's eLibrary system by clicking on the links or querying the docket number.

Any person desiring to intervene or protest in any of the above proceedings must file in accordance with Rules 211 and 214 of the Commission's Regulations (18 CFR 385.211 and 385.214) on or before 5:00 p.m. Eastern time on the specified comment date. Protests may be considered, but intervention is necessary to become a party to the proceeding.

eFiling is encouraged. More detailed information relating to filing requirements, interventions, protests, service, and qualifying facilities filings can be found at: *http://www.ferc.gov/docs-filing/efiling/filing-req.pdf.* For other information, call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Dated: August 13, 2013.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2013–20401 Filed 8–20–13; 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: ER13–186–003

Applicants: Midcontinent Independent System Operator, Inc.

Description: 08–14–13 ITC BRP Compliance to be effective 6/1/2013.

Filed Date: 8/14/13

Accession Number: 20130814–5053

Comments Due: 5 p.m. ET 9/4/13

Docket Numbers: ER13–1422–003

Applicants: Ebensburg Power Company

Description: Inquiry Response to be effective 5/12/2013.

Filed Date: 8/14/13

Accession Number: 20130814–5044

Comments Due: 5 p.m. ET 9/4/13

Docket Numbers: ER13–1523–001

Applicants: Blythe Energy Inc.

Description: Updated Market Power Analysis for Southwest Region of Blythe Energy Inc.

Filed Date: 8/13/13

Accession Number: 20130813–5173

Comments Due: 5 p.m. ET 10/15/13

Docket Numbers: ER13–1988–001

Applicants: Eligo Energy NY, LLC

Description: Amendment to Application for Market Based Rate to be effective 7/18/2013.

Filed Date: 8/14/13

Accession Number: 20130814–5039

Comments Due: 5 p.m. ET 9/4/13

Docket Numbers: ER13–2152–000

Applicants: New York Independent System Operator, Inc.

Description: Notice of Cancellation of Service Agreement No. 1677 to be effective 8/20/2013.

Filed Date: 8/13/13

Accession Number: 20130813–5146

Comments Due: 5 p.m. ET 9/3/13

Docket Numbers: ER13–2153–000

Applicants: NorthWestern Corporation

Description: NorthWestern Corporation submits Average System Cost Filing for Sales of Electric Power to the Bonneville Power Administration, FY 2014–2015.

Filed Date: 8/13/13

Accession Number: 20130813–5174

Comments Due: 5 p.m. ET 9/3/13

Docket Numbers: ER13–2154–000

Applicants: Public Service Company of Oklahoma

Description: PSO–WFEC Elsworth Delivery Point Agreement to be effective 7/15/2013.

Filed Date: 8/14/13

Accession Number: 20130814–5036

Comments Due: 5 p.m. ET 9/4/13

Docket Numbers: ER13–2155–000

Applicants: Idaho Power Company

Description: BPA REPSIA Average System Cost to be effective 10/1/2013.

Filed Date: 8/14/13

Accession Number: 20130814–5042

Comments Due: 5 p.m. ET 9/4/13

Docket Numbers: ER13–2156–000

Applicants: Midcontinent Independent System Operator, Inc.

Description: 08–14–13 ITCM Compliance to be effective 7/18/2013.

Filed Date: 8/14/13

Accession Number: 20130814–5061

Comments Due: 5 p.m. ET 9/4/13

The filings are accessible in the Commission's eLibrary system by clicking on the links or querying the docket number.

Any person desiring to intervene or protest in any of the above proceedings must file in accordance with Rules 211 and 214 of the Commission's Regulations (18 CFR 385.211 and 385.214) on or before 5:00 p.m. Eastern time on the specified comment date. Protests may be considered, but intervention is necessary to become a party to the proceeding.

eFiling is encouraged. More detailed information relating to filing requirements, interventions, protests, service, and qualifying facilities filings can be found at: *http://www.ferc.gov/docs-filing/efiling/filing-req.pdf.* For other information, call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Dated: August 14, 2013.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2013–20403 Filed 8–20–13; 8:45 am]

BILLING CODE 6717–01–P

ENVIRONMENTAL PROTECTION AGENCY

[FRL–9900–13–ORD; Docket ID No. EPA–HQ–ORD–2011–0391]

Draft Toxicological Review of Benzo[a]pyrene: In Support of the Summary Information in the Integrated Risk Information System (IRIS)

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of public comment period and public meeting.

SUMMARY: EPA is announcing a 60-day public comment period for the external review draft human health assessment titled ''Toxicological Review of benzo[a]pyrene: In Support of Summary Information on the Integrated Risk Information System (IRIS)'' (EPA/635/R–13/138) and the draft peer review charge questions. The draft assessment was prepared by the National Center for Environmental Assessment (NCEA) within the EPA Office of Research and Development (ORD). EPA is releasing this draft assessment and peer review charge questions for the purpose of public comment. This draft assessment is not final as described in EPA's information quality guidelines, and it does not represent and should not be construed to represent Agency policy or views. The draft assessment will also be discussed at the first bi-monthly IRIS public meeting scheduled for October 23–24, 2013.

DATES: The public comment period begins, August 21, 2013, and ends October 21, 2013. Technical comments should be in writing and must be received by EPA by October 21, 2013.

Discussion of the draft toxicological review of benzo[a]pyrene will be included on the agenda of the bi-monthly IRIS public meeting to be held on October 23–24, 2013, at EPA offices in Arlington, Virginia. Information on this meeting, including meeting location, time, and registration and participation procedures are available at the IRIS Web site (*http://www.epa.gov/iris/publicmeeting/*).

FOR FURTHER INFORMATION CONTACT: For general information about IRIS public meetings, please contact Christine Ross, IRIS Staff, Environmental Protection Agency, National Center for Environmental Assessment (NCEA), Mail Code 8601P; telephone: 703–347–8592; facsimile: 703–347–8689; or email:*ross.christine@epa.gov*. For information regarding the subject matter of a specific meeting, please contact the EPA representative identified on the IRIS public meeting Web site (*http://www.epa.gov/iris/publicmeeting/*).

ADDRESSES: The draft ''Toxicological Review of benzo[a]pyrene: In Support of Summary Information on the Integrated Risk Information System (IRIS)'' is available primarily via the Internet on the NCEA home page under the Recent Additions and Publications menus at *http://www.epa.gov/ncea*. A limited number of paper copies are available from the Information Management Team, NCEA; telephone: 703–347–8561; facsimile: 703–347–8691. If you request a paper copy, please provide your name, mailing address, and the document title.

Discussion of the draft toxicological review of benzo[a]pyrene will be included on the agenda of the bi-monthly IRIS public meeting to be held on October 23–24, 2013, at EPA offices in Arlington, Virginia. Detailed information regarding meeting location, time, and registration and participation procedures will be available at the IRIS Web site (*http://www.epa.gov/iris/publicmeeting/*).

SUPPLEMENTARY INFORMATION:

I. Information About IRIS

EPA's IRIS Program is a human health assessment program that evaluates quantitative and qualitative risk information on effects that may result from exposure to chemical substances found in the environment. Through the IRIS Program, EPA provides the highest quality science-based human health assessments to support the Agency's regulatory activities and decisions to protect public health. The IRIS database contains information for more than 500 chemical substances that can be used to support the first two steps (hazard identification and dose-response evaluation) of the human health risk assessment process. When supported by available data, IRIS provides health effects information and toxicity values for health effects (including cancer and effects other than cancer). Government and others combine IRIS toxicity values with exposure information to characterize public health risks of chemical substances; this information is then used to support risk management decisions designed to protect public health.

II. Bi-Monthly Public Meeting

In addition to the 60-day public comment period announced in this notice, the draft assessment will be discussed at the first bi-monthly IRIS public meeting scheduled for October 23–24, 2013. Information on this meeting, including meeting location, time, and registration and participation procedures, will be available at the IRIS Web site (*http://www.epa.gov/iris/publicmeeting/*). The purpose of the IRIS public meeting is to allow all interested parties to present scientific and technical comments on the draft IRIS health assessment and charge questions to EPA and other interested parties attending the meeting. The public comments provided in response to this notice, and at the IRIS public meeting, will be considered by the Agency prior to submitting the draft assessment to the SAB for peer review.

III. Peer Review

After consideration of public comments by EPA, the draft assessment will be sent to the EPA's Science Advisory Board (SAB) Chemical Assessment Advisory Committee (CAAC) for peer review. The EPA SAB is a body established under the Federal Advisory Committee Act with a broad mandate to advise the Agency on scientific matters. The public comment period and bi-monthly public meeting announced in this notice are separate processes from the SAB/CAAC peer review. The SAB will schedule one or more public peer review meetings, which will be announced in a separate **Federal Register** Notice at a later date.

IV. How To Submit Technical Comments to the Docket at *http://www.regulations.gov*

Submit your comments, identified by Docket ID No. EPA–HQ–ORD–2011–0391 by one of the following methods:

- *http://www.regulations.gov:* Follow the on-line instructions for submitting comments
- Email: *Docket_ORD@epa.gov*
- Fax: 202–566–9744.
- Mail: Office of Environmental Information (OEI) Docket (Mail Code: 28221T), U.S. Environmental Protection Agency, 1200 Pennsylvania Ave. NW., Washington, DC 20460. The phone number is 202–566–1752.
- Hand Delivery: The OEI Docket is located in the EPA Headquarters Docket Center, EPA West Building, Room 3334, 1301 Constitution Ave. NW., Washington, DC. The EPA Docket Center's Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is 202–566–1744. Deliveries are only accepted during the docket's normal hours of operation, and special arrangements should be made for deliveries of boxed information. If you provide comments by mail or hand delivery, please submit one unbound original with pages numbered consecutively, and three copies of the comments. For attachments, provide an index, number pages consecutively with the comments, and submit an unbound original and three copies.

Instructions for submitting comments to the EPA Docket: Direct your comments to Docket ID No. EPA–HQ–ORD–2011–0391. Please ensure that your comments are submitted within the specified comment period. Comments received after the closing date will be marked ''late,'' and may only be considered if time permits. It is EPA's policy to include all comments it

receives in the public docket without change and to make the comments available online at *http://www.regulations.gov,* including any personal information provided, unless a comment includes information claimed to be confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through *http://www.regulations.gov* or email. The *http://www.regulations.gov* Web site is an ''anonymous access'' system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an email comment directly to EPA without going through *http://www.regulations.gov,* your email address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD–ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses. For additional information about EPA's public docket visit the EPA Docket Center homepage at *http://www.epa.gov/epahome/dockets.htm.*

All documents in the docket are listed in the *http://www.regulations.gov* index. Although listed in the index, some information is not publicly available, e.g., CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, will be publicly available only in hard copy. Publicly available docket materials are available either electronically in *http://www.regulations.gov* or in hard copy at the OEI Docket in the EPA Headquarters Docket Center.

FOR FURTHER INFORMATION CONTACT: For information on the federal docket, contact the Office of Environmental Information Docket; telephone: 202–566–1752; facsimile: 202–566–9744; or email: *Docket_ORD@epa.gov.*

For information on the bi-monthly IRIS public meeting please contact Christine Ross, IRIS Staff, National Center for Environmental Assessment, (8601P), U.S. EPA, 1200 Pennsylvania Avenue NW., Washington, DC 20460; telephone: 703–347–8592; facsimile: 703–347–8689; or email: *ross.christine@epa.gov.*

If you have questions about the document, contact Kathleen Newhouse, National Center for Environmental Assessment (NCEA); telephone: 707–347–8641; facsimile: 703–347–8689; or email: *FRN_Questions@epa.gov.*

Dated: August 15, 2013.

Abdel M. Kadry,

Acting Director, National Center for Environmental Assessment.

[FR Doc. 2013–19875 Filed 8–20–13; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OPP–2009–1017; FRL–9396–5]

Notice of Receipt of Requests To Voluntarily Cancel Certain Pesticide Registrations

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: In accordance with the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), EPA is issuing a notice of receipt of requests by registrants to voluntarily cancel certain pesticide registrations. This notice announces a request from Syngenta Crop Protection, LLC to voluntarily cancel the last two remaining tralkoxydim products registered for use in the United States. EPA intends to grant these requests at the close of the comment period for this announcement unless the Agency receives substantive comments within the comment period that would merit its further review of the requests, or unless the registrants withdraw their requests. If these requests are granted, any sale, distribution, or use of products listed in this notice will be permitted after the registration has been canceled only if such sale, distribution, or use is consistent with the terms as described in the final order.

DATES: Comments must be received on or before September 20, 2013.

ADDRESSES: Submit your comments, identified by docket identification (ID) number EPA–HQ–OPP–2009–1017, by one of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the online instructions for submitting comments. Do not submit electronically any information you consider to be Confidential Business Information (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.

Submit written withdrawal request by mail to: Pesticide Re-Evaluation Division (7508P), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave. NW., Washington, DC 20460–0001. ATTN: John W. Pates, Jr.

- *Hand Delivery:* To make special arrangements for hand delivery or delivery of boxed information, please follow the instructions at *http://www.epa.gov/dockets/contacts.htm.*

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

FOR FURTHER INFORMATION CONTACT: John W. Pates, Jr., Pesticide Re-Evaluation Division (7508P), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave. NW., Washington, DC 20460–0001; telephone number: (703) 308–8195; email address: *pates.john@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, human health, and agricultural advocates; the chemical industry; pesticide users; and members of the public interested in the sale, distribution, or use of pesticides.

B. What should I consider as I prepare my comments for EPA?

1. *Submitting CBI.* Do not submit this information to EPA through regulations.gov or email. Clearly mark the part or all of the information that you claim to be CBI. For CBI information in a disk or CD–ROM that you mail to EPA, mark the outside of the disk or CD–ROM as CBI and then identify electronically within the disk or CD–ROM the specific information that is claimed as CBI. In addition to one complete version of the comment that includes information claimed as CBI, a copy of the comment that does not contain the information claimed as CBI must be submitted for inclusion in the public docket. Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2.

2. *Tips for preparing your comments.* When submitting comments, remember to:

i. Identify the document by docket ID number and other identifying information (subject heading, **Federal Register** date and page number).

ii. Follow directions. The Agency may ask you to respond to specific questions or organize comments by referencing a Code of Federal Regulations (CFR) part or section number.

iii. Explain why you agree or disagree; suggest alternatives and substitute language for your requested changes.

iv. Describe any assumptions and provide any technical information and/or data that you used.

v. If you estimate potential costs or burdens, explain how you arrived at your estimate in sufficient detail to allow for it to be reproduced.

vi. Provide specific examples to illustrate your concerns and suggest alternatives.

vii. Explain your views as clearly as possible, avoiding the use of profanity or personal threats.

viii. Make sure to submit your comments by the comment period deadline identified.

II. What action is the agency taking?

This notice announces receipt by the Agency of requests from registrants to cancel 29 pesticide products registered under FIFRA section 3 or 24(c). These registrations are listed in sequence by registration number (or company number and 24(c) number) in Tables 1a and 1b of this unit.

This notice also announces receipt by EPA of requests from the registrant Syngenta Crop Protection, LLC (Syngenta) to cancel the last two remaining tralkoxydim product registrations. Tralkoxydim is a systemic, postemergence herbicide registered for agricultural use to selectively control certain annual grass weeds in wheat, barley, and triticale. Tolerances are currently established for tralkoxydim residues in or on the raw agricultural commodities barley and wheat (40 CFR 180.548). There are no residential uses currently registered for tralkoxydim. The registration review process for tralkoxydim began in September 2011, with the issuance of the Preliminary Work Plan for Registration Review in the docket EPA–HQ–OPP–2011–0706 for a 60-day comment period. The Tralkoxydim Final Work Plan for Registration Review was completed in February 2012, and the registration review Data Call-In was issued in February 2013. Syngenta is currently the only registrant of tralkoxydim products in the United States. In a letter to EPA, dated August 2, 2013, Syngenta requested voluntary cancellation of two tralkoxydim end-use products (EPA Registration Nos. 000100–01105 and 000100–01106). These are the last two tralkoxydim products registered for use in the United States. EPA is not proposing any tolerance actions for tralkoxydim at this time. If any tolerance actions become necessary in the future, there will be an announcement in the **Federal Register** and there will be a public comment period on the proposed action.

Unless the Agency determines that there are substantive comments that warrant further review of the requests or the registrants withdraw their requests, EPA intends to issue an order in the **Federal Register** canceling all of the affected registrations.

TABLE 1a—REGISTRATIONS WITH PENDING REQUESTS FOR CANCELLATION

Registration No.	Product name	Chemical name
000100–01125	Impasse Termite System	Lambda-cyhalothrin.
000100–01156	Impasse Premix GR	Lambda-cyhalothrin.
000100–01166	Impasse Termite Blocker	Lambda-cyhalothrin.
000264–01048	EXP3 Seed Applied Nematicide/Insecticide	Thiodicarb.
000432–01237	BES Garden Dust 10%	Carbaryl.
000432–01238	AES Carbaryl Insecticide Spray-RTU	Carbaryl.
000432–01239	BES Garden Dust 5%	Carbaryl.
000432–01244	AES Sevin Granules Ant, Flea, Tick & Grub Killer (1% Sevin)	Carbaryl.
001022–00563	Chapco KD	Potassium dimethyldithiocarbamate.
001022–00574	DCD–SDDC	Sodium dimethyldithiocarbamate.
001022–00577	Buffalo System II	Sodium dimethyldithiocarbamate.
009688–00296	Chemsico 0.51% Granular Propiconazole	Propiconazole.
010807–00448	Country Vet Flea & Tick Fogger with Growth Inhibitor	MGK 264, Pyrethrins (NO INERT USE), Pyriproxyfen, Permethrin.
010807–00454	Country Vet Fly Insecticide & Repellent for Horses	Stabilene, Pyrethrins (NO INERT USE), Piperonyl butoxide.
010807–00466	CB Country Vet 80	Piperonyl butoxide, Pyrethrins (NO INERT USE).
010807–00469	Country Vet Fogger with Esfenvalerate	Pyrethrins (NO INERT USE), Piperonyl butoxide, Esfenvalerate, MGK 264.
011556–00121	Advantage TM 110	Imidacloprid.
040391–00010	Entech Fog-10	MGK 264, Piperonyl butoxide, Pyrethrins (NO INERT USE).
060061–00107	Woodtreat XL Sapstain Control Chemical	1-Decanaminium, N-decyl-N,N-dimethyl-, chloride and Propiconazole.
060061–00114	Woodtreat P Sapstain Control Chemical	Propiconazole.
060061–00121	Woodtreat XP Sapstain Control Product	Propiconazole and Carbamic acid, butyl-, 3-iodo-2-propynyl ester.
060061–00124	Valvtect Marine Premium Diesel With Bioguard Additive	Morpholine, 4,4′-(2-ethyl-2-nitro-1,3-propanediyl)bis-, 4-(2-Nitrobutyl)morpholine.
073049–00450	Dinotefuran Fly Bait	Dinotefuron.
083558–00005	Paraquat Dichloride Technical	Paraquat dichloride.
MD–010001	Sevin Brand XLR Plus Carbaryl Insecticide	Carbaryl.
PA–010002	Sevin XLR Plus Carbaryl Insecticide	Carbaryl.
WI–110001	Starcane Ultra Herbicide	Fluroxypyr 1-methylheptyl ester.

TABLE 1b—TRALKOXYDIM REGISTRATIONS WITH PENDING REQUESTS FOR CANCELLATION

Registration No.	Product name	Chemical name
000100–01105	Achieve 40DG Herbicide	Tralkoxydim.
000100–01106	Achieve 80DG Herbicide	Tralkoxydim.

Table 2 of this unit includes the names and addresses of record for all registrants of the products in Table 1a and Table 1b of this unit, in sequence by EPA company number. This number corresponds to the first part of the EPA registration numbers of the products listed in this unit.

TABLE 2—REGISTRANTS REQUESTING VOLUNTARY CANCELLATION

EPA company No.	Company name and address
100	Syngenta Crop Protection, LLC, 410 Swing Road, P.O. Box 18300, Greensboro, NC 27419–8300.
264 MD010001, PA010002	Bayer Cropscience LP, 2 T.W. Alexander Drive, P.O. Box 12014, Research Triangle Park, NC 27709.
432	Bayer Environmental Science, A Division of Bayer Cropscience LP, 2 T.W. Alexander Drive, P.O. Box 12014, Research Triangle Park, NC 27709.
1022	IBC Manufacturing Co., 416 E. Brooks Road, Memphis, TN 38109.
9688	Chemsico, A Division of United Industries Corp., P.O. Box 142642, St. Louis, MO 63114–0642.
10807	Amrep, Inc, 990 Industrial Park Drive, Marietta, GA 30062.
11556	Bayer Healthcare, LLC, P.O. Box 390, Shawnee Mission, KS 66201–0390.
40391	Entech Systems Corporation, Agent: Regguide, 509 Tower Valley Drive, Hillsboro, MO 63050.
60061	Kop-Coat, Inc., 3020 William Pitt Way, Pittsburgh, PA 15238.
73049	Valent Biosciences Corporation, Environmental Science Division, 870 Technology Way, Libertyville, IL 60048–6316.
83558	Celsius Property B.V., Amsterdam (NL), Agent: Makhteshim Agan of North America, Inc., 3120 Highwoods Blvd., Suite 100, Raleigh, NC 27604.
WI–110001	Dow Agrosciences LLC, 9330 Zionsville Road, Suite 308/2E, Indianapolis, IN 46268–1054.

III. What is the agency's authority for taking this action?

Section 6(f)(1) of FIFRA provides that a registrant of a pesticide product may at any time request that any of its pesticide registrations be canceled. FIFRA further provides that, before acting on the request, EPA must publish a notice of receipt of any such request in the **Federal Register**.

Section 6(f)(1)(B) of FIFRA requires that before acting on a request for voluntary cancellation, EPA must provide a 30-day public comment period on the request for voluntary cancellation or use termination. In addition, FIFRA section 6(f)(1)(C) requires that EPA provide a 180-day comment period on a request for voluntary cancellation or termination of any minor agricultural use before granting the request, unless:

1. The registrants request a waiver of the comment period, or

2. The EPA Administrator determines that continued use of the pesticide would pose an unreasonable adverse effect on the environment.

The registrants in Table 2 of Unit II. have requested that EPA waive the 180-day comment period. Accordingly, EPA will provide a 30-day comment period on the proposed requests.

IV. Procedures for Withdrawal of Request

Registrants who choose to withdraw a request for cancellation should submit such withdrawal in writing to the person listed under **FOR FURTHER INFORMATION CONTACT**. If the products have been subject to a previous cancellation action, the effective date of cancellation and all other provisions of any earlier cancellation action are controlling.

V. Provisions for Disposition of Existing Stocks

Existing stocks are those stocks of registered pesticide products that are currently in the United States and that were packaged, labeled, and released for shipment prior to the effective date of the cancellation action. Because the Agency has identified no significant potential risk concerns associated with the pesticide products listed in Table 1a and Table 1b of Unit II. of this notice, the proposed existing stocks provisions for these products are as follows.

A. For All Products Identified in Table 1a in Unit II.

EPA anticipates allowing registrants to sell and distribute existing stocks of these products for 1-year after publication of the Cancellation Order in the **Federal Register**. Thereafter, registrants will be prohibited from selling or distributing the pesticides identified in Table 1a of Unit II., except for export consistent with FIFRA section 17 or for proper disposal. Persons other than registrants will generally be allowed to sell, distribute, or use existing stocks until such stocks are exhausted, provided that such sale, distribution, or use is consistent with the terms of the previously approved labeling on, or that accompanied, the canceled products.

B. For All Tralkoxydim Products Identified in Table 1b in Unit II.

EPA anticipates allowing the registrant to continue to sell and distribute the existing stocks of these products until November 1, 2014. Thereafter, registrants will be prohibited from selling or distributing the pesticides identified in Table 1b of Unit II., except for export consistent with FIFRA section 17 or for proper disposal. Additionally, persons other than the registrant may sell, distribute, or use existing stocks of these products until existing stocks are exhausted, provided that such sale, distribution, or use is consistent with the terms of the

previously approved labeling on, or that accompanied, the canceled products.

List of Subjects

Environmental protection, Pesticides and pests.

Dated: August 14, 2013.

Richard P. Keigwin, Jr.,

Director, Pesticide Re-Evaluation Division, Office of Pesticide Programs.

[FR Doc. 2013–20406 Filed 8–20–13; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OAR–2013–0491; FRL 9900–20–OAR]

California State Motor Vehicle Pollution Control Standards; Tractor-Trailer Greenhouse Gas Regulation; Request for Waiver of Preemption; Opportunity for Public Hearing and Public Comment

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of opportunity for public hearing and comment.

SUMMARY: The California Air Resources Board (CARB) has notified EPA that it has adopted a tractor-trailer greenhouse gas emission regulation applicable to new and in-use 53-foot and longer box-type trailers and to new and in-use tractors that haul such trailers on California highways (HD Tractor-Trailer GHG Regulation). By letter dated June 20, 2013, CARB submitted a request that EPA grant a waiver of preemption of the Clean Air Act (CAA), of the HD Tractor-Trailer GHG Regulation pertaining to new tractors (2011 through 2013 model years) and new trailers (2011 and subsequent model years). This notice announces that EPA has scheduled a public hearing concerning California's request and that EPA is accepting written comment on the request.

DATES: EPA has scheduled a public hearing concerning CARB's request on September 16, 2013, beginning at 9:00 a.m. Any party planning to present oral testimony should notify EPA by September 6, 2013, expressing its interest. EPA will hold the public hearing at EPA's offices at 1310 L Street NW., Washington, DC 20460. Any party may submit written comments by October 18, 2013.

ADDRESSES: EPA will make available for in person inspection, at the Air and Radiation Docket and Information Center, written comments received from interested parties, in addition to any testimony given at the public hearing. The official public docket is the collection of materials that is available for public viewing at the Air and Radiation Docket in the EPA Docket Center, (EPA/DC) EPA West, Room B102, 1301 Constitution Ave. NW., Washington, DC. The EPA Docket Center Public Reading Room is open from 8:30 to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566–1744, and the telephone number for the Air and Radiation Docket is (202) 566–1743. The reference number for this docket is EPA–HQ–OAR–2013–0491.

EPA will make available an electronic copy of this Notice on the Office of Transportation and Air Quality's (OTAQ's) homepage (*http://www.epa.gov/otaq/*). Users can find this document by accessing the OTAQ homepage and looking at the path entitled ''Regulations.'' This service is free of charge, except any cost you already incur for Internet connectivity. Users can also get the official **Federal Register** version of the Notice on the day of publication on the primary Web site: (*http://www.epa.gov/docs/fedrgstr/EPA-AIR/*).

Please note that due to differences between the software used to develop the documents and the software into which the documents may be downloaded, changes in format, page length, etc., may occur.

FOR FURTHER INFORMATION CONTACT: David Dickinson, Compliance Division (6405J), U.S. Environmental Protection Agency, 1200 Pennsylvania Ave. NW., Washington, DC 20460. Telephone: (202) 343–9256, Fax: (202) 343–2804, email address: *Dickinson.David@EPA.GOV.*

For Obtaining and Submitting Electronic Copies of Comments

Submit your comments, identified by Docket ID No. EPA–HQ–OAR–2013–0491, by one of the following methods:

- *http://www.regulations.gov:* Follow the on-line instructions for submitting comments.
- Email: *dickinson.david@epa.gov*.
- Fax: (202) 343–2804.
- Mail: U.S. Environmental Protection Agency, EPA West (Air Docket), 1200 Pennsylvania Ave. NW., Room B108, Mail Code 6102T, Washington, DC 20460, Attention Docket ID No. EPA–HQ–OAR–2013–0491. Please include a total of two copies.
- Hand Delivery: EPA Docket Center, EPA/DC, EPA West, Room B102, 1301 Constitution Ave. NW., Washington, DC. Such deliveries are only accepted during the Docket's normal hours of operation, and special arrangements should be made for deliveries of boxed information. Instructions: Direct your comments to Docket ID No EPA–HQ–OAR–2013–0491.

EPA's policy is that all comments received will be included in the public docket without change and may be made available online at *http://www.regulations.gov*, including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through *http://www.regulations.gov* or email.

The *http://www.regulations.gov* Web site is an ''anonymous access'' system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an email comment directly to EPA without going through *http://www.regulations.gov* your email address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD–ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses. Docket: All documents in the docket are listed in the *http://www.regulations.gov* index. Although listed in the index, some information is not publicly available, e.g., CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, will be publicly available only in hard copy.

mailto: Dickinson.David@EPA.GOV.

SUPPLEMENTARY INFORMATION:

(A) CARB's Waiver Request for its HD Tractor-Trailer GHG Regulation

CARB's June 20, 2013, letter to the Acting Administrator presents EPA with CARB's HD Tractor-Trailer GHG Regulation as adopted in 2008 and amended in 2010 and 2012.[1] CARB is seeking a waiver for those elements of the HD Tractor-Trailer GHG Regulation applicable to new 2011 through 2013

[1] *See* Title 17, California Code of Regulations (CCR) sections 95300 through 95312.

model year (MY) Class 8 tractors equipped with integrated sleeper berths (sleeper cab tractors), and to new 2011 and subsequent MY dry-van and refrigerated-van trailers that are pulled by such tractors on California highways.

(B) Scope of Preemption and Criteria for a Waiver Under the Clean Air Act

Section 209(a) of the Clean Air Act, as amended (''Act''), 42 U.S.C. 7543(a), provides:

> No state or any political subdivision thereof shall adopt or attempt to enforce any standard relating to the control of emissions from new motor vehicles or new motor vehicle engines subject to this part. No state shall require certification, inspection or any other approval relating to the control of emissions from any new motor vehicle or new motor vehicle engine as condition precedent to the initial retail sale, titling (if any), or registration of such motor vehicle, motor vehicle engine, or equipment.

Section 209(b) of the Act requires the Administrator, after notice and opportunity for public hearing, to waive application of the prohibitions of section 209(a) for any state that has adopted standards (other than crankcase emission standards) for the control of emissions from new motor vehicles or new motor vehicle engines prior to March 30, 1966, if the state determines that the state standards will be, in the aggregate, at least as protective of public health and welfare as applicable federal standards. California is the only state that is qualified to seek and receive a waiver under section 209(b). EPA must grant a waiver unless the Administrator finds that (A) the determination of the state is arbitrary and capricious, (B) the state does not need the state standards to meet compelling and extraordinary conditions, or (C) the state standards and accompanying enforcement procedures are not consistent with section 202(a) of the Act. Previous decisions granting waivers of federal preemption for motor vehicles have maintained that state standards are inconsistent with section 202(a) if there is inadequate lead time to permit the development of the necessary technology giving appropriate consideration to the cost of compliance within that time period or if the federal and state test procedures impose inconsistent certification procedures.[2]

[2] To be consistent, the California certification procedures need not be identical to the federal certification procedures. California procedures would be inconsistent, however, if manufacturers would be unable to meet the state and the federal requirements with the same test vehicle in the course of the same test. See, e.g., 43 FR 32182 (July 25, 1978).

(C) Request for Comment

EPA invites comment on CARB's request for a waiver of its HD Tractor-Trailer GHG Regulation with regard to those regulatory provisions pertaining to new tractors (2011 through 2013 model years) and new trailers (2011 and subsequent model years) under the following three criteria: Whether (a) California's determination that its motor vehicle emission standards are, in the aggregate, at least as protective of public health and welfare as applicable federal standards is arbitrary and capricious, (b) California needs such standards to meet compelling and extraordinary conditions, and (c) California's standards and accompanying enforcement procedures are consistent with section 202(a) of the Clean Air Act.

Procedures for Public Participation

The Agency will make a verbatim record of the proceedings. Interested parties may arrange with the reporter at the hearing to obtain a copy of the transcript at their own expense. EPA will keep the record open until October 18, 2013. Upon expiration of the comment period, the Administrator will render a decision on CARB's request based on the record of the public hearing, relevant written submissions, and other information that she deems pertinent.

Persons with comments containing proprietary information must distinguish such information from other comments to the greatest possible extent and label it as ''Confidential Business Information'' (CBI). If a person making comments wants EPA to base its decision in part on a submission labeled CBI, then a non-confidential version of the document that summarizes the key data or information should be submitted for the public docket. To ensure that proprietary information is not inadvertently placed in the docket, submissions containing such information should be sent directly to the contact person listed above and not to the public docket. Information covered by a claim of confidentiality will be disclosed by EPA only to the extent allowed and by the procedures set forth in 40 CFR part 2. If no claim of confidentiality accompanies the submission when EPA receives it, EPA will make it available to the public without further notice to the person making comments.

Dated: August 9, 2013.

Christopher Grundler,

Director, Office of Transportation and Air Quality.

[FR Doc. 2013–20417 Filed 8–20–13; 8:45 am]

BILLING CODE P

FEDERAL COMMUNICATIONS COMMISSION

[IB Docket No. 04–286; DA 13–1747]

Fourth Meeting of the Advisory Committee for the 2015 World Radiocommunication Conference

AGENCY: Federal Communications Commission.

ACTION: Notice.

SUMMARY: In accordance with the Federal Advisory Committee Act, this notice advises interested persons that the fourth meeting of the WRC–15 Advisory Committee will be held on September 19, 2013, at the Federal Communications Commission. The Advisory Committee will consider recommendations from its Informal Working Groups.

DATES: September 19, 2013; 11:00 a.m.

ADDRESSES: Federal Communications Commission, 445 12th Street SW., Room TW–C305, Washington, DC 20554.

FOR FURTHER INFORMATION CONTACT: Alexander Roytblat, Designated Federal Official, WRC–15 Advisory Committee, FCC International Bureau, Strategic Analysis and Negotiations Division, at (202) 418–7501.

SUPPLEMENTARY INFORMATION: The Federal Communications Commission (FCC) established the WRC–15 Advisory Committee to provide advice, technical support and recommendations relating to the preparation for the 2015 World Radiocommunication Conference (WRC–15).

In accordance with the Federal Advisory Committee Act, Public Law 92–463, as amended, this notice advises interested persons of the fourth meeting of the WRC–15 Advisory Committee. Additional information regarding the WRC–15 Advisory Committee is available on the Advisory Committee's Web site, *http://www.fcc.gov/wrc-15.* The meeting is open to the public. The meeting will be broadcast live with open captioning over the Internet from the FCC Live Web page at *www.fcc.gov/live*. Comments may be presented at the WRC–15 Advisory Committee meeting or in advance of the meeting by email to: *WRC–15@fcc.gov.*

Open captioning will be provided for this event. Other reasonable accommodations for people with disabilities are available upon request. Requests for such accommodations should be submitted via email to *fcc504@fcc.gov* or by calling the Consumer & Governmental Affairs Bureau at (202) 418–0530 (voice), (202) 418–0432 (TTY). Such requests should include a detailed description of the

accommodation needed. In addition, please include a way for the FCC to contact the requester if more information is needed to fill the request. Please allow at least five days' advance notice; last minute requests will be accepted, but may not be possible to accommodate.

The proposed agenda for the fourth meeting is as follows:

Agenda

Fourth Meeting of the WRC–15 Advisory Committee

Federal Communications Commission, 445 12th Street SW., Room TW–C305, Washington, DC 20554, September 19, 2013; 11:00 a.m.

1. Opening Remarks
2. Approval of Agenda
3. Approval of the Minutes of the Third Meeting
4. IWG Reports and Documents Relating to Preliminary Views and Draft Proposals
5. Future Meetings
6. Other Business

Federal Communications Commission.

Mindel De La Torre,

Chief, International Bureau.

[FR Doc. 2013–20279 Filed 8–20–13; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL MARITIME COMMISSION

Notice of Agreements Filed

The Commission hereby gives notice of the filing of the following agreements under the Shipping Act of 1984. Interested parties may submit comments on the agreements to the Secretary, Federal Maritime Commission, Washington, DC 20573, within ten days of the date this notice appears in the **Federal Register**. Copies of the agreements are available through the Commission's Web site (*www.fmc.gov*) or by contacting the Office of Agreements at (202) 523–5793 or *tradeanalysis@fmc.gov.*

Agreement No.: 010099–058.

Title: International Council of Containership Operators.

Parties: A.P. Moller-Maersk A/S; China Shipping Container Lines Co., Ltd.; CMA. CGM, S.A.; Compañía Chilena de Navegación Interoceánica S.A.; Compania SudAmericana de Vapores S.A.; COSCO Container Lines Co. Ltd; Crowley Maritime Corporation; Evergreen Marine Corporation (Taiwan), Ltd.; Hamburg-Süd KG; Hanjin Shipping Co., Ltd.; Hapag-Lloyd AG; Hyundai Merchant Marine Co., Ltd.; Kawasaki Kisen Kaisha, Ltd.; Mediterranean Shipping Co. S.A.; Mitsui O.S.K. Lines, Ltd.; Neptune Orient Lines, Ltd.; Nippon Yusen Kaisha; Orient Overseas Container Line, Ltd.; Pacific International Lines (Pte) Ltd.; United Arab Shipping Company (S.A.G.); Wan Hai Lines Ltd.; Yang Ming Transport Marine Corp.; and Zim Integrated Shipping Services Ltd.

Filing Party: John Longstreth, Esq.; K & L Gates LLP; 1601 K Street NW; Washington, DC 20006–1600.

Synopsis: The amendment deletes STX Pan Ocean Co., Ltd. as a party to the agreement.

Agreement No.: 012157–001.

Title: CSCL/CMA CGM Slot Exchange Agreement Asia—U.S. East Coast.

Parties: China Shipping Container Lines Co., Ltd., China Shipping Container Lines (Hong Kong) Co., Ltd., and CMA CGM S.A.

Filing Party: Draughn B. Arbona, Esq., Senior Counsel, CMA CGM (America), Inc. 5701 Lake Wright Drive, Norfolk, VA 23502–1868

Synopsis: The amendment reduces the number of slots exchanged between CMA and CSCL and also revises the agreement to reflect that Evergreen Line Joint Service Agreement no longer participates on a service operated under the agreement.

Agreement No.: 012168–001.

Title: CSCL/UASC Vessel Sharing Agreement—Asia and U.S. East Coast Service.

Parties: China Shipping Container Lines Co. Ltd. and China Shipping Container Lines (Hong Kong) Co., Ltd. (collectively known as China Shipping); and United Arab Shipping Company S.A.G.

Filing Party: Brett M. Esber, Esquire; Blank Rome LLP; 600 New Hampshire Avenue NW; Washington, DC 20037.

Synopsis: The amendment eliminates a secondary exchange of space between the parties.

Agreement No.: 012216.

Title: Simatech/Zim Space Charter Agreement.

Parties: Simatech Americas S.A. and Zim Integrated Shipping Services, Ltd.

Filing Party: Mark E. Newcomb, Esquire; Zim American Integrated Shipping Services Co, Inc.; 5801 Lake Wright Drive; Norfolk, VA 23508.

Synopsis: The agreement authorizes Simatech to charter space to Zim in the trade between Miami, FL on the one hand, and Guatemala and Honduras, on the other hand.

By Order of the Federal Maritime Commission.

Dated: August 16, 2013.

Rachel E. Dickon,

Assistant Secretary.

[FR Doc. 2013–20398 Filed 8–20–13; 8:45 am]

BILLING CODE 6730–01–P

FEDERAL RESERVE SYSTEM

Change in Bank Control Notices; Acquisitions of Shares of a Bank or Bank Holding Company

The notificants listed below have applied under the Change in Bank Control Act (12 U.S.C. 1817(j)) and § 225.41 of the Board's Regulation Y (12 CFR 225.41) to acquire shares of a bank or bank holding company. The factors that are considered in acting on the notices are set forth in paragraph 7 of the Act (12 U.S.C. 1817(j)(7)).

The notices are available for immediate inspection at the Federal Reserve Bank indicated. The notices also will be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing to the Reserve Bank indicated for that notice or to the offices of the Board of Governors. Comments must be received not later than September 5, 2013.

A. Federal Reserve Bank of Kansas City (Dennis Denney, Assistant Vice President) 1 Memorial Drive, Kansas City, Missouri 64198–0001:

1. *Scott R. Bird and Sheryl L. Bird,* both of Quinter, Kansas; to retain voting shares of KansasLand Bancshares, Inc., and thereby indirectly retain voting shares of KansasLand Bank, both in Quinter, Kansas.

Board of Governors of the Federal Reserve System, August 16, 2013.

Michael J. Lewandowski,

Associate Secretary of the Board.

[FR Doc. 2013–20358 Filed 8–20–13; 8:45 am]

BILLING CODE 6210–01–P

FEDERAL RESERVE SYSTEM

Formations of, Acquisitions by, and Mergers of Bank Holding Companies

The companies listed in this notice have applied to the Board for approval, pursuant to the Bank Holding Company Act of 1956 (12 U.S.C. 1841 *et seq.*) (BHC Act), Regulation Y (12 CFR part 225), and all other applicable statutes and regulations to become a bank holding company and/or to acquire the assets or the ownership of, control of, or the power to vote shares of a bank or bank holding company and all of the banks and nonbanking companies owned by the bank holding company, including the companies listed below.

The applications listed below, as well as other related filings required by the Board, are available for immediate inspection at the Federal Reserve Bank indicated. The applications will also be available for inspection at the offices of

the Board of Governors. Interested persons may express their views in writing on the standards enumerated in the BHC Act (12 U.S.C. 1842(c)). If the proposal also involves the acquisition of a nonbanking company, the review also includes whether the acquisition of the nonbanking company complies with the standards in section 4 of the BHC Act (12 U.S.C. 1843). Unless otherwise noted, nonbanking activities will be conducted throughout the United States.

Unless otherwise noted, comments regarding each of these applications must be received at the Reserve Bank indicated or the offices of the Board of Governors not later than September 16, 2013.

A. Federal Reserve Bank of St. Louis (Yvonne Sparks, Community Development Officer) P.O. Box 442, St. Louis, Missouri 63166–2034:

1. *Greenville Bancshares, Inc.,* Piedmont, Missouri; to merge with Ripley County Bancshares, Inc., Piedmont, Missouri, and thereby indirectly acquire Peoples Community State Bank, Doniphan, Missouri.

Board of Governors of the Federal Reserve System, August 16, 2013.

Michael J. Lewandowski,

Associate Secretary of the Board.

[FR Doc. 2013–20359 Filed 8–20–13; 8:45 am]

BILLING CODE 6210–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

DEPARTMENT OF AGRICULTURE

Announcement of the Second 2015 Dietary Guidelines Advisory Committee Meeting and Invitation for Oral Testimony

AGENCY: Department of Health and Human Services, Office of the Secretary, Office of the Assistant Secretary for Health; and U.S. Department of Agriculture, Food, Nutrition and Consumer Services and Research, Education, and Economics.

ACTION: Notice.

SUMMARY: As stipulated by the Federal Advisory Committee Act, the U.S. Department of Health and Human Services (HHS), in collaboration with the U.S. Department of Agriculture (USDA), are hereby giving notice that a meeting of the 2015 Dietary Guidelines Advisory Committee (DGAC) will be held. This meeting will be open to the public.

DATES: This meeting will be held on October 3, 2013 from 8:30 a.m.–11:30 a.m. E.D.T., including oral testimony, and October 4, 2013 from 8:30 a.m.–3:45 p.m. E.D.T.

ADDRESSES: The meeting will be accessible by webcast on the Internet or by attendance in-person. For in-person participants, on October 3, 2013, the meeting will take place in the National Institutes of Health (NIH) Masur Auditorium. On October 4, 2013, the meeting will be held in the NIH Foundation for Advanced Education in the Sciences (FAES) Academic Center. Both facilities are located at the NIH Clinical Center, Building 10, 10 Center Drive, 9000 Rockville Pike, Bethesda, MD 20892.

FOR FURTHER INFORMATION CONTACT: Designated Federal Officer (DFO), 2015 DGAC, Richard D. Olson, M.D., M.P.H.; Alternate DFO, 2015 DGAC, Kellie (O'Connell) Casavale, Ph.D., R.D., Nutrition Advisor; Office of Disease Prevention and Health Promotion, OASH/HHS; 1101 Wootton Parkway, Suite LL100 Tower Building; Rockville, MD 20852: Telephone: (240) 453–8280; Fax: (240) 453–8281; Lead USDA Co-Executive Secretary, Colette I. Rihane, M.S., R.D., Director, Nutrition Guidance and Analysis Division, Center for Nutrition Policy and Promotion, USDA; 3101 Park Center Drive, Room 1034; Alexandria, VA 22302; Telephone: (703) 305–7600; Fax: (703) 305–3300; and/or USDA Co-Executive Secretary, Shanthy A. Bowman, Ph.D., Nutritionist, Food Surveys Research Group, Beltsville Human Nutrition Research Center, Agricultural Research Service, USDA; 10300 Baltimore Avenue, BARC-West Bldg 005, Room 125; Beltsville, MD 20705–2350; Telephone: (301) 504–0619. Additional information about the 2015 DGAC is available on the Internet at *www.DietaryGuidelines.gov*.

SUPPLEMENTARY INFORMATION: Under Section 301 of Public Law 101–445 (7 U.S.C. 5341, the National Nutrition Monitoring and Related Research Act of 1990, Title III) the Secretaries of Health and Human Services (HHS) and Agriculture (USDA) are directed to issue at least every five years a report titled *Dietary Guidelines for Americans.* The law instructs that this publication shall contain nutritional and dietary information and guidelines for the general public, shall be based on the preponderance of scientific and medical knowledge current at the time of publication, and shall be promoted by each federal agency in carrying out any federal food, nutrition, or health program. The *Dietary Guidelines for Americans* was issued voluntarily by HHS and USDA in 1980, 1985, and 1990; the 1995 edition was the first statutorily mandated report, followed by subsequent editions at the appropriate intervals. To assist with satisfying the mandate, a discretionary federal advisory committee is established every five years to provide independent, science-based advice and recommendations. The DGAC consists of a panel of experts who were selected from the public/private sector. Individuals who were selected to serve on the Committee have current scientific knowledge in the field of human nutrition and chronic disease.

Appointed Committee Members: The Secretaries of HHS and USDA appointed 15 individuals to serve as members of the 2015 DGAC in May 2013. Information on the DGAC membership is available at *www.DietaryGuidelines.gov*.

Authority: The 2015 DGAC is authorized under 42 U.S.C. 217a, Section 222 of the Public Health Service Act, as amended.

Committee's Task: The work of the DGAC will be solely advisory in nature and time-limited. The Committee will develop recommendations based on the preponderance of current scientific and medical knowledge using a systematic review approach. The DGAC will examine the current *Dietary Guidelines for Americans,* take into consideration new scientific evidence and current resource documents, and develop a report to the Secretaries of HHS and USDA that outlines its science-based recommendations and rationales which will serve as the basis for developing the eighth edition of the *Dietary Guidelines for Americans.* The Committee will hold approximately five public meetings to review and discuss recommendations. Meeting dates, times, locations, and other relevant information will be announced at least 15 days in advance of each meeting via **Federal Register** notice. As stipulated in the charter, the Committee will be terminated after delivery of its final report to the Secretaries of HHS and USDA or two years from the date the charter was filed, whichever comes first.

Purpose of the Meeting: In accordance with FACA and to promote transparency of the process, deliberations of the Committee will occur in a public forum. At this meeting, the Committee will continue its deliberations.

Meeting Agenda: The meeting agenda will include (a) opportunity for the public to give oral testimony, (b) topic-specific presentations from guest experts identified by the Committee, and (c) review of work since the last public meeting and plans for future Committee work.

Meeting Registration: The meeting is open to the public. The meeting will be accessible by webcast or by attendance in-person. Pre-registration is required for both web viewing and in-person attendance. Pre-registration is expected to open on September 4, 2013. To pre-register, please go to *www.DietaryGuidelines.gov* and click on the link for ''Meeting Registration.'' To register by phone or to request a sign language interpreter or other special accommodations, please call National Capitol Contracting, Laura Walters at (703) 243–9696 by 5:00 p.m. E.D.T., September 30, 2013. Pre-registration must include name, affiliation, phone number or email, days attending, and if participating via webcast or in-person or requesting to provide oral testimony.

Webcast Public Participation: After pre-registration, individuals participating by webcast will receive webcast access information via email.

In-Person Public Participation and Building Access: For in-person participants, the meetings are within the National Institutes of Health (NIH) Clinical Center (Building 10) as noted above in the Addresses section. Details regarding registration capacity and directions will be posted on *www.DietaryGuidelines.gov*. For in-person participants, check-in at the registration desk onsite at the meeting is required and will begin at 7:30 a.m. each day.

Oral Testimony: The Committee invites requests from the public to present three minutes of oral testimony on the morning of October 3, 2013. Due to time limitations, pre-registration is required by 5 p.m. E.D.T., on September 25, 2013. Pre-registration to present oral testimony will be confirmed on a first-come, first-served basis, as time on the meeting agenda permits. Confirmation by email will include further instructions for participation on October 3, 2013. Requests to present oral testimony can be made by going to *www.DietaryGuidelines.gov* and clicking on the link for ''Meeting Registration'' and must include a written outline of the intended testimony not exceeding one page in length. Written comments (separate from oral testimony) are encouraged to be submitted electronically through the public comments database at *www.DietaryGuidelines.gov*.

Written Public Comments and Meeting Documents: Written comments from the public will be accepted throughout the Committee's deliberative process. Written public comments can be submitted and/or viewed at *www.DietaryGuidelines.gov* using the ''Submit Comments'' and ''Read Comments'' links, respectively. Written comments received by September 25, 2013 will ensure transmission to the Committee prior to this meeting. Documents pertaining to Committee deliberations, including meeting agendas, summaries, and transcripts will be available on *www.DietaryGuidelines.gov* under ''Meetings'' and meeting materials will be available for public viewing at the meeting. Meeting information, thereafter, will continue to be accessible online, at the NIH Library, and upon request at the Office of Disease Prevention and Health Promotion, OASH/HHS; 1101 Wootton Parkway, Suite LL100 Tower Building; Rockville, MD 20852: Telephone (240) 453–8280; Fax: (240) 453–8281.

Dated: August 5, 2013.

Don Wright,

Deputy Assistant Secretary for Health, Office of Disease Prevention and Health Promotion, Office of the Assistant Secretary for Health, U.S. Department of Health and Human Services.

Dated: August 5, 2013.

Robert Post,

Acting Executive Director, Center for Nutrition Policy and Promotion, U.S. Department of Agriculture.

Dated: August 5, 2013.

Edward B. Knipling,

Administrator, Agricultural Research Service, U.S. Department of Agriculture.

[FR Doc. 2013–20410 Filed 8–20–13; 8:45 am]

BILLING CODE 4150–32–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

Fees for Sanitation Inspections of Cruise Ships

AGENCY: Centers for Disease Control and Prevention (CDC), Department of Health and Human Services (HHS).

ACTION: General notice.

SUMMARY: The Centers for Disease Control and Prevention (CDC), located within the Department of Health and Human Services (HHS) announces fees for vessel sanitation inspections for Fiscal Year (FY) 2014. These inspections are conducted by HHS/CDC's Vessel Sanitation Program (VSP). VSP helps the cruise line industry fulfill its responsibility for developing and implementing comprehensive sanitation programs to minimize the risk for acute gastroenteritis. Every vessel that has a foreign itinerary and carries 13 or more passengers is subject to twice-yearly inspections and, when necessary, re-inspection.

DATES: These fees are effective October 1, 2013, through September 30, 2014.

FOR FURTHER INFORMATION CONTACT: CAPT Jaret T. Ames, Chief, Vessel Sanitation Program, National Center for Environmental Health, Centers for Disease Control and Prevention, 4770 Buford Highway NE., MS F–58, Atlanta, Georgia 30341–3717, phone: 800–323–2132 or 954–356–6650, email: *vsp@cdc.gov*.

SUPPLEMENTARY INFORMATION:

Purpose and Background

HHS/CDC established the Vessel Sanitation Program (VSP) in the 1970s as a cooperative activity with the cruise ship industry. VSP helps the cruise ship industry prevent and control the introduction, transmission, and spread of gastrointestinal illnesses on cruise ships. VSP operates under the authority of the Public Health Service Act (Section 361 of the Public Health Service Act; 42 U.S.C. 264, ''Control of Communicable Diseases''). Regulations found at 42 CFR 71.41 (Foreign Quarantine—Requirements Upon Arrival at U.S. Ports: Sanitary Inspection; General Provisions) state that carriers arriving at U.S. ports from foreign areas are subject to sanitary inspections to determine whether rodent, insect, or other vermin infestations exist, contaminated food or water, or other sanitary conditions requiring measures for the prevention of the introduction, transmission, or spread of communicable diseases are present.

The fee schedule for sanitation inspections of passenger cruise ships by VSP was first published in the **Federal Register** on November 24, 1987 (52 FR 45019). HHS/CDC began collecting fees on March 1, 1988. This notice announces fees that are effective for FY 2014, beginning on October 1, 2013, through September 30, 2014.

The following formula will be used to determine the fees:

$$\text{Average cost per inspection} = \frac{\text{Total cost of VSP}}{\text{Weighted number of annual inspections}}$$

The average cost per inspection is multiplied by size and cost factors to determine the fee for vessels in each size category. The size and cost factors were established in the fee schedule published in the **Federal Register** on July 17, 1987 (52 FR 27060). The fee schedule was most recently published in the **Federal Register** on August 21, 2012 (77 FR 50511). The size and cost factors for FY 2014 are presented in Appendix A.

Fee

The fee schedule (Appendix A) will be effective October 1, 2013, through September 30, 2014. The fee schedule (Appendix A) will be effective October 1, 2013, through September 30, 2014. The increase in fees is required due to administrative structure support costs within HHS/CDC. The last change in VSP inspection fees was October 1, 2006.

If travel expenses or other charges to VSP change, the fee schedule may need to be adjusted before September 30, 2014. If a fee adjustment is necessary, HHS/CDC will publish a notice in the **Federal Register** with the amended fee schedule (Appendix A) as soon as possible and at least 30 days before the effective date.

Applicability

The fees will apply to all passenger cruise vessels for which inspections are conducted as part of HHS/CDC's VSP.

Dated: August 15, 2013.

J. Ronald Campbell

Director, Division of Executive Secretariat, Centers for Disease Control and Prevention.

Appendix A

SIZE/COST FACTORS USED TO DETERMINE INSPECTION FEES IMPACTS

Vessel size (GRT [1])	Approximate cost per GRT [1] (US$)
Extra Small (<3,001 GRT)	0.25
Small (3,001–15,000 GRT)	0.50
Medium (15,001–30,000 GRT)	1.00
Large (30,001–60,000 GRT) ..	1.50
Extra Large (60,001–120,000 GRT)	2.00
Mega (>120,001 GRT)	3.00

FEE SCHEDULE FOR EACH VESSEL SIZE

Vessel size (GRT [1])	Inspection fee (US$)
Extra Small (<3,000 GRT)	1,495
Small (3,001–15,000 GRT)	2,990
Medium (15,001–30,000 GRT)	5,980
Large (30,001–60,000 GRT) ..	8,970
Extra Large (60,001–120,000 GRT)	11,960
Mega (>120,001 GRT)	17,940

[1] Gross register tonnage in cubic feet, as shown in Lloyd's Register of Shipping.

Inspections and reinspections involve the same procedures, require the same amount of time, and are therefore charged at the same rates.

[FR Doc. 2013–20349 Filed 8–20–13; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

Board of Scientific Counselors, National Institute for Occupational Safety and Health (BSC, NIOSH)

In accordance with section 10(a) (2) of the Federal Advisory Committee Act (Pub. L. 92–463), the Centers for Disease Control and Prevention (CDC) announces the following meeting for the aforementioned committee:

Time and Date: 8:30 a.m.—3:00 p.m., September 18, 2013.

Place: Patriots Plaza I, 395 E Street SW., Room 9200, Washington, DC 20201.

Status: Open to the public, limited only by the space available. The meeting room accommodates approximately 33 people. If you wish to attend in person or by webcast, please see the NIOSH Web site to register (*http://www.cdc.gov/niosh/bsc/*) or call (202) 245–0625 or (202) 245–0626 for building access information. Teleconference is available toll-free; please dial (877) 328–2816, Participant Pass Code 6558291.

Purpose: The Secretary, the Assistant Secretary for Health, and by delegation the Director, Centers for Disease Control and Prevention, are authorized under Sections 301 and 308 of the Public Health Service Act to conduct directly or by grants or contracts, research, experiments, and demonstrations relating to occupational safety and health and to mine health. The Board of Scientific Counselors shall provide guidance to the Director, National Institute for Occupational Safety and Health on research and prevention programs. Specifically, the Board shall provide guidance on the Institute's research activities related to developing and evaluating hypotheses, systematically documenting findings and disseminating results. The Board shall evaluate the degree to which the activities of the National Institute for Occupational Safety and Health: (1) Conform to appropriate scientific standards, (2) address current, relevant needs, and (3) produce intended results.

Matters to be Discussed: NIOSH Director Update, Labor-Management Participation in Research Partnerships, Hydraulic Fracturing: Opportunities for Research and Challenges in Protecting the Workforce, the Safe, Skilled, and Ready Workforce Concept, Evaluation of the Second Decade of the National Occupational Research Agenda, and the NIOSH Center for Workers' Compensation Studies.

Agenda items are subject to change as priorities dictate.

An agenda is also posted on the NIOSH Web site (*http://www.cdc.gov/niosh/bsc/*).

Contact Person for More Information: John Decker, Executive Secretary, BSC, NIOSH, CDC, 1600 Clifton Road NE., MS–E20, Atlanta, Georgia 30329, Telephone: (404) 498–2500, Fax: (404) 498–2526

The Director, Management Analysis and Services Office, has been delegated the authority to sign **Federal Register** notices pertaining to announcements of meetings and other committee management activities for both the Centers for Disease Control and Prevention and the Agency for Toxic Substances and Disease Registry.

Elaine L. Baker,

Director, Management Analysis and Services Office, Centers for Disease Control and Prevention (CDC).

[FR Doc. 2013–20305 Filed 8–20–13; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Medicare and Medicaid Services

[Document Identifier: CMS–10496

Emergency Clearance: Public Information Collection Requirements Submitted to the Office of Management and Budget (OMB)

AGENCY: Center for Medicare and Medicaid Services.

In compliance with the requirement of section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995, the Centers for Medicare and Medicaid Services (CMS), Department of Health and Human Services, is publishing the following summary of proposed collections for public comment. Interested persons are invited to send

comments regarding this burden estimate or any other aspect of this collection of information, including any of the following subjects: (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.

We are, however, requesting an emergency review of the information collection referenced below. In compliance with the requirement of section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995, we have submitted to the Office of Management and Budget (OMB) the following requirements for emergency review. This is necessary to ensure compliance with an initiative of the Administration. We are requesting an emergency review under 5 CFR Part 1320(a)(2)(i) because public harm is reasonably likely to result if the normal clearance procedures are followed. The approval of this data collection process is essential to ensuring that Information Security (IS) incidents, which also include Personally Identifiable Information (PII) and Protected Health Information (PHI), are captured within the specified timeframe. In absence of this change, a significant number of incidents will not be detected; therefore causing harm and potential risk to the public's identity with identity fraud.

1. *Type of Information Collection Request:* New collection (Request for a new OMB control number); *Title of Information Collection:* Title State Health Insurance Exchange Incident Report; *Use:* We have implemented a Computer Matching Agreement (CMA) with the State-Based Administering Entities (AEs). This agreement establishes the terms, conditions, safeguards, and procedures under which CMS will disclose certain information to the AEs in accordance with the Patient Protection and Affordable Care Act of 2010 (Pub. L. 111–148), as amended by the Health Care and Education Reconciliation Act (Pub. L. 111–152), which are referred to collectively as the Affordable Care Act (ACA), amendments to the Social Security Act made by the ACA, and the implementing regulations. The AEs, which are state entities administering Insurance Affordability Programs, will use the data, accessed through the CMS Data Services Hub (Hub), to make Eligibility Determinations for Insurance Affordability Programs and certificates of exemption.

The AEs shall report suspected or confirmed incidents affecting loss or suspected loss of PII within one hour of discovery to their designated Center for Consumer Information and Insurance Oversight State Officer who will then notify the affected Federal agency data sources, i.e., Internal Revenue Service, Department of Defense, Department of Homeland Security, Social Security Administration, Peace Corps, Office of Personnel Management and Veterans Health Administration. Additionally, AEs shall contact the office of the appropriate Special Agent-in-Charge, Treasury Inspector General for Tax Administration (TIGTA), and the IRS Office of Safeguards within 24 hours of discovery of any potential breach, loss, or misuse of Return Information. *Form Number:* CMS–10496 (OCN: 0938–New); *Frequency:* Occasionally; *Affected Public:* State, Local or Tribal governments; *Number of Respondents:* 18; *Total Annual Responses:* 936; *Total Annual Hours:* 234.

We are requesting OMB review and approval of this collection by *September 25, 2013,* with a 180-day approval period. Written comments and recommendation will be considered from the public if received by the individuals designated below by the noted deadline below.

To obtain copies of the supporting statement and any related forms for the proposed paperwork collections referenced above, access CMS's Web site address at *http://www.cms.hhs.gov/PaperworkReductionActof1995* or Email your request, including your address, phone number, OMB number, and CMS document identifier, to *Paperwork@cms.hhs.gov*, or call the Reports Clearance Office on (410) 786–1326.

In commenting on the proposed information collections please reference the document identifier or OMB control number. To be assured consideration, comments and recommendations must be submitted in one of the following ways by *September 20, 2013:*

1. *Electronically.* You may submit 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) accepting comments.

2. *By regular mail.* You may mail written comments to the following address:

CMS, Office of Strategic Operations and Regulatory Affairs, Division of Regulations Development, Attention: Document Identifier (CMS–10496), Room C4–26–05, 7500 Security Boulevard, Baltimore, Maryland 21244–1850.

and,

OMB Office of Information and Regulatory Affairs, Attention: CMS Desk Officer, New Executive Office Building, Room 10235, Washington, DC 20503, Fax Number: (202) 395–6974.

Dated: August 16, 2013.

Martique Jones,

Deputy Director, Regulations Development Group, Office of Strategic Operations and Regulatory Affairs.

[FR Doc. 2013–20396 Filed 8–20–13; 8:45 am]

BILLING CODE 4120–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Medicare & Medicaid Services

[Document Identifier: CMS–R–194, CMS–10497 and CMS–10250]

Agency Information Collection Activities: Proposed Collection; Comment Request

AGENCY: Centers for Medicare & Medicaid 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 any of the following subjects: (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.

DATES: Comments must be received by October 21, 2013.

ADDRESSES: When commenting, please reference the document identifier or OMB control number (OCN). 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: CMS, 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, you may make your request using one of following:

1. Access CMS' Web site address at *http://www.cms.hhs.gov/PaperworkReductionActof1995.*

2. Email your request, including your address, phone number, OMB number, and CMS document identifier, to *Paperwork@cms.hhs.gov.*

3. Call the Reports Clearance Office at (410) 786–1326.

FOR FURTHER INFORMATION CONTACT: Reports Clearance Office at (410) 786–1326.

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–194 Medicare Disproportionate Share Adjustment Procedures and Criteria and Supporting Regulations

CMS–10497 Evaluation of the Medicare Health Care Quality (MHCQ) Demonstration Evaluation: Focus Group and Interview Protocols

CMS–10250 Hospital Outpatient Quality Reporting (OQR) Program

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 Collections

1. *Type of Information Collection Request:* Reinstatement without change of a previously approved collection; *Title of Information Collection:* Medicare Disproportionate Share Adjustment (DSH) Procedures and Criteria and Supporting Regulations; *Use:* Section 1886(d)(5)(F) of the Social Security Act established the Medicare disproportionate share adjustment (DSH) for hospitals, which provides additional payment to hospitals that serve a disproportionate share of the indigent patient population. This payment is an add-on to the set amount per case that we pay to hospitals under the Medicare Inpatient Prospective Payment System (IPPS).

Under current regulations at 42 CFR 412.106, in order to meet the qualifying criteria for this additional DSH payment, a hospital must prove that a disproportionate percentage of its patients are low income using Supplemental Security Income (SSI) and Medicaid as proxies for this determination. This percentage includes two computations: (1) The ''Medicare fraction'' or the ''SSI ratio'' which is the percent of patient days for beneficiaries who are eligible for Medicare Part A and SSI and (2) the ''Medicaid fraction'' which is the percent of patient days for patients who are eligible for Medicaid but not Medicare. Once a hospital qualifies for this DSH payment, we also determine a hospital's payment adjustment. *Form Number:* CMS–R–194 (OCN: 0938–0691); *Frequency:* Occasionally; *Affected Public:* Private sector—business or other for-profits and not-for-profit institutions; *Number of Respondents:* 800; *Total Annual Responses:* 800; *Total Annual Hours:* 400. (For policy questions regarding this collection contact JoAnne Cerne at 410–786–4530.)

2. *Type of Information Collection Request:* New collection (Request for a new OMB control number); *Title of Information Collection:* Evaluation of the Medicare Health Care Quality (MHCQ) Demonstration Evaluation: Focus Group and Interview Protocols; *Use:* The Medicare Health Care Quality (MHCQ) Demonstration was developed to address concerns about the U.S. health care system, which typically fragments care while also encouraging both omissions in and duplication of care. To rectify this situation, Congress has directed us to test major changes to the delivery and payment systems to improve the quality of care while also increasing efficiency across the health care system. This would be achieved through several types of interventions: Adoption and use of information technology and decision support tools by physicians and their patients, such as evidence-based medicine guidelines, best practice guidelines, and shared decision-making programs; reform of payment methodologies; improved coordination of care among payers and providers serving defined communities; measurement of outcomes; and enhanced cultural competence in the delivery of care.

The MHCQ Demonstration programs are designed to examine the extent to which major, multifaceted changes to traditional Medicare's health delivery and financing systems lead to improvements in the quality of care provided to Medicare beneficiaries without increasing total program expenditures. Each demonstration site uses a different approach for changing health delivery and financing systems, but all share the goal of improving the quality and efficiency of medical care provided to Medicare beneficiaries. Focus groups and individual interviews will be conducted at 2 demonstration sites that are active in the demonstration: Gundersen Health System (GHS) and Meridian Health System (MHS).

This MHCQ Demonstration evaluation will include analysis of both quantitative and qualitative sources of information. This multifaceted approach will enable this evaluation to consider a broad variety of evidence for evaluating the nature and impact of each site's interventions. We are seeking approval to conduct in-person focus groups and individual interviews with beneficiaries and their caregivers to inform our evaluation of the MHCQ Demonstration at the GHS and MHS demonstration sites. *Form Number:* CMS–10497 (OCN: 0938-New); *Frequency:* Occasionally; *Affected Public:* Individuals or households; *Number of Respondents:* 36; *Total Annual Responses:* 36; *Total Annual Hours:* 108. (For policy questions regarding this collection contact Normandy Brangan at 410–786–6640.)

3. *Type of Information Collection Request:* Revision of a currently approved collection; *Title of Information Collection:* Hospital Outpatient Quality Reporting (OQR)

Program; *Use:* Section 109(a) of the Tax Relief and Health Care Act of 2006 (TRHCA) (Pub. L. 109–432) amended section 1833(t) of the Social Security Act by adding a new subsection (17) that affects the payment rate update applicable to Outpatient Prospective Payment System (OPPS) payments for services furnished by hospitals in outpatient settings on or after January 1, 2009. Section 1833(t)(17)(A) of the Act, which applies to hospitals as defined under section 1886(d)(1)(B) of the Act, requires that hospitals that fail to report data required for quality measures selected by the Secretary in the form and manner required by the Secretary under section 1833(t)(17)(B) of the Act will incur a reduction in their annual payment update (APU) factor to the hospital outpatient department fee schedule by 2.0 percentage points. Sections 1833(t)(17)(C)(i) and (ii) of the Act require the Secretary to develop measures appropriate for the measurement of the quality of care furnished by hospitals in outpatient settings. Such measures must reflect consensus among affected parties and, to the extent feasible and practicable, must be set forth by one or more national consensus building entities. The Secretary also has the authority to replace measures or indicators as appropriate and requires the Secretary to establish procedures for making the data submitted available to the public. Such procedures must provide the hospitals the opportunity to review such data prior to public release. Our program established under these amendments is referred to as the Hospital Outpatient Quality Reporting (OQR) Program.

Hospital OQR Program payment determinations are made based on OQR quality measure data reported and supporting forms submitted by hospitals as specified through rulemaking. To reduce burden, a variety of different data collection mechanisms are employed, with every consideration taken to employ existing data and data collection systems. The complete list of measures and data collection forms are organized by type of data collected and data collection mechanism.

The Medicare program has a responsibility to ensure that Medicare beneficiaries receive the health care services of appropriately high quality that are comparable to that received by those under other payers. The Hospital OQR Program seeks to encourage care that is both efficient and of high quality in the hospital outpatient setting through collaboration with the hospital community to develop and implement quality measures that are fully and specifically reflective of the quality of hospital outpatient services. *Form Number:* CMS–10250 (OCN: 0938–1109); *Frequency:* Occasionally; *Affected Public:* Private sector—For-profit and not for institutions; *Number of Respondents:* 3,200; *Total Annual Responses:* 3,200; *Total Annual Hours:* 949,590. (For policy questions regarding this collection contact Anita Bhatia at 410–786–7236.)

Dated: August 16, 2013.

Martique Jones,

Deputy Director, Regulations Development Group, Office of Strategic Operations and Regulatory Affairs.

[FR Doc. 2013–20400 Filed 8–20–13; 8:45 am]

BILLING CODE 4120–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2013–N–0001]

The Food and Drug Administration/European Medicines Agency Orphan Product Designation and Grant Public Workshop

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice of public workshop.

The Food and Drug Administration's (FDA) Office of Orphan Products Development is announcing the following meeting entitled ''The Food and Drug Administration/European Medicines Agency Orphan Product Designation and Grant Workshop.'' This 1-day workshop is intended to provide valuable information about the FDA and European Medicines Agency (EMA) Orphan Drug Designation programs, the FDA Humanitarian Use Device (HUD) Designation program, and the FDA Orphan Products Grant program to participants representing pharmaceutical, biotechnology, and device companies, as well as academics.

Date and Time: The meeting will be held on October 4, 2013, from 8:30 a.m. to 4 p.m.

Location: The meeting will be held at FDA White Oak Campus, 10903 New Hampshire Ave., Bldg. 31 Conference Center, the Great Room (rm. 1503), Silver Spring, MD 20993–0002. Entrance for the public meeting participants (non-FDA employees) is through Building 1 where routine security check procedures will be performed. For parking and security information, please refer to *http://www.fda.gov/AboutFDA/WorkingatFDA/BuildingsandFacilities/WhiteOakCampusInformation/ucm241740.htm.*

Contact Person: Eleanor Dixon-Terry, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 32, rm. 5279, Silver Spring, MD 20993–0002, 301–796–8660, FAX: 301–847–8621, *Eleanor.Dixon-Terry@fda.hhs.gov.*

Registration: Interested participants may register for this meeting at the following Web site: *https://events-support.com/events/FDA_Orphan_Workshop.* If you need sign language interpretation during this meeting, please contact Eleanor Dixon-Terry at *Eleanor.Dixon-Terry@fda.hhs.gov* by September 20, 2013.

Attendance: Online registration for the workshop will be limited to 240 participants for the morning session, of which approximately 50 teams (up to 150 participants) may register for the one-on-one sessions. There will be no registration fee for the workshop.

For participants who cannot attend the morning meetings, simultaneous live interactive Webcasts will be made available. Participants may access the drug and biologics Webcast by visiting the following site: *https://collaboration.fda.gov/odd100413/.* The medical devices Webcast can be accessed by visiting: *https://collaboration.fda.gov/hudd100413/.*

SUPPLEMENTARY INFORMATION: The FDA/EMA Orphan Product Designation and Grant Workshop is being conducted in partnership with the European Organisation for Rare Diseases, Genetic Alliance, and the National Organization for Rare Disorders.

The morning program includes two simultaneous sessions. The first will provide an overview of the FDA and EMA Orphan Drug Designation programs, respectively, while the second will provide an overview of the FDA HUD Designation Program and Pediatric Device Consortia Grant Program. Both morning sessions will also cover the Orphan Products Grant Program as they relate to drugs, biologics, and devices. Both of these morning sessions will also be available by Webcast.

The afternoon session (no Webcast), provides an opportunity for appropriately registered participants to have one-on-one meetings with FDA staff members onsite, to discuss the specifics on how to apply for an orphan product grant, a HUD designation, or orphan drug designation. It also provides for videoconference sessions with EMA staff representatives on EMA orphan drug designation. Participants requesting one-on-one meetings are expected to bring information for at

least one candidate orphan drug or device that holds promise for the treatment of a rare disease or condition in order to discuss the processes for putting together an application. In addition, participants in the HUD or orphan drug designation one-on-one sessions are highly encouraged to come prepared with a working draft submission of their particular promising therapy in order to maximize the utility of the one-on-one meetings.

Dated: August 16, 2013.

Leslie Kux,

Assistant Commissioner for Policy.

[FR Doc. 2013–20371 Filed 8–20–13; 8:45 am]

BILLING CODE 4160–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Draft Report on Carcinogens Monographs for ortho-Toluidine and Pentachlorophenol and By-Products of Its Synthesis; Availability of Documents; Request for Comments; Notice of Meeting

SUMMARY: The notice announces a meeting to peer review the Draft Report on Carcinogens (RoC) Monographs for *ortho*-Toluidine and Pentachlorophenol and By-products of its Synthesis (hereafter referred to as ''pentachlorophenol''). These documents were prepared by the Office of the Report on Carcinogens (ORoC), Division of the National Toxicology Program (DNTP), National Institute of Environmental Health Sciences (NIEHS).

DATES: *Meeting:* October 7, 2013, 8:30 a.m. to approximately 5:00 p.m. Eastern Daylight Time (EDT) and October 8, 2013, from 8:30 a.m. until adjournment, approximately 11:30 a.m.

Document Availability: Draft monographs will be available by August 28, 2013, at *http://ntp.niehs.nih.gov/go/38853*.

Public Comments Submissions: Deadline is September 25, 2013.

Pre-Registration for Meeting and/or Oral Comments: Deadline is September 30, 2013.

ADDRESSES: *Meeting Location:* Rodbell Auditorium, Rall Building, NIEHS, 111 T.W. Alexander Drive, Research Triangle Park, NC 27709.

Agency Meeting Web page: The draft monographs, draft agenda, registration, and other meeting materials will be posted at *http://ntp.niehs.nih.gov/go/38853*.

Webcast: The meeting will be available via webcast at *http://www.niehs.nih.gov/news/video/index.cfm*.

FOR FURTHER INFORMATION CONTACT: Dr. Lori White, NTP Designated Federal Official, Office of Liaison, Policy and Review, DNTP, NIEHS, P.O. Box 12233, MD K2–03, Research Triangle Park, NC 27709. Phone: (919) 541–9834, Fax: (301) 480–3272, Email: *whiteld@niehs.nih.gov*. Hand Delivery/Courier: 530 Davis Drive, Room 2136, Morrisville, NC 27560.

SUPPLEMENTARY INFORMATION:

Background: The Report on Carcinogens (RoC) is a congressionally mandated, science-based, public health report that identifies agents, substances, mixtures, or exposures (collectively called ''substances'') in our environment that pose a cancer hazard for people in the United States. The NTP prepares the RoC on behalf of the Secretary of Health and Human Services.

The NTP follows an established, four-part process for preparation of the RoC (*http://ntp.niehs.nih.gov/go/rocprocess*). A RoC Monograph is prepared for each candidate substance selected for review for the RoC. Pentachlorophenol and *ortho*-toluidine were selected as candidate substances following solicitation of public comment, review by the NTP Board of Scientific Counselors on June 21–22, 2012, and approved by the NTP Director (*http://ntp.niehs.nih.gov/go/9741*). A draft RoC monograph consists of a (1) cancer evaluation component that reviews all information that may bear on a listing decision, assesses its quality and sufficiency for reaching a listing decision, applies the RoC listing criteria to the relevant scientific information, and recommends a listing status for the candidate substance in the RoC and (2) a substance profile that contains the NTP's preliminary listing recommendation and a summary of the scientific evidence considered key to reaching that recommendation. This meeting is planned for peer review of the draft RoC Monographs for *ortho*-toluidine and pentachlorophenol.

ortho-Toluidine (CASRN 95–53–4) is an arylamine used (directly or as an intermediate) to manufacture herbicides, dyes, pigments, and rubber chemicals. It is currently listed as reasonably anticipated to be a human carcinogen in the 12th RoC. Additional information about the review of *ortho*-toluidine for the RoC is available at *http://ntp.niehs.nih.gov/go/37898*.

Pentachlorophenol (CASRN 87–86–5) is a general biocide that has been used extensively as a fungicide, bactericide, herbicide, and insecticide by agriculture and other industries. In 1987, over-the-counter use was banned and other uses restricted. Currently, pentachlorophenol is defined in the United States as a 'heavy duty' wood preservative that is used primarily in the treatment of utility poles and cross arms. The candidate substance is defined as ''pentachlorophenol and by-products of its synthesis.'' During synthesis of pentachlorophenol, several additional chlorinated molecules are formed as by-products. In addition, biomonitoring studies have found that people who are exposed to pentachlorophenol or pentachlorophenol-containing products are always exposed to the combination of pentachlorophenol and its by-products. Additional information about the review of pentachlorophenol for the RoC is available at *http://ntp.niehs.nih.gov/go/37897*.

Meeting and Registration: The meeting is open to the public with time set aside for oral public comment; attendance at the NIEHS is limited only by the space available. The meeting is scheduled for October 7, 2013, 8:30 a.m. to approximately 5:00 p.m. EDT and October 8, 2013, from 8:30 a.m. until adjournment, approximately 11:30 a.m. Two days are set aside for the meeting; however, it may adjourn sooner if the panel completes its peer review of the draft monographs. Pre-registration to attend the meeting and/or provide oral comments is by September 30, 2013, at *http://ntp.niehs.nih.gov/go/38853*. Visitor and security information is available at *http://www.niehs.nih.gov/about/visiting/index.cfm*. Individuals with disabilities who need accommodation to participate in this event should contact Ms. Robbin Guy at phone: (919) 541–4363 or email: *guyr2@niehs.nih.gov*. TTY users should contact the Federal TTY Relay Service at (800) 877–8339. Requests should be made at least five business days in advance of the event.

The preliminary agenda and draft monographs should be posted on the NTP Web site (*http://ntp.niehs.nih.gov/go/38853*) by August 28, 2013. Additional information will be posted when available or may be requested in hardcopy, see **FOR FURTHER INFORMATION CONTACT**. Following the meeting, a report of the peer review will be prepared and made available on the NTP Web site. Registered attendees are encouraged to access the meeting Web page to stay abreast of the most current information regarding the meeting.

Request for Comments: The NTP invites written and oral public comments on the draft monographs. The deadline for submission of written comments is September 25, 2013, to enable review by the peer-review panel

and NTP staff prior to the meeting. Pre-registration to provide oral comments is by September 30, 2013, at *http://ntp.niehs.nih.gov/go/38853*. Public comments and any other correspondence on the draft monographs should be sent to the **FOR FURTHER INFORMATION CONTACT.** Persons submitting written comments should include their name, affiliation, mailing address, phone, email, and sponsoring organization (if any) with the document. Written comments received in response to this notice will be posted on the NTP Web site, and the submitter will be identified by name, affiliation, and/or sponsoring organization.

Public comment at this meeting is welcome, with time set aside for the presentation of oral comments on the draft monographs. In addition to in-person oral comments at the meeting at the NIEHS, public comments can be presented by teleconference line. There will be 50 lines for this call; availability will be on a first-come, first-served basis. The lines will be open from 8:30 a.m. until approximately 5:00 p.m. EDT on October 7 and from 8:30 a.m. EDT until adjournment on October 8, and oral comments will be received only during the formal public comment periods indicated on the preliminary agenda. Each organization is allowed one time slot per monograph. At least 7 minutes will be allotted to each speaker, and if time permits, may be extended to 10 minutes at the discretion of the chair. Persons wishing to make an oral presentation are asked to register online at *http://ntp.niehs.nih.gov/go/38853* by September 30, 2013, and if possible, to send a copy of their slides and/or statement or talking points at that time. Written statements can supplement and may expand the oral presentation. Registration for oral comments will also be available at the meeting, although time allowed for presentation by on-site registrants may be less than that for pre-registered speakers and will be determined by the number of speakers who register on-site.

Background Information on the RoC: Published biennially, each edition of the RoC is cumulative and consists of substances newly reviewed in addition to those listed in previous editions. The 12th RoC, the latest edition, was published on June 10, 2011 (available at *http://ntp.niehs.nih.gov/go/roc12*). The 13th RoC is under development. For each listed substance, the RoC contains a substance profile, which provides information on: Cancer studies that support the listing—including those in humans, animals, and studies on possible mechanisms of action—information about potential sources of exposure to humans, and current Federal regulations to limit exposures.

Background Information on NTP Peer Review Panels: NTP panels are technical, scientific advisory bodies established on an ''as needed'' basis to provide independent scientific peer review and advise the NTP on agents of public health concern, new/revised toxicological test methods, or other issues. These panels help ensure transparent, unbiased, and scientifically rigorous input to the program for its use in making credible decisions about human hazard, setting research and testing priorities, and providing information to regulatory agencies about alternative methods for toxicity screening. The NTP welcomes nominations of scientific experts for upcoming panels. Scientists interested in serving on an NTP panel should provide a current *curriculum vitae* to the **FOR FURTHER INFORMATION CONTACT.** The authority for NTP panels is provided by 42 U.S.C. 217a; section 222 of the Public Health Service (PHS) Act, as amended. The panel is governed by the Federal Advisory Committee Act, as amended (5 U.S.C. Appendix 2), which sets forth standards for the formation and use of advisory committees.

Dated: August 14, 2013.

John R. Bucher,

Associate Director, National Toxicology Program.

[FR Doc. 2013–19928 Filed 8–20–13; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Environmental Health Sciences; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), 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 Environmental Health Sciences Special Emphasis Panel Expedited Review of Biorepository Project.

Date: September 12, 2013.

Time: 1:00 p.m. to 2:30 p.m.

Agenda: To review and evaluate grant applications.

Place: NIEHS/National Institutes of Health, Keystone Building, 530 Davis Drive, Research Triangle Park, NC 27709 (Telephone Conference Call).

Contact Person: Sally Eckert-Tilotta, Ph.D., Scientific Review Administrator, Nat. Institute of Environmental Health Sciences, Office of Program Operations, Scientific Review Branch, P.O. Box 12233, Research Triangle Park, NC 27709, (919) 541–1446, *eckertt1@niehs.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.115, Biometry and Risk Estimation—Health Risks from Environmental Exposures; 93.142, NIEHS Hazardous Waste Worker Health and Safety Training; 93.143, NIEHS Superfund Hazardous Substances—Basic Research and Education; 93.894, Resources and Manpower Development in the Environmental Health Sciences; 93.113, Biological Response to Environmental Health Hazards; 93.114, Applied Toxicological Research and Testing, National Institutes of Health, HHS)

Dated: August 15, 2013.

Carolyn Baum,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2013–20343 Filed 8–20–13; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Center for Complementary and Alternative Medicine Notice of Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of a meeting of the National Advisory Council for Complementary and Alternative Medicine.

The meeting will be open to the public as indicated below, with attendance limited to space available. Individuals who plan to attend 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 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 Advisory Council for Complementary and Alternative Medicine NCCAM Advisory Council Board.

Date: October 4, 2013.

Closed: 8:30 a.m. to 10:00 a.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Building 31, Conference Room 10, 31 Center Drive, Bethesda, MD 20892.

Open: 10:15 a.m. to 4:00 p.m.

Agenda: Report from the Institute Director and other staff.

Place: National Institutes of Health, Building 31, Conference Room 10, 31 Center Drive, Bethesda, MD 20892.

Contact Person: Martin H. Goldrosen, Ph.D., Director, Division of Extramural Activities, National Center for Complementary and Alternative Medicine, NIH, 6707 Democracy Blvd., Ste. 401, Bethesda, MD 20892–5475, (301) 594–2014, *goldrosm@mail.nih.gov.*

Any interested person may file written comments with the committee by forwarding the statement to the Contact Person 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.

In the interest of security, NIH has instituted stringent procedures for entrance onto the NIH campus. All visitor vehicles, including taxicabs, hotel, and airport shuttles will be inspected before being allowed on campus. Visitors will be asked to show one form of identification (for example, a government-issued photo ID, driver's license, or passport) and to state the purpose of their visit.

Information is also available on the Institute's/Center's home page: *nccam.nih.gov/about/naccam/,* where an agenda and any additional information for the meeting will be posted when available.

(Catalogue of Federal Domestic Assistance Program Nos. 93.213, Research and Training in Complementary and Alternative Medicine, National Institutes of Health, HHS)

Dated: August 15, 2013.

Michelle Trout,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2013–20342 Filed 8–20–13; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Center For Scientific Review; Notice of Closed Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), 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: Biological Chemistry and Macromolecular Biophysics.

Date: August 26, 2013.

Time: 11:00 a.m. to 12:00 p.m.

Agenda: To review and evaluate grant applications

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892 (Telephone Conference Call).

Contact Person: Nitsa Rosenzweig, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 1102, MSC 7760, Bethesda, MD 20892, (301) 435–1747, *rosenzweign@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.

Name of Committee: Center for Scientific Review Special Emphasis Panel; Muscle Disease and Biology.

Date: September 3, 2013.

Time: 1:00 p.m. to 3:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892, (Telephone Conference Call).

Contact Person: Aftab A Ansari, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4108, MSC 7814, Bethesda, MD 20892, 301–237–9931, *ansaria@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 14, 2013.

David Clary,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2013–20341 Filed 8–20–13; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Office of Refugee Resettlement

[C.F.D.A. Number: 93.566]

Notice of FY 2013 Refugee Social Services Formula Awards to States and Wilson/Fish Alternative Project Grantees

AGENCY: Office of Refugee Resettlement, ACF, HHS.

ACTION: Notice of awards.

SUMMARY: The Office of Refugee Resettlement (ORR), Administration for Children and Families (ACF), announces the allocation of Refugee Social Services formula awards to States and Wilson/Fish Alternative Project grantees.

The FY 2013 formula allocations for Social Services are available on ORR's Web site at: *http://www.acf.hhs.gov/programs/orr/spotlight#announcements.*

DATES: The awards are effective immediately.

FOR FURTHER INFORMATION CONTACT: Henley Portner, Office of the Director, Office of Refugee Resettlement, (202) 401–5363, *Henley.Portner@acf.hhs.gov.*

SUPPLEMENTARY INFORMATION: The purpose of the Refugee Social Services program is to provide employability services, English language training, case management, social adjustment services, interpretation and translation services, and other resettlement services to refugees, Amerasians, asylees, Cuban and Haitian entrants, victims of trafficking, and Iraqis and Afghans with Special Immigrant Visas. The awards are determined by the number of the eligible populations residing in the State during the two-year period from October 1, 2010, to September 30, 2012. States with allocations under $100,000 through this calculation instead receive floor allocations ranging from $75,000 to $100,000 depending on the number of the eligible population in each State. The purpose of the floor allocations is to ensure that all participating States receive an award sufficient to maintain a program of resettlement services.

Funds must be obligated by September 30, 2014, and funds must be expended by September 30, 2015.

ACF reminds recipients and members of the public that a **Federal Register** notice, concerning a change in procedures that requires electronic submission of State/Tribal plans and reporting, is open for comment through August 27, 2013. The notice is available in **Federal Register**, Volume 78, No. 125, published on June 28, 2013, and at

http://www.gpo.gov/fdsys/pkg/FR-2013-06-28/pdf/2013-15465.pdf.

Statutory Authority: Sections 412(c)(1)(B) of the Immigration and Nationality Act (INA) (8 U.S.C. 1522(c)(1)(B))

Eskinder Negash,

Director, Office of Refugee Resettlement.

[FR Doc. 2013–20377 Filed 8–20–13; 8:45 am]

BILLING CODE 4184–46–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Office of Refugee Resettlement

[C.F.D.A. Number: 93.584]

Notice of FY 2013 Refugee Targeted Assistance Formula Awards to States and Wilson/Fish Alternative Project Grantees

AGENCY: Office of Refugee Resettlement, ACF, HHS.

ACTION: Notice of awards.

SUMMARY: The Office of Refugee Resettlement (ORR), Administration for Children and Families (ACF), announces the allocation of Refugee Targeted Assistance formula awards to States and Wilson/Fish Alternative Project grantees.

DATES: The awards are effective immediately.

FOR FURTHER INFORMATION CONTACT: Henley Portner, Office of the Director, Office of Refugee Resettlement, (202) 401–5363, *Henley.Portner@acf.hhs.gov.*

SUPPLEMENTARY INFORMATION: Refugee Targeted Assistance award allocations are available on the ORR Web page. The table of FY 2013 Allocations to Counties and Targeted Assistance Areas and the Table of FY 2013 Allocations to States may be found at: *http://www.acf.hhs.gov/programs/orr/spotlight#announcements.*

The purpose of the Targeted Assistance program is to provide employment and other resettlement services to refugees, Amerasians, asylees, Cuban and Haitian entrants, victims of trafficking, and Iraqis and Afghans with Special Immigrant Visas. The grants are awarded to States on behalf of counties with the greatest number of arrivals of the eligible populations. Services provided are intended to assist refugees obtain employment within one year's participation in the program and to achieve self-sufficiency. Awards are determined by the number of the eligible populations residing in each county during the two-year period from October 1, 2010, to September 30, 2012.

Funds must be obligated by September 30, 2014, and funds must be expended by September 30, 2015.

ACF reminds recipients and members of the public that a **Federal Register** notice, concerning a change in procedures that requires electronic submission of State/Tribal plans and reporting, is open for comment through August 27, 2013. The notice is available in **Federal Register**, Volume 78, No. 125, published on June 28, 2013, and at *http://www.gpo.gov/fdsys/pkg/FR-2013-06-28/pdf/2013-15465.pdf.*

Statutory Authority: Section 412(c)(2)(A) of the Immigration and Nationality Act (INA) (8 U.S.C. 1522).

Eskinder Negash,

Director, Office of Refugee Resettlement.

[FR Doc. 2013–20370 Filed 8–20–13; 8:45 am]

BILLING CODE 4184–46–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

[Docket No. USCG–2013–0756]

Merchant Marine Personnel Advisory Committee

AGENCY: Coast Guard, DHS.

ACTION: Notice of Federal Advisory Committee Meeting.

SUMMARY: The Merchant Marine Personnel Advisory Committee (MERPAC) will meet on September 11, 2013 and September 12, 2013 in Linthicum Heights, MD, to discuss various issues related to the training and fitness of merchant marine personnel. This meeting will be open to the public.

DATES: MERPAC working groups will meet on September 11, 2013, from 8 a.m. until 4 p.m., and the full committee will meet on September 12, 2013, from 8 a.m. until 4 p.m. Please note that this meeting may adjourn early if all business is finished.

ADDRESSES: The Committee will meet in Room A–111/113 of the Maritime Institute of Technology and Graduate Studies (MITAGS), 692 Maritime Boulevard, Linthicum Heights, MD 21090. For further information on the location of MITAGS, please contact Mr. Brian Senft at (410) 859–5700.

For information on facilities or services for individuals with disabilities or to request special assistance, contact Mr. Davis Breyer at 202–372–1445 or at *davis.j.breyer@uscg.mil* as soon as possible.

To facilitate public participation, we are inviting public comment on the issues to be considered by the committee and working groups as listed in the ''Agenda'' section below. Written comments for distribution to committee members and inclusion on MERPAC Web site must be submitted on or before August 28, 2013.

Written comments must be identified by Docket No. USCG–2013–0756 and submitted by one of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments (preferred method to avoid delays in processing).
- *Fax:* 202–493–2251.
- *Mail:* Docket Management Facility (M–30), U.S. Department of Transportation, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE., Washington, DC 20590–0001.
- *Hand Delivery:* Same as mail address above, between 9 a.m. and 5 p.m., Monday through Friday, except Federal Holidays. The telephone number is 202–366–9329.

Instructions: All submissions received must include the words ''Department of Homeland Security'' and the docket number for this action. Comments received will be posted without alteration at *http://www.regulations.gov*, including any personal information provided. You may review a Privacy Act notice regarding our public dockets in the January 17, 2008, issue of the **Federal Register** (73 FR 3316).

Docket: For access to the docket to read documents or comments related to this notice, go to *http://www.regulations.gov*, enter the docket number in the ''Search'' field and follow the instructions on the Web site.

Public oral comment periods will be held each day. Speakers are requested to limit their comments to 3 minutes. Please note that the public oral comment periods may end before the prescribed ending time following the last call for comments. Contact Davis Breyer as indicated above no later than August 28, 2013, to register as a speaker.

This notice may be viewed in our online docket, USCG–2013–0756, at *http://www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: Mr. Davis Breyer, Alternate Designated Federal Officer (ADFO), telephone 202–372–1445, or at *davis.j.breyer@uscg.mil.* If you have any questions on viewing or submitting material to the docket, call Barbara Hairston, Program Manager, Docket Operations, telephone 202–366–9826.

SUPPLEMENTARY INFORMATION: Notice of this meeting is given under the *Federal*

Advisory Committee Act (FACA), Title 5, United States Code (Pub. L. 92–463).

MERPAC is an advisory committee established under the Secretary's authority in section 871 of the Homeland Security Act of 2002, Title 6, United States Code, section 451, and chartered under the provisions of the FACA. The Committee acts solely in an advisory capacity to the Secretary of the Department of Homeland Security (DHS) through the Commandant of the Coast Guard and the Director of Commercial Regulations and Standards on matters relating to personnel in the U.S. merchant marine, including but not limited to training, qualifications, certification, documentation, and fitness standards. The Committee will advise, consult with, and make recommendations reflecting its independent judgment to the Secretary.

A copy of all meeting documentation is available at *https://homeport.uscg.mil* by using these key strokes: Missions; Port and Waterways Safety; Advisory Committees; MERPAC; and then use the announcements key. Alternatively, you may contact Mr. Breyer as noted in the **ADDRESSES** section above.

Agenda

Day 1

The agenda for the September 11, 2013, meeting is as follows:

(1) The full committee will meet briefly to discuss the working groups' business/task statements, which are listed under paragraph 2 (a)–(g) below.

(2) Working groups addressing the following task statements, available for viewing at *http://homeport.uscg.mil/merpac* will meet to deliberate:

(a) Task Statement 30, Utilizing Military Education, Training and Assessment for the International Convention on Standards of Training, Certification and Watchkeeping for Seafarers (STCW) and U.S. Coast Guard Certifications;

(b), Task Statement 58, Communication between External Stakeholders and the Mariner Credentialing Program, as it Relates to the National Maritime Center;

(c) Task Statement 78, Consideration of the International Labor Organization's Maritime Labour Convention, 2006;

(d) Task Statement 80, Crew Training Requirements Onboard Natural Gas-Fueled Vessels Other Than Liquefied Natural Gas Carriers.

(e) Task Statement 81, Development of Competency Requirements for Vessel Personnel Working Within the Polar Regions;

(f) Task Statement 82, Review and submit recommendations for proposed revisions to CG–719K, Merchant Mariner Credential Medical Evaluation Report and CG–719K/E, Merchant Mariner Evaluation of Fitness for Entry Level Ratings; and

(g) Task Statement 83, Development of competency requirements to meet STCW Chief Engineer III/2 for personnel working on small vessels with high horsepower.

(3) Public comment period. This will be held prior to the Reports of working groups.

(4) Reports of working groups. At the end of the day, the working groups will report to the full committee on what was accomplished in their meetings. The full committee will not take action on these reports on this date. Any official action taken as a result of this working group meeting will be taken on day 2 of the meeting.

(5) Adjournment of meeting.

Day 2

The agenda for the September 12, committee meeting is as follows:

(1) Introduction;

(2) Remarks from Coast Guard Leadership;

(3) Roll call of committee members and determination of a quorum;

(4) Designated Federal Officer (DFO) announcements;

(5) Reports from the following working groups;

(a) Task Statement 30, Utilizing Military Education, Training and Assessment for STCW and U.S. Coast Guard Certifications;

(b) Task Statement 58, Communication between External Stakeholders and the Mariner Credentialing Program, as it Relates to the National Maritime Center;

(c) Task Statement 78, Consideration of the International Labor Organization's Maritime Labour Convention, 2006;

(d) Task Statement 80, Crew Training Requirements Onboard Natural Gas-Fueled Vessels Other Than Liquefied Natural Gas Carriers.

(e) Task Statement 81, Development of Competency Requirements for Vessel Personnel Working Within the Polar Regions;

(f) Task Statement 82, Review and submit recommendations for proposed revisions to CG–719K, Merchant Mariner Credential Medical Evaluation Report and CG–719K/E, Merchant Mariner Evaluation of Fitness for Entry Level Ratings; and

(g) Task Statement 83, Development of competency requirements to meet STCW Chief Engineer III/2 for personnel working on small vessels with high horsepower.

(6) Other items for discussion:

(a) Report on National Maritime Center (NMC) activities from NMC Commanding Officer, such as the net processing time it takes for a mariner to receive his or her credential after application submittal;

(b) Report on Mariner Credentialing Program Policy Division activities, such as its current initiatives and projects;

(c) Report on International Maritime Organization (IMO)/International Labor Organization (ILO issues related to the merchant marine industry;

(d) Report on the implementation of the 2010 amendments to the STCW Convention; and

(e) Briefings about on-going Coast Guard projects related to personnel in the U.S. Merchant Marine, such as possible Task Statements concerning:

- Correction of merchant mariner credentials issued with clear errors;
- Review of draft update to Volume III of the Marine Safety Manual, Chapters 20 to 26; and
- Seafarer fatigue

(7) Public comment period/presentations.

(8) Discussion of working group recommendations. The committee will review the information presented on each issue, deliberate on any recommendations presented by the working groups and approve/formulate recommendations for the Department's consideration. Official action on these recommendations may be taken on this date.

(9) Closing remarks/plans for next meeting.

(10) Adjournment of meeting.

A copy of all meeting documentation is available at *http://homeport.uscg.mil/merpac.* Alternatively, you may contact Mr. Breyer as noted in the **ADDRESSES** section above.

Dated: August 15, 2013.

J. G. Lantz,

Director of Commercial Regulations and Standards.

[FR Doc. 2013–20350 Filed 8–20–13; 8:45 am]

BILLING CODE 9110–04–P

DEPARTMENT OF HOMELAND SECURITY

U.S. Customs and Border Protection

Notice of Issuance of Final Determination Concerning Certain Hard Disk Drives and Self-Encrypting Drives

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

ACTION: Notice of final determination.

SUMMARY: This document provides notice that U.S. Customs and Border Protection (''CBP'') has issued a final determination concerning the country of origin of certain digital storage devices known as hard disk drives (''HDDs'') and self-encrypting drives (''SEDs''). Based upon the facts presented, CBP has concluded that the programming operations performed in the United States, using U.S.-origin firmware, substantially transform non-TAA country HDDs. Therefore, the country of origin of the HDDs and SEDs is the United States for purposes of U.S. Government procurement.

DATES: The final determination was issued on August 14, 2013. A copy of the final determination is attached. Any party-at-interest, as defined in 19 CFR 177.22(d), may seek judicial review of this final determination on or before September 20, 2013.

FOR FURTHER INFORMATION CONTACT: Heather K. Pinnock, Valuation and Special Programs Branch: (202) 325–0034.

SUPPLEMENTARY INFORMATION: Notice is hereby given that on August 14, 2013, pursuant to subpart B of Part 177, U.S. Customs and Border Protection Regulations (19 CFR part 177, subpart B), CBP issued a final determination concerning the country of origin of certain digital storage devices known as HDDs and SEDs, which may be offered to the U.S. Government under an undesignated government procurement contract. This final determination, HQ H241362, was issued under procedures set forth at 19 CFR Part 177, subpart B, which implements Title III of the Trade Agreements Act of 1979, as amended (19 U.S.C. 2511–18). In the final determination, CBP concluded that, based upon the facts presented, the programming operations performed in the United States, using U.S.-origin firmware, substantially transform non-TAA country HDDs. Therefore, the country of origin of the HDDs and SEDs is the United States for purposes of U.S. Government procurement.

Section 177.29, CBP Regulations (19 CFR 177.29), provides that a notice of final determination shall be published in the **Federal Register** within 60 days of the date the final determination is issued. Section 177.30, CBP Regulations (19 CFR 177.30), provides that any party-at-interest, as defined in 19 CFR 177.22(d), may seek judicial review of a final determination within 30 days of publication of such determination in the **Federal Register**.

Dated: August 14, 2013.

Sandra L. Bell,

Executive Director, Regulations and Rulings, Office of International Trade

Attachment

HQ H241362

MAR OT:RR:CTF:VS H241362 HkP

CATEGORY: Origin

Stuart P. Seidel, Esq.
Baker & McKenzie
815 Connecticut Avenue NW
Washington, DC 20006–4078

RE: Government Procurement; Trade Agreements Act; Country of Origin of Hard Disk Drives and Self-Encryption Drives; Substantial Transformation

Dear Mr. Seidel:

This is in response to your letter, dated April 24, 2013, requesting a final determination on behalf of Seagate Technology, LLC (''Seagate''), pursuant to subpart B of part 177 of the U.S. Customs and Border Protection (''CBP'') Regulations (19 C.F.R. Part 177). Under these regulations, which implement Title III of the Trade Agreements Act of 1979 (TAA), as amended (19 U.S.C. § 2511 et seq.), CBP issues country of origin advisory rulings and final determinations as to whether an article is or would be a product of a designated country or instrumentality for the purposes of granting waivers of certain ''Buy American'' restrictions in U.S. law or practice for products offered for sale to the U.S. Government. In reaching our decision, we have taken into account additional information submitted on June 3, 2013.

This final determination concerns the country of origin of three lines of Seagate's Hard Disk Drives (''HDDs'') designated as: (1) ''Mission Critical''; (2) ''Business Critical''; and, (3) ''Personal Storage''. We note that as a U.S. importer, Seagate is a party-at-interest within the meaning of 19 C.F.R. § 177.22(d)(1) and is entitled to request this final determination. Your request for confidential treatment regarding all cost and price information contained in your request is granted and such information will not be disclosed to the public.

FACTS:

Seagate imports fully assembled HDDs from [non-TAA country] or [non-TAA country]. An HDD is a digital storage device. The products at issue are three lines of HDDs: (1) Mission Critical, sold under the brand names ''Cheetah'', ''Savvio'', and ''Enterprise Performance''; (2) Business Critical, sold under the brand names ''Constellation'', ''Enterprise Capacity'', and ''Enterprise Value''; and, (3) Personal Storage, sold under the brand names ''Barracuda'' and ''Desktop''.

HDDs are designed in the United States and assembled either in [non-TAA country] or [non-TAA country] from components manufactured by Seagate outside the United States or obtained by Seagate from suppliers in Asia. The assembly process in [non-TAA country] or [non-TAA country] is as follows:

The Head Disk Assembly (''HDA''), usually comprised of two magnetic recording media (''Media'') and three read/write recording heads (''Heads''), a head actuator assembly, and an airtight metal enclosure is assembled in minutes.

The HDA is mated to a printed circuit board (''PCB'') containing disk drive electronics to create an HDD. It is assembled in seconds.

The HDD is loaded into the factory testing system, and testing firmware is downloaded onto the HDD to facilitate media certifications. The HDD stays in a sequence of media certification operations for one or more days, as necessary.

Following successful media certification, the HDD testing firmware is replaced with generic, basic firmware that only allows the HDD's computer interface functions to be tested. Testing lasts between [xxx] and [xxx].

After testing, the generic firmware is removed and the drive is ''forced blocked'', that is, it is blocked from being able to have software loaded onto it or to be further tested. It is stated that force blocking renders the HDD unable to function as a storage drive.

The Heads in the HDA incorporate semiconductor, magnetic, mechanical, and manufacturing process design into an integrated recording reader and writer. It takes approximately [xxx] hours to design a Head, [xxx] of which are allocated to design work in the U.S., [xxx] hours to design work in [non-TAA country], and [xxx] hours to design work in [non-TAA country]. The Media in the HDA incorporates thin film magnetics, mechanical surface design and manufacturing process design. It takes approximately [xxx] hours to design Media, [xxx] of which are allocated to work done in the U.S., [xxx] hours to work done in [TAA country], and [xxx] hours to work done in [non-TAA country].

Fully assembled HDDs are shipped to the United States. According to the information submitted, in their imported condition, HDDs cannot function as storage media. The disk heads cannot move, data cannot be stored or retrieved and, were the HDDs to be installed on computers or networks, they would not be recognized or listed. They do, however, have a rudimentary serial port that enables the HDD to communicate with a computer using a proprietary Seagate protocol so that firmware may be installed and tests performed.

In the U.S., the imported HDD is unblocked and programmed with two types of firmware:

1. Servo Firmware, which controls all motor, preamp and servo functions without which the motors, Media, and Heads will not operate and the HDD will not work; and

2. Non-Security Controller Firmware, which manages all communications between the host and target drives as well as all data within the drive. It allows data files to be stored on the Media in the HDD, to be found and listed within applications, and to be saved, retrieved and overwritten.

Installation and testing of the Servo and Non-Security Controller Firmware takes between [xxx] and [xxx], depending on the capacity and model of the HDD. Both types of firmware are developed in the U.S. and [TAA country]. Approximately 80% of the work hours spent on combined firmware

design is allocated to work performed in the United States at Seagate's design centers and approximately 20% to work performed in [TAA country]. Combined, the compiled firmware code is approximately 2 MB in size and contains approximately one million lines of code. The firmware loaded onto the HDD in the U.S. makes the HDD a fully functional, generic storage device.

During programming operations, approximately 25% of the generic HDDs are reformatted based on specific customer requirements, such as security features, format sizes, and format modes. Customer-specific code is developed in the United States. Security Controller Firmware, which may be added on to Non-Security Controller Firmware as a part of a customer's code, allows the HDDs to be secured through encryption, which involves enabling an encryption program and security interface, locking the debug ports, and loading credentials and certificates. The Security Controller Firmware is written in the U.S. (85–90%) and in [TAA country] (10–15%), based on architecture totally designed in the U.S. involving thousands of hours and millions of dollars. After the HDDs are configured to customer security requirements, the HDDs are known as self-encrypting drives (SEDs). SEDs encrypt data as it is being written and decrypts data as it is being read.

After programming is complete, the HDDs and SEDs are validated or tested. A final quality assurance inspection is performed, after which the HDDs and SEDs receive new part numbers and labels, and are sold.

ISSUE:

What is the country of origin of Seagate's Hard Disk Drives and Self-Encrypting Drives for purposes of U.S. Government procurement?

LAW AND ANALYSIS:

Pursuant to Subpart B of Part 177, 19 CFR § 177.21 et seq., which implements Title III of the Trade Agreements Act of 1979, as amended (19 U.S.C. § 2511 et seq.), CBP issues country of origin advisory rulings and final determinations as to whether an article is or would be a product of a designated country or instrumentality for the purposes of granting waivers of certain ''Buy American'' restrictions in U.S. law or practice for products offered for sale to the U.S. Government.

Under the rule of origin set forth under 19 U.S.C. § 2518(4)(B):

An article is a product of a country or instrumentality only if (i) it is wholly the growth, product, or manufacture of that country or instrumentality, or (ii) in the case of an article which consists in whole or in part of materials from another country or instrumentality, it has been substantially transformed into a new and different article of commerce with a name, character, or use distinct from that of the article or articles from which it was so transformed.

See also 19 C.F.R. § 177.22(a).

In rendering advisory rulings and final determinations for purposes of U.S. Government procurement, CBP applies the provisions of subpart B of Part 177 consistent with the Federal Procurement Regulations. *See* 19 C.F.R. § 177.21. In this regard, CBP recognizes that the Federal Procurement Regulations restrict the U.S. Government's purchase of products to U.S.-made or designated country end products for acquisitions subject to the TAA. *See* 48 C.F.R. § 25.403(c)(1). The Federal Procurement Regulations define ''U.S.-made end product'' as:

[A]n article that is mined, produced, or manufactured in the United States or that is substantially transformed in the United States into a new and different article of commerce with a name, character, or use distinct from that of the article or articles from which it was transformed.

In order to determine whether a substantial transformation occurs when components of various origins are assembled into completed products, CBP considers the totality of the circumstances and makes such determinations on a case-by-case basis. The country of origin of the item's components, extent of the processing that occurs within a country, and whether such processing renders a product with a new name, character, and use are primary considerations in such cases. Additionally, factors such as the resources expended on product design and development, the extent and nature of post-assembly inspection and testing procedures, and worker skill required during the actual manufacturing process will be considered when determining whether a substantial transformation has occurred. No one factor is determinative.

In *Data General v. United States,* 4 Ct. Int'l Trade 182 (1982), the court determined that for purposes of determining eligibility under item 807.00, Tariff Schedules of the United States (predecessor to subheading 9802.00.80, Harmonized Tariff Schedule of the United States), the programming of a foreign PROM (Programmable Read-Only Memory chip) in the United States substantially transformed the PROM into a U.S. article. In programming the imported PROMs, the U.S. engineers systematically caused various distinct electronic interconnections to be formed within each integrated circuit. The programming bestowed upon each circuit its electronic function, that is, its ''memory'' which could be retrieved. A distinct physical change was effected in the PROM by the opening or closing of the fuses, depending on the method of programming. This physical alteration, not visible to the naked eye, could be discerned by electronic testing of the PROM. The court noted that the programs were designed by a U.S. project engineer with many years of experience in ''designing and building hardware.'' While replicating the program pattern from a ''master'' PROM may be a quick one-step process, the development of the pattern and the production of the ''master'' PROM required much time and expertise. The court noted that it was undisputed that programming altered the character of a PROM. The essence of the article, its interconnections or stored memory, was established by programming. The court concluded that altering the non-functioning circuitry comprising a PROM through technological expertise in order to produce a functioning read only memory device, possessing a desired distinctive circuit pattern, was no less a ''substantial transformation'' than the manual interconnection of transistors, resistors and diodes upon a circuit board creating a similar pattern.

In *Texas Instruments v. United States,* 681 F.2d 778, 782 (CCPA 1982), the court observed that the substantial transformation issue is a ''mixed question of technology and customs law.''

In C.S.D. 84–85, 18 Cust. B. & Dec. 1044 (Apr. 2, 1984), CBP stated:

We are of the opinion that the rationale of the court in the *Data General* case may be applied in the present case to support the principle that the essence of an integrated circuit memory storage device is established by programming . . . . [W]e are of the opinion that the programming (or reprogramming) of an EPROM results in a new and different article of commerce which would be considered to be a product of the country where the programming or reprogramming takes place.

Accordingly, the programming of a device that changes or defines its use generally constitutes substantial transformation. *See also* Headquarters Ruling Letter ('HQ'') 558868, dated February 23, 1995 (programming of SecureID Card substantially transforms the card because it gives the card its character and use as part of a security system and the programming is a permanent change that cannot be undone); HQ 735027, dated September 7, 1993 (programming blank media (EEPROM) with instructions that allow it to perform certain functions that prevent piracy of software constitute substantial transformation); and, HQ 733085, dated July 13, 1990; *but see* HQ 732870, dated March 19, 1990 (formatting a blank diskette does not constitute substantial transformation because it does not add value, does not involve complex or highly technical operations and did not create a new or different product); HQ 734518, dated June 28, 1993, (motherboards are not substantially transformed by the implanting of the central processing unit on the board because, whereas in *Data General* use was being assigned to the PROM, the use of the motherboard had already been determined when the importer imported it).

HQ H052325, dated February 14, 2006, concerned the country of origin of a switch and a switch/router. The Brocade 7800 Extension Switch was assembled to completion in China and programmed in the U.S. with U.S.-origin operating system (OS) software and customer specified firmware and software. The Brocade FX8–24 switch/router contained a PCBA that was assembled and programmed in China and shipped to the U.S., where it was assembled with other components to make the final product. The completed unit was then programmed with U.S.-origin OS software and customer firmware and software. In both cases, the U.S.-origin OS software provided the devices with their functionality. Customs found that in both cases, the processing performed in the United States, including the downloading of the U.S.-origin OS software, resulted in a substantial transformation of the foreign

origin components, and that the United States was the country of origin.

In HQ H175415, dated October 4, 2011, hardware components were assembled into complete Ethernet switches in China. The switches were then shipped to the U.S., where they were programmed with EOS software, developed in the U.S. The U.S.-origin EOS software enabled the imported switches to interact with other network switches through network switching and routing, and allowed for the management of functions such as network performance monitoring and security and access control. Without this software, the imported devices could not function as Ethernet switches. As a result of the programming performed in the U.S., with software developed in the U.S., CBP found that the imported switches were substantially transformed in the U.S.

In HQ H215555 (July 13, 2012), fully assembled SheevaPlug microcomputers were imported into the United States, where they were programmed with Pwnie Express proprietary software developed in the U.S. The custom software provided a web-based interface for configuring the microcomputers into Pwn Plugs. In addition, the U.S. software allowed Pwn Plugs to provide secure, persistent and reliable remote access over a variety of network protocols and customer environments. Without the U.S.-origin Pwnie Express software, an imported microcomputer could not function as a Pwn Plug. As a result of the programming performed in the U.S., with software developed in the U.S., we found that the imported microcomputers were substantially transformed in the U.S. and that the country of origin of Pwn Plugs was the United States.

In this case, fully assembled digital storage devices are imported into the United States. Mechanically, the HDDs consist of magnetic heads and a PBC. Their purpose is to store data. Accordingly, in their imported condition they are completely non-functional, in that, their disk heads cannot move, they cannot store or retrieve data, and they cannot be recognized or listed by a computer or network. The imported HDDs only have a basic ability to communicate through a serial port using a proprietary Seagate protocol that is used solely to install firmware and to test the devices. They are programmed in the U.S. with U.S.-origin Servo firmware, which causes the HDD to function mechanically by controlling the motors, preamp and servo mechanisms, which operate the recording media and disk heads in the HDA. They are also programmed in the U.S. with U.S.-origin Controller firmware, which manages all communication between the host and target drives as well as all data management within the drive. In particular, Controller firmware allows data files to be stored on the recording media in the HDA, found and listed within applications, and saved, retrieved and overwritten. Together, the U.S.-origin firmware causes the imported HDDs to function as digital storage devices. As a result of the programming performed in the U.S., with software primarily developed in the U.S., we find that the imported HDDs are substantially transformed in the U.S. *See Data General,* C.S.D. 84–85, HQ 215555, HQ 052325, HQ 558868, HQ 735027, and HQ 733085. The country of origin of the HDDs is the United States.

Counsel also argues that SEDs are different products than standard HDDs because they undergo an additional substantial transformation. Specifically, counsel states that the U.S.-origin security firmware with which HDD is programmed in the U.S. converts a standard HDD into a SED, a controlled encryption device for U.S. export control purposes. In addition, counsel states that the SED performs different functions than a standard HDD, has different labeling and part numbers, is marketed and sold in a different market than the HDD (a separate portion of the Seagate website is devoted to security devices such as SEDs), and is priced differently. We agree. To the extent that the HDDs are programmed with additional U.S.-origin security firmware, the country of origin of the SEDs will be the United States.

Nonetheless, this determination concerns whether the HDDs and SEDs are products of a designated country or instrumentality for the purposes of granting waivers of certain ''Buy American'' restrictions in U.S. law or practice for products offered for sale to the U.S. Government. Consequently, the question of whether additional programming performed in the U.S., using U.S.-origin firmware incorporating an encryption code, transforms the HDD into a SED subject to U.S. export control jurisdiction is outside the scope of this determination.

Please be advised that whether the HDDs may be marked ''Made in the U.S.A.'' or with similar words, is an issue under the authority of the Federal Trade Commission (''FTC''). We suggest that you contact the FTC, Division of Enforcement, 6th and Pennsylvania Avenue, NW, Washington, DC 20508, on the propriety of markings indicating that articles are made in the United States.

HOLDING:

Based on the facts provided, the programming operations performed in the United States impart the essential character to Seagate's hard disk drives. As such, the HDDs are considered products of the United States for purposes of U.S. Government procurement.

Notice of this final determination will be given in the **Federal Register**, as required by 19 C.F.R. § 177.29. Any party-at-interest other than the party which requested this final determination may request, pursuant to 19 C.F.R. § 177.31, that CBP reexamine the matter anew and issue a new final determination. Pursuant to 19 C.F.R. § 177.30, any party-at-interest may, within 30 days of publication of the **Federal Register** Notice referenced above, seek judicial review of this final determination before the Court of International Trade.

Sincerely,

Sandra L. Bell,

Executive Director Regulations and Rulings Office of International Trade

[FR Doc. 2013–20425 Filed 8–20–13; 8:45 am]

BILLING CODE 9111–14–P

DEPARTMENT OF THE INTERIOR

Geological Survey

[GX13N05ESB0500]

Agency Information Collection Activities: Comment Request

AGENCY: U.S. Geological Survey (USGS), Interior.

ACTION: Notice of a new information collection, Registry of Climate Change Vulnerability Assessments.

SUMMARY: We (the U.S. Geological Survey) will ask the Office of Management and Budget (OMB) to approve the information collection (IC) described below. To comply with the Paperwork Reduction Act of 1995 (PRA) and as part of our continuing efforts to reduce paperwork and respondent burden, we invite the general public and other Federal agencies to take this opportunity to comment on this IC.

DATES: Submit written comments on or before October 21, 2013.

ADDRESSES: You may submit comments on this IC to the Information Collection Clearance Officer, U.S. Geological Survey, 12201 Sunrise Valley Drive, MS 807, Reston, VA 20192 (mail); (703) 648–7197 (fax); or *dgovoni@usgs.gov* (email). Please reference ''Information Collection 1028—NEW, Registry of Climate Change Vulnerability Assessments'' in the subject line.

FOR FURTHER INFORMATION CONTACT: Laura Thompson, National Climate Change and Wildlife Science Center, U.S. Geological Survey, 12201 Sunrise Valley Drive, Mail Stop 400, Reston, VA 20192 (mail); 703–648–4083 (phone); or *lthompson@usgs.gov* (email).

SUPPLEMENTARY INFORMATION:

I. Abstract

The USGS proposes to collect information on existing assessments of the vulnerability of various resources and societal assets to climate change (hereafter VA or ''vulnerability assessments''). This information will include organization conducting the study, its location, the topical focus of the assessment, methodology and supporting data used, and point of contact information. Because many governmental and nongovernmental parties are conducting such assessments, and because their conclusions, methodologies, and related data assets may be of interest or utility to others contemplating such assessments, the USGS will make the information collected available on the Web in the form of a simple registry-type database. Users, including the

general public, scientists, resource management agencies, and others will be able to search the database by various keywords of interest.

II. Data

OMB Control Number: 1028—NEW.

Title: Registry of Climate Change Vulnerability Assessments.

Type of Request: New information collection.

Affected Public: Federal agencies, state, tribal and nongovernmental partners, individual scientists, and others involved in the conduct of climate change vulnerability assessments.

Respondent's Obligation: None (participation is voluntary).

Frequency of Collection: This information will be collected initially and reviewed at least annually. All listed Registry projects will be contacted and requested to update their information; Federal agencies participating in the Registry will conduct ''data calls'' according to agency practice to identify new agency projects, and external partners will be reminded via Web posting and community-of-practice networking that new projects may be added to the Registry. Additional entries may be added at any time, as information becomes available.

Estimated Total Number of Annual Responses: Approximately 1360 responses (i.e., additions to the registry) are expected in the initial data collection phase (first year), including approximately 1200 from Federal organizations and approximately 160 state/local, tribal, and nongovernmental organizations. In subsequent years, annual additions to the registry are expected to be 100 or fewer.

Estimated Time per Response: We estimate that it will take one hour per person to document a single assessment project for inclusion in the registry. In future years, reviewing project information to ensure currency or identifying new projects is expected to require *de minimis* effort.

Estimated Annual Burden Hours: 1360 in year one and less than 100 in each subsequent year.

Estimated Reporting and Recordkeeping ''Non-Hour Cost'' Burden: There are no ''non-hour cost'' burdens associated with this collection of information.

Public Disclosure Statement: The PRA (44 U.S.C. 3501, *et seq.*) provides that an agency 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. Until OMB approves a collection of information, you are not obligated to respond.

Comments: We are soliciting comments as to: (a) Whether the proposed collection of information is necessary for the agency to perform its duties, including whether the information is useful; (b) the accuracy of the agency's estimate of the burden of the proposed collection of information; (c) how to enhance the quality, usefulness, and clarity of the information to be collected; and (d) how to minimize the burden on the respondents, including the use of automated collection techniques or other forms of information technology.

Please note that the comments submitted 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 IC. Before including your address, phone number, email address, or other personal identifying information in your comment, you should be aware that your entire comment, including your personal identifying information, may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

Dated: August 15, 2013.

Thomas D. Beard, Jr.,

Chief, National Climate Change and Wildlife Science Center, U.S. Geological Survey.

[FR Doc. 2013–20361 Filed 8–20–13; 8:45 am]

BILLING CODE 4311–AM–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[LLCAN06000–L14300000–ET0000/CACA 54303]

Notice of Application for Withdrawal and Opportunity for Public Meeting; California

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice.

SUMMARY: The United States Forest Service (USFS) filed an application with the Bureau of Land Management (BLM) requesting the Secretary of the Interior to withdraw approximately 541 acres of National Forest System lands in the Shasta-Trinity National Forest for a period of 20 years, from location and entry under the United States mining laws, but not from leasing under the mineral or geothermal leasing laws. The purpose of the withdrawal would be to protect the cultural, recreational, and biological resources within and along the Trinity River Wild and Scenic River (TRWSR) located in Trinity County, California. This notice temporarily segregates the lands from location and entry under the United States mining laws for up to 2 years while the withdrawal application is considered. This notice also gives the public an opportunity to comment on the withdrawal application and to request a public meeting.

DATES: Comments and/or requests for a public meeting should be received by November 19, 2013.

ADDRESSES: Comments and/or requests for a public meeting should be sent to California State Director, Bureau of Land Management, 2800 Cottage Way, Suite W1623, Sacramento, CA 95825–1886.

FOR FURTHER INFORMATION CONTACT: Elizabeth Easley, BLM California State Office, 916–978–4673, or Brenda Tracy, Shasta-Trinity National Forest Headquarters, 530–226–2500 during regular business hours, 8 a.m. to 4:30 p.m., Monday through Friday, except holidays. Persons who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339 to contact the above individuals. The FIRS is available 24 hours a day, 7 days a week, to leave a message or question with the above individual. You will receive a reply during normal business hours.

SUPPLEMENTARY INFORMATION: The USFS has filed an application requesting that the Secretary of the Interior withdraw, subject to valid existing rights, the following described lands located in Trinity County, California, from location and entry under the United States mining laws, but not from leasing under the mineral or geothermal leasing laws, to protect the cultural, recreational, and biological resources within the TRWSR:

Mount Diablo Meridian

T. 33 N., R. 8 W.,
sec. 8, S½SW¼;
sec. 18, E½NE¼NE¼ and SE¼SE¼NE¼.
T. 32 N., R. 10 W.,
sec. 4, lot 4 except that portion in Mineral Entry Patent 28914 (described as the W½ of said lot 4), and SW¼NW¼;
sec. 5, lot 7 and SE¼NE¼.
T. 33 N., R. 10 W.,
sec. 29, lots 8, 9, 10, 15, and 18;
sec. 30, lots 7 and 8;
sec. 32, lots 12 and 14, W½NE¼NW¼, and W½SE¼NW¼.

The areas described aggregate 541 acres, more or less, in Trinity County, California.

The above-described lands being National Forest System lands, the Secretary shall make a withdrawal only

with the consent of the head of department or agency administering these lands.

The use of a right-of-way, interagency agreement, or cooperative agreement would not adequately constrain non-discretionary uses and would not provide adequate protection of the resources within the TRWSR .

There are no suitable alternative sites with equal or greater benefit to the government.

No additional water rights will be needed to fulfill the purpose of the requested withdrawal.

The identification of mineral resources along the Trinity River indicates there is a high potential for the occurrence of placer gold and associated platinum group elements in the river alluvium. There is a moderate to high potential for commercial placer gold development. These alluvial gravel deposits, including the placer tailings, also have a moderate potential for development as sources of mineral materials. There are no other significant mineral occurrences or development potentials.

Records related to the application may be examined by contacting either of the above individuals listed above.

Comments or Requests for Public Meetings: For a period until November 19, 2013, all persons who wish to submit comments, suggestions, or objections in connection with the proposed withdrawal may present their views in writing to the BLM California State office at the address listed above.

Notice is also hereby given that the opportunity for a public meeting is afforded in connection with the proposed withdrawal. All interested parties who desire a public meeting for the purpose of being heard on the proposed withdrawal must submit a written request to the BLM California State Office at the address listed above by November 19, 2013.

If the BLM authorized officer determines that the BLM/FS will hold a public meeting, the BLM will publish a notice of the time and place in the **Federal Register** and a local newspaper at least 30 days before the scheduled date of the meeting.

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. Individuals that submit written comments may request confidentiality by asking us in your comment to withhold your personal identifying information from public review, however, we cannot guarantee that we will be able to do so.

Temporary Segregation: For a period until August 21, 2015, the National Forest System lands described in this notice will be segregated from location and entry under the United States mining laws, but not from leasing under the mineral or geothermal leasing laws, unless the application is denied or canceled or the withdrawal is approved prior to that date. The temporary land uses that may be permitted during the temporary segregation period include licenses, permits, rights of way, and disposal of vegetative resources other than under the mining laws.

The application will be processed in accordance with the regulations set forth in 43 CFR part 2300.

Cynthia Staszak,

Associate Deputy State Director, Natural Resources (CA930).

[FR Doc. 2013–20392 Filed 8–20–13; 8:45 am]

BILLING CODE 4310–40–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[LLCAN06000–L14300000–ET0000; CACA 054196]

Notice of Proposed Withdrawal and Opportunity for Public Meeting; California

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice.

SUMMARY: The Assistant Secretary of the Interior for Policy, Management and Budget proposes to withdraw, subject to valid existing rights, on behalf of the Bureau of Land Management (BLM) 3,123 acres of public lands located in Trinity County, California, from location and entry under the United States mining laws, but not from mineral material sales or mineral or geothermal leasing, to protect the cultural, recreational, and biological resources within and along the recreational segments of the Trinity Wild and Scenic River (TRWSR). This notice temporarily segregates the lands for up to 2 years from location and entry under the United States mining laws and gives the public an opportunity to comment on the proposed withdrawal application and to request a public meeting.

DATES: The BLM must receive comments and requests for a public meeting by November 19, 2013.

ADDRESSES: Comments and meeting requests should be sent to Jennifer Mata, Field Manager, Redding Field Office, Bureau of Land Management (BLM), 355 Hemsted Drive, Redding, CA 96002.

FOR FURTHER INFORMATION CONTACT: Susie Greenhalgh, Northern California District Office, BLM, 530–224–2142. Persons who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339 to contact the above individual. The FIRS is available 24 hours a day, 7 days a week, to leave a message or question with the above individual. You will receive a reply during normal business hours.

SUPPLEMENTARY INFORMATION: The BLM filed an application requesting the Assistant Secretary for Policy, Management and Budget to withdraw, subject to valid existing rights, the following described lands located in Trinity County, California, from location and entry under the United States mining laws, but not from leasing under the mineral or geothermal leasing laws, or disposal under the Materials Act of 1947, to protect the cultural, recreational, and biological resources within the TRWSR:

Mount Diablo Meridian

T. 33 N., R. 8 W.,
- sec. 18, lot 4, W½SE¼SW¼, SE¼SE¼SW¼, SW¼SW¼NW¼SE¼, and SW¼SW¼SE¼;
- sec. 19, N½NE¼NW¼, N½SW¼NE¼NW¼, and N½SE¼NE¼NW¼.

T. 32 N., R. 9 W.,
- sec. 4, lots 15 and 16;
- sec. 5, lot 5;
- sec. 6, lots 1, 6, 13, 17, and 21 to 26, inclusive, and SE¼NE¼;
- sec. 26, lots 11, 12, and 13, S½SE¼NE¼, and N½NE¼SE¼.

T. 33 N., R. 9 W.,
- sec. 13, lot 1, S½NE¼NE¼, N½SE¼NW¼, and SE¼SE¼NW¼;
- sec. 22, S½SE¼SE¼;
- sec. 23, N½NE¼NE¼NE¼, SE¼NE¼NE¼, SW¼SE¼SW¼NE¼, NE¼SE¼NE¼, S½SE¼NE¼, S½SW¼SW¼SW¼, S½SE¼SW¼SW¼, NE¼SE¼SW¼, S½SE¼SW¼, and S½NW¼SE¼;
- sec. 24, lot 1;
- sec. 27, lot 17;
- sec. 28, lots 4, 7, 8, 9, 12, and 13;
- sec. 29, SE¼NE¼SE¼, NE¼SE¼SE¼, and S½SE¼SE¼;
- sec. 31, SE¼SE¼NE¼ and E½NE¼SE¼;
- sec. 32, N½NE¼NE¼, SW¼NE¼NE¼, NW¼NE¼, NE¼NE¼NW¼, S½NE¼NW¼, SE¼NW¼NW¼, NE¼SW¼NW¼, W½SW¼NW¼, SW¼SE¼SE¼, W½SE¼SE¼SE¼, and SE¼SE¼SE¼SE¼;
- sec. 34, lot 6.

T. 32 N., R. 10 W.,
- sec. 1, lots 12, 13, and 14, SW¼NW¼, W½SE¼NW¼, W½NE¼SW¼, NW¼SW¼, E½SW¼SW¼, and NE¼SE¼SE¼;

sec. 2, lot 2, SW¼NE¼, E½NE¼SE¼NW¼, E½SE¼SE¼NW¼, E½NE¼NE¼SW¼, E½SE¼NE¼SW¼, N½SE¼, NE¼SW¼SE¼, and N½SE¼SE¼;
sec. 12, lots 9 and 10, and NW¼NE¼NE¼NE¼.
T. 33 N., R. 10 W.,
sec. 7, lot 13;
sec. 18, lots 13 to 16, inclusive, and 18 to 22, inclusive, and a portion of lot 8 as described in the Donation Grant Deed recorded December 24, 1986 in Book 264, pages 339 and 340, and containing 16.30 acres, more or less, to wit:

That portion of Section 18, Township 33 North, Range 10 West, M.D.M., according to the official plat thereof, described as follows:

Beginning at the quarter corner common to Sections 19 and 18, Township 33 North, Range 10 West, M.D.M., which point is marked by a brass capped iron pipe monument in a mound of rock set by the Bureau of Land Management in 1962; thence

1. North 0°29′ East, 1318.58 feet to the center south 1/16th corner of said Section 18, which is marked by a brass capped pipe monument in a mound of rock set by the Bureau of Land Management in 1986; thence

2. South 87°21′ East, 772.29 feet along the North line of the Southwest quarter of the Southeast quarter [lot 8] of said Section 18 to a point; thence

3. South 10°51′11″ West 579.13 feet to a point; thence

4. South 37°08′48″ West, 904.48 feet to a point in the South Line of said Section 18, from which the South quarter corner thereof bears North 86°54′ West, 127.55 feet distant; thence

5. North 86°54′ West, 127.55 feet to the point of beginning.

This portion of lot 8 has not been officially surveyed and platted.

sec. 19, lots 11, 13, and 16 to 19, inclusive;
sec. 20, lot 4;
sec. 29, lots 7 and 11;
sec. 32, lots 11, 15, and 16;
sec. 35, lot 6, E½NE¼SW¼, NE¼SE¼SW¼, and SW¼SE¼.
T. 33 N., R. 11 W.,
sec. 1, lots 10 and 11;
sec. 12, lots 8, 9, and 14;
sec. 13, lot 6.
T. 34 N., R. 11 W.,
sec. 21, lots 4 and 11 to 14, inclusive, and NW¼NW¼;
sec. 27, lots 12 and 13;
sec. 28, lots 3, 4, 6, 7, 9, 10, and 11;
sec. 34, lots 15, 16, and 19;
sec. 35, lots 4 and 12;
sec. 36, lots 2, 3, and 7.

The areas described aggregate 3,123 acres, more or less, in Trinity County.

The Assistant Secretary for Policy, Management and Budget approved the BLM's petition/application. Therefore, the petition/application constitutes a withdrawal proposal of the Secretary of the Interior (43 CFR 2310.1–3(e)).

The purpose of the proposed withdrawal is to protect the cultural, recreational, and biological resources within the TRWSR.

The use of a right-of-way, interagency agreement, or cooperative agreement would not adequately constrain non-discretionary uses and would not provide adequate protection of the Federal investment in the improvements located on the lands.

There are no suitable alternative sites as the described lands contain the resource values to be protected.

No additional water rights will be needed to fulfill the purpose of the requested withdrawal.

Records relating to the application may be examined by contacting the BLM at the above address and phone number.

For a period until November 19, 2013, all persons who wish to submit comments, suggestions, or objections in connection with the proposed withdrawal may present their views in writing to the Field Manager, BLM Redding Field Office, 355 Hemsted Drive, Redding, CA 96002. Information regarding the proposed withdrawal will be available for public review at the BLM's Redding Field Office, during regular business hours, 8 a.m. to 4:30 p.m. Monday through Friday, except Federal holidays.

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. Individuals that submit written comments may request confidentiality by asking us in your comment to withhold your personal identifying information from public review, however, we cannot guarantee that we will be able to do so.

Notice is hereby given that the opportunity for a public meeting is afforded in connection with the proposed withdrawal. All interested parties who desire a public meeting for the purpose of being heard on the proposed withdrawal must submit a written request to the Field Manager, BLM Redding Field Office, BLM at the address indicated above by November 19, 2013. If the BLM authorized officer determines that the BLM will hold a public meeting, the BLM will publish a notice of the time and place in the **Federal Register** and a local newspaper at least 30 days before the scheduled date of the meeting.

For a period until August 21, 2015, the public lands described in this notice will be segregated from location and entry under the United States mining laws, but not from leasing under the mineral or geothermal leasing laws or disposal under the Materials Act of 1947, unless the application is denied or canceled or the withdrawal is approved prior to that date.

Licenses, permits, cooperative agreement, or discretionary land use authorizations of a temporary nature that will not significantly impact the values to be protected by the withdrawal may be allowed with the approval of the authorized officer of the BLM during the temporary segregation period.

The application will be processed in accordance with the regulations set forth in 43 CFR part 2300.

Robert M. Wick,

Acting Deputy State Director, Natural Resources (CA930).

[FR Doc. 2013–20393 Filed 8–20–13; 8:45 am]

BILLING CODE 4310–40–P

DEPARTMENT OF THE INTERIOR

National Park Service

[NPS–WASO–BSD–CONC–12098; PPWOBSADC0, PPMVSCS1Y.Y00000]

Information Collection Request Sent to the Office of Management and Budget (OMB) for Approval; National Park Service Concessions

AGENCY: National Park Service, Interior.

ACTION: Notice; request for comments.

SUMMARY: We (National Park Service) have sent an Information Collection Request (ICR) to OMB for review and approval. We summarize the ICR below and describe the nature of the collection and the estimated burden and cost. This information collection is scheduled to expire on September 30, 2013. We 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. However, under OMB regulations, we may continue to conduct or sponsor this information collection while it is pending at OMB.

DATES: You must submit comments on or before September 20, 2013.

ADDRESSES: Send your comments and suggestions on this information collection to the Desk Officer for the Department of the Interior at OMB–OIRA at (202) 395–5806 (fax) or *OIRA_Submission@omb.eop.gov* (email). Please provide a copy of your comments to Madonna L. Baucum, Information Collection Clearance Officer, National Park Service, 1849 C Street NW. (2601), Washington, DC 20240 (mail); or *madonna_baucum@nps.gov* (email). Please include ''1024–0029'' in the subject line of your comments.

FOR FURTHER INFORMATION CONTACT: To request additional information about this ICR, contact Ben Erichsen, Chief, Commercial Services Program, at (202) 513–7156 (telephone) or *ben_erichsen@nps.gov* (email). You may review the ICR online at *http://www.reginfo.gov.* Follow the instructions to review Department of the Interior collections under review by OMB.

SUPPLEMENTARY INFORMATION:

OMB Control Number: 1024–0029.

Title: National Park Service Concessions.

Service Form Number(s): 10–356 and 10–356A.

Type of Request: Revision of a currently approved collection.

Description of Respondents: Individuals, businesses, and nonprofit organizations.

Respondent's Obligation: Required to obtain or retain a benefit.

Frequency of Collection: Annually for financial reports, ongoing for recordkeeping, and on occasion for the remaining requirements.

Activity	Number of respondents	Number of annual responses	Completion time per response	Total annual burden hours
Proposal—Large Concession	30	30	240 hours	7,200
Proposal—Small Concession	60	60	80 hours	4,800
Amendments	1	1	1 hour	1
Appeals	1	1	30 minutes	1
Request To Construct a Capital Improvement—Large Projects.	31	31	16 hours	496
Request To Construct a Capital Improvement—Small Projects.	89	89	8 hours	712
Construction Report—Large Project	31	31	56 hours	1,736
Construction Report—Small Project	89	89	24 hours	2,136
Application to Sell or Transfer a Concession Operation.	20	20	80 hours	1,600
Form 10–356	150	150	16 hours	2,400
Form 10–356A	350	350	4 hours	1,400
Recordkeeping—Large Concessions	150	150	800 hours	120,000
Recordkeeping—Small Concessions	350	350	50 hours	17,500
Totals	1.352	1.352		159,982

Estimated Annual Nonhour Burden Cost: $425,000.

Abstract: Private businesses under contract to the National Park Service manage food, lodging, tours, whitewater rafting, boating, and many other recreational activities and amenities in more than 100 national parks. These services gross more than $1 billion every year and provide jobs for more than 25,000 people during peak season.

The regulations at 36 CFR Part 51 primarily implement Title IV of the National Parks Omnibus Management Act of 1998 (Pub. L. 105–391), which provides legislative authority, policies, and requirements for the solicitation, award, and administration of NPS concession contracts. The information collection requirements associated with NPS concessions are currently approved under four OMB control numbers. During our review for this renewal, we discovered some additional requirements that need OMB approval. In this revision of 1024–0029, we are including all of the information collection requirements associated with applying for and operating NPS concessions. If OMB approves this revision, we will discontinue OMB Control Numbers 1024–0125, 1024–0126, and 1024–0231.

Comments: On March 7, 2013, we published in the **Federal Register** (78 FR 14822) a notice of our intent to request that OMB approve this information collection. In that notice, we solicited comments for 60 days, ending on May 6, 2013. We did not receive any comments.

We again invite comments concerning this information collection on:

- Whether or not the collection of information is necessary, including whether or not the information will have practical utility;
- The accuracy of our estimate of the burden for this collection of information;
- 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 respondents.

Comments that you submit in response to this notice are a matter of public record. Before including your address, phone number, email address, or other personal identifying information in your comment, you should be aware that your entire comment, including your personal identifying information, may be made publicly available at any time. While you can ask OMB in your comment to withhold your personal identifying information from public review, we cannot guarantee that it will be done.

Dated: August 16, 2013.

Leonard E. Stowe,

Acting Information Collection Clearance Officer, National Park Service.

[FR Doc. 2013–20395 Filed 8–20–13; 8:45 am]

BILLING CODE 4310–EH–P

INTERNATIONAL TRADE COMMISSION

[Investigation No. 332–540]

Digital Trade in the U.S. and Global Economies, Part 2; Scheduling of an Additional Public Hearing

AGENCY: United States International Trade Commission.

ACTION: Scheduling of additional public hearing in Moffett Field, CA.

SUMMARY: The Commission has scheduled a public hearing in investigation No. 332–540, *Digital Trade in the U.S. and Global Economies, Part 2* at the NASA Ames Research Center in Moffett Field, California beginning at 9:30 a.m. on Wednesday, September 25, 2013.

DATES: September 12, 2013: Deadline for filing requests to appear at the public hearing.

September 18, 2013: Deadline for filing pre-hearing briefs and statements.

September 25, 2013: Public hearing.

October 3, 2013: Deadline for filing post-hearing briefs and statements.

March 21, 2014: Deadline for filing all other written submissions.

July 14, 2014: Transmittal of Commission report to the Senate Committee on Finance.

ADDRESSES: All written submissions should be addressed to the Secretary, United States International Trade Commission, 500 E Street SW., Washington, DC 20436. The public record for this investigation may be viewed on the Commission's electronic docket (EDIS) at *https://edis.usitc.gov/edis3-internal/app.*

FOR FURTHER INFORMATION CONTACT: Project Leader James Stamps (202–205–3227 or *james.stamps@usitc.gov*) or Deputy Project Leader David Coffin (202–205–2232 or *david.coffin@usitc.gov*) for information specific to this investigation. For information on the legal aspects of these investigations, contact William Gearhart of the Commission's Office of the General Counsel (202–205–3091 or *william.gearhart@usitc.gov*). The media should contact Margaret O'Laughlin, Office of External Relations (202–205–1819 or *margaret.olaughlin@usitc.gov*). Hearing-impaired individuals may obtain information on this matter by contacting the Commission's TDD terminal at 202–205–1810. General information concerning the Commission may also be obtained by accessing its Web site (*http://www.usitc.gov*). Persons with mobility impairments who will need special assistance in gaining access to the Commission should contact the Office of the Secretary at 202–205–2000.

Background: The additional hearing relates to the second of two reports that the Commission is preparing on the role of digital trade in the U.S. and global economies at the request of the U.S. Senate Committee on Finance. The Commission held a public hearing in connection with both reports in Washington, DC, on March 7, 2013. The first report, *Digital Trade in the U.S. and Global Economies, Part 1,* Investigation No. 332–531, will be available to the public on August 15, 2013, on the Commission's Web site (*http://www.usitc.gov*). As requested by the Committee, the Commission will base its report in this second investigation on available information, including a survey of U.S. firms in selected industries particularly involved in digital trade and the application of approaches outlined in the first report. To the extent practicable, this second report will:

- estimate the value of U.S. digital trade and the potential growth of this trade (with the potential growth estimates to highlight any key trends and discuss their implications for U.S. businesses and employment);
- provide insight into the broader linkages and contributions of digital trade to the U.S. economy (such linkages and contributions may include effects on consumer welfare, output, productivity, innovation, business practices, and job creation);
- present case studies that examine the importance of digital trade to selected U.S. industries that use or produce such goods and services, with some of the case studies to highlight, if possible, the impact of digital trade on small and medium-sized enterprises; and
- examine the effect of notable barriers and impediments to digital trade on selected industries and the broader U.S. economy.

The Commission expects to transmit this second report to the Committee by July 14, 2014. For the purposes of this investigation, the Commission is defining ''digital trade'' to encompass commerce in products and services delivered via the Internet as well as commerce in products and services that is facilitated by the use of the Internet and Internet-based technologies. Commerce includes both U.S. domestic economic activity as well as international trade.

Public Hearing: The additional hearing will be held at the NASA Ames Conference Center/NASA Research Park, Building 152, Room 171, 200 Dailey Road, Moffett Field, CA, beginning at 9:30 a.m. on Wednesday, September 25, 2013. Requests to appear at the public hearing should be filed with the Secretary, no later than 5:15 p.m., September 12, 2013, in accordance with the requirements in the ''Requests to Appear'' section below. All pre-hearing briefs and statements should be filed not later than 5:15 p.m., September 18, 2013; and all post-hearing briefs and statements responding to matters raised at the hearing should be filed not later than 5:15 p.m., October 3, 2013. In the event that, as of the close of business on September 12, 2013, no witnesses are scheduled to appear at the hearing, the hearing will be canceled. Any person interested in attending the hearing as an observer or nonparticipant should contact the Office of the Secretary at 202–205–2000 after September 12, 2013, for information concerning whether the hearing will be held.

This field hearing is being planned in conjunction with a field hearing to be held on September 26, 2013 for Inv. No. 332–541, *Trade Barriers that U.S. Small and Medium-sized Enterprises Perceive as Affecting Exports to the European Union.* Interested persons who wish to present consolidated statements and testimony relevant to both investigations are invited to do so on Wednesday, September 25, 2013.

Requests To Appear: Requests to appear at the Moffett Field, CA hearing may be in the form of a letter, which should be on company or other appropriate stationery. Requests should identify the name, title, and company or other organizational affiliation (if any), address, telephone number, email address, and industry or main line of business of the company, if any, of the person signing the request letter and of the persons who plan to appear at one or both hearings. Requests to appear may be made by mail or delivered in person to the Commission's Office of the Secretary (see **ADDRESSES**), or may be filed by email sent to *digitaltrade@usitc.gov.* The Commission does not accept requests filed by fax.

Written Submissions: In lieu of or in addition to participating in the hearing, interested parties are invited to submit written statements concerning this investigation. Such submissions should be addressed to the Secretary, and should be received not later than 5:15 p.m., March 21, 2014. All written submissions must conform to the provisions of section 201.8 of the Commission's *Rules of Practice and Procedure* (19 CFR 201.8). Section 201.8 and the Commission's Handbook on Filing Procedures require that interested parties file documents electronically on or before the filing deadline and submit eight (8) true paper copies by 12:00 p.m. eastern time on the next business day. In the event that confidential treatment of a document is requested, interested parties must file, at the same time as the eight paper copies, at least four (4) additional true paper copies in which the confidential information must be deleted (see the following paragraph for further information regarding confidential business information). Persons with questions regarding electronic filing should contact the Secretary (202–205–2000).

Any submissions that contain confidential business information (CBI) must also conform to the requirements of section 201.6 of the *Commission's Rules of Practice and Procedure* (19 CFR 201.6). Section 201.6 of the rules requires that the cover of the document and the individual pages be clearly marked as to whether they are the ''confidential'' or ''non-confidential'' version, and that the confidential business information is clearly identified by means of brackets. All written submissions, except for

confidential business information, will be made available for inspection by interested parties.

In its request letter, the Committee stated that it intends to make the Commission's reports available to the public in their entirety, and asked that the Commission not include any confidential business information or national security classified information in the reports that the Commission sends to the Committee. Any confidential business information received by the Commission in this investigation and used in preparing this report will not be published in a manner that would reveal the operations of the firm supplying the information.

By order of the Commission.
Issued: August 15, 2013

Lisa R. Barton,

Acting Secretary to the Commission.

[FR Doc. 2013–20387 Filed 8–20–13; 8:45 am]

BILLING CODE 7020–02–P

INTERNATIONAL TRADE COMMISSION

[Investigation No. 332–541]

Trade Barriers That U.S. Small and Medium-sized Enterprises Perceive as Affecting Exports to the European Union; Scheduling of an Additional Public Hearing With Simplified Filing Procedures

AGENCY: United States International Trade Commission.

ACTION: Scheduling of additional public hearing in Moffett Field, CA.

SUMMARY: The Commission has scheduled an additional public hearing in Inv. No. 332–541, *Trade Barriers that U.S. Small and Medium-sized Enterprises Perceive as Affecting Exports to the European Union,* to be held beginning at 9:30 a.m., September 26, 2013, at the NASA Ames Research Center at Moffett Field, CA. This hearing is in addition to a previously announced public hearing in this investigation to be held at the U.S. International Trade Commission Building, 500 E Street SW., Washington, DC, beginning at 9:30 a.m. on October 8, 2013. Procedures for filing requests to appear have been changed for both hearings to encourage the appearance of small businesses.

This field hearing is being scheduled in conjunction with a field hearing to be held on September 25, 2013, also at the NASA Center in Moffett Field, CA in a second Commission investigation, No. 332–540, *Digital Trade in the U.S. and Global Economies, Part 2,* requested by the Senate Committee on Finance. Interested persons who wish to present consolidated statements and testimony relevant to both investigations are invited to do so on Wednesday September 25, 2013.

DATES: September 12, 2013: Deadline for filing requests to appear at the Moffett Field, CA hearing.

September 18, 2013: Deadline for filing pre-hearing briefs and statements.

September 26, 2013: Public hearing in Moffett Field, CA.

October 3, 2013: Deadline for filing post-hearing briefs.

October 15, 2013: Deadline for filing all other written submissions.

January 31, 2014: Transmittal of Commission report to the USTR.

ADDRESSES: All written submissions should be addressed to the Secretary, United States International Trade Commission, 500 E Street SW., Washington, DC 20436. The public record for this investigation may be viewed on the Commission's electronic docket (EDIS) at *https://edis.usitc.gov/edis3-internal/app.*

FOR FURTHER INFORMATION CONTACT: Project Leader William Deese (202–205–2626 or *william.deese@usitc.gov*) or Deputy Project Leader Tamar Khachaturian (202–205–3299 or *tamar.khachaturian@usitc.gov*) for information specific to this investigation. For information on the legal aspects of these investigations, contact William Gearhart of the Commission's Office of the General Counsel (202–205–3091 or *william.gearhart@usitc.gov*). The media should contact Margaret O'Laughlin, Office of External Relations (202–205–1819 or *margaret.olaughlin@usitc.gov*). Hearing-impaired individuals may obtain information on this matter by contacting the Commission's TDD terminal at 202–205–1810. General information concerning the Commission may also be obtained by accessing its Internet server (*http://www.usitc.gov*). Persons with mobility impairments who will need special assistance in gaining access to the Commission should contact the Office of the Secretary at 202–205–2000.

Background: The hearing relates to a report that the Commission is preparing at the request of the United States Trade Representative (USTR) under section 332(g) of the Tariff Act of 1930 (19 U.S.C. 1332(g)). The USTR requested that the Commission prepare a report that catalogs trade barriers that U.S. small and medium-sized enterprises (SMEs) perceive as disproportionately affecting their exports to the EU, compared to those of larger U.S. exporters to the EU. In the request letter, the USTR stated that the United States, in the Transatlantic Trade and Investment Partnership (TTIP) negotiations with the European Union (EU), is seeking to strengthen the participation of SMEs in transatlantic trade and to address trade barriers that may disproportionately impact small businesses. The notice announcing the institution of this investigation and the Washington, DC, hearing on October 8, 2013, was published in the **Federal Register** of July 30, 2013 (78 FR 45969); the notice is also posted on the Commission's Web site at *www.usitc.gov.*

The Commission is particularly interested in receiving information and views from SMEs and related organizations about trade-related barriers faced by U.S. SMEs in exporting goods or services to the EU and about EU trade barriers by economic sector or by special issue. (For purposes of this report, an SME is defined as a firm with fewer than 500 U.S.-based employees.) The Commission is also interested in receiving information and views about specific trade barriers in individual EU countries; the relative effect on exports of different EU trade barriers; and ways in which SME participation in transatlantic trade might be strengthened.

Public Hearing: The additional hearing will be held at the NASA Ames Conference Center/NASA Research Park, Building 152, Room 171, 200 Dailey Road, Moffett Field, CA, beginning at 9:30 a.m. on September 26, 2013. Requests to appear at the public hearing should be filed with the Secretary, no later than 5:15 p.m. (eastern daylight time), September 18, 2013, in accordance with the requirements in the ''Requests to Appear'' section below. All pre-hearing briefs and statements should be filed no later than 5:15 p.m. (eastern daylight time), September 18, 2013; and all post-hearing briefs and statements should be filed not later than 5:15 p.m., October 3, 2013. In the event that, as of the close of business on September 12, 2013, no witnesses are scheduled to appear at the hearing, the hearing will be canceled. Any person interested in attending the hearing as an observer or nonparticipant should contact the Office of the Secretary at 202–205–2000 after September 12, 2013, for information concerning whether the hearing will be held.

Requests To Appear: Requests to appear at the Moffett Field, CA, and Washington, DC, hearings may be in the form of a letter, which should be on company or other appropriate

stationery. Requests should identify the name, title, and company or other organizational affiliation (if any), address, telephone number, email address, and industry or main line of business of the company, if any, of the person signing the request letter and of the persons who plan to appear at one or both hearings. Requests to appear may be made by mail or delivered in person to the Commission's Office of the Secretary (see **ADDRESSES**), or may be filed by email sent to *SMEHearing@usitc.gov*. The Commission does not accept requests filed by fax.

Written Submissions: In lieu of or in addition to participating in the hearing, interested parties are invited to file written submissions concerning this investigation. Such submissions should be addressed to the secretary, and should be received no later than 5:15 p.m., October 15, 2013. All written submissions must conform to the provisions of section 201.8 of the *Commission's Rules of Practice and Procedure* (19 CFR 201.8). Section 201.8 and the Commission's Handbook on Filing Procedures require that interested parties file documents electronically on or before the filing deadline and submit eight (8) true paper copies by 12:00 p.m. eastern time on the next business day. In the event that confidential treatment of a document is requested, interested parties must file, at the same time as the eight paper copies, at least four (4) additional true paper copies in which the confidential information must be deleted (see the following paragraph for further information regarding confidential business information). Persons with questions regarding electronic filing should contact the Secretary (202–205–2000).

Any submissions that contain confidential business information (CBI) must also conform to the requirements of section 201.6 of the *Commission's Rules of Practice and Procedure* (19 CFR 201.6). Section 201.6 of the rules requires that the cover of the document and the individual pages be clearly marked as to whether they are the ''confidential'' or ''non-confidential'' version, and that the confidential business information is clearly identified by means of brackets. All written submissions, except for confidential business information, will be made available for inspection by interested parties.

In the request letter, the USTR stated that the Office of the USTR intends to make the Commission's report available to the public in their entirety, and asked that the Commission not include any confidential business information or national security classified information in the report that the Commission sends to the USTR. Any confidential business information received by the Commission in this investigation and used in preparing this report will not be published in a manner that would reveal the operations of the firm supplying the information.

By order of the Commission.

Issued: August 16, 2013

Lisa R. Barton,

Acting Secretary to the Commission.

[FR Doc. 2013–20388 Filed 8–20–13; 8:45 am]

BILLING CODE 7020–02–P

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

Importer of Controlled Substances; Notice of Application; NORAMCO, Inc.

Pursuant to Title 21 Code of Federal Regulations 1301.34 (a), this is notice that on June 27, 2013, Noramco, Inc., 1440 Olympic Drive, Athens, Georgia 30601, made application by renewal to the Drug Enforcement Administration (DEA) for registration as an importer of the basic classes of controlled substances:

Drug	Schedule
Phenylacetone (8501)	II
Thebaine (9333)	II
Poppy Straw Concentrate (9670)	II
Tapentadol (9780)	II

The company plans to import Thebaine (9333) analytical standards for distribution to its customers. The company plans to import an intermediate form of Tapentadol (9780) to bulk manufacture Tapentadol for distribution to its customers. The company plans to import the Phenylacetone (8501) in bulk for the manufacture of a controlled substance.

Comments and requests for hearings on applications to import narcotic raw material are not appropriate. 72 FR 3417 (2007).

In reference to the non-narcotic raw material, any bulk manufacturer who is presently, or is applying to be, registered with DEA to manufacture such basic classes of controlled substances listed in schedules I or II, which fall under the authority of section 1002(a)(2)(B) of the Act (21 U.S.C. 952(a)(2)(B)) may, in the circumstances set forth in 21 U.S.C. 958(i), file comments or objections to the issuance of the proposed registration and may, at the same time, file a written request for a hearing on such application pursuant to 21 CFR 1301.43, and in such form as prescribed by 21 CFR 1316.47.

Any such written comments or objections should be addressed, in quintuplicate, to the Drug Enforcement Administration, Office of Diversion Control, Federal Register Representative (ODL), 8701 Morrissette Drive, Springfield, Virginia 22152; and must be filed no later than September 20, 2013.

This procedure is to be conducted simultaneously with, and independent of, the procedures described in 21 CFR 1301.34(b), (c), (d), (e), and (f). As noted in a previous notice published in the **Federal Register** on September 23, 1975, 40 FR 43745–46, all applicants for registration to import a basic class of any controlled substances in schedule I or II are, and will continue to be, required to demonstrate to the Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration, that the requirements for such registration pursuant to 21 U.S.C. 958(a); 21 U.S.C. 823(a); and 21 CFR 1301.34(b), (c), (d), (e), and (f) are satisfied.

Dated: August 14, 2013.

Joseph T. Rannazzisi,

Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration.

[FR Doc. 2013–20285 Filed 8–20–13; 8:45 am]

BILLING CODE 4410–09–P

DEPARTMENT OF JUSTICE

Office of Justice Programs

[OJP (BJA) Docket No. 1629]

Meeting of the Department of Justice's (DOJ's) National Motor Vehicle Title Information System (NMVTIS) Federal Advisory Committee

AGENCY: Office of Justice Programs (OJP), Justice.

ACTION: Notice of meeting.

SUMMARY: This is an announcement of a meeting of DOJ's National Motor Vehicle Title Information System (NMVTIS) Federal Advisory Committee to discuss various issues relating to the operation and implementation of NMVTIS.

DATES: The meeting will take place on Tuesday October 8, 2013, from 10:00 a.m. to 4:00 p.m. ET.

ADDRESSES: The meeting will take place at the Office of Justice Programs (OJP), 810 7th Street NW., Washington, DC 20531.

FOR FURTHER INFORMATION CONTACT: Todd Brighton, Designated Federal Employee (DFE), Bureau of Justice

Assistance, Office of Justice Programs, 810 7th Street NW. Washington, DC 20531; Phone: (202) 616–3879 [note: this is not a toll-free number]; Email: *Todd.Brighton@usdoj.gov.*

SUPPLEMENTARY INFORMATION: This meeting is open to the public. Members of the public who wish to attend this meeting must register with Mr. Brighton at the above address at least seven (7) days in advance of the meeting. Registrations will be accepted on a space available basis. Access to the meeting will not be allowed without registration. Please bring photo identification and allow extra time prior to the meeting. Interested persons whose registrations have been accepted may be permitted to participate in the discussions at the discretion of the meeting chairman and with approval of the DFE.

Anyone requiring special accommodations should notify Mr. Brighton at least seven (7) days in advance of the meeting.

Purpose

The NMVTIS Federal Advisory Committee will provide input and recommendations to the Office of Justice Programs (OJP) regarding the operations and administration of NMVTIS. The primary duties of the NMVTIS Federal Advisory Committee will be to advise the Bureau of Justice Assistance (BJA) Director on NMVTIS-related issues, including but not limited to: implementation of a system that is self-sustainable with user fees; options for alternative revenue-generating opportunities; determining ways to enhance the technological capabilities of the system to increase its flexibility; and options for reducing the economic burden on current and future reporting entities and users of the system.

Todd Brighton,

NMVTIS Enforcement Coordinator, Bureau of Justice Assistance, Office of Justice Programs.

[FR Doc. 2013–20290 Filed 8–20–13; 8:45 am]

BILLING CODE 4410–18–P

DEPARTMENT OF LABOR

Mine Safety and Health Administration

Proposed Information Collection; Hazardous Conditions Complaints

AGENCY: Mine Safety and Health Administration, Labor.

ACTION: Request for public comments.

SUMMARY: The Department of Labor, as part of its continuing effort to reduce paperwork and respondent burden, conducts a pre-clearance consultation program to provide the general public and Federal agencies with an opportunity to comment on proposed and continuing collections of information in accordance with the Paperwork Reduction Act of 1995, 44 U.S.C. 3506(c)(2)(A). This program helps to assure 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, the Mine Safety and Health Administration (MSHA) is soliciting comments concerning the proposed information collection for updating Hazardous Conditions Complaints 30 CFR 43.4 and 43.7.

DATES: All comments must be postmarked or received by midnight Eastern Standard Time on October 21, 2013.

ADDRESSES: Comments concerning the information collection requirements of this notice may be sent by any of the methods listed below.

- *Federal E-Rulemaking Portal: http://www.regulations.gov.* Follow the on-line instructions for submitting comments for docket number [MSHA–2013–0024].
- *Regular Mail or Hand Delivery:* MSHA, Office of Standards, Regulations, and Variances, 1100 Wilson Boulevard, Room 2350, Arlington, VA 22209–3939. Sign in at the receptionist's desk on the 21st floor.

FOR FURTHER INFORMATION CONTACT: Sheila McConnell, Deputy Director, Office of Standards, Regulations, and Variances, MSHA, at *McConnell.Sheila.A@dol.gov* (email); 202–693–9440 (voice); or 202–693–9441 (facsimile).

SUPPLEMENTARY INFORMATION:

I. Background

Under Section 103(g) of the Federal Mine Safety and Health Act of 1977, as amended (Mine Act), a representative of miners, or any individual miner where there is no representative of miners, may submit a written or oral notification of an alleged violation of the Mine Act or a mandatory standard that an imminent danger exists. The notifier has the right to obtain an immediate inspection by the Mine Safety and Health Administration (MSHA). A copy of the notice must be provided to the operator, with individual miner names redacted.

MSHA regulations at 30 CFR Part 43 implement Section 103(g) of the Mine Act. These regulations provide the procedures for submitting notification of the alleged violation or imminent danger and the actions that MSHA must take after receiving the notice. Although the regulations contain a review procedure (required by Section 103(g)(2) of the Mine Act) whereby a miner or a representative of miners may in writing request a review if no citation or order is issued as a result of the original notice, the option is so rarely used that it was not considered in the burden estimates.

II. Desired Focus of Comments

MSHA is soliciting comments concerning the proposed extension of the information collection related to Hazardous Conditions Complaints in 30 CFR 43.4 and 43.7. MSHA is particularly interested in comments that:

- Evaluate whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information has practical utility;
- Evaluate the accuracy of the MSHA's estimate of the burden of the collection of information, including the validity of the methodology and assumptions used;
- Suggest methods to enhance the quality, utility, and clarity of the information to be collected; and
- Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

This proposed information collection request is available on MSHA's Web site at *http://www.msha.gov* under ''Federal Register Documents'' on the right side of the screen by selecting ''New and Existing Information Collections and Supporting Statements''. This proposed information collection request will be available on MSHA's Web site for 60 days after the publication date of this notice, and on *http://www.regulations.gov.* Because comments will not be edited to remove any identifying or contact information, MSHA cautions the commenter against including any information in the submission that should not be publicly disclosed.

The public may also examine the proposed information collection at MSHA, Office of Standards, Regulations, and Variances, 1100 Wilson Boulevard, Room 2350, Arlington, VA 22209–3939 by signing in at the receptionist's desk on the 21st floor.

Questions about the information collection requirements may be directed to the person listed in the **FOR FURTHER INFORMATION CONTACT** section of this notice.

III. Current Actions

This request for collection of information contains notification and recordkeeping provisions for the Proposed Information Collection Request Submitted for Public Comment and Recommendations; Hazardous Conditions Complaints 30 CFR 43.4 and 43.7. MSHA has updated the data in respect to the number of respondents and responses, as well as the total burden hours and burden costs supporting this information collection request.

Type of Review: Extension.

Agency: Mine Safety and Health Administration.

Title: Hazardous Conditions Complaints 30 CFR 43.4 and 43.7.

OMB Number: 1219–0014.

Affected Public: Business or other for-profit; Individuals or Households.

Total Number of Respondents: 2,431.

Frequency: Various.

Total Number of Responses: 2,431.

Total Burden Hours: 486 hours.

Total Annual Respondent or Recordkeeper Cost Burden: $0.

Comments submitted in response to this notice will be summarized and included in the request for Office of Management and Budget approval of the information collection request; they will also become a matter of public record.

Dated: August 16th, 2013.

George F. Triebsch,

Certifying Officer.

[FR Doc. 2013–20365 Filed 8–20–13; 8:45 am]

BILLING CODE 4510–43–P

DEPARTMENT OF LABOR

Mine Safety and Health Administration

Proposed Information Collection; Ventilation Plan and Main Fan Maintenance Record (Pertains to Metal and Nonmetal Underground Mines)

AGENCY: Mine Safety and Health Administration, Labor.

ACTION: Request for public comments.

SUMMARY: The Department of Labor, as part of its continuing effort to reduce paperwork and respondent burden, conducts a pre-clearance consultation program to provide the general public and Federal agencies with an opportunity to comment on proposed and continuing collections of information in accordance with the Paperwork Reduction Act of 1995, 44 U.S.C. 3506(c)(2)(A). This program helps to assure 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, the Mine Safety and Health Administration (MSHA) is soliciting comments concerning the proposed information collection for updating Ventilation Plan and Main Fan Maintenance Record 30 CFR 57.8520, and 57.8525.

DATES: All comments must be postmarked or received by midnight Eastern Standard Time on October 21, 2013.

ADDRESSES: Comments concerning the information collection requirements of this notice may be sent by any of the methods listed below.

- *Federal E-Rulemaking Portal: http://www.regulations.gov.* Follow the on-line instructions for submitting comments for docket number [MSHA–2013–0025].
- *Regular Mail or Hand Delivery:* MSHA, Office of Standards, Regulations, and Variances, 1100 Wilson Boulevard, Room 2350, Arlington, VA 22209–3939. Sign in at the receptionist's desk on the 21st floor.

FOR FURTHER INFORMATION CONTACT: Sheila McConnell, Deputy Director, Office of Standards, Regulations, and Variances, MSHA, at *McConnell.Sheila.A@dol.gov* (email); 202–693–9440 (voice); or 202–693–9441 (facsimile).

SUPPLEMENTARY INFORMATION:

I. Background

Section 103(h) of the Federal Mine Safety and Health Act of 1977 (Mine Act), 30 U.S.C. 813, authorizes the Mine Safety and Health Administration (MSHA) to collect information necessary to carry out its duty in protecting the safety and health of miners.

Underground mines usually present harsh and hostile working environments. The ventilation system is the most vital life support system in underground mining and a properly operating ventilation system is essential for maintaining a safe and healthful working environment. A well planned mine ventilation system is necessary to assure a fresh air supply to miners at all working places, to control the amounts of harmful airborne contaminants in the mine atmosphere, and to dilute possible accumulation of explosive gases.

Lack of adequate ventilation in underground mines has resulted in fatalities from asphyxiation and/or explosions due to a buildup of explosive gases. Inadequate ventilation can be a primary factor for deaths caused by disease of the lungs (e.g. silicosis).

In addition, poor working conditions from lack of adequate ventilation contribute to accidents resulting from heat stress, limited visibility, or impaired judgment from contaminants. The mine operator is required to prepare a written plan of the mine ventilation system. The plan is required to be updated at least annually. Upon written request of the District Manager, the plan or revisions must be submitted to MSHA for review and comment.

The main ventilation fans for an underground mine must be maintained either according to the manufacturers' recommendations or a written periodic schedule. Upon request of an Authorized Representative of the Secretary of Labor, this fan maintenance schedule must be made available for review. The records assure compliance with the standard and may serve as a warning mechanism for possible ventilation problems before they occur.

II. Desired Focus of Comments

MSHA is particularly interested in comments that:

- Evaluate whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information has practical utility;
- Evaluate the accuracy of the MSHA's estimate of the burden of the collection of information, including the validity of the methodology and assumptions used;
- Suggest methods to enhance the quality, utility, and clarity of the information to be collected; and
- Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

This information collection request is available on MSHA's Web site at *http://www.msha.gov* under ''Federal Register Documents'' on the right side of the screen by selecting ''New and Existing Information Collections and Supporting Statements.'' The information collection request will be available on MSHA's Web site for 60 days after the publication date of this notice, and on *http://www.regulations.gov.* Because

comments will not be edited to remove any identifying or contact information, MSHA cautions the commenter against including any information in the submission that should not be publicly disclosed.

The public may also examine this information collection request at MSHA, Office of Standards, Regulations, and Variances, 1100 Wilson Boulevard, Room 2350, Arlington VA 22209–3939 by signing in at the receptionist's desk on the 21st floor.

Questions about the information collection requirements may be directed to the person listed in the **FOR FURTHER INFORMATION CONTACT** section of this notice.

III. Current Actions

This request for collection of information contains notification and recordkeeping provisions for the Proposed Information Collection Request submitted for public comment and recommendations; Ventilation Plan and Main Fan Maintenance Record 30 CFR 57.8520, and 57.8525. MSHA has updated the data in respect to the number of respondents and responses, as well as the total burden hours and burden costs supporting this information collection request.

Type of Review: Extension.

Agency: Mine Safety and Health Administration

Title: Ventilation Plan and Main Fan Maintenance Record.

OMB Number: 1219–0016.

Affected Public: Business or other for-profit.

Total Number of Respondents: 270.

Frequency: Various.

Total Number of Responses: 286.

Total Burden Hours: 6,617 hours.

Total Annual Respondent or Recordkeeper Cost Burden: $0.

Comments submitted in response to this notice will be summarized and included in the request for Office of Management and Budget approval of the information collection request; they will also become a matter of public record.

Dated: August 16th, 2013.

George F. Triebsch,

Certifying Officer.

[FR Doc. 2013–20362 Filed 8–20–13; 8:45 am]

BILLING CODE 4510–43–P

LEGAL SERVICES CORPORATION

Sunshine Act Meeting; Cancellation—Institutional Advancement Committee

On August 8, 2013, the Legal Services Corporation (''LSC'' or ''Corporation'') issued a public announcement that the Institutional Advancement Committee will meet telephonically on August 20, 2013, at 4 p.m., Eastern Daylight Time (''EDT''). This announcement was published in the **Federal Register** on August 12, 2013, at 78 FR 48910. This announcement is for the purpose of informing the public that the telephonic meeting of August 20, 2013 has been cancelled.

FOR FURTHER INFORMATION CONTACT: Atitaya Rok, Staff Attorney, at (202) 295–1500. Questions may be sent by electronic mail to *FR_NOTICE_QUESTIONS@lsc.gov.*

Dated: August 16, 2013.

Atitaya C. Rok,

Staff Attorney.

[FR Doc. 2013–20454 Filed 8–19–13; 11:15 am]

BILLING CODE 7050–01–P

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

[Notice: 13–096]

NASA Asteroid Initiative Idea Synthesis Workshop

AGENCY: National Aeronautics and Space Administration.

ACTION: Notice of Public Conference to examine ideas in response to the recent RFI for the agency's Asteroid Initiative.

SUMMARY: The National Aeronautics and Space Administration announces a public conference to provide a status on the Agency's Asteroid Initiative planning and to enable feedback and discussion from the global community and the public.

DATES: (12 p.m. CDT) Monday, September 30, 2013–(5 p.m. CDT) Wednesday October 2, 2013

ADDRESSES: Lunar and Planetary Institute, 3600 Bay Area Boulevard, Houston, TX 77058.

FOR FURTHER INFORMATION CONTACT: Michele Gates, Senior Technical Advisor, NASA Human Exploration and Operations Mission Directorate: 202–358–1048.

SUPPLEMENTARY INFORMATION:

- The purpose of this conference is to publicly examine and synthesize highly rated responses to the NASA's Asteroid Initiative RFI. Findings will be developed and provided as inputs to NASA's planning activities.
- This conference will be streamed live online. Viewing and interactive participation options will be posted at *http://www.nasa.gov/content/asteroid-initiative-idea-synthesis-workshop* prior to the event.
- Due to limited seating capacity, onsite attendance is by invitation only. Invitations will be sent starting Monday, August 19.

Registration

- NASA will invite many of the RFI submitters to attend the workshop to share their ideas. Invited presenters will have the option to attend onsite, or present their ideas remotely via online virtual meeting capabilities. Presenters must R.S.V.P. through the registration form provided to them in the invitation email.
- Anyone who is not invited to present at the workshop will be able to participate virtually through live streaming forums dedicated to the workshop plenary sessions and focused track sessions.

Check In

- Workshop check-in will open at 11:00 a.m. CDT on Monday, September 30.
- All attendees must enter through the LPI main doors (3600 Bay Area Blvd., Houston, Texas 77058).

Media

News media interested in attending are required to pre-register and should contact Sarah Becky Ramsey at 202–358–1694 or Rachel Kraft at 202–358–1100 for additional information.

Security

Event attendees will receive a workshop badge upon check in. All participates are asked to keep this badge on them at all times while in the facility.

Driving Directions

All attendees must park at the University Baptist Church Clear Lake, located at 16106 Middlebrook Drive, Houston, TX 77059. A shuttle will be available throughout the workshop to and from the LPI building. A map is available at the *University Baptist Church Web site.*

Local Area information including additional directions and maps can be found here: *http://www.hou.usra.edu/meetings/local_info/*

Public Transportation

For Houston Metro information, please visit their Web site at *http://www.ridemetro.org/SchedulesMaps/Default.aspx.*

William Gerstenmaier,

Associate Administrator, Human Exploration & Operations Mission Directorate.

[FR Doc. 2013–20353 Filed 8–20–13; 8:45 am]

BILLING CODE 7510–13–P

NATIONAL MEDIATION BOARD

Submission for OMB Review; Comment Request

AGENCY: National Mediation Board (NMB).

ACTION: Notice.

SUMMARY: The Director, Office of Administration, invites comments on the submission for OMB review, in accordance with the Paperwork Reduction Act of 1995 (Pub. L. 104–13, May 22, 1995 and 5 CFR part 1320). This notice announces that the NMB has submitted to the Office of Management and Budget a request for clearance of three (3) information collections.

DATES: Interested persons are invited to submit comments within 30 days from the date of this publication.

ADDRESSES: Written comments should be addressed to June D. W. King, Director, Office of Administration, National Mediation Board, 1301 K Street NW., Suite 250 East, Washington, DC 20572 or should be emailed to *king@nmb.gov.*

SUPPLEMENTARY INFORMATION: Section 3506 of the Paperwork Reduction Act of 1995 (U.S.C. Chapter 35) requires that the Office of Management and Budget (OMB) provide interested Federal agencies and the public an early opportunity to comment on information collection requests. OMB may amend or waive the requirement for public consultation to the extent that public participation in the approval process would defeat the purpose of the information collection, violate State or Federal law, or substantially interfere with any agency's ability to perform its statutory obligations. The Chief Information Officer, Finance and Administration Department, publishes that notice containing proposed information collection requests prior to submission of these requests to OMB. Each proposed information collection contains the following: (1) Type of review requested, e.g. new, revision extension, existing or reinstatement; (2) Title; (3) Summary of the collection; (4) Description of the need for, and proposed use of, the information; (5) Respondents and frequency of collection; and (6) Reporting and/or Record keeping burden. OMB invites public comment.

Dated: August 15, 2013.

June D.W. King,

Director, Office of Administration, National Mediation Board.

Request for Arbitration Panel for Airline System Boards of Adjustment

Frequency: On occasion.

Affected Public: Airline Carrier and Union Officials.

Reporting and Recordkeeping Hour Burden:

Responses: Estimate about 80 annually.

Burden Hours: 20.

Abstract: Section 183 of the Railway Labor Act, 45 U.S.C., 183, provides that the parties to the labor-management disputes in the airline industry must have a procedure for the resolution of disputes involving the interpretation or application of provisions of the collective bargaining agreement. The Railway Labor Act mentions system board of adjustment or arbitration boards as the mechanism for resolution and is silent as to how the neutral arbitrator is to be selected if the parties are unable to agree on an individual. The National Mediation Board provides panels of arbitrators to help the parties in their selection of an arbitrator.

This form is necessary to assist the parties in this process. The parties invoke the process through the submission of this form. The brief information is necessary for the NMB to perform this important function.

Arbitration Services—Personal Data Sheet

Frequency: On occasion.

Affected Public: Arbitrators.

Reporting and Recordkeeping Hour Burden:

Responses: 25 annually.

Burden Hours: 25.

Abstract: Sections 183 and 153 of the Railway Labor Act, 45 U.S.C., 153 and 183, provide for the use of arbitrators in the resolution of disputes concerning the application or interpretation of provisions of a collective bargaining agreement in the airline and railroad industries. The NMB maintains a roster of arbitrators for this purpose. The NMB must have a means for interested individuals to apply for inclusion on this roster. This form is the application for inclusion on the NMB roster. The brief information that the NMB solicits is necessary to perform this responsibility under the Railway Labor Act.

Request for Public Law Board Member

Frequency: On occasion.

Affected Public: Carrier and Union Officials of railroads.

Reporting and Recordkeeping Hour Burden:

Responses: Estimate 15 annually.

Burden Hours: 3.75.

Abstract: Section 153, Second, of the Railway Labor Act, 45 U.S.C. 153, Second, governs procedures to be followed by carriers and representatives of employees in the establishment and functioning of special adjustment boards. These special adjustment boards are referred to as public law boards (board). The statute provides that within thirty (30) days from the date a written request is made by an employee representative or carrier official for the establishment of a board, an agreement establishing such board shall be made. If, however, one party fails to designate a member of the board, the party making the request may ask the NMB to designate a member on behalf of the other party. The NMB must designate the representative who, together with the other party constitute the public board. It will be the task of these two individuals to decide on the terms of the agreement. If these individuals are unable to decide upon the terms, the Railway Labor Act provides that one of these parties may request that the NMB designate a neutral to resolve the remaining matters which are procedural issues. Pursuant to 29 C.F.R. 1207.2, requests for the NMB to appoint either representatives or neutrals must be made on printed forms which may be secured from the NMB.

This form is necessary for the NMB to fulfill its statutory responsibilities. Without this information, the NMB would not be able to assist the railroad labor and management representatives in resolving disputes, which is contrary to the intent of the Railway Labor Act.

Requests for copies of the proposed information collection request may be accessed from *www.nmb.gov* or should be addressed to Denise Murdock, NMB, 1301 K Street NW., Suite 250 E, Washington, DC 20572 or addressed to the email address murdock@nmb.gov or faxed to 202–692–5081. Please specify the complete title of the information collection when making your request.

Comments regarding burden and/or the collection activity requirements should be directed to June D. W. King at 202–692–5010 or via internet address *king@nmb.gov* Individuals who use a telecommunications device for the deaf (TDD/TDY) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339.

[FR Doc. 2013–20280 Filed 8–20–13; 8:45 am]

BILLING CODE 7550–01–P

NATIONAL SCIENCE FOUNDATION

Sunshine Act Meetings; National Science Board

The National Science Board's *ad hoc* Committee on Nominations for the NSB Class of 2014–2020, pursuant to NSF regulations (45 CFR part 614), the National Science Foundation Act, as amended (42 U.S.C. 1862n–5), and the Government in the Sunshine Act (5 U.S.C. 552b), hereby gives notice in regard to the scheduling of a meeting for the transaction of National Science Board business, as follows:

DATE AND TIME: Monday, August 26, 2013 at 3:30 p.m. EST

SUBJECT MATTER: Consideration of nominations for the NSB class of 2014–2020.

STATUS: Closed.

This meeting will be held by teleconference originating at the National Science Board Office, National Science Foundation, 4201Wilson Blvd., Arlington, VA 22230.

Please refer to the National Science Board Web site (*www.nsf.gov/nsb*) for information or schedule updates, or contact: Ann Bushmiller, National Science Foundation, 4201Wilson Blvd., Arlington, VA 22230. Telephone: (703) 292–7000.

Ann Bushmiller,

NSB Senior Legal Counsel.

[FR Doc. 2013–20485 Filed 8–19–13; 4:15 pm]

BILLING CODE 7555–01–P

NUCLEAR REGULATORY COMMISSION

Advisory Committee on Reactor Safeguards (ACRS) Meeting of the ACRS Subcommittee on Fukushima; Notice of Meeting

The ACRS Subcommittee on Fukushima will hold a meeting on September 18, 2013, Room T–2B3, 11545 Rockville Pike, Rockville, Maryland.

The entire meeting will be open to public attendance.

The agenda for the subject meeting shall be as follows:

Wednesday, September 18—1:00 p.m. until 5:00 p.m.

The Subcommittee will review and discuss the development of Interim Staff Guidance in Support of Order EA–13–109, ''Order Modifying Licenses with Regard to Reliable Hardened Containment Vents Capable of Operation Under Severe Accident Conditions.'' The Subcommittee will hear presentations by and hold discussions with the NRC staff and other interested persons regarding this matter. The Subcommittee will gather information, analyze relevant issues and facts, and formulate proposed positions and actions, as appropriate, for deliberation by the Full Committee.

Members of the public desiring to provide oral statements and/or written comments should notify the Designated Federal Official (DFO), Weidong Wang (Telephone 301–415–6279 or Email: *Weidong.Wang@nrc.gov*) five days prior to the meeting, if possible, so that appropriate arrangements can be made. Thirty-five hard copies of each presentation or handout should be provided to the DFO thirty minutes before the meeting. In addition, one electronic copy of each presentation should be emailed to the DFO one day before the meeting. If an electronic copy cannot be provided within this timeframe, presenters should provide the DFO with a CD containing each presentation at least thirty minutes before the meeting. Electronic recordings will be permitted only during those portions of the meeting that are open to the public. Detailed procedures for the conduct of and participation in ACRS meetings were published in the **Federal Register** on October 18, 2012, (77 FR 64146–64147).

Detailed meeting agendas and meeting transcripts are available on the NRC Web site at *http://www.nrc.gov/reading-rm/doc-collections/acrs*. Information regarding topics to be discussed, changes to the agenda, whether the meeting has been canceled or rescheduled, and the time allotted to present oral statements can be obtained from the Web site cited above or by contacting the identified DFO. Moreover, in view of the possibility that the schedule for ACRS meetings may be adjusted by the Chairman as necessary to facilitate the conduct of the meeting, persons planning to attend should check with these references if such rescheduling would result in a major inconvenience.

If attending this meeting, please enter through the One White Flint North building, 11555 Rockville Pike, Rockville, MD. After registering with security, please contact Mr. Theron Brown (Telephone 240–888–9835) to be escorted to the meeting room.

Dated: August 14, 2013.

Cayetano Santos,

Chief, Technical Support Branch, Advisory Committee on Reactor Safeguards.

[FR Doc. 2013–20382 Filed 8–20–13; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

Advisory Committee On Reactor Safeguards (ACRS), Meeting of the ACRS Subcommittee on Regulatory Policies and Practices; Notice of Meeting

The ACRS Subcommittee on Regulatory Policies and Practices will hold a meeting on September 16, 2013, Room T–2B1, 11545 Rockville Pike, Rockville, Maryland.

The entire meeting will be open to public attendance.

The agenda for the subject meeting shall be as follows:

Monday, September 16, 2013—8:30 a.m. Until 5 p.m.

The Subcommittee will review the State-of-the-Art Reactor Consequence Analysis (SOARCA) uncertainty analyses. The Subcommittee will hear presentations by and hold discussions with the NRC staff and other interested persons regarding this matter. The Subcommittee will gather information, analyze relevant issues and facts, and formulate proposed positions and actions, as appropriate, for deliberation by the Full Committee.

Members of the public desiring to provide oral statements and/or written comments should notify the Designated Federal Official (DFO), Hossein Nourbakhsh (Telephone 301–415- or Email: *Hossein.Nourbakhsh@nrc.gov*) five days prior to the meeting, if possible, so that appropriate arrangements can be made. Thirty-five hard copies of each presentation or handout should be provided to the DFO thirty minutes before the meeting. In addition, one electronic copy of each presentation should be emailed to the DFO one day before the meeting. If an electronic copy cannot be provided within this timeframe, presenters should provide the DFO with a CD containing each presentation at least thirty minutes before the meeting. Electronic recordings will be permitted only during those portions of the meeting that are open to the public. Detailed procedures for the conduct of and participation in ACRS meetings were published in the **Federal Register** on October 18, 2012, (77 FR 64146–64147).

Detailed meeting agendas and meeting transcripts are available on the NRC Web site at *http://www.nrc.gov/reading-rm/doc-collections/acrs*. Information regarding topics to be discussed, changes to the agenda, whether the meeting has been canceled or rescheduled, and the time allotted to

present oral statements can be obtained from the Web site cited above or by contacting the identified DFO. Moreover, in view of the possibility that the schedule for ACRS meetings may be adjusted by the Chairman as necessary to facilitate the conduct of the meeting, persons planning to attend should check with these references if such rescheduling would result in a major inconvenience.

If attending this meeting, please enter through the One White Flint North building, 11555 Rockville Pike, Rockville, MD. After registering with security, please contact Mr. Theron Brown (Telephone 240–888–9835) to be escorted to the meeting room.

Dated: *August 5, 2013.*

Cayetano Santos,

Chief, Technical Support Branch, Advisory Committee on Reactor Safeguards.

[FR Doc. 2013–20385 Filed 8–20–13; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

[Docket No. 040–09092; [NRC–2013–0164]

AUC, LLC Reno Creek, In Situ Project, New Source Material License Application

AGENCY: Nuclear Regulatory Commission.

ACTION: Notice of intent to prepare a supplemental environmental impact statement.

SUMMARY: By letter dated October 3, 2012, AUC, LLC (AUC) submitted to the U.S. Nuclear Regulatory Commission (NRC) an application for a new source material license. The requested license, or the proposed action, would authorize the construction and operation, and decommissioning of AUC's proposed *in-situ* uranium recovery (ISR, also known as *in-situ* leach) facilities, and would require restoration of the aquifer from which the uranium would be extracted. The proposed facility will be located near the town of Wright, Wyoming in Campbell County. The application was accepted for review by NRC on June 18, 2013. A notice of receipt and availability of the license application, including the Environmental Report (ER), and opportunity to request a hearing was published in the **Federal Register** on August 5, 2013 (78 FR 47427).

ADDRESSES: Please refer to Docket ID NRC–2013–0164 when contacting the NRC about the availability of information regarding this document. You may access publicly-available information related to this action by the following methods:

- Federal Rulemaking Web site: Go to *http://www.regulations.gov* and search for Docket ID NRC–2013–0164. Address questions about NRC dockets to Carol Gallagher; telephone: 301–287–3422; email: *Carol.Gallagher@nrc.gov*. For technical questions, contact the individual(s) listed in the **FOR FURTHER INFORMATION CONTACT** section of this document.
- NRC's Agencywide Documents Access and Management System (ADAMS): You may access publicly available documents online in the NRC Library at *http://www.nrc.gov/reading-rm/adams.html*. To begin the search, select ''*ADAMS Public Documents*'' and then 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*. Information and documents associated with the Reno Creek ISR Project, including the license application, are available for public review through our electronic reading room: *http://www.nrc.gov/reading-rm/adams.html* and on the NRC's Reno Creek ISR Project Web page: *http://www.nrc.gov/materials/uranium-recovery/license-apps/reno-creek.html*.
- NRC'S PDR: You may examine and purchase copies of public documents at the NRC's PDR, Room O1–F21, One White Flint North, 11555 Rockville Pike, Rockville, Maryland 20852.

FOR FURTHER INFORMATION CONTACT: Jill Caverly, Senior Project Manager, Office of Federal and State Materials and Environmental Management Programs, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001; telephone: 301–415–6699; email: *Jill.Caverly@nrc.gov*.

SUPPLEMENTARY INFORMATION:

1.0 Background

The purpose of this notice of intent is to inform the public that the NRC will be preparing a site-specific Supplemental Environmental Impact Statement (SEIS) regarding the proposed action in accordance with NRC's regulations in part 51 of Title 10 of the *Code of Federal Regulations* (10 CFR), ''*Environmental Protection Regulations for Domestic Licensing and Related Regulatory Functions,*'' that implement the National Environmental Policy Act of 1969, as amended (NEPA) (42 U.S.C. 4321 et seq.). The SEIS will tier off of the *Generic Environmental Impact Statement for In-Situ Leach Uranium Milling Facilities* (ISR GEIS) (NUREG–1910) that was published in 2009. The SEIS will examine the potential environmental impacts of the proposed construction, operation, and decommissioning of the Reno Creek ISR facility. The SEIS will also include an analysis of impacts from the proposed action to historic and cultural resources. The NRC staff will coordinate compliance with the Section 106 of the National Historic Preservation Act of 1966, as amended (NHPA) in parallel with the NEPA process using the process set forth in 36 CFR 800.8(c).

AUC submitted its application for a 10 CFR part 40 license by letter dated October 3, 2012. A notice of receipt and availability of the license application, including the ER, and opportunity to request a hearing was published in the **Federal Register** on August 5, 2013 (73 FR 47427).

The NRC will prepare a SEIS for the issuance of the ISR license to possess and use source material for uranium milling to fulfill 10 CFR 51.20(b)(8) requirements. The purpose of this Notice of Intent is to inform the public that the NRC staff, as part of its review of AUC's application, is preparing a draft SEIS for public comment that will tier off of the ISR GEIS. The GEIS identifies specific areas for consideration on a site specific basis that form the staff's intended scope for this site specific SEIS. While NRC's part 51 regulations do not require scoping for SEISs, the NRC staff is planning to place ads in newspapers serving communities near the proposed site, requesting information and comments from the public regarding the proposed action as well as information about other resources, such as historic and cultural resources, that could be affected by the proposed action. In preparing the SEIS, the NRC staff will also consult with Environmental Protection Agency Region 8, U.S. Fish & Wildlife Service; Wyoming Department of Environmental Quality; Wyoming State Historic Preservation Office; potentially interested Tribes and public interest groups; and Wyoming Game and Fish Department.

The NRC will evaluate the potential environmental impacts associated with the proposed ISR facility in parallel with the safety review of the license application. The environmental evaluation will be documented in draft and final SEISs in accordance with NEPA and NRC's implementing regulations contained in 10 CFR part 51.

2.0 Reno Creek ISR Facilities

The facilities, if licensed, would use ISR technology to extract uranium from the 6,057-acre project site. The facility

would include a central processing plant, consisting of pressurized down flow ion exchange columns, accompanying wellfields (including injection and production wells), and horizontal and vertical excursion monitoring well networks. The ISR process involves the dissolution of the water-soluble uranium from the mineralized host sandstone rock by pumping oxidants and chemical compounds through a series of injection wells. The uranium-rich solution is transferred from production wells to the central processing plant for uranium concentration using ion exchange columns. Final processing is conducted in the central processing plant to produce yellowcake, which would be sold to offsite facilities for further processing and eventual use as commercial fuel in nuclear power reactors.

3.0 Alternatives To Be Evaluated

No-Action—the no-action alternative would be to deny the license application. Under this alternative, the NRC would not issue the license. This serves as a baseline for comparison.

Proposed Action—the proposed federal action is to issue a license authorizing the possession and use of source material at the proposed ISR facilities. The license review process analyzes the safety and environmental issues related to the construction, operation, and decommissioning of the ISR facilities, and the restoration of the aquifer from which the uranium would be extracted. The applicant would be issued an NRC license under the provisions of 10 CFR part 40.

Other alternatives not listed here may be identified through the environmental review process.

4.0 Environmental Impact Areas To Be Analyzed

The following areas have been tentatively identified for analysis in the SEIS:

- *Land Use:* Plans, policies, and controls;
- *Transportation:* Transportation modes, routes, quantities, and risk estimates;
- *Geology and Soils:* Physical geography, topography, geology, and soil characteristics;
- *Water Resources:* Surface and groundwater hydrology, water use and quality, and the potential for degradation;
- *Ecology:* Wetlands, aquatic, terrestrial, economically and recreationally; Important species, and threatened and endangered species;
- *Air Quality:* Meteorological conditions, ambient background, pollutant sources, and the potential for degradation;
- *Noise:* Ambient, sources, and sensitive receptors;
- *Historical and Cultural Resources:* Historical, archaeological, and traditional cultural resources;
- *Visual and Scenic Resources:* Landscape characteristics, manmade features and viewshed;
- *Socioeconomics:* Demography, economic base, labor pool, housing, transportation, utilities, public services/facilities, and education;
- *Environmental Justice:* Potential disproportionately high and adverse impacts to minority and low-income populations;
- *Public and Occupational Health:* Potential public and occupational consequences from construction, routine operation, transportation, and credible accident scenarios (including natural events);
- *Waste Management:* Types of wastes expected to be generated, handled, and stored; and
- *Cumulative Effects:* Impacts from past, present, and reasonably foreseeable actions at and near the site(s).

This list is not intended to be all inclusive, nor is it a predetermination of potential environmental impacts.

5.0 The NEPA Process

The SEIS for the Reno Creek ISR Project will be prepared pursuant to the NRC's NEPA regulations at 10 CFR Part 51. The NRC will conduct its environmental review of the application and as soon as practicable, the NRC will prepare and publish a draft SEIS. The NRC currently plans to have a 45-day public comment period for the draft SEIS. Availability of the draft SEIS and the dates of the public comment period will be announced in the **Federal Register** and the NRC Web site: *www.nrc.gov*. The final SEIS will include responses to public comments received on the draft SEIS.

Dated at Rockville, Maryland, this 12th day of August, 2013.

For the U.S. Nuclear Regulatory Commission.

Aby Mohseni,

Deputy Director, Environmental Protection and Performance Assessment Directorate, Division of Waste Management and Environmental Protection, Office of Federal and State Materials and Environmental Management Programs.

[FR Doc. 2013–20386 Filed 8–20–13; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

[Docket No. 40–8838; NRC–2013–0194]

Request To Modify License by Replacing Security Plan With New Radiation Safety Plan; U.S. Department of the Army, Jefferson Proving Ground, Madison, Indiana

AGENCY: Nuclear Regulatory Commission.

ACTION: License amendment request; opportunity to provide comments, request a hearing and to petition for leave to intervene.

SUMMARY: The U.S. Nuclear Regulatory Commission (NRC) has received, by letter dated June 21, 2013 (actual receipt by NRC was July 18, 2013), a license amendment application from the U.S. Department of the Army (the licensee) for its Jefferson Proving Ground (JPG) site located in Madison, Indiana, requesting to replace its security plan with a new radiation safety plan.

DATES: Submit comments by September 20, 2013. Requests for a hearing and petition for leave to intervene must be filed by October 21, 2013.

ADDRESSES: You may submit comment by any of the following methods (unless this document describes a different method for submitting comments on a specific subject):

- *Federal Rulemaking Web site:* Go to *http://www.regulations.gov* and search for Docket ID NRC–2013–0194. Address questions about NRC dockets to Carol Gallagher; telephone: 301–287–3422; email: *Carol.Gallagher@nrc.gov*. For technical questions, contact the individual(s) listed in the **FOR FURTHER INFORMATION CONTACT** section of this document.
- *Mail comments to:* Cindy Bladey, Chief, Rules, Announcements, and Directives Branch (RADB), Office of Administration, Mail Stop: 3WFN, 06A44M, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001.

For additional direction on accessing information and submitting comments, see ''Accessing Information and Submitting Comments'' in the **SUPPLEMENTARY INFORMATION** section of this document.

FOR FURTHER INFORMATION CONTACT: Thomas McLaughlin, Office of Federal and State Materials and Environmental Management Programs, U.S. Nuclear Regulatory Commission, Washington, DC 20555; telephone: 301–415–5869; email: *Thomas.McLaughlin@nrc.gov.*

SUPPLEMENTARY INFORMATION:

I. Accessing Information and Submitting Comments

A. Accessing Information

Please refer to Docket ID NRC–2013–0194 when contacting the NRC about the availability of information regarding this document. You may access publicly-available information related to this action by the following methods:

- *Federal Rulemaking Web site:* Go to *http://www.regulations.gov* and search for Docket ID NRC–2013–0194.
- *NRC's Agencywide Documents Access and Management System (ADAMS):* You may access publicly-available documents online in the NRC Library at *http://www.nrc.gov/reading-rm/adams.html.* To begin the search, select ''ADAMS Public Documents'' and then 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 in this notice (if that document is available in ADAMS) is provided the first time that a document is referenced. The U.S. Department of the Army License Amendment request is available electronically in ADAMS under Accession No. ML13191A824.
- *NRC's PDR:* You may examine and purchase copies of public documents at the NRC's PDR, Room O1–F21, One White Flint North, 11555 Rockville Pike, Rockville, Maryland 20852.

B. Submitting Comments

Please include Docket ID NRC–2013–0194 in the subject line of your comment submission, in order to ensure that the NRC is able to make your comment submission available to the public in this docket.

The NRC cautions you not to include identifying or contact information that you do not want to be publicly disclosed in your comment submission. The NRC posts all comment submissions at *http://www.regulations.gov* as well as entering the comment submissions into ADAMS. The NRC does not routinely edit comment submissions to remove identifying or contact information.

If you are requesting or aggregating comments from other persons for submission to the NRC, then you should inform those persons not to include identifying or contact information that they do not want to be publicly disclosed in their comment submission. Your request should state that the NRC does not routinely edit comment submissions to remove such information before making the comment submissions available to the public or entering the comment submissions into ADAMS.

II. Background

License No. SUB–1435 authorizes the licensee to possess depleted uranium. The proposed change is to modify License Condition No. 12 D which refers to the security plan of December 10, 2003 (ADAMS Accession No. ML033650261). In the security plan, a management team of Army personnel controls access to JPG. Under the proposed revised radiation plan, which would supersede the 2003 security plan, the access control for JPG would be managed by the Fish and Wildlife Service (ADAMS Accession No. ML13191A824).

An NRC administrative review, documented in a letter to the U.S. Department of the Army dated July 24, 2013 (ADAMS Accession No. ML13204A269), found the application acceptable to begin a technical review. If the NRC approves the amendment, the approval will be documented in an amendment to the NRC License No. SUB–1435. However, before approving the proposed amendment, the NRC will need to make the findings required by the Atomic Energy Act of 1954, as amended, and the NRC's regulations. These findings will be documented in a Safety Evaluation Report and an Environmental Assessment, unless the extension request satisfies the requirements of a categorical exclusion under 10 CFR 51.22.

III. Opportunity To Request a Hearing and Petitions for Leave To Intervene

Within 60 days after the date of publication of this **Federal Register** notice, any person whose interest may be affected by this proceeding and who wishes to participate as a party in the proceeding must file a written request for a hearing and/or a petition for leave to intervene with respect to the license amendment request. Requirements for hearing requests and petitions for leave to intervene are found in 10 CFR 2.309, ''Hearing requests, petitions to intervene, requirements for standing, and contentions.'' Interested persons should consult 10 CFR 2.309, which is available at the NRC's PDR, Room O1–F21, One White Flint North, 11555 Rockville Pike, Rockville, Maryland 20852 (or call the PDR at 1–800–397–4209 or 301–415–4737). The NRC's regulations are available online in the NRC Library at *http://www.nrc.gov/reading-rm/doc-collections/cfr/.*

As required by 10 CFR 2.309, a petition for leave to intervene shall set forth with particularity the interest of the petitioner in the proceeding and how that interest may be affected by the results of the proceeding. The petition must provide the name, address, and telephone number of the petitioner and specifically explain the reasons why intervention should be permitted with particular reference to the following factors: (1) The nature of the petitioner's right under the Act to be made a party to the proceeding; (2) the nature and extent of the petitioner's property, financial, or other interest in the proceeding; and (3) the possible effect of any order that may be entered in the proceeding on the petitioner's interest.

A petition for leave to intervene must also include a specification of the contentions that the petitioner seeks to have litigated in the hearing. For each contention, the petitioner must provide a specific statement of the issue of law or fact to be raised or controverted, as well as a brief explanation of the basis for the contention. Additionally, the petitioner must demonstrate that the issue raised by each contention is within the scope of the proceeding and is material to the findings the NRC must make to support the granting of a license amendment in response to the application. The petition must also include a concise statement of the alleged facts or expert opinions which support the position of the petitioner and on which the petitioner intends to rely at hearing, together with references to the specific sources and documents on which the petitioner intends to rely. Finally, the petition must provide sufficient information to show that a genuine dispute exists with the applicant on a material issue of law or fact, including references to specific portions of the application for amendment that the petitioner disputes and the supporting reasons for each dispute, or, if the petitioner believes that the application for amendment fails to contain information on a relevant matter as required by law, the identification of each failure and the supporting reasons for the petitioner's belief. Each contention must be one that, if proven, would entitle the petitioner to relief.

Those permitted to intervene become parties to the proceeding, subject to any limitations in the order granting leave to intervene, and have the opportunity to participate fully in the conduct of the hearing with respect to resolution of that person's admitted contentions, including the opportunity to present evidence and to submit a cross-examination plan for cross-examination of witnesses, consistent with the NRC's regulations, policies, and procedures.

The Atomic Safety and Licensing Board will set the time and place for any prehearing conferences and evidentiary hearings, and the appropriate notices will be provided.

Requests for hearing, petitions for leave to intervene, and motions for leave to file new or amended contentions that are filed after October 21, 2013 day deadline will not be entertained absent a determination by the presiding officer that the filing demonstrates good cause by satisfying the three factors in 10 CFR 2.309(c)(1)(i–(iii).

A State, local governmental body, Federally-recognized Indian tribe, or agency thereof may submit a petition to the Commission to participate as a party under 10 CFR 2.309(h)(1). The petition should state the nature and extent of the petitioner's interest in the proceeding. The petition should be submitted to the Commission by October 21, 2013. The petition must be filed in accordance with the filing instructions in Section IV of this document, and should meet the requirements for petitions for leave to intervene set forth in this section, except that under 10 CFR 2.309(h)(2) a State, local governmental body, or Federally-recognized Indian tribe, or agency thereof does not need to address the standing requirements in 10 CFR 2.309(d) if the facility is a production or utilization facility located within its boundaries. A State, local governmental body, Federally-recognized Indian tribe, or agency thereof may also have the opportunity to participate in a hearing as a nonparty pursuant to 10 CFR 2.315(c).

If a hearing is granted, any person who does not wish, or is not qualified, to become a party to this proceeding may, in the discretion of the presiding officer, be permitted to make a limited appearance under 10 CFR 2.315(a). A person making a limited appearance may make an oral or written statement of position on the issues, but may not otherwise participate in the proceeding. A limited appearance may be made at any session of the hearing or at any prehearing conference, subject to such limits and conditions as may be imposed by the presiding officer. Persons desiring to make a limited appearance are requested to inform the Secretary of the Commission by October 21, 2013.

IV. Electronic Submissions (E-Filing)

All documents filed in NRC adjudicatory proceedings, including a request for hearing, a petition for leave to intervene, any motion or other document filed in the proceeding prior to the submission of a request for hearing or petition to intervene, and documents filed by interested governmental entities participating under 10 CFR 2.315(c), must be filed in accordance with the NRC E-Filing rule (72 FR 49139; August 28, 2007). The E-Filing process requires participants to submit and serve all adjudicatory documents over the Internet, or in some cases to mail copies on electronic storage media. Participants may not submit paper copies of their filings unless they seek an exemption in accordance with the procedures described below.

To comply with the procedural requirements of E-Filing, at least 10 days prior to the filing deadline, the participant should contact the Office of the Secretary by email at *hearing.docket@nrc.gov,* or by telephone at 301–415–1677, to request (1) a digital identification (ID) certificate, which allows the participant (or its counsel or representative) to digitally sign documents and access the E-Submittal server for any proceeding in which it is participating; and (2) advise the Secretary that the participant will be submitting a request or petition for hearing (even in instances in which the participant, or its counsel or representative, already holds an NRC-issued digital ID certificate). Based upon this information, the Secretary will establish an electronic docket for the hearing in this proceeding if the Secretary has not already established an electronic docket.

Information about applying for a digital ID certificate is available on the NRC's public Web site at *http://www.nrc.gov/site-help/e-submittals/apply-certificates.html.* System requirements for accessing the E-Submittal server are detailed in the NRC's ''Guidance for Electronic Submission,'' which is available on the agency's public Web site at *http://www.nrc.gov/site-help/e-submittals.html.* Participants may attempt to use other software not listed on the Web site, but should note that the NRC's E-Filing system does not support unlisted software, and the NRC Meta System Help Desk will not be able to offer assistance in using unlisted software.

If a participant is electronically submitting a document to the NRC in accordance with the E-Filing rule, the participant must file the document using the NRC's online, Web-based submission form. In order to serve documents through the Electronic Information Exchange System, users will be required to install a Web browser plug-in from the NRC's Web site. Further information on the Web-based submission form, including the installation of the Web browser plug-in, is available on the NRC's public Web site at *http://www.nrc.gov/site-help/e-submittals.html.*

Once a participant has obtained a digital ID certificate and a docket has been created, the participant can then submit a request for hearing or petition for leave to intervene. Submissions should be in Portable Document Format (PDF) in accordance with the NRC guidance available on the NRC's public Web site at *http://www.nrc.gov/site-help/e-submittals.html.* A filing is considered complete at the time the documents are submitted through the NRC's E-Filing system. To be timely, an electronic filing must be submitted to the E-Filing system no later than 11:59 p.m. Eastern Time on the due date. Upon receipt of a transmission, the E-Filing system time-stamps the document and sends the submitter an email notice confirming receipt of the document. The E-Filing system also distributes an email notice that provides access to the document to the NRC's Office of the General Counsel and any others who have advised the Office of the Secretary that they wish to participate in the proceeding, so that the filer need not serve the documents on those participants separately. Therefore, applicants and other participants (or their counsel or representative) must apply for and receive a digital ID certificate before a hearing request/petition to intervene is filed so that they can obtain access to the document via the E-Filing system.

A person filing electronically using the agency's adjudicatory E-Filing system may seek assistance by contacting the NRC Meta System Help Desk through the ''Contact Us'' link located on the NRC's Web site at *http://www.nrc.gov/site-help/e-submittals.html,* by email to *MSHD.Resource@nrc.gov,* or by a toll-free call at 1–866–672–7640. The NRC Meta System Help Desk is available between 8 a.m. and 8 p.m., Eastern Time, Monday through Friday, excluding government holidays.

Participants who believe that they have a good cause for not submitting documents electronically must file an exemption request, in accordance with 10 CFR 2.302(g), with their initial paper filing requesting authorization to continue to submit documents in paper format. Such filings must be submitted by: (1) First class mail addressed to the Office of the Secretary of the Commission, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, Attention: Rulemaking and Adjudications Staff; or (2) courier, express mail, or expedited delivery

service to the Office of the Secretary, Sixteenth Floor, One White Flint North, 11555 Rockville Pike, Rockville, Maryland 20852, Attention: Rulemaking and Adjudications Staff. Participants filing a document in this manner are responsible for serving the document on all other participants. Filing is considered complete by first-class mail as of the time of deposit in the mail, or by courier, express mail, or expedited delivery service upon depositing the document with the provider of the service. A presiding officer, having granted an exemption request from using E-Filing, may require a participant or party to use E-Filing if the presiding officer subsequently determines that the reason for granting the exemption from use of E-Filing no longer exists.

Documents submitted in adjudicatory proceedings will appear in the NRC's electronic hearing docket which is available to the public at *http://ehd1.nrc.gov/ehd/,* unless excluded pursuant to an order of the Commission, or the presiding officer. Participants are requested not to include personal privacy information, such as social security numbers, home addresses, or home phone numbers in their filings, unless an NRC regulation or other law requires submission of such information. With respect to copyrighted works, except for limited excerpts that serve the purpose of the adjudicatory filings and would constitute a Fair Use application, participants are requested not to include copyrighted materials in their submission.

Dated at Rockville, Maryland, this 7th day of August 2013.

For the Nuclear Regulatory Commission.

Andrew Persinko,

Deputy Director, Decommissioning and Uranium Recovery Licensing Directorate, Division of Waste Management and Environmental Protection, Office of Federal and State Materials and Environmental Management Programs.

[FR Doc. 2013–20421 Filed 8–20–13; 8:45 am]

BILLING CODE 7590–01–P

POSTAL REGULATORY COMMISSION

[Docket No. CP2013–76; Order No. 1810]

Negotiated Service Agreement

AGENCY: Postal Regulatory Commission.

ACTION: Notice.

SUMMARY: The Commission is noticing a recent Postal Service filing concerning an additional Global Expedited Package Services (GEPS) 3 negotiated service agreement. This notice informs the public of the filing, invites public comment, and takes other administrative steps.

DATES: *Comments are due:* August 22, 2013.

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: Stephen L. Sharfman, General Counsel, at 202–789–6820.

SUPPLEMENTARY INFORMATION:

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I. Introduction
II. Background
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I. Introduction

On August 14, 2013, the Postal Service filed a notice stating that it has entered into an additional Global Expedited Package Services (GEPS) 3 negotiated service agreement (Agreement).[1] The Postal Service seeks inclusion of the Agreement within the GEPS 3 product. *Id.* at 2.

II. Background

The Commission first approved the addition of a GEPS negotiated service agreement to the competitive product list as a result of consideration of Governors' Decision No. 08–7 in Docket No. CP2008–5.[2] The Commission later added GEPS 3 to the competitive product list and authorized the agreement filed in Docket No. CP2010–71 to serve as the baseline agreement for comparison of potential functionally equivalent agreements.[3]

The Agreement is a successor to the negotiated service agreement that was the subject of Docket No. CP2012–34 and is set to expire on August 31, 2013. Notice at 3. The effective date of the Agreement is September 1, 2013. *Id.* It is set to expire on the later of one calendar year after the effective date or the last day of the month that is one calendar year after the effective date. *Id.,* Attachment 1 at 7.

III. Contents of Filing

The Notice includes the following attachments:

- Attachment 1—a redacted copy of the Agreement;
- Attachment 2—a redacted copy of the certified statement required by 39 CFR 3015.5(c)(2);
- Attachment 3—a redacted copy of Governors' Decision No. 08–7, which establishes prices and classifications for Global Expedited Package Services Contracts; and
- Attachment 4—an application for non-public treatment of materials to be filed under seal.

Materials filed under seal include unredacted copies of the Agreement, the certified statement, and supporting financial workpapers. *Id.,* Attachment 4 at 3. The Postal Service filed redacted versions of the financial workpapers publically.

In the Notice, the Postal Service asserts that the Agreement is functionally equivalent to the GEPS 3 baseline agreement, notwithstanding differences in two of the introductory paragraphs of the Agreement; revisions to several existing articles; and new, deleted, and renumbered articles. *Id.* at 4–7. The Postal Service states that these differences affect neither the fundamental service being offered under the Agreement nor the Agreement's fundamental structure. *Id.* at 7.

The Postal Service contends that the Agreement is in compliance with the requirements of 39 U.S.C. 3633 and that the Agreement is functionally equivalent to the baseline agreement. *Id.* The Postal Service therefore requests that the Commission add the Agreement to the GEPS 3 product. *Id.*

IV. Commission Action

The Commission establishes Docket No. CP2013–76 for consideration of matters raised by the Notice. Interested persons may submit comments on whether the Postal Service's filings are consistent with 39 U.S.C. 3632, 3633, or 3642, 39 CFR part 3015, and subpart B of 39 CFR part 3020. Comments are due no later than August 22, 2013. The public portions of the Postal Service's filing can be accessed via the Commission's Web site, *http://www.prc.gov.* Information concerning access to non-public material is located in 39 CFR part 3007.

The Commission appoints Kenneth R. Moeller to serve as Public Representative in the above-captioned proceeding.

[1] Notice of United States Postal Service of Filing a Functionally Equivalent Global Expedited Package Services 3 Negotiated Service Agreement and Application for Non-Public Treatment of Materials Filed Under Seal, August 14, 2013 (Notice).

[2] *See* Order No. 86, Docket No. CP2008–5, Order Concerning Global Expedited Package Services Contracts, June 27, 2008.

[3] *See* Order No. 503, Docket Nos. MC2010–28 and CP2010–71, Order Approving Global Expedited Package Services 3 Negotiated Service Agreement, July 29, 2010.

V. Ordering Paragraphs

It is ordered:

1. The Commission establishes Docket No. CP2013–76 for consideration of the matters raised by the Postal Service's Notice.

2. Comments by interested persons in this proceeding are due no later than August 22, 2013.

3. Pursuant to 39 U.S.C. 505, the Commission appoints Kenneth R. Moeller to serve as an officer of the Commission (Public Representative) to represent the interests of the general public in this docket.

4. The Secretary shall arrange for publication of this order in the **Federal Register**.

By the Commission.

Shoshana M. Grove,

Secretary.

[FR Doc. 2013–20281 Filed 8–20–13; 8:45 am]

BILLING CODE P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–70210; File Nos. SR–NYSE–2013–42; SR–NYSEMKT–2013–50; SR–NYSEArca–2013–62)

Self-Regulatory Organizations; New York Stock Exchange LLC; NYSE MKT LLC; NYSE Arca, Inc.; Order Granting Approval of Proposed Rule Change Relating to a Corporate Transaction in Which NYSE Euronext Will Become a Wholly-Owned Subsidiary of IntercontinentalExchange Group, Inc.

August 15, 2013.

I. Introduction

On June 14, 2013, each of New York Stock Exchange LLC (''Exchange''), NYSE MKT LLC (''NYSE MKT''), and NYSE Arca, Inc. (''NYSE Arca'' and, with the Exchange and NYSE MKT, the ''NYSE Exchanges''), filed with the Securities and Exchange Commission (''Commission''), pursuant to Section 19(b)(1) [1] of the Securities Exchange Act of 1934 (''Act''),[2] and Rule 19b–4 thereunder,[3] proposed rule changes in which NYSE Euronext Holdings LLC (''NYX Holdings''), the successor entity to the NYSE Exchanges' indirect parent, NYSE Euronext (''NYSE Euronext''), will become a wholly-owned subsidiary of IntercontinentalExchange Group, Inc. (''ICE Group'') The proposed rule changes were published for comment in the **Federal Register** on July 1, 2013.[4] The Commission received one comment letter on the NYSE proposal.[5] The Exchange filed a response to these comments on August 8, 2013.[6]

The Commission has reviewed carefully the proposed rule changes, the comment letter, and finds that the proposed rule changes are consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange.[7] In particular, the Commission finds that the proposed rule changes are consistent with Section 6(b) of the Act,[8] which, among other things, requires a national securities exchange to be so organized and have the capacity to be able to carry out the purposes of the Act and to enforce compliance by its members and persons associated with its members with the provisions of the Act, the rules and regulations thereunder, and the rules of the exchange, and assure the fair representation of its members in the selection of its directors and administration of its affairs, and provide that one or more directors shall be representative of issuers and investors and not be associated with a member of the exchange, broker, or dealer. Section 6(b) of the Act [9] also requires that the rules of the exchange be designed to promote just and equitable principles of trade, 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.

II. Discussion

The Exchange, NYSE MKT and NYSE Arca have submitted their proposed rule changes in connection with the proposed business combination (the ''Combination'') pursuant to which NYSE Euronext's successor entity, NYSE Euronext Holdings LLC (''NYX Holdings''), will become a wholly-owned subsidiary of ICE Group.

NYSE Euronext owns 100% of the equity interest of NYSE Group, Inc., a Delaware corporation (''NYSE Group''), which in turn directly or indirectly owns (1) 100% of the equity interest of the NYSE Exchanges and, (2) 100% of the equity interest of NYSE Market (DE), Inc. (''NYSE Market''), NYSE Regulation, Inc. (''NYSE Regulation''), NYSE Arca L.L.C., NYSE Arca Equities, Inc. (''NYSE Arca Equities'') and NYSE Amex Options LLC (''NYSE Amex Options'') (the NYSE Exchanges, together with NYSE Market, NYSE Regulation, NYSE Arca L.L.C., NYSE Arca Equities, NYSE Amex Options and any similar U.S. regulated entity acquired, owned or created after the date hereof, the ''U.S. Regulated Subsidiaries'' and each, a ''U.S. Regulated Subsidiary'').

IntercontinentalExchange, Inc. (''ICE'') is an operator of regulated exchanges and clearing houses serving the risk management needs of global markets for agricultural, credit, currency, emissions, energy and equity index products. ICE owns ICE Futures Europe, ICE Futures U.S., Inc., ICE Futures Canada, Inc., ICE U.S. OTC Commodity Markets, LLC, and five central counterparty clearing houses, including ICE Clear Europe Limited and ICE Clear Credit LLC, each of which is registered as a clearing agency under Section 17A of the Exchange Act,[10] ICE Clear U.S., Inc., ICE Clear Canada, Inc., and The Clearing Corporation, and owns 100% of the equity in Creditex Group Inc., which in turn indirectly owns Creditex Securities Corporation. Neither ICE Group nor any company owned by it directly or indirectly, including, but not limited to, those referenced in this paragraph, is a registered national securities exchange or a member of any U.S. Regulated Subsidiary.

As a result of the Combination, the businesses of ICE and NYSE Euronext, including the U.S. Regulated Subsidiaries, will be held under ICE Group as a single publicly traded holding company that will be listed on the Exchange. The proposed rule changes are necessary to effectuate the consummation of the Combination and will not be operative until the date of the consummation of the Combination (the ''Closing Date''). The proposed rule changes and exhibits thereto contain modifications to the underlying corporate governance documents of the U.S. Regulated Subsidiaries and their respective direct and indirect owners that reflect the current structure of the Combination. The Commission notes that any changes to the structure of the Combination that are made subsequent to the date of this approval order but

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[1] 15 U.S.C. 78s(b)(1).

[2] 15 U.S.C. 78a.

[3] 17 CFR 240.19b–4.

[4] *See* Securities Exchange Act Release Nos. 69851 (June 25, 2013), 78 FR 39407 (July 1, 2013) (SR–NYSE–2013–42) (''Notice''); 69849 (June 25, 2013), 78 FR 39369 (July 1, 2013)(SR–NYSEMKT–2013–50) (''NYSEMKT Notice''); 69850 (June 25, 2013), 78 FR 39352 (July 1, 2013) (SR–NYSEArca–2013–62) (''NYSE Arca Notice'').

[5] *See* Letter to Commission, from Andrew Rothlein, dated July 11, 2013 (''Rothlein Letter'').

[6] *See* letter from Janet McGinness, NYSE, to Elizabeth M. Murphy, Secretary, Commission, dated August 8, 2013 (''NYSE Response to Comment''). On August 12, 2013, the Commission received a rebuttal letter to the NYSE Response to Comments (the ''Rothlein Rebuttal Letter'').

[7] In approving the proposed rule changes, the Commission has considered their impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[8] 15 U.S.C. 78f(b).

[9] *Id.*

[10] 15 U.S.C. 78q–1.

prior to the Closing Date may be considered additional proposed rule changes required to be filed with and approved by the Commission pursuant to Section 19 of the Act.[11] In addition, the Commission notes that, if the Combination is not consummated, the proposed rule changes will not become effective.

A. Corporate Structure

Following the Combination, the successor to NYSE Euronext, the NYSE Exchanges' indirect parent, NYX Holdings, will be a wholly-owned subsidiary of ICE Group.[12] ICE Group will hold all of the equity interests in ICE, which will continue its current operations, and in NYX Holdings, which will hold (1) 100% of the equity interests of NYSE Group (which, in turn, would continue to directly or indirectly hold 100% of the equity interests of the U.S. Regulated Subsidiaries) and (2) 100% of the equity interest of Euronext N.V. (''Euronext'') (which, in turn, directly or indirectly holds 100% of the equity interests of trading markets in Belgium, France, the Netherlands, Portugal and the United Kingdom). ICE's common stock is listed on the Exchange under the symbol ''ICE,'' and following the completion of the Combination, ICE Group common stock is expected to be listed for trading on the Exchange under the same symbol.

The NYSE Exchanges represent that the Combination will have no effect on the ability of any party to trade securities on the NYSE Exchanges. Other than as described herein, the NYSE Exchanges also represent that ICE Group will not make any changes to the regulated activities of the U.S. Regulated Subsidiaries in connection with the Combination. If ICE Group determines to make any such changes to the regulated activities of any U.S. Regulated Subsidiary, it will seek the approval of the Commission.

A core aspect of the structure of the Combination is that it would maintain local regulation of the marketplace, members, and issuers. Therefore, securities exchanges, members, and issuers of the U.S. Regulated Subsidiaries will continue to be regulated in the same manner as they are currently regulated. The Commission notes that this conclusion (*i.e.,* that securities exchanges, members, and issuers of the U.S. Regulated Subsidiaries will continue to be regulated in the same manner as they are currently regulated) is based on the structure of the Combination as described in this proposal.

1. ICE Group

Following the Combination, ICE Group will be a for-profit, publicly traded corporation that will act as a holding company for the businesses of NYX Holdings and ICE. ICE Group will hold (i) all of the equity interests in NYX Holdings, which in turn, directly or indirectly holds 100 percent of the equity interests of the U.S. Regulated Subsidiaries, and (ii) all of the equity interests in ICE. Section 19(b) of the Act and Rule 19b–4 thereunder require a self-regulatory organization (''SRO'') to file proposed rule changes with the Commission. Although ICE Group is not an SRO, certain provisions of its amended and restated Certificate of Incorporation (''ICE Group Certificate'') and amended and restated Bylaws (''ICE Group Bylaws'', and together with the ICE Group Certificate, ''the ICE Group Articles''), along with other corporate documents, are rules of an exchange[13] if they are stated policies, practices, or interpretations, as defined in Rule 19b–4 under the Act, of the exchange, and must be filed with the Commission pursuant to Section 19(b)(4) of the Act and Rule 19b–4 thereunder. Accordingly, the NYSE Exchanges have filed the proposed ICE Group Articles, along with other corporate documents, with the Commission.

Voting and Ownership Limitations

The proposed ICE Group Articles include restrictions on the ability to vote and own shares of stock of ICE Group. Under the proposed ICE Group Certificate (1) no person, either alone or together with its related persons,[14] may be entitled to vote or cause the voting of shares of stock of ICE Group beneficially owned by such person or its related persons, in person or by proxy or through any voting agreement or other arrangement, to the extent that such shares represent in the aggregate more than 10% of the then outstanding votes entitled to be cast on such matter, and (2) no person, either alone or together with its related persons, may acquire the ability to vote more than 10% of the then outstanding votes entitled to be cast on any such matter by virtue of agreements or arrangements entered into with other persons to refrain from voting shares of stock of ICE Group (the ''ICE Group Voting Restriction'').[15] The ICE Group Certificate will require ICE Group to disregard any votes purported to be cast in excess of the ICE Group Voting Restriction.

In addition, the ownership restrictions in the ICE Group Certificate would provide that no person, either alone or together with its related persons, may at any time own beneficially shares of ICE Group representing in the aggregate more than 20% of the then outstanding votes entitled to be cast on any matter (the ''ICE Group Ownership Restrictions'').[16] If any person, either alone or together with its related persons, owns shares of ICE Group in excess of the ICE Group Ownership Restriction, then such person and its related persons are obligated to sell promptly, and ICE Group is obligated to purchase promptly, at a price equal to the par value of such shares and to the extent funds are legally available for such purchase, the number of shares of ICE Group necessary so that such person, together with its related persons, will beneficially own shares of ICE Group representing in the aggregate no more than 20% of the then outstanding votes entitled to be cast on any matter, after taking into account that such repurchased shares will become treasury shares and will no longer be deemed to be outstanding.[17]

The ICE Group Certificate would provide that the ICE Group Voting Restriction and the ICE Group Ownership Restriction would apply only for so long as ICE Group directly or indirectly controls a U.S. Regulated

[11] 15 U.S.C. 78s.

[12] ICE Group is currently a wholly-owned subsidiary of ICE. ICE Group in turn has two wholly-owned subsidiaries, ICE Merger Sub, a Delaware corporation, and NYSE Euronext Merger Sub, a Delaware limited liability company. To effect the Combination, (1) ICE Merger Sub will be merged with and into ICE (the ''ICE Merger''), with ICE as the surviving corporation and a wholly-owned subsidiary of ICE Group, and (2) immediately following the ICE Merger, NYSE Euronext shall be merged with and into NYSE Euronext Merger Sub, with NYSE Euronext Merger Sub as the surviving company and a wholly-owned subsidiary of ICE Group (the ''NYSE Euronext Merger''). NYSE Euronext Merger Sub, as the surviving entity in the NYSE Euronext Merger, will change its name to ''NYX Holdings'' from and after the closing of the Combination.

[13] *See* Section 3(a)(27) of the Act, 15 U.S.C. 78c(a)(27). If ICE Group decides to change the ICE Group Articles, ICE Group must submit such change to the board of directors of the U.S. Regulated Subsidiaries, and if any or all of such board of directors shall determine that such amendment must be filed with or filed with and approved by the Commission pursuant to Section 19 of the Act and the rules thereunder, such change shall not be effective until filed with or filed with and approved by the Commission, as applicable. *See* proposed ICE Group Certificate, Article X; proposed ICE Group Bylaws, Section 11.3.

[14] *See* proposed ICE Group Certificate, Article V, Section A(13).

[15] *See* proposed ICE Group Certificate, Article V, Section A.

[16] *See* proposed ICE Group Certificate, Article V, Section B.

[17] *See* proposed ICE Group Certificate, Article V, Section B.4.

Subsidiary or a European Market Subsidiary.[18]

The ICE Group board of directors may waive the provisions regarding voting and ownership limits, subject to a determination by the ICE Group board of directors that the exercise of such voting rights (or the entering into of a voting agreement) or ownership, as applicable:

- Will not impair the ability of any of the U.S. Regulated Subsidiaries, ICE Group, or NYSE Group to discharge their respective responsibilities under the Act and the rules and regulations thereunder;
- Will not impair the ability of any of the European Market Subsidiaries, ICE Group, or Euronext to discharge their respective responsibilities under the European Exchange Regulations; [19]
- Is otherwise in the best interest of ICE Group, its shareholders, the U.S. Regulated Subsidiaries and the European Market Subsidiaries; and
- Will not impair the Commission's ability to enforce the Act or the European Regulators' ability to enforce the European Exchange Regulations.[20]

Such resolution expressly permitting such voting or ownership must be filed with and approved by the Commission under Section 19 of the Act [21] and filed with and approved by each European Regulator having appropriate jurisdiction and authority.

In addition, for so long as ICE Group directly or indirectly controls the Exchange, NYSE Market (DE), Inc., NYSE MKT, NYSE Arca, NYSE Arca Equities Inc. or any facility of NYSE Arca or NYSE MKT, the ICE Group board of directors cannot waive the voting and ownership limits above the 20% threshold for any person if such person or its related persons is a member of NYSE or NYSE MKT, an ETP Holder of NYSE Arca Equities,[22] or an OTP Holder or an OTP Firm of NYSE Arca.[23] Further, the ICE Group board of directors also cannot waive the voting and ownership limits above the 20% threshold if such person or its related persons is subject to any statutory disqualification (as defined in Section 3(a)(39) of the Act) (a ''U.S. Disqualified Person'') or has been determined by a European Regulator to be in violation of laws or regulations adopted in accordance with the European Directive on Markets in Financial Instruments applicable to any European Market Subsidiary requiring such person to act fairly, honestly and professionally (a ''European Disqualified Person'').[24]

Members that trade on an exchange traditionally have had ownership interests in such exchange. As the Commission has noted in the past, however, a member's interest in an exchange could become so large as to cast doubt on whether the exchange can fairly and objectively exercise its self-regulatory responsibilities with respect to that member.[25] A member that is a controlling shareholder of an exchange might be tempted to exercise that controlling influence by directing the exchange to refrain from, or the exchange may hesitate to, diligently monitor and surveil the member's conduct or diligently enforce its rules and the federal securities laws with respect to conduct by the member that violates such provisions.[26]

The Commission finds the ownership and voting restrictions in the proposed ICE Group Articles are consistent with the Act. These requirements should minimize the potential that a person could improperly interfere with or restrict the ability of the Commission, the Exchange, or its subsidiaries to effectively carry out their regulatory oversight responsibilities under the Act.[27]

2. NYX Holdings and NYSE Group

Following the Combination, NYX Holdings will be a wholly-owned subsidiary of ICE Group. Furthermore, NYX Holdings will not be a publicly-held company. The NYSE Exchanges have proposed certain changes to reflect that NYX Holdings will become a wholly-owned subsidiary and will not be publicly held. NYX Holdings will act as a holding company for the businesses of the NYSE Group and Euronext. NYX Holdings will own all of the equity interests in NYSE Group and its subsidiaries, including the Exchange, NYSE Arca, and NYSE MKT, and all of the equity interests in Euronext and its respective subsidiaries.[28] Section 19(b)

[18] *See* proposed ICE Group Certificate, Article V, Section A.1. and B.1.

[19] *See* proposed ICE Group Bylaws, Article III, Section 3.15(b) and (e) for the definitions of ''European Exchange Regulations'' and ''European Market Subsidiary'', respectively.

[20] *See* proposed ICE Group Certificate, Article V, Section A.11. for the definition of ''European Regulator.''

[21] 15 U.S.C. 78s.

[22] ''ETP Holder'' is defined in NYSE Arca Equities Rule 1.1(m). ''OTP Holder'' and ''OTP Firm'' are defined, respectively, in NYSE Arca Rule 1.1(q) and 1.1(r).

[23] *See* proposed ICE Group Certificate, Article V, Section A.3.

[24] *Id.*

[25] *See, e.g.,* Securities Exchange Act Release Nos. 62716 (August 13, 2010), 75 FR 51295 (August 19, 2010) (File No. 10–198) (order approving registration application of BATS Y-Exchange, Inc. as a national securities exchange); 61698 (March 12, 2010), 75 FR 13151 (March 18, 2010) (File Nos. 10–194 and 10–196) (order approving registration applications of EDGX Exchange, Inc. and EDGA Exchange, Inc. as national securities exchanges); 58375 (August 18, 2008), 73 FR 49498 (August 21, 2008) (File No. 10–182) (order approving registration application of BATS Exchange, Inc. as a national securities exchange); 55293 (February 14, 2007), 72 FR 8033 (February 22, 2007) (SR–NYSE–2006–120) (order approving proposed combination between NYSE Group, Inc. and Euronext N.V. (''NYSE-Euronext Merger Order''); 53382 (February 27, 2006), 71 FR 11251 (March 6, 2006) (SR–NYSE–2005–77) (order approving merger of New York Stock Exchange, Inc. and Archipelago, and demutualization of New York Stock Exchange, Inc.) (''NYSE Inc.-Archipelago Merger Order'')); 53128 (January 13, 2006), 71 FR 3550 (January 23, 2006) (File No. 10–131); 51149 (February 8, 2005), 70 FR 7531 (February 14, 2005) (SR–CHX–2004–26); 49718 (May 17, 2004), 69 FR 29611 (May 24, 2004) (SR–PCX–2004–08); 49098 (January 16, 2004), 69 FR 3974 (January 27, 2004) (SR-Phlx-2003–73); and 49067 (January 13, 2004), 69 FR 2761 (January 20, 2004) (SR–BSE–2003–19).

[26] *See, e.g.,* id.

[27] *See, e.g.,* NYSE-Euronext Merger Order, 72 FR at 8037.

[28] NYX Holdings, as a Delaware limited liability company, will operate pursuant to an operating agreement (the ''NYX Holdings Operating Agreement''). The NYX Holdings Operating Agreement is largely based on the organizational documents of NYSE Euronext, which would cease to be in effect. The NYX Holdings Operating Agreement would modify the current NYSE Euronext's organizational documents to (1) simplify and provide for a more efficient governance and capital structure that is appropriate for a wholly-owned subsidiary; (2) conform certain provisions to analogous provisions of the organizational documents of NYSE Group, which will likewise be an indirect wholly-owned subsidiary of ICE Group following completion of the Combination; and (3) make certain clarification and technical edits (for example, to conform the use of defined terms and other provisions, and to update cross-references to sections). In addition, the current Independence Policy of the NYSE Euronext board of directors would cease to be in effect.

More specifically, the NYX Holdings Operating Agreement would reflect, in part, the following modifications to the NYSE Euronext Certificate and Bylaws: (i) removing the provision for preferred membership interests, (ii) allowing a majority of the membership interests outstanding to call special meetings, take shareholder action by written consent, and to postpone such meetings, (iii) allowing shareholders to fill board vacancies, (iv) deleting provisions requiring a supermajority vote of shareholders to amend or repeal certain sections of the NYX Holdings Operating Agreement, (v) clarifying that notice of shareholder meetings is not required if waived, (vi) deleting the requirement that directors be elected by a majority of the votes cast, (vii) deleting provisions requiring advance notice from shareholders of shareholder director nominations or shareholder proposals, (viii) deleting provisions relating to the mechanics of shareholders' meetings, such as the appointment of an inspector of elections, (ix) clarifying that NYX Holdings may not have a Nominating and Governance Committee, (x) deleting the requirement that 75% of the Euronext board must be independent, (xi) providing that the Corporation Trust Company would be the registered office and agent of NYX Holdings in Delaware, (xii) removing certain residency requirements applicable to directors and officers and references to U.S. and European director domiciles, (xiii) deleting that board meetings be held with equal frequency in the United States and Europe, (xiv) removing

of the Act and Rule 19b–4 thereunder require a SRO to file proposed rule changes with the Commission. Although NYX Holdings and NYSE Group are not SROs, certain provisions of the proposed NYX Holdings Operating Agreement and NYSE Group's Third Amended and Restated Certificate of Incorporation (''NYSE Group Certificate of Incorporation'') [29] are rules of an exchange [30] if they are stated policies, practices, or interpretations, as defined in Rule 19b–4 under the Act, of the exchange, and must be filed with the Commission pursuant to Section 19(b)(4) of the Act and Rule 19b–4 thereunder. Accordingly, the NYSE Exchanges have filed the proposed NYX Holdings Operating Agreement and the proposed NYSE Group Certificate of Incorporation with the Commission.

Voting and Ownership Limitations; Changes in Control

The NYSE Exchanges have proposed changing the voting and ownership limitations of NYX Holdings to include a statement that such limitations would not be applicable as long as ICE Group owned all of the issued and outstanding shares of NYX Holdings [31] and only for so long as NYX Holdings directly or indirectly controls any U.S. Regulated Subsidiary or any European Market Subsidiary.[32] Instead, while NYX Holdings is a wholly-owned subsidiary of ICE Group, there shall be no transfer of the shares of NYX Holdings without the approval of the Commission.[33] If NYX Holdings ceases to be wholly-owned by ICE Group, but directly or indirectly controls any U.S. Regulated Subsidiary or any European Market Subsidiary, the voting and ownership limitations would apply.[34] The voting restrictions contained in the current NYSE Group Certificate of Incorporation are substantially the same as those in the current NYSE Euronext Certificate (except that the current NYSE Group Certificate of Incorporation does not contain any references to European subsidiaries, markets or regulators.) The Exchange proposes to update the NYSE Group Certificate of Incorporation to provide that its voting and ownership restrictions would apply in the event that NYX Holdings and the trust established pursuant to the NYSE Euronext Trust Agreement do not collectively own all of the issued and outstanding shares of stock of NYSE Group and only for so long as NYSE Group directly or indirectly controls any U.S. Regulated Subsidiary.[35]

The Commission finds that the changes to the ownership and voting restrictions in the proposed NYX Holdings Operating Agreement and the proposed NYSE Group Certificate of Incorporation, as well as the change in control provisions in the NYSE Euronext Certificate of Incorporation are consistent with the Act. The transfer, ownership and voting restrictions should minimize the potential that a person could improperly interfere with or restrict the ability of the Commission and the U.S. Regulated Subsidiaries to effectively carry out their regulatory oversight responsibilities under the Act.

In addition, to allow ICE Group to wholly-own and vote all of NYSE Euronext stock upon consummation of the Combination, ICE Group delivered a written notice to the board of directors of NYSE Euronext pursuant to the procedures set forth in the current NYSE Euronext Certificate of Incorporation requesting approval of its ownership and voting of NYSE Euronext stock in excess of the NYSE Euronext voting restriction and NYSE Euronext ownership restriction.[36] The board of directors of NYSE Euronext must resolve to expressly permit ownership or voting in excess of the NYSE Euronext voting restriction limitation and NYSE Euronext ownership restriction. Such resolution of the NYSE Euronext board of directors must be filed with and approved by the

provisions related to participation requirements when the chairman or deputy chairman of the board of directors is also the chief executive officer or deputy chief executive officer, and (xv) simplifying certain aspects of the indemnification and expense advancement provisions in light of the fact that there are not expected to be any independent, non-executive directors of NYX Holdings.

[29] Generally, the NYSE Exchanges propose, in part, the following changes to NYSE Group's Certificate of Incorporation: (i) clarifying the ability to fix the number of directors and making the board's ability to remove directors subject to the rights of holder of preferred stock; (ii) amending to contemplate successors to NYSE Euronext as the holder of all of the issued and outstanding shares of NYSE Group for purposes of the NYSE Trust Agreement, (iii) clarifying that the voting and ownership concentration limits would be effective ''for so long as the Corporation shall control, directly or indirectly'' a U.S. Regulated Subsidiary, (iv) amending the definition of ''Regulated Subsidiary'' in the NYSE Group Bylaws, and (v) making certain clarifications and technical edits.

[30] *See* Section 3(a)(27) of the Act, 15 U.S.C. 78c(a)(27). If NYX Holdings decides to change its Certificate of Incorporation or Bylaws, NYX Holdings must submit such change to the board of directors of the Exchange, NYSE Market, NYSE Regulation, NYSE MKT, NYSE Arca Equities and NYSE Arca, and if any or all of such board of directors shall determine that such amendment or repeal must be filed with or filed with and approved by the Commission pursuant to Section 19 of the Act and the rules thereunder, such change shall not be effective until filed with or filed with and approved by the Commission, as applicable. *See* proposed NYX Holdings Operating Agreement, Section 16. If NYSE Group decides to change its Certificate of Incorporation or Bylaws, NYSE Group must submit such change to the board of directors of the Exchange, NYSE Market, NYSE Regulation, NYSE MKT, NYSE Arca Equities and NYSE Arca, and if any or all of such board of directors shall determine that such amendment or repeal must be filed with or filed with and approved by the Commission pursuant to Section 19 of the Act and the rules thereunder, such change shall not be effective until filed with or filed with and approved by the Commission, as applicable. *See* proposed NYSE Group Certificate of Incorporation, Article XII.

[31] *See* proposed NYX Holdings Operating Agreement, Article IX, Section 9.1.

[32] *See* proposed NYX Holdings Operating Agreement, Article IX, Sections 9.1(a)(voting restrictions) and 9.2(b)(ownership restrictions).

[33] *See* proposed NYX Holdings Operating Agreement, Article VII, Section 7.2.

[34] The proposed NYX Holdings Operating Agreement would make two additional changes as compared to the current NYSE Euronext Certificate and Bylaws:

First, it would expand the definition of ''Related Persons'' to provide that (1) in the case of a person that is a ''member'' (as defined in Section 3(a)(3)(A)(i) of the Exchange Act) of NYSE MKT, such person's ''Related Persons'' would include the ''member'' (as defined in Section 3(a)(3)(A)(ii), (iii) or (iv) of the Exchange Act) with which such person is associated; and (2) in the case of any person that is a ''member'' (as defined in 3(a)(3)(A)(ii), (iii) or (iv) of the Exchange Act) of NYSE MKT, such person's ''Related Persons'' would include any ''member'' (as defined in Section 3(a)(3)(A)(i) of the Exchange Act) that is associated with such person. *See* proposed NYX Holdings Operating Agreement, Article I, Section 1.1, xi and xii.

Second, the mandatory repurchase of membership interests from a Person whose ownership represents in the aggregate more than 20% in interest of the interests entitled to vote on any matter would be at a price determined by reference to each incremental percentage ownership over 20% rather than at par value, specifically $1,000 for each percent. *See* proposed NYX Holdings Operating Agreement, Article IX, Section 9.1(b)(4).

[35] *See* proposed NYSE Group Certificate of Incorporation, Article IV, Section 4(b). In addition, the definition of ''Related Persons'' in the NYSE Group Certificate of Incorporation would be expanded to provide that (1) in the case of a person that is a ''member'' (as defined in Section 3(a)(3)(A)(i) of the Exchange Act) of NYSE MKT, such person's ''Related Persons'' would include the ''member'' (as defined in Section 3(a)(3)(A)(iv) of the Exchange Act, in addition to Sections 3(a)(3)(A)(ii) and (iii) of the Exchange Act, which are currently referenced in this provision of the NYSE Group Certificate) with which such person is associated; and (2) in the case of any person that is a ''member'' (as defined in Section 3(a)(3)(A)(iv) of the Exchange Act, in addition to Sections 3(a)(3)(A)(ii) and (iii) of the Exchange Act, which are currently referenced in this provision of the NYSE Group Certificate) of NYSE MKT, such person's ''Related Persons'' would include any ''member'' (as defined in Section 3(a)(3)(A)(i) of the Exchange Act) that is associated with such person. This conforms the definition of Related Person to that in the ICE Group Certificate and the proposed NYX Holdings Operating Agreement. *See* proposed NYSE Group Certificate of Incorporation, Article IV, Sections 4(b)(1)(E)(vi) and (xii).

[36] Prior to permitting any person to exceed the ownership limitation and voting limitation, such person must deliver notice of such person's intention to own or vote shares in excess of the ownership limitation or voting limitation to the NYSE Euronext board of directors. *See* current NYSE Euronext Certificate of Incorporation, Article V, Sections 1(C) and 2(C).

Commission under Section 19(b) of the Act, and become effective thereunder. Further, the board of directors may not approve any voting or ownership in excess of the limitations unless it determines that such ownership or exercise of voting rights (i) Will not impair the ability of the U.S. Regulated Subsidiaries, NYSE Euronext, and NYSE Group to discharge their respective responsibilities under the Act and the rules and regulations thereunder, (ii) will not impair the ability of any European Market Subsidiary, NYSE Euronext, or Euronext to discharge their respective responsibilities under the European Exchange Regulations, (iii) is otherwise in the best interests of NYSE Euronext, its shareholders, the U.S. Regulated Subsidiaries, and the European Market Subsidiaries, and (iv) will not impair the Commission's ability to enforce the Act or the European Regulators' ability to enforce the European Exchange Regulations.[37] For so long as NYSE Euronext directly or indirectly controls the Exchange or NYSE Market, NYSE Arca, NYSE Arca Equities, any facility of NYSE Arca, or NYSE MKT, the NYSE Euronext board of directors cannot waive the voting and ownership limits above the 20% threshold if such person or its related persons is a member of the Exchange or NYSE MKT, or an ETP Holder, an OTP Holder or an OTP Firm.[38] Further, the NYSE Euronext board of directors cannot waive the voting and ownership limits above the 20% threshold if such person or its related persons is a U.S. Disqualified Person or a European Disqualified Person.[39] On June 5, 2013, the board of directors of NYSE Euronext adopted by written consent the NYSE Euronext Resolutions to permit ICE Group, either alone or with its related persons, to exceed the NYSE Euronext ownership restriction and the NYSE Euronext voting restriction. In adopting such resolutions, the board of directors of NYSE Euronext made the necessary determinations set forth above and approved the submission of the proposed rule changes to the Commission. Among other things, in this notice, ICE Group represented to the board of directors of NYSE Euronext that neither ICE Group, nor any of its related persons, is (1) An NYSE Member; (2) an NYSE MKT Member; (3) an ETP Holder; (4) an OTP Holder or OTP Firm; or (5) a U.S. Disqualified Person or a European Disqualified Person. The NYSE Euronext board of directors adopted a resolution approving ICE Group's request that it be permitted, either alone or with its related persons, to exceed the NYSE Euronext voting restriction and the NYSE Euronext ownership restriction. The NYSE Euronext board of directors also determined that ownership of NYSE Euronext by ICE Group is in the best interests of NYSE Euronext, its stockholders and the U.S. Regulated Subsidiaries.[40]

The Commission believes it is consistent with the Act to allow ICE Group to wholly-own and vote all of the outstanding common stock of NYSE Euronext. The Commission notes that ICE Group represents that neither ICE Group nor any of its related persons is subject to any statutory disqualification (as defined in Section 3(a)(39) of the Act), or is a member of the Exchange or NYSE MKT, an ETP Holder, an OTP Holder or an OTP Firm, or a European Disqualified Person. ICE Group has also included in its corporate documents certain provisions designed to maintain the independence of the U.S. Regulated Subsidiaries' self-regulatory functions from ICE Group, NYX Holdings and NYSE Group.[41] Accordingly, the Commission believes that the acquisition of ownership and exercise of voting rights of NYSE Euronext common stock by ICE Group will not impair the ability of the Commission or any of the U.S. Regulated Subsidiaries to discharge their respective responsibilities under the Act.

3. Proposed Amendments to Board Composition Requirements for the Exchange, NYSE MKT, NYSE Market and NYSE Regulation

The Fourth Amended and Restated Operating Agreement, dated as of August 23, 2012, of the Exchange (the ''Exchange Operating Agreement''), currently provides that (1) a majority of the members of the Exchange's board of directors must be U.S. persons and members of the board of directors of NYSE Euronext who satisfy the independence requirements of the NYSE Euronext board, and (2) at least 20% of the Exchange's board members must be persons who are not board members of NYSE Euronext but who qualify as independent under the independence policy of the NYSE Euronext board of directors (the ''Non-Affiliated Exchange Directors'').[42] The nominating and governance committee of the NYSE Euronext board of directors is required to designate as Non-Affiliated Exchange Directors the candidates recommended jointly by the Director Candidate Recommendation Committees of each of NYSE Market and NYSE Regulation or, in the event there are Petition Candidates (as such term is defined in the Exchange Operating Agreement), the candidates that emerge from a specified process will be designated as the Non-Affiliated Exchange Directors.[43]

Under the Proposed Rule Change, these provisions would be amended to refer to ICE Group instead of NYSE Euronext. Also, references throughout to the Exchange's ''Corporation Independence Policy'' would be changed to ''Company Independence Policy'' in recognition of the form of organization of the Exchange. Substantially the same revisions would be made to the analogous provisions of the Third Amended and Restated Operating Agreement of NYSE MKT.

In addition, references to NYSE Euronext in the Director Independence Policy of each of the Exchange, NYSE Market, NYSE Regulation, NYSE Arca and NYSE MKT would be revised to refer to ICE Group.[44]

The Commission finds that these proposals are consistent with the Act, particularly Section 6(b)(1),[45] which requires an exchange to be so organized and have the capacity to carry out the purposes of the Act. Further, the Commission notes that the NYSE Exchanges are not proposing to change any of the provisions relating to (i) the

[37] *See* current NYSE Euronext Certificate of Incorporation, Article V, Sections 1(C) and 2(C).

[38] *See* current NYSE Euronext Certificate of Incorporation, Article V, Sections 1(C) and 2(C).

[39] *See* current NYSE Euronext Certificate of Incorporation, Article V, Sections 1(C) and 2(C).

[40] Such resolution of the NYSE Euronext board of directors was filed as part of the proposed rule changes. *See* Exhibit D to each of the proposed rule changes, which exhibit is available on the Commission's Web site (*http://www.sec.gov/rules/sro.shtml*), at the Commission's Public Reference Room, at the NYSE, and on the NYSE's Web site (*http://www.nyse.com*).

[41] *See infra* note 47.

[42] *See* Exchange Operating Agreement, Section 2.03(a).

[43] *See id.*

[44] Generally, the NYSE Exchanges propose, in part, the following changes to the constituent documents of the Exchange, NYSE MKT, NYSE Market and NYSE Regulation: (i) replacing NYSE Euronext with ICE Group as appropriate, (ii) updating the address of the registered office and agent for NYSE Market, and (ii) correcting certain typographical errors and making certain technical changes.

The NYSE Exchanges propose, in part, the following changes to the Exchange Rules, NYSE MKT Rules and NYSE Arca Equities Rules: (i) replacing NYSE Euronext with ICE Group or NYX Holdings, as appropriate, (ii) revising the Exchange Rules to delete the definitions of ''member'' and ''member organization'' relating to NYSE MKT due to the incorporation of such provisions into the proposed ICE Group Certificate, and (iii) eliminating certain provisions in NYSE MKT Rule 104T relating to restrictions on transfer in the NYSE Euronext Certificate because the referenced restrictions are no longer in effect and there will be no analogous provision in the ICE Group Certificate.

[45] 15 U.S.C. 78f(b)(1).

fair representation of the members of each of the NYSE Exchanges in the selection of its directors and administration of its affairs or (ii) one or more of the directors of each of the NYSE Exchanges being representative of issuers and investors and not being associated with a member of the exchange or with a broker dealer, each as required under Section 6(b)(3) of the Act.[46]

B. Relationship of ICE Group, NYX Holdings, NYSE Group, and the U.S. Regulated Subsidiaries; Jurisdiction Over ICE Group

Although ICE Group itself will not carry out regulatory functions, its activities with respect to the operation of any of the U.S. Regulated Subsidiaries must be consistent with, and not interfere with, the U.S. Regulated Subsidiaries' self-regulatory obligations. The proposed ICE Group corporate documents include certain provisions that are designed to maintain the independence of the U.S. Regulated Subsidiaries' self-regulatory functions from ICE Group, NYX Holdings, and NYSE Group, enable the U.S. Regulated Subsidiaries to operate in a manner that complies with the U.S. federal securities laws, including the objectives and requirements of Sections 6(b) and 19(g) of the Act,[47] and facilitate the ability of the U.S. Regulated Subsidiaries and the Commission to fulfill their regulatory and oversight obligations under the Act.[48]

For example, under the proposed ICE Group Bylaws, ICE Group shall comply with the U.S. federal securities laws, the European Exchange Regulations, and the respective rules and regulations thereunder; shall cooperate with the Commission, the European Regulators, and the U.S. Regulated Subsidiaries.[49] Also, each director, officer, and employee of ICE Group, to the extent in discharging his or her responsibilities shall comply with the U.S. federal securities laws and the rules and regulations thereunder, cooperate with the Commission, and cooperate with the U.S. Regulated Subsidiaries.[50] In addition, in discharging his or her responsibilities as a member of the board, each director of ICE Group must, to the fullest extent permitted by applicable law, take into consideration the effect that ICE Group's actions would have on the ability of the U.S. Regulated Subsidiaries to carry out their responsibilities under the Act, on the ability of the European Market Subsidiaries to carry out their responsibilities under the European Exchange Regulations as operators of European Regulated Markets, and on the ability of the U.S. Regulated Subsidiaries, NYSE Group, and ICE Group (i) to engage in conduct that fosters and does not interfere with the ability of the U.S. Regulated Subsidiaries, NYSE Group, NYX Holdings and ICE Group to prevent fraudulent and manipulative acts and practices in the securities markets; (ii) to promote just and equitable principles of trade in the securities markets; (iii) to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities; (iv) to remove impediments to and perfect the mechanisms of a free and open market in securities and a U.S. national securities market system; and (v) in general, to protect investors and the public interest.[51] For so long as ICE Group directly or indirectly controls any U.S. Regulated Subsidiary, ICE Group, its directors, officers and employees shall give due regard to the preservation of the independence of the self-regulatory function of the U.S. Regulated Subsidiaries (to the extent of each U.S. Regulated Subsidiary's self-regulatory function) and the European Market Subsidiaries (to the extent of each European Market Subsidiaries' self-regulatory function).[52] Further, ICE Group agrees to keep confidential all confidential information pertaining to: (1) the self-regulatory function of the any U.S. Regulated Subsidiary (including but not limited to disciplinary matters, trading data, trading practices and audit information) contained in the books and records of any of the U.S. Regulated Subsidiaries; and (2) the self-regulatory function of the European Market Subsidiaries under the European Exchange Regulations as operator of a European Regulated Market (including but not limited to disciplinary matters, trading data, trading practices and audit information) contained in the books and records of the European Market Subsidiaries, and not use such information for any commercial[53] purposes.[54]

In addition, ICE Group's books and records shall be subject at all times to inspection and copying by the Commission, the European Regulators, any U.S. Regulated Subsidiary (provided that such books and records are related to the activities of such U.S. Regulated Subsidiary or any other U.S. Regulated Subsidiary over which such U.S. Regulated Subsidiary has regulatory authority or oversight) and any European Market Subsidiary (provided that such books and records are related to the operation or administration of such European Market Subsidiary or any European Regulated Market over which such European Market Subsidiary has regulatory authority or oversight).[55] The ICE Group Bylaws would provide that these obligations regarding such confidential information will not be interpreted so as to limit or impede (i) the rights of the Commission or the relevant U.S. Regulated Subsidiary to have access to and examine such confidential information pursuant to the U.S. federal securities laws and the rules and regulations thereunder; or (ii) the ability of any officers, directors, employees or agents of ICE Group to disclose such confidential information to the Commission or any U.S. Regulated Subsidiary.[56] ICE Group's books and records related to U.S. Regulated Subsidiaries shall be maintained within the United States, and ICE Group's books and records related to European Market Subsidiaries shall be maintained in the home jurisdiction of one or more of the European Market Subsidiaries or of any subsidiary of ICE Group in Europe.[57] The ICE Group Bylaws also provide that if and to the extent than any of ICE Group's books and records may relate to both European Market Subsidiaries and U.S. Regulated Subsidiaries (each such book and record an ''Overlapping Record''), ICE Group shall be entitled to maintain such books and records either in the home jurisdiction of one or more European

[46] 15 U.S.C. 78f(b)(3).

[47] 15 U.S.C. 78f(b) and 15 U.S.C. 78s(g).

[48] *See* proposed ICE Group Bylaws Article IX.

[49] *See* proposed ICE Group Bylaws, Article IX, Section 9.1 and 9.2.

[50] *See* proposed ICE Group Bylaws, Article III, Section 3.14(b).

[51] *See* proposed ICE Group Bylaws, Article III, Section 3.14(a).

[52] *See* proposed ICE Group Bylaws, Article IX, Section 9.4 and 9.5.

[53] The Commission believes that any non-regulatory use of such information would be for a commercial purpose. *See, e.g.,* NYSE-Euronext Merger Order, *supra* note 25, 72 FR at 8041 n. 71.

[54] *See* proposed ICE Group Bylaws, Article VIII, Section 8.1.

[55] *See* proposed ICE Group Bylaws, Article VIII, Section 8.3.

[56] *See* proposed ICE Group Bylaws, Article VIII, Section 8.2.

[57] *See* proposed ICE Group Bylaws, Article VIII, Sections 8.4 and 8.5.

Market Subsidiaries or in the United States.[58]

In addition, for so long as ICE Group directly or indirectly controls any U.S. Regulated Subsidiary, the books, records, premises, officers, directors, and employees of ICE Group shall be deemed to be the books, records, premises, officers, directors, and employees of the U.S. Regulated Subsidiaries for purposes of and subject to oversight pursuant to the Act, and for so long as ICE Group directly or indirectly controls any European Market Subsidiary, the books, records, premises, officers, directors, and employees of ICE Group shall be deemed to be the books, records, premises, officers, directors, and employees of such European Market Subsidiaries for purposes of and subject to oversight pursuant to the European Exchange Regulations.[59]

ICE Group and its directors and, to the extent they are involved in the activities of the U.S. Regulated Subsidiaries, ICE Group's officers and employees whose principal place of business and residence is outside of the United States irrevocably submit to the jurisdiction of the U.S. federal courts and the Commission with respect to activities relating to the U.S. Regulated Subsidiaries, and to the jurisdiction of the European Regulators and European courts with respect to activities relating to the European Market Subsidiaries.[60]

The ICE Group Bylaws would provide that ICE Group will take reasonable steps necessary to cause its directors, officers and employees, prior to accepting a position as an officer, director or employee, as applicable, of ICE Group to agree and consent in writing to the applicability to them of these jurisdictional and oversight provisions with respect to their activities related to any U.S. Regulated Subsidiary.[61]

Further, ICE Group acknowledges that it is responsible for referring possible rule violations to the NYSE Exchanges. In addition, ICE Group will enter into an agreement with NYSE Regulation acknowledging that each of the Exchange, NYSE MKT and NYSE Arca has contracted to have NYSE Regulation perform its self-regulatory obligations, in each case with the self-regulatory organization retaining its responsibility for the adequate performance of those regulatory obligations, and agreeing to provide adequate funding to NYSE Regulation. [62]

Finally, the proposed ICE Group Articles require that, for so long as ICE Group controls, directly or indirectly, any of the U.S. Regulated Subsidiaries, any changes to the proposed ICE Group Articles be submitted to the board of directors of such U.S. Regulated Subsidiaries, and if any such boards of directors determines that such amendment is required to be filed with or filed with and approved by the Commission pursuant to Section 19 of the Act [63] and the rules thereunder, such change shall not be effective until filed with or filed with and approved by, the Commission.[64]

The Commission finds that these provisions are consistent with the Act, and that they are intended to assist the NYSE Exchanges in fulfilling its self-regulatory obligations and in administering and complying with the requirements of the Act. With respect to the maintenance of books and records of ICE Group, the Commission notes that while ICE Group has the discretion to maintain Overlapping Records in either the United States or the home jurisdiction of one or more of the European Market Subsidiaries, ICE Group is liable for any books and records it is required to produce for inspection and copying by the Commission that are created outside the United States and where the law of a foreign jurisdiction prohibits ICE Group from providing such books and records to the Commission for inspection and copying.[65] Moreover, the Commission notes that NYSE Euronext is under an existing obligation to make its books and records available in compliance with the requirements of Rule 17a–1(b).[66] The Commission notes that the obligations of NYSE Euronext established in the prior orders remains in effect for its successors entity, i.e., NYX Holdings. [67] The Commission also notes that the NYSE Euronext Trust Agreement (''Trust Agreement'') [68] established under a prior order also remains in effect unchanged, other than revising the reference in the Trust Agreement from the nominating and governance committee of NYSE Euronext to the nominating and governance committee of ICE Group.[69]

Under Section 20(a) of the Act,[70] any person with a controlling interest in the U.S. Regulated Subsidiaries shall be jointly and severally liable with and to the same extent that the U.S. Regulated Subsidiaries are liable under any provision of the Act, unless the controlling person acted in good faith and did not directly or indirectly induce the act or acts constituting the violation or cause of action. In addition, Section 20(e) of the Act [71] creates aiding and abetting liability for any person who knowingly provides substantial assistance to another person in violation of any provision of the Act or rule thereunder. Further, Section 21C of the Act [72] authorizes the Commission to enter a cease-and-desist order against any person who has been ''a cause of'' a violation of any provision of the Act through an act or omission that the person knew or should have known would contribute to the violation. These provisions are applicable to ICE Group's dealings with the U.S. Regulated Subsidiaries.

C. ICE Group Director Independence Policy

Under the Proposed Rule Change, ICE Group will adopt a Director Independence Policy that would be substantially identical to the current Independence Policy of the NYSE Euronext board of directors except for the change of the entity whose board of directors adopted the policy and nonsubstantive conforming changes.

The Commission finds that the proposed Director Independence Policy is consistent with the Act, particularly Section 6(b)(1),[73] which requires an exchange to be so organized and have the capacity to carry out the purposes of the Act. The Commission notes that a majority of ICE Group's Board would

[58] *See* proposed ICE Group Bylaws, Article VIII, Section 8.6.

[59] *See* proposed ICE Group Bylaws, Article VIII, Sections 8.4 and 8.5.

[60] *See* proposed ICE Group Bylaws, Article VII, Sections 7.1 and 7.2.

[61] *See* proposed ICE Group Bylaws, Article IX, Section 9.3.

[62] *See, e.g.,* Notice at 39412.

[63] 15 U.S.C. 78s.

[64] *See* proposed ICE Group Bylaws, Article XI, Section 11.3; proposed ICE Group Certificate, Article X(C).

[65] See Securities Exchange Act Release Nos. 55293 (February 14, 2007), 72 FR 8033, 8041 (February 22, 2007) (SR–NYSE–2006–120).

[66] *Id.*

[67] NYSE Euronext is currently required to maintain in the United States originals or copies of books and records that relate to both the U.S. Regulated Subsidiaries and its European market subsidiaries covered by Rule 17a–1(b) promptly after creation of such books and records. *See supra,* note 65, 72 FR 8041, 8042.

[68] The NYSE Trust was created, in part, to take actions to mitigate the effects of any material adverse change in European law that has an ''extraterritorial'' impact on the non-European issuers listed on NYSE Group securities exchanges, non-European financial services firms that are members of any NYSE Group securities exchange, or any NYSE Group securities exchange. *See supra,* note 65, 72 FR at 8042.

[69] Section 4(a) of Article IV of the NYSE Group Certificate also would be amended to contemplate successors to NYSE Euronext as the holder of all of the issued and outstanding shares of NYSE Group for purposes of the Trust Agreement.

[70] 15 U.S.C. 78t(a).

[71] 15 U.S.C. 78t(e).

[72] 15 U.S.C. 78u–3.

[73] 15 U.S.C. 78f(b)(1).

need to be independent. In addition, the Commission notes that as a company listed on the Exchange, ICE Group's board of directors must also satisfy the independence requirements applicable to a listed company's board of directors as contained in the Exchange's Listed Company Manual. Further, the Commission notes that there are requirements in ICE Group's Independence Policy that independent directors may not be or have been within the last year, and may not have an immediate family member who is or within the last year was, a member of the Exchange, NYSE Arca or NYSE MKT.

D. Options Trading Rights

The Commission received one comment letter [74] on the proposed rule changes regarding certain Option Trading Rights (''OTRs'') that were separated from full New York Stock Exchange, Inc.[75] seats (''Separated OTRs''). All New York Stock Exchange seat ownership (with or without OTRs) was extinguished in the 2006 demutualization of New York Stock Exchange, Inc.[76] Although the commenter takes no position on the merits of the Combination, the commenter opposes the Combination on the grounds that the Exchange does not fully own all of the assets being transferred. Specifically, the commenter contends that the owners of Separated OTRs retained their Separated OTRs, even after the New York Stock Exchange, Inc. exited the options business in 1997, with the expectation that their ownership of the Separated OTRs would afford them full rights to trade options under the auspices of New York Stock Exchange, Inc. or its successor entity. The commenter asked that the Commission withhold approval of the Combination until the matter of Separated OTRs is resolved.[77] The NYSE Response to Comments states that the issue of the rights of owners of Separated OTRs is not before the Commission in the context of the proposed rule filing by the Exchange and notes that the Exchange is not proposing in its filing a change in the trading rights on the Exchange.[78]

The issue of the rights of owners of Separated OTRs is not before the Commission in the context of this rule filing. Pursuant to Section 19(b)(1) of the Act,[79] an SRO (such as NYSE) is required to file with the Commission any proposed rule or any proposed change in, addition to, or deletion from the rules of such SRO. Further, pursuant to Section 19(b)(2) of the Act,[80] the Commission shall approve a proposed rule change filed by an SRO if the Commission finds that such proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to the SRO.

III. Conclusion

For the foregoing reasons, the Commission finds that the proposed rule change is consistent with the Act and the rules and regulations thereunder applicable to a national securities exchange. *It is therefore ordered,* pursuant to Section 19(b)(2) of the Act [81] that the proposed rule changes (SR–NYSE–2013–42; SR–NYSEMKT–2013–50; SR–NYSEArca-2013–62), are approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[82]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2013–20338 Filed 8–20–13; 8:45 am]

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[74] *See* Rothlein Letter, *supra* note 5.

[75] New York Stock Exchange, Inc. is the predecessor entity to NYSE. *See* NYSE Inc.-Archipelago Merger Order, *supra* note 25.

[76] *See* NYSE Inc.-Archipelago Merger Order, *supra* note 25.

[77] The Commission notes that the commenter continued to argue, in part, in its rebuttal to the NYSE Response to Comments that the Commission should withhold approval of the Combination until the matter of Separated OTRs are resolved. *See* Rothlein Rebuttal Letter, *supra* note 6.

[78] *See* NYSE Response to Comments, *supra* note 6.

[79] 15 U.S.C. 78s(b)(1).

[80] 15 U.S.C. 78s(b)(2).

[81] *Id.*

[82] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–70206; File No. SR–NYSE–2013–59]

Self-Regulatory Organizations; New York Stock Exchange LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Describe the Billing Practice for Co-Location Services and Expand Co-Location Services To Provide for a 40 Gigabit Liquidity Center Network Connection

August 15, 2013.

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 August 12, 2013, New York Stock Exchange LLC (''NYSE'' or the ''Exchange'') filed with the Securities and Exchange Commission (the ''Commission'') the proposed rule change as described in Items I and II below, which Items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to (i) describe the Exchange's current billing practice for co-location services received by Users that connect to more than one market, and (ii) expand its co-location services to provide for a 40 gigabit (''Gb'') Liquidity Center Network (''LCN'') connection in the Exchange's data center. The text of the proposed rule change is available on the Exchange's Web site at *www.nyse.com,* at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and the Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to (i) describe the Exchange's current billing practice for co-location services received by Users that connect to more than one market, and (ii) expand its co-location services to provide a 40 Gb LCN connection in the Exchange's data center.[4] The Exchange's affiliates, NYSE

[1] 15 U.S.C.78s(b)(1).

[2] 15 U.S.C. 78a.

[3] 17 CFR 240.19b–4.

[4] The Securities and Exchange Commission (''Commission'') initially approved the Exchange's co-location services in Securities Exchange Act Release No. 62960 (September 21, 2010), 75 FR 59310 (September 27, 2010) (SR–NYSE–2010–56) (the ''Original Co-location Approval''). The Exchange's co-location services allow Users to rent

Continued

MKT LLC (''NYSE MKT'') and NYSE Arca, Inc. (''NYSE Arca,'' and together with NYSE MKT, ''Affiliates''), have filed substantially the same proposed rule change.[5] The Exchange will propose applicable fees for the proposed 40 Gb LCN connection via a separate proposed rule change.

Current Billing Practice

The Exchange and its Affiliates (collectively, the ''Exchanges'') utilize a single data center in Mahwah, New Jersey (the ''data center'') to provide co-location services to their respective Users.[6] The Exchanges offer identical co-location services in the data center and charge identical fees for such services. A User only incurs a single charge for a particular co-location service and is not charged multiple times if it obtains such service as, for example, a member of more than one Exchange. In other words, if a User receives a co-location service in the data center, and, pursuant to separate non-co-location fees, connects to all three Exchanges, the User is not charged for such co-location service three separate times.[7] Similarly, some Users are content service provider Users (''CSP Users'') that do not connect to any Exchange; rather, they provide services to other Users co-located at the data center. CSP Users are nonetheless subject to the relevant fees for the co-location services they use.[8] Users have been billed for co-location services in this manner beginning with the availability of co-location services in the data center in 2010.

As discussed below, there are a number of reasons for billing co-location in this manner. Co-location services do not directly result in access to any of the Exchanges; other, non-co-location fees apply to access. In addition, the level of co-location services requested by a User does not, in and of itself, depend on whether the User connects only to the Exchange, or to the Exchange and one or both of its Affiliates; and, in fact, as noted above, not all Users connect to an Exchange.

First, the fees for co-location services are not fees for direct access to an Exchange; co-location services do not provide such direct access to an Exchange. Rather, all orders sent to the Exchanges enter their respective trading and execution systems through the same order gateway—the Common Customer Gateway (''CCG'')—regardless of whether the sender is co-located in the data center or not. The particular trading and execution systems of the Exchanges to which an order is eventually sent are determined by order/quote entry ports (''ports''). Fees for ports are charged separately based on the particular Exchanges to which the ports are configured to access/connect.[9] Accordingly, a User that accesses an Exchange pays for that access in the form of a port fee, as does any member that is not a co-location User. In this regard, and as noted in the Original Co-location Approval as well as subsequent rule filings relating to changes in co-location services and pricing, Users that receive co-location services from the Exchange do not receive any means of access to any of the Exchange's trading and execution systems that is separate from, or superior to, that of other Users.[10]

Second, the level of co-location services a User purchases does not, in and of itself, depend on whether the User connects only to the Exchange or to the Exchange and one or both of its Affiliates. Similarly, the cost incurred by the Exchanges to provide co-location services does not vary based on whether the User connects to one or to several of the Exchanges' markets. The fees charged for co-location services generally fall in three groups: (1) Equipment and hardware, (2) labor-based services, and (3) administrative matters. Many of the fees vary depending on the amount of such services used, so that as the level of equipment and hardware or services used increases, so does the cost.[11] Therefore, a User that connects only to the Exchange and that receives co-location services in the data center would be charged the same amount as a User that receives the same level of co-location services but connects to the Exchange and one or both of its Affiliates or a User that does not connect to any Exchange.

space in the data center so they may locate their electronic servers in close physical proximity to the Exchange's trading and execution system. *See id.* at 59310. For purposes of the Exchange's co-location services, the term ''User'' includes (i) member organizations, as that term is defined in NYSE Rule 2(b); (ii) Sponsored Participants, as that term is defined in NYSE Rule 123B.30(a)(ii)(B); and (iii) non-member organization broker-dealers and vendors that request to receive co-location services directly from the Exchange. *See, e.g.,* Securities Exchange Act Release No. 65973 (December 15, 2011), 76 FR 79232 (December 21, 2011) (SR–NYSE–2011–53).

[5] *See* SR–NYSEMKT–2013–67 and SR–NYSEArca–2013–80 (August 1, 2013). The Commission initially approved NYSE MKT's co-location services in Securities Exchange Act Release No. 62961 (September 21, 2010), 75 FR 59299 (September 27, 2010) (SR–NYSEAmex–2010–80). For purposes of NYSE MKT co-location services, the term ''User'' includes (i) member organizations, as that term is defined in the definitions section of the General and Floor Rules of the NYSE MKT Equities Rules, and ATP Holders, as that term is defined in NYSE Amex Options Rule 900.2NY(5); (ii) Sponsored Participants, as that term is defined in Rule 123B.30(a)(ii)(B)—Equities and NYSE Amex Options Rule 900.2NY(77); and (iii) non-member organization and non-ATP Holder broker-dealers and vendors that request to receive co-location services directly from the Exchange. *See, e.g.,* Securities Exchange Act Release Nos. 65974 (December 15, 2011), 76 FR 79249 (December 21, 2011) (SR–NYSEAmex–2011–81) and 65975 (December 15, 2011), 76 FR 79233 (December 21, 2011) (SR–NYSEAmex–2011–82). The Commission initially approved NYSE Arca's co-location services in Securities Exchange Act Release No. 63275 (November 8, 2010), 75 FR 70048 (November 16, 2010) (SR–NYSEArca–2010–100). For purposes of NYSE Arca co-location services, the term ''User'' includes (i) ETP Holders and Sponsored Participants that are authorized to obtain access to the NYSE Arca Marketplace pursuant to NYSE Arca Equities Rule 7.29 (see NYSE Arca Equities Rule 1.1(yy)); (ii) OTP Holders, OTP Firms and Sponsored Participants that are authorized to obtain access to the NYSE Arca System pursuant to NYSE Arca Options Rule 6.2A (see NYSE Arca Options Rule 6.1A(a)(19)); and (iii) non-ETP Holder, non-OTP Holder and non-OTP Firm broker-dealers and vendors that request to receive co-location services directly from the Exchange. *See, e.g.,* Securities Exchange Act Release Nos. 65970 (December 15, 2011), 76 FR 79242 (December 21, 2011) (SR–NYSEArca–2011–74) and 65971 (December 15, 2011), 76 FR 79267 (December 21, 2011) (SR–NYSEArca–2011–75).

[6] For purposes of this proposal, the term ''Users'' hereinafter refers collectively to the Exchanges' Users.

[7] The three Exchanges operate five markets. The NYSE operates an equities market. NYSE Arca operates an options market, and, through its wholly owned subsidiary NYSE Arca Equities Inc., an equities market. NYSE MKT operates an equities market, and through NYSE Amex Options LLC, an options market. A User can only access a market through co-location services if such User is authorized to obtain such access as a member, OTP Holder, ETP Holder or Sponsored Participant. *See supra* note 5.

[8] CSP Users, may, for example, provide order routing/brokerage services and/or market data delivery services to subscriber Users. CSP Users are subject to the same fees as other Users. However, rather than use a standard LCN connection, CSP Users send data to, and communicate with, subscribing users via a dedicated LCN connection (an ''LCN CSP'' connection). Accordingly, only CSP Users are subject to the fees for LCN CSP connections. *See* Securities Exchange Act Release No. 67666 (August 15, 2012), 77 FR 50742 (August 22, 2012) (SR–NYSE–2012–18).

[9] For a more detailed description of the method of billing for ports, *see* Securities Exchange Act Release No. 68229 (November 14, 2012), 77 FR 69688 (November 20, 2012) (SR–NYSE–2012–60).

[10] *See, e.g.,* Original Co-location Approval at 59311. *See also* Securities Exchange Act Release Nos. 65973 (December 15, 2011), 76 FR 79232 (December 21, 2011) (SR–NYSE–2011–53) and 67666 (August 15, 2012), 77 FR 50742 (August 22, 2012) (SR–NYSE–2012–18). In addition, co-located Users do not receive any market data or data service product that is not available to all Users, although Users that receive co-location services normally would expect reduced latencies in sending orders to, and receiving market data from, the Exchanges.

[11] The Exchange notes that it also charges a fee to a User that provides ''hosting'' to its own customers (''Hosted Users''). *See* SR–NYSE–2011–53, *supra* note 3. Hosting includes, for example, a User supporting its Hosted User's technology, whether hardware or software, through the User's co-location space. As with the fees described above, a User is charged additional fees as the level of co-location services increases.

For example, with respect to equipment and hardware, a User may purchase cross connects, which are fiber cross connects between its cabinets or between its cabinets and those of another User. The number of cross-connects a User purchases directly depends on how it configures its cabinets and whether it is a CSP User, not the number of Exchanges to which it connects. Similarly, a User may purchase a physical cage to house its servers and other equipment in the data center. Fees for cages are based on the size of the cage. The more cabinets a User has, the greater the size of the cage it is likely to request and therefore the greater the cost. The number of the Exchanges to which the User connects is not determinative of the number of cabinets and size of the cage that the User purchases.

With respect to labor-related services, for example, the Exchanges charge an ''Initial Install Services'' fee of $800 per cabinet, for initial racking of equipment in a User's cabinet and the provision of up to 10 cables. A ''Rack and Stack Installation'' charge of $200 per server applies for handling, unpacking, tagging, and installation of the server in the User's cabinet. Additionally, a ''Hot Hands Service'' is available and allows Users to use on-site data center personnel to maintain User equipment, with hourly charges depending on whether the service is during normal business hours and whether the service is expedited. None of these charges vary based on the number of the Exchanges' markets to which a User connects, but rather based on the services sought.

With respect to administrative matters, for example, the Exchange charges $50 per badge request for provision of a permanent data center site access badge for a User representative. The Exchange also charges $75 per hour for visitor security escorting, which is required during User visits to the data center. These, like other co-location fees, are not charged differently based on how many of the Exchanges' markets to which a User connects.[12]

Finally, the Exchange notes that not all Users of co-location services actually connect to the Exchanges. If billing for co-location services was based on the Exchanges to which a User connected, CSP Users would not be charged at all. Therefore, billing once per co-location service is also consistent with the fact that some CSP Users do not connect to any of the Exchanges.

The Exchange will amend its Price List to describe the Exchange's current billing practice for co-location services received by Users that connect to more than one of the Exchanges.

40 Gb LCN Connection

The LCN is a local area network that is available in the data center and that provides Users with access to the Exchange's trading and execution systems via the CCG and to the Exchanges' proprietary market data products. LCN access is currently available in one and 10 Gb capacities. LCN access with higher capacity is designed to achieve lower latency in the transmission of data between Users and the Exchange. The Exchange proposes to make a 40 Gb LCN connection available in the Exchange's data center.[13] This Exchange is proposing this change in order to make an additional service available to its co-location Users and thereby satisfy demand for more efficient, lower-latency connections.

As is the case with all Exchange co-location arrangements, neither a User nor any of the User's customers would be permitted to submit orders directly to the Exchange unless such User or customer is a member organization, a Sponsored Participant or an agent thereof (e.g., a service bureau providing order entry services). Additionally, as is the case with existing co-location services, use of the co-location services proposed herein would be completely voluntary and would be available to all Users on a non-discriminatory basis.[14]

The proposed change is not otherwise intended to address any other issues relating to co-location services and/or related fees, and the Exchange is not aware of any problems that Users would have in complying with the proposed change.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6(b) of the Act,[15] in general, and furthers the objectives of Sections 6(b)(5) of the Act,[16] in particular, because it is 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 mechanisms of, a free and open market and a national market system and, in general, to protect investors and the public interest and because it is not designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

The Exchange believes that its billing practice promotes just and equitable principles of trade and is not designed to permit unfair discrimination between customers, issuers, brokers, or dealers because the level of co-location services requested by a User generally does not, in and of itself, depend on whether the User connects only to the Exchange, or to the Exchange and its Affiliates. For example, to charge one User twice for a cage because that User connects to two Exchanges, when another User that buys the same size cage only pays once, would not promote just and equitable principles of trade. Similarly, the cost incurred by the Exchanges to provide co-location services does not vary based on whether the User connects to one or several of the Exchanges' markets. CSP Users do not connect to any of the Exchanges, which would make billing based on connection to the Exchanges impractical. The Exchange also believes that its billing practice is not designed to permit unfair discrimination between customers, issuers, brokers, or dealers because charging a User for co-location services based on how many of the Exchanges' markets to which a User connects could result in the Exchanges receiving the proceeds from multiple fees despite only providing a service once.

The Exchange also believes that the proposed change would remove impediments to, and perfect the mechanisms of, a free and open market and a national market system and, in general, protect investors and the public interest because co-location services do not directly result in access to the Exchanges' markets, and, therefore, co-

[12] *See supra* note 4.

[13] At this time, the Exchange is not proposing to make LCN CSP connections available at a 40 Gb bandwidth because, at least initially, CSP User demand is not anticipated to exist. Also, the Exchange notes that, for a 40 Gb ''Bundle,'' SFTI and optic connections would be at 10 Gb and only the LCN connections would be at 40 Gb, because 40 Gb bandwidths are not currently offered for SFTI and optic connections. The Exchange will include language in the Price List in the related fee change to reflect this fact.

[14] As is currently the case, Users that receive co-location services from the Exchange will not receive any means of access to the Exchange's trading and execution systems that is separate from, or superior to, that of other Users. In this regard, all orders sent to the Exchange enter the Exchange's trading and execution systems through the CCG, regardless of whether the sender is co-located in the data center or not. In addition, co-located Users do not receive any market data or data service product that is not available to all Users, although Users that receive co-location services normally would expect reduced latencies in sending orders to, and receiving market data from, the Exchange.

[15] 15 U.S.C. 78f(b).

[16] 15 U.S.C. 78f(b)(5).

location fees are not charges that depend on how many of the Exchanges' markets a User connects to. In fact, certain Users do not connect to any of the Exchanges. Instead, all orders sent to the Exchanges enter their respective trading and execution systems through CCG, regardless of whether the sender is co-located in the data center or not. Additionally, the particular trading and execution systems of the Exchanges to which an order is eventually sent are determined by ports, for which fees are charged separately based on the particular Exchanges to which the ports are configured to access/connect. In this regard, Users that receive co-location services from the Exchanges do not receive any means of access to the Exchanges' trading and execution systems that is separate from, or superior to, that of other Users.

The Exchange believes that the proposed 40 Gb LCN connection is not designed to permit unfair discrimination between customers, issuers, brokers, or dealers because it would make a service available to Users that require the increased bandwidth, but Users that do not require the increased bandwidth could continue to request an existing lower-bandwidth LCN connection. The Exchange believes that this would remove impediments to, and perfect the mechanisms of, a free and open market and a national market system and, in general, protect investors and the public interest because it would provide Users with additional choices with respect to the optimal bandwidth for their connections.

Finally, the Exchange believes that it is subject to significant competitive forces, as described below in the Exchange's statement regarding the burden on competition.

For these reasons, the Exchange believes that the proposal is consistent with the Act.

B. Self-Regulatory Organization's Statement on Burden on Competition

In accordance with Section 6(b)(8) of the Act,[17] the Exchange believes that the proposed rule change will not impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act because any market participants that are otherwise capable of satisfying any applicable co-location fees, requirements, terms and conditions established from time to time by the Exchange could have access to the co-location services provided in the data center. This is also true because, in addition to the services being completely voluntary, they are available to all Users on an equal basis (i.e., the same range of products and services are available to all Users).

The Exchange also believes that its billing practice will not impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act because all Users are only charged once for each co-location service in the data center, even if such User connects to more than one of the Exchanges' markets, or to none of the Exchanges, and the pricing for co-location services is such that as the level of services increases, so does the cost. Additionally, the Exchange believes that its co-location billing practice is consistent with the co-location services billing practice of at least one of its competitors, The NASDAQ Stock Market LLC (''NASDAQ'').[18]

The Exchange also believes that the proposed 40 Gb LCN connections will not impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act because it will satisfy User demand for more efficient, lower-latency connections. Additionally, the Exchange believes that the proposed change will enhance competition, in that NASDAQ offers a similar service to its co-location users.[19]

Finally, the Exchange notes that it operates in a highly competitive market in which market participants can readily favor competing venues if, for example, they deem fee levels at a particular venue to be excessive or if they determine that another venue's products and services are more competitive than on the Exchange. In such an environment, the Exchange must continually review, and consider adjusting, the services it offers as well as any corresponding fees and credits to remain competitive with other exchanges. For the reasons described above, the Exchange believes that the proposed rule change reflects this competitive environment.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were solicited or received with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing proposed rule change does not: (1) Significantly affect the protection of investors or the public interest; (2) impose any significant burden on competition; and (3) by its terms does not become operative for 30 days after the date of this filing, 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[20] and Rule 19b–4(f)(6) thereunder.[21]

A proposed rule change filed under Rule 19b–4(f)(6) normally does not become operative for 30 days after the date of filing. However, Rule 19b–4(f)(6)(iii) permits the Commission to 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. The Exchange noted that the cost incurred by the Exchange to provide co-location services does not vary based on whether the User connects to one or several of the Exchange's Affiliates, or to none of the Affiliates, and co-location services do not directly result in access to the Exchange or its Affiliates. Also, the proposal of a new 40Gb LCN connection would merely make higher-bandwidth, lower-latency LCN connections available on a voluntary basis to Users that require the increased bandwidth. The Commission believes that waiving the 30-day operative delay is consistent with the protection of investors and the public interest. With respect to the Exchange's billing practices for co-location for Users that connect to the Exchange and its Affiliates, the waiver of the 30-day operative delay would allow the Exchange's fee schedule to immediately reflect the Exchange's existing practice. Regarding the proposed 40 Gb LCN Connection, it would allow Users to immediately benefit from an additional choice with respect to the optimal bandwidth for

[17] 15 U.S.C. 78f(b)(8).

[18] *See* NASDAQ Rule 7034 for a description of NASDAQ's co-location services. The Exchange understands that NASDAQ only charges its co-location users one fee for each co-location service received, even if such user eventually connects to NASDAQ and any of its affiliates (e.g., NASDAQ OMX BX, Inc. or NASDAQ OMX PHLX LLC).

[19] *See id.*

[20] 15 U.S.C. 78s(b)(3)(A).

[21] 17 CFR 240.19b–4(f)(6). In addition, Rule 19b–4(f)(6)(iii) requires a self-regulatory organization to provide the Commission with written notice of its intent to file the proposed rule change, along with a brief description and text of the proposed rule change, at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has met this requirement.

their connections.[22] Accordingly, the Commission hereby grants the Exchange's request and designates the proposal operative upon filing.

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–NYSE–2013–59 on the subject line.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–NYSE–2013–59. 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 Web site (*http://www.sec.gov/rules/sro.shtml).* Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street NE., Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–NYSE–2013–59 and should be submitted on or before September 11, 2013.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[23]

Kevin M. O'Neill,

Deputy Secretary.

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[22] For purposes only of waiving the 30-day operative delay, the Commission has also considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[23] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–70209; File No. SR–NYSEArca–2013–60]

Self-Regulatory Organizations; NYSE Arca, Inc.; Order Granting Approval of Proposed Rule Change To List and Trade Shares of Market Vectors Low Volatility Commodity ETF and Market Vectors Long/Short Commodity ETF Under NYSE Arca Equities Rule 8.200

August 15, 2013.

I. Introduction

On June 12, 2013, NYSE Arca, Inc. (''Exchange'' or ''NYSE Arca'') filed with the Securities and Exchange Commission (''Commission''), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'') [1] and Rule 19b–4 thereunder,[2] a proposed rule change to list and trade shares (''Shares'') of the Market Vectors Low Volatility Commodity ETF (''Low Volatility ETF'') and Market Vectors Long/Short Commodity ETF (''Long/Short ETF'' and, together with the Low Volatility ETF, ''Funds'') under NYSE Arca Equities Rule 8.200. The proposed rule change was published for comment in the **Federal Register** on July 2, 2013.[3] The Commission received no comments on the proposed rule change. This order grants approval of the proposed rule change.

II. Description of Proposed Rule Change

The Exchange proposes to list and trade Shares of the Funds pursuant to NYSE Arca Equities Rule 8.200, Commentary .02.[4] Each Fund is a series of the Market Vectors Commodity Trust (''Trust''), a Delaware statutory trust.[5] Van Eck Absolute Return Advisers Corp. is the managing owner of the Funds (''Managing Owner'').[6] The Managing Owner also serves as the commodity pool operator and commodity trading advisor of the Funds. The Managing Owner is registered as a commodity pool operator and commodity trading advisor with the Commodity Futures Trading Commission (''CFTC'') and is a member of National Futures Association. Wilmington Trust, National Association (''Trustee''), a national bank with its principal place of business in Delaware, is the sole trustee of the Trust. The Bank of New York Mellon will be the custodian, administrator, and transfer agent for the Funds.

Overview of the Funds

The Low Volatility ETF will seek to track changes, whether positive or negative, in the performance of the Morningstar® Long/Flat Commodity Index℠ (''Long/Flat Index'') over time. The Long/Short ETF will seek to track changes, whether positive or negative, in the performance of the Morningstar® Long/Short Commodity Index℠ (''Long/Short Index'' and, together with the Long/Flat Index, ''Indexes'') over time.

Each Fund will seek to achieve its respective investment objective by investing principally in exchange-traded futures contracts on commodities (''Index Commodity Contracts'') comprising the Long/Flat Index and the Long/Short Index, respectively, and U.S. Treasury bills maturing in eight weeks or less to reflect ''flat'' positions and, in certain circumstances (as described below), futures contracts other than Index Commodity Contracts traded on

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 69862 (June 26, 2013), 78 FR 39810 (''Notice'').

[4] Commentary .02 to NYSE Arca Equities Rule 8.200 applies to Trust Issued Receipts that invest in ''Financial Instruments.'' The term ''Financial Instruments,'' as defined in Commentary .02(b)(4) to NYSE Arca Equities Rule 8.200, means any combination of investments, including cash; securities; options on securities and indices; futures contracts; options on futures contracts; forward contracts; equity caps, collars, and floors; and swap agreements.

[5] The Trust filed a pre-effective amendment to its registration statements with respect to the Funds on Form S–1 under the Securities Act of 1933 (''1933 Act'') on December 7, 2012 (File No. 333–179435 for the Low Volatility ETF (''Low Volatility Registration Statement'')) and File No. 333–179432 for the Long/Short ETF (''Long/Short Registration Statement'' and, together with the Low Volatility Registration Statement, ''Registration Statements'').

[6] The Managing Owner is affiliated with a broker-dealer and has implemented a ''fire wall'' with respect to such broker-dealer and has policies and procedures in place regarding access to information concerning the composition and/or changes to the Funds' portfolio composition.

U.S. or foreign exchanges (''Other Commodity Contracts'').[7] In addition, to a limited extent, the Funds may also invest in swap agreements on Index Commodity Contracts or Other Commodity Contracts cleared through a central clearing house or the clearing house's affiliate (''Cleared Swaps''), forward contracts, exchange-traded cash-settled options (including options on one or more Index Commodity Contracts, Other Commodity Contracts, or indexes that include any Index Commodity Contracts or Other Commodity Contracts), swaps other than Cleared Swaps, and other over-the-counter (''OTC'') transactions that provide economic exposure to the investment returns of the commodities markets, as represented by the Indexes and their constituents (collectively, ''Other Commodity Instruments,'' and, together with Other Commodity Contracts and Cleared Swaps, ''Other Instruments''), as described below. The Funds also may invest in U.S. Treasury bonds, other U.S. Treasury bills, and other U.S. government securities and related securities, money market funds, certificates of deposit, time deposits, and other high credit quality short-term fixed income securities, as described in the Registration Statements (collectively, ''Cash Instruments''). The Cash Instruments used to track flat positions in the Indexes will be U.S. Treasury bills.

Each Fund intends to invest first in Index Commodity Contracts. Thereafter, if a Fund reaches the position limits applicable to one or more Index Commodity Contracts or a ''Futures Exchange''[8] imposes limitations on the Fund's ability to maintain or increase its positions in an Index Commodity Contract after reaching accountability levels or a price limit is in effect on an Index Commodity Contract during the last 30 minutes of its regular trading session, the Fund's intention is to invest first in Cleared Swaps, to the extent permitted under the position limits applicable to Cleared Swaps and appropriate in light of the liquidity in the Cleared Swaps market, and then, using its commercially reasonable judgment, in Other Commodity Contracts or in Other Commodity Instruments. By using certain or all of these investments, the Managing Owner will endeavor to cause a Fund's performance to closely track that of the Long/Flat Index or Long/Short Index, respectively, over time. The specific circumstances under which investments in Other Commodity Contracts and Other Commodity Instruments may be used are discussed below.

Consistent with seeking to achieve each Fund's investment objective, if a Fund reaches position limits applicable to one or more Index Commodity Contracts or when a Futures Exchange has imposed limitations on a Fund's ability to maintain or increase its positions in an Index Commodity Contract, the Managing Owner may cause a Fund to first enter into or hold Cleared Swaps and then, if applicable, enter into and hold Other Commodity Contracts or Other Commodity Instruments. For example, certain Cleared Swaps have standardized terms similar, and are priced by reference, to a corresponding Index Commodity Contract or Other Commodity Contract. Additionally, certain Other Commodity Instruments can generally be structured as the parties to the contract desire. Therefore, a Fund might enter into multiple Cleared Swaps and/or certain Other Commodity Instruments intended to exactly replicate the performance of one or more Index Commodity Contracts or Other Commodity Contracts, or a single Other Commodity Instrument designed to replicate the performance of the applicable Index as a whole.[9]

After reaching position limits or when a Futures Exchange has imposed limitations on the Fund's ability to maintain or increase its positions in an Index Commodity Contract as described above, and after entering into or holding Cleared Swaps, a Fund might also enter into or hold Other Commodity Contracts or Other Commodity Instruments that would (1) facilitate effective trading, consistent with a Fund's long/flat or long/short strategy, as applicable; or (2) be expected to alleviate overall deviation between a Fund's performance and that of the Long/Flat Index or Long/Short Index, as applicable, that may result from certain market and trading inefficiencies or other reasons.

By using certain or all of these investments, the Managing Owner will endeavor to cause a Fund's performance to closely track that of the Long/Flat Index or Long/Short Index, as applicable, over time. Each Fund will invest to the fullest extent possible in Index Commodity Contracts and Other Instruments without being leveraged (*i.e.,* without seeking performance that is a multiple (*e.g.,* 2X or 3X) or inverse multiple of the Fund's respective Index) or unable to satisfy its expected current or potential margin or collateral obligations with respect to its investments in Index Commodity Contracts and Other Commodity Contracts or Other Instruments.[10]

Each of the Indexes is currently composed of long, flat, or short (as applicable) positions in Index Commodity Contracts, each of which is subject to speculative position limits and other position limitations, as applicable, which are imposed by either the CFTC or the rules of the Futures Exchanges on which the Index Commodity Contracts are traded. These position limits prohibit any person from holding a position of more than a specific number of such Index Commodity Contracts.

Futures Exchanges may establish daily price fluctuation limits on futures contracts. The daily price fluctuation

[7] According to the Exchange, the Managing Owner expects that Other Commodity Contracts in which a Fund may invest in the circumstances described below would include futures contracts of different expirations, on different commodities, or traded on different exchanges than Index Commodity Contracts.

[8] The Futures Exchanges are the exchanges on which the Index Commodity Contracts are traded and include the following: the Chicago Mercantile Exchange, Inc. (''CME''), Chicago Board of Trade (''CBOT'', a division of CME), NYMEX (a division of CME), ICE Futures US (''ICE–US''), and ICE Futures Europe (''ICE–UK''). Some of a Fund's futures trading may be conducted on commodity futures exchanges outside the United States. Trading on such exchanges is not regulated by any U.S. governmental agency and may involve certain risks not applicable to trading on U.S. exchanges, including different or diminished investor protections.

[9] Assuming that there is no default by a counterparty to an Other Commodity Instrument, the performance of the Other Commodity Instrument should positively correlate with the performance of the Long/Flat Index or Long/Short Index, as applicable, or the applicable Index Commodity Contract.

[10] The Managing Owner will attempt to minimize these market and credit risks by requiring the Funds to abide by various trading limitations and policies, which will include limiting margin accounts and trading only in liquid markets. The Managing Owner will implement procedures which will include, but will not be limited to: Executing and clearing trades with creditworthy counterparties; limiting the amount of margin or premium required for any Index Commodity Contract or Other Commodity Contract or all Index Commodity Contracts or Other Commodity Contracts combined; and generally limiting transactions to Index Commodity Contracts or Other Commodity Contracts which will be traded in sufficient volume to permit the taking and liquidating of positions. The Funds will enter into Other Commodity Instruments traded OTC (if any) with counterparties selected by the Managing Owner. The Managing Owner will select such Other Commodity Instrument (if any) counterparties giving due consideration to such factors as it deems appropriate, including, without limitation, creditworthiness, familiarity with the applicable Index, and price. Under no circumstances will the Funds enter into an Other Commodity Instrument traded OTC (if any) with any counterparty whose credit rating is lower than investment-grade at the time a contract is entered into. The Funds expect that investments in OTC Other Commodity Instruments (if any) will be made on terms that are standard in the market for such OTC Other Commodity Instruments. In connection with such OTC Other Commodity Instruments, the Funds may post or receive collateral in the form of Cash Instruments, which will be marked to market daily.

limit establishes the maximum amount that the price of futures contracts may vary either up or down from the previous day's settlement price. Once the daily price fluctuation limit has been reached in a particular futures contract, no trades may be made at a price beyond that limit. Futures Exchanges may also establish accountability levels applicable to futures contracts. A Futures Exchange may order a person who holds or controls aggregate positions in excess of specified position accountability levels not to further increase the positions, to comply with any prospective limit which exceeds the size of the position owned or controlled, or to reduce any open position which exceeds position accountability levels if the Futures Exchange determines that such action is necessary to maintain an orderly market. Position limits, accountability levels, and daily price fluctuation limits set by the Futures Exchanges have the potential to cause tracking error, which could cause changes in the net asset value (''NAV'') per Share to substantially vary from changes in the level of the Index and prevent an investor from being able to effectively use the Fund as a way to indirectly invest in the global commodity markets.

According to the Exchange, although the Managing Owner does not expect the Funds to have a significant exposure to Other Commodity Instruments that trade OTC, the Trust's Declaration of Trust does not limit the amount of funds that the Funds may invest in such Other Commodity Instruments. Therefore, as the amount of funds invested in Other Commodity Instruments that trade OTC increase, the applicable risks described in the Registration Statements increase correspondingly.[11]

The Long/Flat Index

The Long/Flat Index is a rules-based, fully collateralized commodity futures index that employs a momentum rule to determine if exposure to a particular commodity should be maintained with its prescribed weighting (''long position'') or moved to cash (''flat position'').[12] For each Index Commodity Contract represented by the Long/Flat Index, Morningstar®, Inc. (''Morningstar'')[13] calculates a ''linked price''[14] that incorporates both price changes and roll yield.[15] Whether a position will be long or flat is determined, at the time of a monthly repositioning, by comparing the linked price of each Index Commodity Contract to its 12-month moving average. For example, if, at a monthly repositioning, the linked price for an Index Commodity Contract exceeds its 12-month moving average, the Long/Flat Index takes the long position in the subsequent month. Conversely, if the linked price for an Index Commodity Contract is below its 12-month moving average, the Long/Flat Index moves the position to cash, *i.e.,* flat.

To be considered for inclusion in the Long/Flat Index, a commodity future must be listed on a U.S. futures exchange, be denominated in U.S. dollars and rank in the top 95% by total U.S. dollar value of the total open interest pool of all eligible commodities. The weight of each Index Commodity Contract is the product of two factors: magnitude and the direction of the momentum signal *(i.e.*, 1 for long, 0 for flat, or -1 for short). On the annual reconstitution date, the magnitude is the open interest weight of the Index Commodity Contract, calculated on the second Friday of December, using data through the last trading day of November. Individual contract weights are capped at 10%. Between reconstitution dates, the weights vary based on the performance of the individual commodity positions. The Long/Flat Index is reconstituted annually and directions (*i.e.,* whether long or flat) of each Index Commodity Contract are determined monthly *on the second Friday of each month, which is one week prior to the* monthly repositioning. As of February 28, 2013, the sector weightings of the Long/Flat Index were Agriculture (29.44%), Energy (50.37%), Livestock (4.48%), and Metals (15.71%).

The Long/Short Index

The Long/Short Index is a rules-based, fully collateralized commodity futures index that employs a momentum rule to determine if exposure to a particular Index Commodity Contract should be maintained with its prescribed weighting (''long position'') or moved to a short weighting (''short position'').[16] For each Index Commodity Contract represented by the Long/Short Index, Morningstar calculates a ''linked price''[17] that incorporates both price

[11] Markets in which a Fund may effect a transaction in certain Other Commodity Instruments may be in the OTC markets. The participants and dealers in such markets are typically not subject to the same level of credit evaluation and regulatory oversight as are members of the exchange-based markets. This exposes a Fund to the risk that a counterparty will not settle a transaction in accordance with its terms and conditions because of a credit or liquidity problem or a dispute over the terms of the contract (whether or not bona fide), thus causing the Fund to suffer a loss. *See* note 10, *supra.*

[12] According to the Exchange, a long position is a position that will increase in market price if the price of the commodities comprising the Long/Flat Index, in the aggregate, are rising during the period when the position is open. A flat position is a position that will not increase in market price whether the price of the commodities comprising the Long/Flat Index, in the aggregate, is rising or falling.

[13] Morningstar, Inc. is the index provider (''Index Provider'' or ''Morningstar'') with respect to the Indexes. Morningstar is not registered as a broker-dealer. Morningstar Investment Services (''MIS''), a wholly-owned subsidiary of the Index Provider, is a broker-dealer and a registered investment adviser under the Investment Advisers Act of 1940. Morningstar has implemented procedures designed to prevent the illicit use and dissemination of material, non-public information regarding the Indexes and has implemented a ''fire wall'' with respect to its affiliated broker-dealer regarding the Indexes.

[14] A ''linking'' factor is defined for each commodity that converts the price of the contract in effect at each point in time to a value that accounts for contract rolls, *i.e.,* the ''linked price.'' Each time a contract is rolled, the ''linking'' factor is adjusted by the ratio of the closing price of the current contract to the closing price of the new contract.

[15] Roll yield is the amount of return generated (either positive or negative) by rolling a short-term contract into a longer-term contract and profiting or losing money from the convergence toward a higher or lower spot price. The linked price is determined on the basis of price changes and roll yields. Rolling a futures contract means closing out a position on near-dated (*i.e.,* commodity futures contracts that are nearing expiration) commodity futures contracts before they expire and establishing an equivalent position in a longer-dated futures contract (*i.e.,* commodity futures contracts that have an expiration date further in the future) on the same commodity. Futures contacts can be in ''backwardation,'' which means that futures contracts with longer-term expirations are priced lower than those with shorter-term expirations, or can exhibit ''contango,'' which means that futures contacts with longer-term expirations are priced higher than those with shorter-term expirations. In backwardation, market roll yields are positive. In contango, market roll yields are negative.

[16] A short position is a position that will increase in market price if the price of the Index Commodity Contracts comprising the Long/Short Index, in the aggregate, are falling during the period when the position is open. The Long/Short Index includes short positions in Index Commodity Contracts. The Long/Short ETF may also obtain a short position relative to certain Index Commodity Contracts by establishing a short position with a counterparty by investing in Other Instruments. According to the Long/Short Registration Statement, the Long/Short ETF will profit if the price of a short position in an Index Commodity Contract or Other Instrument that provides exposure to a short position in such Index Commodity Contract falls while the position is open, and the Long/Short ETF will suffer loss if the price of a short position in an Index Commodity Contract or Other Instrument that provides exposure to a short position in such Index Commodity Contract rises while the position is open. Because the value of the Index Commodity Contract or Other Instrument could rise an unlimited amount, a short position in an Index Commodity Contract or Other Instrument that provides exposure to a short position in such Index Commodity Contract theoretically will expose the Long/Short ETF to unlimited losses. In circumstances where a market has reached its maximum price limits imposed by the applicable exchange, the Long/Short ETF may be unable to offset its short position until the next trading day, when prices could expand again in rapid trading.

[17] *See* note 14, *supra.*

changes and roll yield.[18] Whether a position will be long or short (or cash, *i.e.,* flat in the case of energy futures contracts, as described below) is determined, at the time of a monthly repositioning, by comparing the linked price of each Index Commodity Contract to its 12-month moving average. For example, if, at a monthly repositioning, the linked price for an Index Commodity Contract exceeds its 12-month moving average, the Long/Short Index takes a long position in the subsequent month. Conversely, if the linked price for an Index Commodity Contract is below its 12-month moving average, the Long/Short Index takes a short position. An exception is made for commodities in the energy sector. If the signal for an Index Commodity Contract in the energy sector is short, the weight of that Index Commodity Contract is moved to cash (*i.e.,* flat). According to the Long/Short Registration Statement, energy is unique in that its price is extremely sensitive to geopolitical events and not necessarily driven purely by demand-supply imbalances.

To be considered for inclusion in the Long/Short Index, a commodity future must be listed on a U.S. futures exchange, be denominated in U.S. dollars and rank in the top 95% by total U.S. dollar value of the total open interest pool of all eligible commodities. The weight of each individual Index Commodity Contract is the product of two factors: magnitude and the direction of the momentum signal (*i.e.,* 1 for long, 0 for flat, or -1 for short). On the annual reconstitution date, the magnitude is the open interest weight of the Index Commodity Contract, calculated on the second Friday of December, using data through the last trading day of November. Individual contract weights are capped at 10%. Between reconstitution dates, the weights vary based on the performance of the individual Index Commodity Contract positions. The Long/Short Index is reconstituted annually and directions (*i.e.,* whether long, flat, or short) of each Index Commodity Contract are determined monthly on the second Friday of each month, which is one week prior to the monthly repositioning. As of February 28, 2013, the sector weightings of the Long/Short Index were Agriculture (29.40%), Energy (49.57%), Livestock (4.69%), and Metals (16.34%). The inception date of the Long/Short Index was December 21, 1979.

Composition of the Indexes

Information on the composition of the Indexes as of February 28, 2013, including the Index Commodity Contracts, percentage weightings and signals, as well as the Futures Exchanges on which the Index Commodity Contracts trade, is set forth in the Notice.[19]

With respect to each of the Indexes, the following are excluded:

(1) Financial futures contracts (*e.g.,* securities, currencies, interest rates, etc.).

(2) Commodity futures contracts not denominated in U.S. dollars.

(3) Commodity futures contracts with less than twelve months of pricing.

Morningstar sorts all commodity futures contracts that meet the above eligibility requirements in descending order by the total U.S. dollar value of open interest. All commodity futures contracts that make up the top 95% of the total open interest pool of all eligible commodity futures contracts, starting with the one with the largest open interest value, will be included in each of the Indexes.

The weight of each Index Commodity Contract in the Indexes is the product of two factors: magnitude and the direction of the momentum signal. Morningstar initially sets the magnitude based on the 12-month average of the dollar value of open interest of each Index Commodity Contract. Morningstar then caps the top magnitude at 10%, redistributing any overage to the magnitudes of the remaining Index Commodity Contracts. Morningstar chooses this capped open-interest weighting system in order to reflect the importance of each Index Commodity Contract in a global economy and to keep the Indexes diversified across commodities.

Each of the Indexes is reconstituted and rebalanced (*i.e.,* the Indexes' membership and constituent weights are reset) annually, on the third Friday of December after the day's closing values of the Indexes have been determined. The reconstitution is effective at the open of trading on first trading day after the third Friday of December.

Morningstar implements all futures contract rolls on the third Friday of each month to coincide with portfolio repositioning and the rolling of the U.S. Treasury bills used for collateral. If the third Friday of the month is a trading holiday, Morningstar rolls and rebalances or reconstitutes on the trading day prior to the third Friday. To ensure that contracts are rolled before becoming committed to receive physical delivery, contracts are selected so that the delivery month is at least two months away from the upcoming month. On each potential roll date, the delivery month of the current contract is compared to the delivery month of the nearest contract whose delivery month is at least two months away from the upcoming month. If the latter is further into the future than the former, the contract is rolled.

A more detailed description of the Funds and the Shares, the Indexes and the Index Commodity Contracts, as well as investment risks, creation and redemption procedures, NAV calculation, availability of values and other information regarding the Funds' holdings, and fees, among other things, is included in the Notice and the Registration Statements, as applicable.[20]

III. Discussion and Commission's Findings

After careful review, the Commission finds that the proposed rule change is consistent with the requirements of Section 6 of the Act[21] and the rules and regulations thereunder applicable to a national securities exchange.[22] In particular, the Commission finds that the proposed rule change is consistent with Section 6(b)(5) of the Act,[23] which requires, among other things, that the Exchange's rules 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 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. The Commission notes that the Shares must comply with the requirements of NYSE Arca Equities Rule 8.200 and Commentary .02 thereto to be listed and traded on the Exchange.

The Commission finds that the proposal to list and trade the Shares on the Exchange is consistent with Section 11A(a)(1)(C)(iii) of the Act,[24] which sets forth Congress's finding that it is in the public interest and appropriate for the protection of investors and the maintenance of fair and orderly markets to assure the availability to brokers, dealers, and investors of information with respect to quotations for, and transactions in, securities. According to

[18] *See* note 15, *supra.*

[19] *See* Notice, *supra* note 3, at 39814–5.

[20] *See supra* notes 3 and 5, respectively.

[21] 15 U.S.C. 78f.

[22] In approving this proposed rule change, the Commission notes that it has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[23] 15 U.S.C. 78f(b)(5).

[24] 15 U.S.C. 78k–1(a)(1)(C)(iii).

the Exchange, quotation and last-sale information for the Shares will be disseminated through the facilities of the Consolidated Tape Association (''CTA''). Further, the prices of the Index Commodity Contracts, Other Instruments (except as described below) and Cash Instruments held by the Fund will be available from the applicable exchanges and market data vendors. The closing prices and settlement prices of Index Commodity Contracts or Other Commodity Contracts held by the Funds are readily available from the Web sites of the applicable Futures Exchanges, other futures exchanges, automated quotation systems, published or other public sources, or on-line information services such as Bloomberg or Reuters. Moreover, according to the Exchange, the relevant futures exchanges on which the Index Commodity Contracts or Other Commodity Contracts are listed also provide delayed futures information on current and past trading sessions and market news free of charge on their respective Web sites. The specific contract specifications for the Index Commodity Contracts or Other Commodity Contracts are also available on such Web sites, as well as other financial informational sources. The prices of forward agreements, swaps, and other OTC transactions held by the Funds are not available from the exchanges, but will be available from major market data vendors and financial information service providers such as Reuters and Bloomberg and will be included in the calculation of the NAV and the intra-day indicative value (''IIV'') for the Shares.

Each Fund will disseminate its respective holdings on a daily basis on the Funds' Web site, which will include, as applicable, the names, quantity, price and market value of Index Commodity Contracts, Other Instruments (including forward contracts, OTC swaps, and other OTC transactions), and Cash Instruments. This Web site disclosure of the portfolio composition of the Funds will occur at the same time as the disclosure by the Managing Owner of the portfolio composition to authorized participants so that all market participants are provided portfolio composition information at the same time.[25]

The intra-day level and the most recent end-of-day closing level of each Index will be published by the Exchange once every 15 seconds throughout the Exchange's Core Trading Session and as of the close of business for the Exchange, respectively. Any adjustments made to an Index will be published on Morningstar's Web site. The IIV[26] per Share of each Fund will be widely disseminated by one or more major market data vendors at least every 15 seconds during the NYSE Arca Core Trading Session.[27] The NAV per Share of each Fund will be calculated as of the closing time of NYSE Arca Core Trading Session or the last to close of the Futures Exchanges on which the Index Commodity Contracts or Other Commodity Contracts (which are listed on futures exchanges other than Futures Exchanges) are traded, whichever is later.[28] The NAV for each Fund will be disseminated to all market participants at the same time. The Exchange will make available on its Web site daily trading volume of the Shares, closing prices of the Shares, and the corresponding NAV.

The Commission believes that the proposal to list and trade the Shares is reasonably designed to promote fair disclosure of information that may be necessary to price the Shares appropriately and to prevent trading when a reasonable degree of transparency cannot be assured. If the Exchange becomes aware that the NAV with respect to the Shares is not disseminated to all market participants at the same time, it will halt trading in the Shares until such time as the NAV is available to all market participants. Further, the Exchange represents that it may halt trading during the day in which an interruption to the dissemination of the IIV, an Index value, or the value of the Index Commodity Contracts or Other Instruments occurs. If the interruption persists past the trading day in which it occurred, the Exchange will halt trading no later than the beginning of the trading day following the interruption. The Exchange may halt trading in the Shares if trading is not occurring in the Index Commodity Contracts or Other Instruments, or if other unusual conditions or circumstances detrimental to the maintenance of a fair and orderly market are present.[29] The Exchange states that it has a general policy prohibiting the distribution of material, non-public information by its employees. Moreover, the trading of the Shares will be subject to NYSE Arca Equities Rule 8.200, Commentary .02(e), which sets forth certain restrictions on Equity Trading Permit (''ETP'') Holders[30] acting as registered Market Makers[31] in Trust Issued Receipts to facilitate surveillance.

[25] Disclosure regarding the components of each Index, the percentage weightings of the components of each Index and the long, short, or flat positions therein is available at *http://corporate.morningstar.com/US/asp/subject.aspx?page=2649&filter=Commodity&xmlfile=2738.xml.*

[26] The IIV will be based on the prior day's final NAV per Share, adjusted every 15 seconds during the NYSE Arca Core Trading Session to reflect the continuous price changes of a Fund's Index Commodity Contracts and other holdings. The Exchange represents that the normal trading hours for Index Commodity Contracts may begin after 9:30 a.m. and end before 4:00 p.m., Eastern Time, and that there will be a gap in time at the beginning and the end of each day during which the Funds' Shares will be traded on the Exchange, but real-time trading prices for at least some of the Index Commodity Contracts held by the Funds are not available. As a result, during those gaps the IIVs of the Funds will be updated but will reflect the closing prices for such Index Commodity Contracts that have stopped trading before the NAV is calculated.

[27] According to the Exchange, several major market data vendors display and/or make widely available IIVs taken from the CTA or other data feeds.

[28] All open commodity futures contracts traded on a U.S. or non-U.S. exchange will be calculated at their then current market value, which will be based upon the settlement price for that particular commodity futures contract traded on the applicable U.S. or non-U.S. exchange on the date with respect to which NAV is being determined; provided, that if a commodity futures contract traded on a U.S. or on a non-U.S. exchange could not be liquidated on such day, due to the operation of daily limits (if applicable) or other rules of the exchange upon which that position is traded or otherwise, the settlement price on the most recent day on which the position could have been liquidated will be the basis for determining the market value of such position for such day. The value of Cleared Swaps will be determined based on the value of the Index Commodity Contract in connection with each specific Cleared Swap. In calculating the NAV of a Fund, the settlement value of a Cleared Swap (if any) and an OTC Other Commodity Instrument (if any) will be determined by either applying the then-current disseminated value for the related Index Commodity Contracts or the terms as provided under the applicable Cleared Swap or OTC Other Commodity Instrument, as applicable. However, in the event that one or more of the related Index Commodity Contracts are not trading due to the operation of daily limits or otherwise, the Managing Owner may in its sole discretion choose to value the applicable Fund's Cleared Swaps or OTC Other Commodity Instruments (if any) on a fair value basis in order to calculate such Fund's NAV. These fair value prices would be generally determined based on available inputs about the current value of the Index Commodity Contract to which the Cleared Swap or OTC Other Commodity Instrument relates and would be based on principles that the Managing Owner deems fair and equitable so long as such principles are consistent with normal industry standards. Exchange-traded Other Commodity Instruments will be valued at their market prices on the exchanges on which such instruments trade.

[29] With respect to trading halts, the Exchange may consider all relevant factors in exercising its discretion to halt or suspend trading in the Shares. Trading in the Shares will be subject to trading halts caused by extraordinary market volatility pursuant to the Exchange's ''circuit breaker'' rule in NYSE Arca Equities Rule 7.12. Trading also may be halted because of market conditions or for reasons that, in the view of the Exchange, make trading in the Shares inadvisable.

[30] *See* NYSE Arca Equities Rule 1.1(n) (defining ETP Holder).

[31] *See* NYSE Arca Equities Rule 1.1(v) (defining Market Maker).

The Commission notes that the Financial Industry Regulatory Authority (''FINRA''), on behalf of the Exchange,[32] will communicate as needed regarding trading in the Shares with other markets and other entities that are members of the Intermarket Surveillance Group (''ISG'') and FINRA may obtain trading information regarding trading in the Shares, futures contracts, and exchange-traded options from such markets and other entities. In addition, the Exchange may obtain information regarding trading in the Shares, futures contracts, and exchange-traded options from markets and other entities that are members of ISG or with which the Exchange has in place a comprehensive surveillance sharing agreement.[33] The Managing Owner is affiliated with a broker-dealer and has implemented a ''fire wall'' with respect to such broker-dealer, and has policies and procedures in place regarding access to information concerning the composition and/or changes to the Funds' portfolio composition. The Index provider is not registered as a broker-dealer but is affiliated with a broker-dealer and has implemented procedures designed to prevent the illicit use and dissemination of material, non-public information regarding the Indexes and has implemented a ''fire wall'' with respect to its affiliated broker-dealer regarding the Indexes.

The Exchange represents that the Shares are deemed to be equity securities, thus rendering trading in the Shares subject to the Exchange's existing rules governing the trading of equity securities. In support of this proposal, the Exchange has made representations, including:

(1) Each Fund will meet the initial and continued listing requirements applicable to Trust Issued Receipts in NYSE Arca Equities Rule 8.200 and Commentary .02 thereto.

(2) The Exchange has appropriate rules to facilitate transactions in the Shares during all trading sessions.

(3) The trading in the Shares will be subject to the existing trading surveillances, administered by FINRA on behalf of the Exchange, which are designed to detect violations of Exchange rules and applicable federal securities laws, and that these procedures are adequate to properly monitor Exchange trading of the Shares in all trading sessions and to deter and detect violations of Exchange rules and applicable federal securities laws.

(4) Prior to the commencement of trading, the Exchange will inform its ETP Holders in an Information Bulletin of the special characteristics and risks associated with trading the Shares. Specifically, the Information Bulletin will discuss the following: (a) The risks involved in trading the Shares during the Opening and Late Trading Sessions when an updated IIV will not be calculated or publicly disseminated, as well as during the Core Trading Session where the IIV may be based in part on static underlying values; (b) the procedures for purchases and redemptions of Shares in creation baskets and redemption baskets (and that Shares are not individually redeemable); (c) NYSE Arca Equities Rule 9.2(a), which imposes a duty of due diligence on its ETP Holders to learn the essential facts relating to every customer prior to trading the Shares; (d) how information regarding the IIV is disseminated; (e) the requirement that ETP Holders deliver a prospectus to investors purchasing newly issued Shares prior to or concurrently with the confirmation of a transaction; and (f) trading information.

(5) With respect to application of Rule 10A–3 under the Act,[34] the Funds rely on the exception contained in Rule 10A–3(c)(7).[35]

(6) Each Fund intends to invest first in Index Commodity Contracts. Thereafter, if a Fund reaches the position limits applicable to one or more Index Commodity Contracts or a Futures Exchange imposes limitations on the Fund's ability to maintain or increase its positions in an Index Commodity Contract after reaching accountability levels or a price limit is in effect on an Index Commodity Contract during the last 30 minutes of its regular trading session, each Fund's intention is to invest first in Cleared Swaps to the extent permitted under the position limits applicable to Cleared Swaps and appropriate in light of the liquidity in the Cleared Swaps market, and then, using its commercially reasonable judgment, in Other Commodity Contracts or in Other Commodity Instruments. Each Fund's investments will be consistent with such Fund's investment objective and will not be used to enhance leverage.

(7) With respect to the Funds' assets traded on exchanges, not more than 10% of the weight of such assets in the aggregate shall consist of components whose principal trading market is not a member of ISG or is a market with which the Exchange does not have a comprehensive surveillance sharing agreement.

(8) The Managing Owner will attempt to minimize market and credit risks by requiring the Funds to abide by various trading limitations and policies, which will include limiting margin accounts and trading only in liquid markets. The Managing Owner will implement procedures which will include, but will not be limited to: executing and clearing trades with creditworthy counterparties; limiting the amount of margin or premium required for any Index Commodity Contract or Other Commodity Contract or all Index Commodity Contracts or Other Commodity Contracts combined; and generally limiting transactions to Index Commodity Contracts or Other Commodity Contracts which will be traded in sufficient volume to permit the taking and liquidating of positions.

(9) The Funds will enter into Other Commodity Instruments traded OTC (if any) with counterparties selected by the Managing Owner. The Managing Owner will select such Other Commodity Instrument counterparties giving due consideration to such factors as it deems appropriate, including, without limitation, creditworthiness, familiarity with the applicable Index, and price. Under no circumstances will the Funds enter into an OTC Other Commodity Instrument with any counterparty whose credit rating is lower than investment-grade at the time a contract is entered into. The Funds expect that investments in OTC Other Commodity Instruments (if any) will be made on terms that are standard in the market for such OTC Other Commodity Instruments. In connection with such OTC Other Commodity Instruments, the Funds may post or receive collateral in the form of Cash Instruments, which will be marked to market daily.

(10) A minimum of 100,000 Shares of each Fund will be outstanding at the commencement of trading on the Exchange.

This approval order is based on all of the Exchange's representations and description of the Funds, including those set forth above and in the Notice.[36]

[32] The Exchange states that, while FINRA surveils trading on the Exchange pursuant to a regulatory services agreement, the Exchange is responsible for FINRA's performance under this regulatory services agreement.

[33] The Exchange states that CME Group, Inc., (which includes CME, CBOT, and NYMEX), and ICE–US are members of ISG. In addition, the Exchange states that it has entered into a comprehensive surveillance sharing agreement with ICE–UK that applies with respect to trading in Index Commodity Contracts.

[34] 17 CFR 240.10A–3.

[35] 17 CFR 240.10A–3(c)(7).

[36] The Commission notes that it does not regulate the market for U.S.-traded futures in which the Funds plans to take positions, which is the responsibility of the CFTC. The CFTC has the

For the foregoing reasons, the Commission finds that the proposed rule change is consistent with Section 6(b)(5) of the Act [37] and the rules and regulations thereunder applicable to a national securities exchange.

IV. Conclusion

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,[38] that the proposed rule change (SR–NYSEArca–2013–60) be, and it hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[39]

Kevin M. O'Neill,

Deputy Secretary.

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authority to set limits on the positions that any person may take in such futures. These limits may be directly set by the CFTC or by the markets on which such futures are traded. The Commission has no role in establishing position limits on such futures even though such limits could impact an exchange-traded product that is under the jurisdiction of the Commission.

[37] 15 U.S.C. 78f(b)(5).

[38] 15 U.S.C. 78s(b)(2).

[39] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–70212; File No. SR–NYSEMKT–2013–69]

Self-Regulatory Organizations; NYSE MKT LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Amending the Fees for Display Use of the NYSE MKT BBO and NYSE MKT Trades Market Data Products and Making Certain Technical Changes to the Fee Schedule

August 15, 2013.

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 August 1, 2013, NYSE MKT LLC (the ''Exchange'' or ''NYSE MKT'') filed with the Securities and Exchange Commission (the ''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

[1] 15 U.S.C. 78s(b)(1).

[2] 15 U.S.C. 78a.

[3] 17 CFR 240.19b–4.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend the fees for display use of the NYSE MKT BBO and NYSE MKT Trades market data products and make certain technical changes to the fee schedule. The changes will be operative on August 1, 2013. The text of the proposed rule change is available on the Exchange's Web site at *www.nyse.com,* at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and the Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend the fees for display use of the NYSE MKT BBO [4] and NYSE MKT Trades [5] market data products and make certain technical changes to the fee schedule. The changes will be operative on August 1, 2013.

The Exchange currently charges $10 per month for professional users and $5 per month for non-professional users for display use of NYSE MKT BBO.[6] Alternatively, the Exchange charges $0.005 per quote for display use of NYSE MKT BBO for non-professional users, capped at $5 per month per non-professional user.[7] The Exchange currently charges $10 per month for professional users for display use of NYSE MKT Trades. The Exchange currently does not offer NYSE MKT Trades for non-professional users under a per-user fee structure.[8]

The Exchange also charges an access fee of $750 per month for NYSE MKT BBO and an access fee of $750 for NYSE MKT Trades. However, a single access fee applies for clients receiving both NYSE MKT BBO and NYSE MKT Trades.

Vendors that redistribute NYSE MKT Trades data pay a redistribution fee of $750 per month.

The Exchange proposes to lower the professional user fees for display use of NYSE MKT BBO from $10 per month to $1 per month, lower the non-professional user fees for display use of NYSE MKT BBO from $5 per month to $0.05 per month, and eliminate the per quote option for display use of NYSE MKT BBO for non-professional users. The Exchange also proposes to lower the professional user fee for display use of NYSE MKT Trades from $10 per month to $1 per month and introduce a fee for display use of NYSE MKT Trades by non-professional users of $0.05 per month.

The Exchange also proposes to establish a $20,000 per month enterprise fee for an unlimited number of professional and non-professional users for NYSE MKT BBO and a $20,000 per month enterprise fee for an unlimited number of professional and non-professional users for NYSE MKT Trades. A single enterprise fee will apply for vendors receiving both NYSE MKT BBO and NYSE MKT Trades.

As an example, under the current fee structure, if a firm had 1,500 professional users who each received

[4] NYSE MKT BBO is an NYSE MKT-only market data feed that allows a vendor to redistribute on a real-time basis the same best-bid-and-offer information that the Exchange reports under the Consolidated Quotation (''CQ'') Plan for inclusion in the CQ Plan's consolidated quotation information data stream. The data feed includes the best bids and offers for all securities that are traded on the Exchange and for which NYSE MKT reports quotes under the CQ Plan.

[5] NYSE MKT Trades is an NYSE MKT-only market data feed that allows a vendor to redistribute on a real-time basis the same last sale information that the Exchange reports under the Consolidated Tape Association (''CTA'') Plan for inclusion in the CTA Plan's consolidated data streams and certain other related data elements. Specifically, NYSE MKT Trades includes the real-time last sale price, time, size, and bid-ask quotations for each security traded on the Exchange and a stock summary message. The stock summary message updates every minute and includes NYSE MKT's opening price, high price, low price, closing price, and cumulative volume for the security.

[6] The Exchange applies the same criteria for qualification as a ''non-professional subscriber'' as the CTA and CQ Plan participants use. *See* Securities Exchange Act Release No. 62187 (May 27, 2010), 75 FR 31500, 31502 (June 3, 2010) (SR–NYSEAmex–2010–35).

[7] *Id.* The cap is referenced in this filing, although it does not currently appear in the fee schedule.

[8] *See* SR–NYSEAmex–2010–35, *supra* n.6. When NYSE MKT Trades was initially offered, the Exchange had not observed a demand for non-professional use because an alternative product was available. *See id.* The Exchange now offers two last sale market data products for distribution to non-professional users, NYSE MKT Trades Digital Media and NYSE MKT Realtime Reference Prices Digital Media. *See* Securities Exchange Act Release No. 69300 (Apr. 4, 2013), 78 FR 21469 (Apr. 10, 2013) (SR–NYSEMKT–2013–31).

NYSE MKT Trades at $10 per month and NYSE MKT BBO at $10 per month, then the firm currently pays $30,000 per month in professional user fees. Under the proposed enterprise fee, the firm will pay a flat fee of $20,000 for an unlimited number of professional and non-professional users for both products.

A vendor that pays the enterprise fee would not have to report the number of such users on a monthly basis.[9] However, every six months, a vendor must provide the Exchange with a count of the total number of natural person users of each product, including both professional and non-professional users.

Lastly, the Exchange proposes to make certain technical corrections to clarify its fee schedule and to delete operative dates that are no longer needed.

The purpose of the foregoing changes is to encourage greater use of NYSE MKT BBO and NYSE MKT Trades by making them more affordable, to compete more effectively with similar products in the marketplace, and to clarify the fee schedule. The Exchange is eliminating the per quote option for display use of NYSE MKT BBO for non-professional users because non-professional users are not electing to use it. The Exchange is not aware of any significant problems that persons affected are likely to have in complying with the proposed rule change.

The Exchange further believes that the proposed rule change is consistent with the market-based approach of the Securities and Exchange Commission (''Commission''). The decision of the United States Court of Appeals for the District of Columbia Circuit in *NetCoalition v. SEC,* 615 F.3d 525 (DC Cir. 2010), upheld reliance by the Commission upon the existence of competitive market mechanisms to set reasonable and equitably allocated fees for proprietary market data:

> In fact, the legislative history indicates that the Congress intended that the market system 'evolve through the interplay of competitive forces as unnecessary regulatory restrictions are removed' and that the SEC wield its regulatory power 'in those situations where competition may not be sufficient,' such as in the creation of a 'consolidated transactional reporting system.'

Id. at 535 (quoting H.R. Rep. No. 94–229 at 92 (1975), *as reprinted in* 1975 U.S.C.C.A.N. 323). The court agreed with the Commission's conclusion that ''Congress intended that 'competitive forces should dictate the services and practices that constitute the U.S. national market system for trading equity securities.' '' [10]

As explained below in the Exchange's Statement on Burden on Competition, the Exchange believes that there is substantial evidence of competition in the marketplace for data and that the Commission can rely upon such evidence in concluding that the fees established in this filing are the product of competition and therefore satisfy the relevant statutory standards.[11] In addition, the existence of alternatives to NYSE MKT BBO and NYSE MKT Trades, including real-time consolidated data, free delayed consolidated data, and proprietary data from other sources, as described below, further ensures that the Exchange cannot set unreasonable fees, or fees that are unreasonably discriminatory, when vendors and subscribers can elect such alternatives.

As the *NetCoalition* decision noted, the Commission is not required to undertake a cost-of-service or ratemaking approach, and the Exchange incorporates by reference into this proposed rule change its affiliate's analysis of this topic in another rule filing.[12]

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with the provisions of Section 6 of the Act,[13] in general, and Sections 6(b)(4) and 6(b)(5) of the Act,[14] in particular, in that it provides an equitable allocation of reasonable fees among its members, issuers, and other persons using its facilities and is not designed to permit unfair discrimination among customers, issuers, brokers, or dealers. The Exchange also believes that the proposed rule change is consistent with Section 11(A) of the Act [15] in that it is consistent with (i) fair competition among brokers and dealers, among exchange markets, and between exchange markets and markets other than exchange markets and (ii) the availability to brokers, dealers, and investors of information with respect to quotations for and transactions in securities. Furthermore, the proposed rule change is consistent with Rule 603 of Regulation NMS,[16] which provides that any national securities exchange that distributes information with respect to quotations for or transactions in an NMS stock do so on terms that are not unreasonably discriminatory.

The Exchange believes that lowering the professional and non-professional user fees for NYSE MKT BBO and lowering the professional user fee for NYSE MKT Trades is reasonable because it will make the products more affordable and result in their greater availability to professional and non-professional users. The Exchange believes that introducing a non-professional fee for NYSE MKT Trades is reasonable because it provides an additional method for retail investors to access NYSE MKT last sale data and provides the same last sale data that is available to professional users, an option heretofore unavailable.[17] The Exchange believes it is reasonable to eliminate the per quote option for non-professional users of NYSE MKT BBO because non-professional users have not elected this option.

In addition, the Exchange believes that the proposed fees are reasonable when compared to fees for comparable products offered by at least one other exchange and under the CTA and CQ Plans. Specifically, The NASDAQ Stock Market LLC (''NASDAQ'') offers NASDAQ Basic, which includes best bid and offer and last sale data, for a monthly fee of $10 per professional subscriber and $0.50 per non-professional subscriber; alternatively, a broker-dealer may purchase an enterprise license at a rate of $100,000 per month for distribution to an unlimited number of non-professional subscribers only.[18] Under the current CTA Plan, Tape B market data includes NYSE MKT and certain other exchanges' data. Monthly fees for professional users range from $13.60–$14.60 for consolidated last sale data and $13.65–$15.60 for bid-ask data; the monthly fee for each non-professional subscriber is $1.00 for both last sale and bid-ask data.[19] A monthly enterprise fee of $500,000 is available under which a

[9] Most professional users currently are subject to a per display device count, except for a small number of professional users that have qualified for the Exchange's Unit-of-Count Policy. *See* SR–NYSEAmex–2010–35, *supra* n.6. That policy continues to apply to such professional users for display use only if the proposed enterprise fee does not apply. *See* Securities Exchange Act Release No. 69285 (April 3, 2013) 78 FR 21172 (April 9, 2013) (SR–NYSEMKT–2013–32).

[10] *NetCoalition,* 615 F.3d at 535.

[11] Section 916 of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (the ''Dodd-Frank Act'') amended paragraph (A) of Section 19(b)(3) of the Act, 15 U.S.C. 78s(b)(3), to make clear that all exchange fees for market data may be filed by exchanges on an immediately effective basis.

[12] *See* Securities Exchange Act Release No. 63291 (Nov. 9, 2010), 75 FR 70311 (Nov. 17, 2010) (SR–NYSEArca–2010–97).

[13] 15 U.S.C. 78f(b).

[14] 15 U.S.C. 78f(b)(4), (5).

[15] 15 U.S.C. 78k–1.

[16] *See* 17 CFR 242.603.

[17] *See supra* n.8.

[18] *See* NASDAQ Rule 7047.

[19] *See* CTA Plan dated July 25, 2012 and CQ Plan dated August 23, 2010, *available at https://cta.nyxdata.com/CTA.*

U.S. registered broker-dealer may distribute data to an unlimited number of its own employees and its nonprofessional subscriber brokerage account customers. Participants in the CTA and CQ Plans recently submitted an immediately effective filing with rate changes that are expected to be implemented September 1, 2013.[20] The Exchange is proposing professional and non-professional user fees and enterprise fees that are substantially less than the fees currently charged by NASDAQ and currently charged and proposed for the CTA and CQ Plans. In contrast to NASDAQ and the CTA and CQ Plans, the Exchange also will permit enterprise distribution by a non-broker-dealer.

The proposed enterprise fees for NYSE MKT BBO and NYSE MKT Trades also are reasonable because they could result in a fee reduction for vendors with a large number of professional and non-professional users, as described in the example above. If a vendor has a smaller number of professional users of NYSE MKT BBO and/or NYSE MKT Trades, then it may continue using the per user structure and benefit from the per user fee reductions. By reducing prices for vendors with a large number of professional and non-professional users, the Exchange believes that more vendors may choose to offer NYSE MKT BBO and NYSE MKT Trades, thereby expanding the distribution of this market data for the benefit of investors. The Exchange also believes that offering an enterprise fee will expand the range of options for offering NYSE MKT BBO and NYSE MKT Trades and will allow vendors greater choice in selecting the most appropriate level of data and fees for the professional and non-professional users they are servicing.

The Exchange further believes that the proposed enterprise fees are reasonable because they will simplify billing for certain recipients that have large numbers of professional and non-professional users. Firms that pay the proposed enterprise fees will not have to report the number of users on a monthly basis as they currently do, but rather will only have to count natural person users every six months; this is a significant reduction in administrative burdens and is a significant value. The Exchange believes that it is reasonable to charge a single enterprise fee for clients receiving both NYSE MKT BBO and NYSE MKT Trades because the Exchange has charged a single access fee for both products since 2010,[21] and the products will continue to be offered separately for vendors and users that so choose.

The Exchange believes that the proposed fees are equitable and not unfairly discriminatory because they will be charged uniformly to vendors and users that select these products. The Exchange notes that the fee structure of differentiated professional and non-professional fees has long been used by the Exchange for other products, by other exchanges for their products, and by the CTA and CQ Plans in order to reduce the price of data to retail investors and make it more broadly available.[22] The Exchange further believes that offering NYSE MKT Trades to non-professional users with the same data available to professional users results in greater equity among data recipients. The Exchange believes that eliminating the per quote non-professional user fee for NYSE MKT BBO is equitable and not unfairly discriminatory because non-professional users have not elected this option and the Exchange will continue offering other methods by which non-professional users can access this data. Finally, the Exchange believes that it is equitable and not unfairly discriminatory to establish an enterprise fee because it reduces the Exchange's costs and administrative burdens in tracking and auditing large numbers of users.

The proposed technical corrections to the fee schedule will benefit vendors and users by making the fee schedule clearer and easier to understand.

For these reasons, the Exchange believes that the proposed fees are reasonable, equitable, and not unfairly discriminatory.

B. Self-Regulatory Organization's Statement on Burden on Competition

In accordance with Section 6(b)(8) of the Act,[23] 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. An exchange's ability to price its proprietary data feed products is constrained by (1) the inherent contestability of the market for proprietary data and actual competition for the sale of such data, (2) the joint product nature of exchange platforms, and (3) the existence of alternatives to proprietary data.

The Existence of Actual Competition. The market for proprietary data products is currently competitive and inherently contestable because there is fierce competition for the inputs necessary to the creation of proprietary data and strict pricing discipline for the proprietary products themselves. Numerous exchanges compete with each other for listings and order flow and sales of market data itself, providing virtually limitless opportunities for entrepreneurs who wish to compete in any or all of those areas, including producing and distributing their own market data. Proprietary data products are produced and distributed by each individual exchange, as well as other entities, in a vigorously competitive market.

Competitive markets for listings, order flow, executions, and transaction reports provide pricing discipline for the inputs of proprietary data products and therefore constrain markets from overpricing proprietary market data. The U.S. Department of Justice also has acknowledged the aggressive competition among exchanges, including for the sale of proprietary market data itself. In announcing that the bid for NYSE Euronext by NASDAQ OMX Group Inc. and IntercontinentalExchange Inc. had been abandoned, Assistant Attorney General Christine Varney stated that exchanges ''compete head to head to offer real-time equity data products. These data products include the best bid and offer of every exchange and information on each equity trade, including the last sale.'' [24]

It is common for broker-dealers to further exploit this recognized competitive constraint by sending their order flow and transaction reports to multiple markets, rather than providing them all to a single market. As a 2010 Commission Concept Release noted, the ''current market structure can be described as dispersed and complex'' with ''trading volume . . . dispersed among many highly automated trading centers that compete for order flow in the same stocks'' and ''trading centers offer[ing] a wide range of services that are designed to attract different types of

[20] *See* Securities Exchange Act Release No. Release No. 70010 (July 19, 2013) (File No. SR–CTA/CQ–2013–04). Monthly fees will be $24 for professional subscribers and $1 for non-professional subscribers for Tape B last sale and bid-ask data, and the monthly enterprise fee described above will be increased to $520,000.

[21] *See* SR–NYSEAmex–2010–35, *supra* n.6.

[22] *See, e.g.,* Securities Exchange Act Release No. 20002, File No. S7–433 (July 22, 1983) (establishing nonprofessional fees for CTA data); NASDAQ Rules 7023(b), 7047.

[23] 15 U.S.C. 78f(b)(8).

[24] Press Release, U.S. Department of Justice, Assistant Attorney General Christine Varney Holds Conference Call Regarding NASDAQ OMX Group Inc. and IntercontinentalExchange Inc. Abandoning Their Bid for NYSE Euronext (May 16, 2011), available at *http://www.justice.gov/iso/opa/atr/speeches/2011/at-speech-110516.html.*

market participants with varying trading needs.''[25]

In addition, in the case of products that are distributed through market data vendors, the market data vendors themselves provide additional price discipline for proprietary data products because they control the primary means of access to certain end users. These vendors impose price discipline based upon their business models. For example, vendors that assess a surcharge on data they sell are able to refuse to offer proprietary products that their end users do not or will not purchase in sufficient numbers. Internet portals, such as Google, impose price discipline by providing only data that they believe will enable them to attract ''eyeballs'' that contribute to their advertising revenue. Similarly, vendors will not offer NYSE MKT BBO or NYSE MKT Trades unless those products will help them maintain current users or attract new ones. For example, a broker-dealer will not choose to offer NYSE MKT BBO or NYSE MKT Trades to its retail customers unless the broker-dealer believes that the retail customers will use and value the data and the provision of such data will help the broker-dealer maintain the customer relationship, which allows the broker-dealer to generate profits for itself. Professional users will not request NYSE MKT BBO or NYSE MKT Trades from market data vendors unless they can use the data for profit-generating purposes in their businesses. All of these operate as constraints on pricing proprietary data products.

Joint Product Nature of Exchange Platform. Transaction execution and proprietary data products are complementary in that market data is both an input and a byproduct of the execution service. In fact, market data and trade executions are a paradigmatic example of joint products with joint costs. The decision whether and on which platform to post an order will depend on the attributes of the platforms where the order can be posted, including the execution fees, data quality, and price and distribution of their data products. The more trade executions a platform does, the more valuable its market data products become.

The costs of producing market data include not only the costs of the data distribution infrastructure, but also the costs of designing, maintaining, and operating the exchange's transaction execution platform and the cost of regulating the exchange to ensure its fair operation and maintain investor confidence. The total return that a trading platform earns reflects the revenues it receives from both products and the joint costs it incurs. Moreover, an exchange's broker-dealer customers view the costs of transaction executions and market data as a unified cost of doing business with the exchange.

Other market participants have noted that the liquidity provided by the order book, trade execution, core market data, and non-core market data are joint products of a joint platform and have common costs.[26] The Exchange agrees with and adopts those discussions and the arguments therein. The Exchange also notes that the economics literature confirms that there is no way to allocate common costs between joint products that would shed any light on competitive or efficient pricing.[27]

Analyzing the cost of market data product production and distribution in isolation from the cost of all of the inputs supporting the creation of market data and market data products will inevitably underestimate the cost of the data and data products. Thus, because it is impossible to obtain the data inputs to create market data products without a fast, technologically robust, and well-regulated execution system, system costs and regulatory costs affect the price of both obtaining the market data itself and creating and distributing market data products. It would be equally misleading, however, to attribute all of an exchange's costs to the market data portion of an exchange's joint products. Rather, all of an exchange's costs are incurred for the unified purposes of attracting order flow, executing and/or routing orders, and generating and selling data about market activity. The total return that an exchange earns reflects the revenues it receives from the joint products and the total costs of the joint products.

The level of competition and contestability in the market is evident in the numerous alternative venues that compete for order flow, including 12 equities self-regulatory organization (''SRO'') markets, as well as internalizing broker-dealers (''BDs'') and various forms of alternative trading systems (''ATSs''), including dark pools and electronic communication networks (''ECNs''). Competition among trading platforms can be expected to constrain the aggregate return that each platform earns from the sale of its joint products, but different platforms may choose from a range of possible, and equally reasonable, pricing strategies as the means of recovering total costs. For example, some platforms may choose to pay rebates to attract orders, charge relatively low prices for market data products (or provide market data products free of charge), and charge relatively high prices for accessing posted liquidity. Other platforms may choose a strategy of paying lower rebates (or no rebates) to attract orders, setting relatively high prices for market data products, and setting relatively low prices for accessing posted liquidity. In this environment, there is no economic basis for regulating maximum prices for one of the joint products in an industry in which suppliers face competitive constraints with regard to the joint offering.

Existence of Alternatives. The large number of SROs, BDs, and ATSs that currently produce proprietary data or are currently capable of producing it provides further pricing discipline for proprietary data products. Each SRO, ATS, and BD is currently permitted to produce proprietary data products, and

[25] Concept Release on Equity Market Structure, Securities Exchange Act Release No. 61358 (Jan. 14, 2010), 75 FR 3594 (Jan. 21, 2010) (File No. S7–02–10). This Concept Release included data from the third quarter of 2009 showing that no market center traded more than 20% of the volume of listed stocks, further evidencing the dispersal of and competition for trading activity. *Id.* at 3598.

[26] *See* Securities Exchange Act Release No. 62887 (Sept. 10, 2010), 75 FR 57092, 57095 (Sept. 17, 2010) (SR–Phlx–2010–121); Securities Exchange Act Release No. 62907 (Sept. 14, 2010), 75 FR 57314, 57317 (Sept. 20, 2010) (SR–NASDAQ–2010–110); and Securities Exchange Act Release No. 62908 (Sept. 14, 2010), 75 FR 57321, 57324 (Sept. 20, 2010) (SR–NASDAQ–2010–111) (''all of the exchange's costs are incurred for the unified purposes of attracting order flow, executing and/or routing orders, and generating and selling data about market activity. The total return that an exchange earns reflects the revenues it receives from the joint products and the total costs of the joint products.''); *see also* August 1, 2008 Comment Letter of Jeffrey S. Davis, Vice President and Deputy General Counsel, NASDAQ OMX Group, Inc., Statement of Janusz Ordover and Gustavo Bamberger (''because market data is both an input to and a byproduct of executing trades on a particular platform, market data and trade execution services are an example of 'joint products' with 'joint costs.' ''), attachment at pg. 4, *available at www.sec.gov/comments/34-57917/3457917-12.pdf.*

[27] *See generally* Mark Hirschey, **FUNDAMENTALS OF MANAGERIAL ECONOMICS,** at 600 (2009) (''It is important to note, however, that although it is possible to determine the separate marginal costs of goods produced in variable proportions, it is impossible to determine their individual average costs. This is because common costs are expenses necessary for manufacture of a joint product. Common costs of production—raw material and equipment costs, management expenses, and other overhead—cannot be allocated to each individual by-product on any economically sound basis. . . . Any allocation of common costs is wrong and arbitrary.''). This is not new economic theory. *See, e.g.,* F. W. Taussig, ''A Contribution to the Theory of Railway Rates,'' Quarterly Journal of Economics V(4) 438, 465 (July 1891) (''Yet, surely, the division is purely arbitrary. These items of cost, in fact, are jointly incurred for both sorts of traffic; and I cannot share the hope entertained by the statistician of the Commission, Professor Henry C. Adams, that we shall ever reach a mode of apportionment that will lead to trustworthy results.'').

many currently do or have announced plans to do so, including but not limited to the Exchange, NYSE, NYSE Arca, NASDAQ OMX, BATS, and Direct Edge.

The fact that proprietary data from ATSs, BDs, and vendors can bypass SROs is significant in two respects. First, non-SROs can compete directly with SROs for the production and sale of proprietary data products. Second, because a single order or transaction report can appear in an SRO proprietary product, a non-SRO proprietary product, or both, the amount of data available via proprietary products is greater in size than the actual number of orders and transaction reports that exist in the marketplace. Because market data users can thus find suitable substitutes for most proprietary market data products, a market that overprices its market data products stands a high risk that users may substitute another source of market data information for its own.

Moreover, consolidated data provides two additional measures of pricing discipline for proprietary data products that are a subset of the consolidated data stream. First, the consolidated data is widely available in real-time at $0.50-$1 per month for non-professional users. Second, consolidated data is also available at no cost with a 15- or 20-minute delay. Because consolidated data contains marketwide information, it effectively places a cap on the fees assessed for proprietary data that is simply a subset of the consolidated data (such as NYSE MKT Trades and NYSE MKT BBO). The mere availability of low-cost or free consolidated data provides a powerful form of pricing discipline for proprietary data products that contain data elements that are a subset of the consolidated data by highlighting the optional nature of proprietary products.

Those competitive pressures imposed by available alternatives are clearly evident in the Exchange's proposed pricing. As noted above, the Exchange's proposed user and enterprise fees are substantially less than the fees charged by both NASDAQ and the CTA and CQ Plans, and the Exchange's enterprise fee also permits distribution by a non-broker-dealer.[28]

In addition to the competition and price discipline described above, the market for proprietary data products is also highly contestable because market entry is rapid and inexpensive. The history of electronic trading is replete with examples of entrants that swiftly grew into some of the largest electronic trading platforms and proprietary data producers: Archipelago, Bloomberg Tradebook, Island, RediBook, Attain, TrackECN, BATS Trading and Direct Edge. Today, BATS and Direct Edge provide certain market data at no charge on their Web sites in order to attract more order flow, and use revenue rebates from resulting additional executions to maintain low execution charges for their users.[29]

Further, data products are valuable to professional users only if they can be used for profit-generating purposes in their businesses and valuable to non-professional users only insofar as they provide information that such users expect will assist them in tracking prices and market trends and making order routing and trading decisions.[30] The Exchange believes that the proposed lower user fees and the enterprise fees, which may permit wider distribution of last sale and quote information at a lower cost to vendors with a large number of professional and non-professional users, may encourage more users to demand and more vendors to choose to offer NYSE MKT BBO and NYSE MKT Trades, thereby benefitting professional and non-professional users, including public investors. The Exchange also believes that offering NYSE MKT Trades for non-professional users on a per user basis and providing the same information as is provided to professional users will create more choices for vendors that will allow them to offer products with the appropriate level of information at a range of prices, thereby encouraging wider distribution of the data.

In establishing the proposed fees, the Exchange considered the competitiveness of the market for proprietary data and all of the implications of that competition. The Exchange believes that it has considered all relevant factors and has not considered irrelevant factors in order to establish fair, reasonable, and not unreasonably discriminatory fees and an equitable allocation of fees among all users. The existence of numerous alternatives to the Exchange's products, including real-time consolidated data, free delayed consolidated data, and proprietary data from other sources, ensures that the Exchange cannot set unreasonable fees, or fees that are unreasonably discriminatory, when vendors and subscribers can elect these alternatives or choose not to purchase a specific proprietary data product if its cost to purchase is not justified by the returns any particular vendor or subscriber would achieve through the purchase.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were solicited or received with respect to the proposed rule change.

III. 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)[31] of the Act and subparagraph (f)(2) of Rule 19b–4[32] 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)[33] 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 (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov*. Please include File Number SR–NYSEMKT–2013–69 on the subject line.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549–1090.

[28] *See supra* nn.18–20.

[29] This is simply a securities market-specific example of the well-established principle that in certain circumstances more sales at lower margins can be more profitable than fewer sales at higher margins; this example is additional evidence that market data is an inherent part of a market's joint platform.

[30] Rule 603(c) of Regulation NMS requires vendors to make the consolidated core data feeds available to customers when trading and order-routing decisions can be implemented. *See* 17 CFR 242.603(c).

[31] 15 U.S.C. 78s(b)(3)(A).

[32] 17 CFR 240.19b–4(f)(2).

[33] 15 U.S.C. 78s(b)(2)(B).

All submissions should refer to File Number SR–NYSEMKT–2013–69. 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 Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street NE., Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–NYSEMKT–2013–69 and should be submitted on or before September 11, 2013.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[34]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2013–20339 Filed 8–20–13; 8:45 am]

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[34] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–70217; File No. SR–NYSE–2013–07]

Self-Regulatory Organizations; New York Stock Exchange LLC; Notice of Designation of Longer Period for Commission Action on Proceedings To Determine Whether To Disapprove Proposed Rule Change Amending NYSE Rules 451 and 465, and the Related Provisions of Section 402.10 of the NYSE Listed Company Manual, Which Provide a Schedule for the Reimbursement of Expenses by Issuers to NYSE Member Organizations for the Processing of Proxy Materials and Other Issuer Communications Provided to Investors Holding Securities in Street Name and To Establish a Five-Year Fee for the Development of an Enhanced Brokers Internet Platform

August 15, 2013.

On February 1, 2013, New York Stock Exchange (''NYSE'') filed with the Securities and Exchange Commission (''Commission''), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the ''Act'')[1] and Rule 19b–4 thereunder,[2] a proposed rule change to amend NYSE Rules 451 and 465, and the related provisions of Section 402.10 of the NYSE Listed Company Manual, which provide a schedule for the reimbursement of expenses by issuers to NYSE member organizations for the processing of proxy materials and other issuer communications provided to investors holding securities in street name and to establish a five-year fee for the development of an enhanced brokers internet platform. The proposed rule change was published for comment in the **Federal Register** on February 22, 2013.[3] In response, the Commission received twenty-four comment letters on the proposal.[4] On April 3, 2013, the Commission subsequently extended the time period in which to either approve the proposed rule change, or to institute proceedings to determine whether to disapprove the proposed rule change, to May 23, 2013.[5] The Commission thereafter received four more comment letters and a response to comments from NYSE.[6] On May 23, 2013, the Commission initiated proceedings to determine whether to disapprove the proposed rule change and solicited additional comments.[7] The Commission thereafter received fourteen comment letters on the proposal and a response to the Order Instituting Proceedings from NYSE.[8]

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 68936 (February 15, 2013), 78 FR 12381.

[4] *See* letters to Elizabeth M. Murphy, Secretary, Commission from: Charles V. Rossi, President, The Securities Transfer Association, dated February 20, 2013 and March 4, 2013; Karen V. Danielson, President, Shareholder Services Association, dated March 4, 2013; Jeanne M. Shafer, dated March 6, 2013; David W. Lovatt, dated March 6, 2013; Stephen Norman, Chair, The Independent Steering Committee of Broadridge, dated March 7, 2013; Jeffrey D. Morgan, President & CEO, National Investor Relations Institute, dated March 7, 2013; Kenneth Bertsch, President and CEO, Society of Corporate Secretaries & Governance Professionals, dated March 7, 2013; Niels Holch, Executive Director, Shareholder Communications Coalition, dated March 12, 2013; Geoffrey M. Dugan, General Counsel, iStar Financial Inc., dated March 13, 2013; Paul E. Martin, Chief Financial Officer, Perficient, Inc., dated March 13, 2013; John Harrington, President, Harrington Investments, Inc., dated March 14, 2013; James McRitchie, Shareowner, Corporate Governance, dated March 14, 2013; Clare A. Kretzman, General Counsel, Gartner, Inc., dated March 15, 2013; Tom Quaadman, Vice President, Center for Capital Markets Competitiveness, dated March 15, 2013; Dennis E. Nixon, President, International Bancshares Corporation, dated March 15, 2013; Argus I. Cunningham, Chief Executive Officer, Sharegate Inc., dated March 15, 2013; Laura Berry, Executive Director, Interfaith Center on Corporate Responsibility, dated March 15, 2013; Dorothy M. Donohue, Deputy General Counsel—Securities Regulation, Investment Company Institute, dated March 15, 2013; Charles V. Callan, Senior Vice President—Regulatory Affairs, Broadridge Financial Solutions, Inc., dated March 15, 2013; Brad Philips, Treasurer, Darling International Inc., dated March 15, 2013; John Endean, President, American Business Conference, dated March 18, 2013; Tom Price, Managing Director, The Securities Industry and Financial Markets Association, dated March 18, 2013; and Michael S. O'Brien, Vice President—Corporate Governance Officer, BNY Mellon, dated March 28, 2013.

[5] *See* Securities Exchange Act Release No. 69286 (April 3, 2013), 78 FR 21481 (April 10, 2013).

[6] *See* letters to Elizabeth M. Murphy, Secretary, Commission from: Jeff Mahoney, General Counsel, Council of Institutional Investors, dated April 5, 2013; Paul Torre, Executive Vice President, AST Fund Solutions, LLC, dated May 16, 2013; and John M. Payne, Chief Executive Officer, Zumbox, Inc., dated May 20, 2013; *see also* letter to the Honorable Mary Jo White, Chair, Commission from Dieter Waizenegger, Executive Director, CtW Investment Group, dated May 17, 2013. *See also* response letter from Janet McGinnis, EVP & Corporate Secretary, NYSE Euronext, to Elizabeth M. Murphy, Secretary, Commission, dated May 17, 2013.

[7] *See* Securities Exchange Act Release No. 69622 (May 23, 2013), 78 FR 32510 (May 30, 2013) (''Order Instituting Proceedings'').

[8] *See* letters to Elizabeth M. Murphy, Secretary, Commission from: Katie J. Sevcik, Legal and Regulatory Committee Chair, Shareholder Services Association, dated June 12, 2013; Paul Torre, Executive Vice President, AST Fund Solutions, LLC, dated June 18, 2013; Loren Hanson, Assistant Secretary/Assistant Treasurer, Otter Tail Corporation, dated June 17, 2013; Michael J. Hogan, Chief Executive Officer, FOLIO*fn* Investments, Inc., dated June 18, 2013; Harold Westervelt, President, INVeSHARE, dated June 18, 2013; Dieter Waizenegger, Executive Director, Investment Group, dated June 20, 2013; Dorothy M. Donohue, Deputy General Counsel—Securities Regulation, Investment Company Institute, dated June 20, 2013; Lisa Lindsley, Director, Capital Strategies Program, The American Federation of State, County and

Section 19(b)(2) of the Act[9] provides that, after initiating disapproval proceedings, the Commission shall issue an order approving or disapproving the proposed rule change not later than 180 days after the date of publication of notice of the filing of the proposed rule change. The Commission may extend the period for issuing an order approving or disapproving the proposed rule change, however, by not more than 60 days if the Commission determines that a longer period is appropriate and publishes the reasons for such determination. The proposed rule change was published for comment in the **Federal Register** on February 22, 2013. August 21, 2013 is 180 days from that date, and October 20, 2013 is an additional 60 days from that date.

The Commission finds it appropriate to designate a longer period within which to issue an order approving or disapproving the proposed rule change so that it has sufficient time to consider the proposed rule change, the issues raised in the comment letters that have been submitted in connection with the proposed rule change, and the NYSE's responses to such issues. Specifically, as the Commission noted in more detail in the Order Instituting Proceedings, the proposal raises significant questions as to whether the Exchange has provided adequate justification for material aspects of its proposal such that the Commission can determine that the proposal is consistent with the Act. Extending the time within which to approve or disapprove the proposed rule change will enable the Commission to more fully consider this issue and the other issues raised in the comment letters.

Accordingly, the Commission, pursuant to Section 19(b)(2) of the Act,[10] designates October 20, 2013, as the date by which the Commission should either approve or disapprove the proposed rule change.

Municipal Employees, dated July 3, 2013; Brandon Rees, Acting Director, American Federation of Labor and Congress of Industrial Organizations Office of Investment, dated July 5, 2013; Charles V. Rossi, President, The Securities Transfer Association, Inc., dated July 5, 2013; James J. Angel, dated July 5, 2013; and Michael J. Hogan, Chief Executive Officer, FOLIO*fn* Investments, Inc., dated July 12, 2013; *see also* letters to the Honorable Mary Jo White, Chair, Commission from Ann Yerger, Executive Director, Council of Institutional Investors, dated May 17, 2013; and Charles E. Schumer, United States Senator, dated May 23, 2013. *See also* response letter from Janet McGinnis, EVP & Corporate Secretary, NYSE Euronext, to Elizabeth M. Murphy, Secretary, Commission, dated July 9, 2013.

[9] 15 U.S.C. 78s(b)(2).

[10] 15 U.S.C. 78s(b)(2).

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[11]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2013–20345 Filed 8–20–13; 8:45 am]

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[11] 17 CFR 200.30–3(a)(31).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–70211; File No. SR–NYSE–2013–58]

Self-Regulatory Organizations; New York Stock Exchange LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Amending the Fees for Display Use of the NYSE BBO and NYSE Trades Market Data Products and Making Certain Technical Changes to the Fee Schedule

August 15, 2013.

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 August 1, 2013, New York Stock Exchange LLC (''NYSE'' or the ''Exchange'') filed with the Securities and Exchange Commission (the ''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend the fees for display use of the NYSE BBO and NYSE Trades market data products and make certain technical changes to the fee schedule. The changes will be operative on August 1, 2013. The text of the proposed rule change is available on the Exchange's Web site at *www.nyse.com,* at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and the Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend the fees for display use of the NYSE BBO[4] and NYSE Trades[5] market data products and make certain technical changes to the fee schedule. The changes will be operative on August 1, 2013.

The Exchange currently charges $15 per month for professional users and $5 per month for non-professional users for display use of NYSE BBO.[6] Alternatively, the Exchange charges $0.005 per quote for display use of NYSE BBO for non-professional users, capped at $5 per month per non-professional user.[7] The Exchange currently charges $15 per month for professional users for display use of NYSE Trades. The Exchange currently does not offer NYSE Trades for non-professional users under a per-user fee structure.[8]

[1] 15 U.S.C. 78s(b)(1).

[2] 15 U.S.C. 78a.

[3] 17 CFR 240.19b–4.

[4] NYSE BBO is an NYSE-only market data feed that allows a vendor to redistribute on a real-time basis the same best-bid-and-offer information that the Exchange reports under the Consolidated Quotation (''CQ'') Plan for inclusion in the CQ Plan's consolidated quotation information data stream. The data feed includes the best bids and offers for all securities that are traded on the Exchange and for which NYSE reports quotes under the CQ Plan.

[5] NYSE Trades is an NYSE-only market data feed that allows a vendor to redistribute on a real-time basis the same last sale information that the Exchange reports under the Consolidated Tape Association (''CTA'') Plan for inclusion in the CTA Plan's consolidated data streams and certain other related data elements. Specifically, NYSE Trades includes the real-time last sale price, time, size, and bid-ask quotations for each security traded on the Exchange and a stock summary message. The stock summary message updates every minute and includes NYSE's opening price, high price, low price, closing price, and cumulative volume for the security.

[6] The Exchange applies the same criteria for qualification as a ''non-professional subscriber'' as the CTA and CQ Plan participants use. *See* Securities Exchange Act Release No. 62181 (May 26, 2010), 75 FR 31488 (June 3, 2010) (SR–NYSE–2010–30).

[7] *Id.* The cap is referenced in this filing, although it does not currently appear in the fee schedule.

[8] *See* Securities Exchange Act Release No. 59309 (Jan. 28, 2009), 74 FR 6073 (Feb. 4, 2009) (SR–NYSE–2009–04). When NYSE Trades was initially offered, the Exchange had not observed a demand for non-professional use. *See id.* The Exchange

Continued

The Exchange also charges an access fee of $1,500 per month for NYSE BBO and an access fee of $1,500 for NYSE Trades. However, a single access fee applies for clients receiving both NYSE BBO and NYSE Trades.

Vendors that redistribute NYSE Trades data pay a redistribution fee of $1,000 per month.

The Exchange proposes to lower the professional user fees for display use of NYSE BBO from $15 per month to $4 per month, lower the non-professional user fees for display use of NYSE BBO from $5 per month to $0.20 per month, and eliminate the per quote option for display use of NYSE BBO for non-professional users. The Exchange also proposes to lower the professional user fee for display use of NYSE Trades from $15 per month to $4 per month and introduce a fee for display use of NYSE Trades by non-professional users of $0.20 per month.

The Exchange also proposes to establish a $190,000 per month enterprise fee for an unlimited number of professional and non-professional users for NYSE BBO and a $190,000 per month enterprise fee for an unlimited number of professional and non-professional users for NYSE Trades. A single enterprise fee will apply for vendors receiving both NYSE BBO and NYSE Trades.

As an example, under the current fee structure, if a firm had 7,000 professional users who each received NYSE Trades at $15 per month and NYSE BBO at $15 per month, then the firm currently pays $210,000 per month in professional user fees. Under the proposed enterprise fee, the firm will pay a flat fee of $190,000 for an unlimited number of professional and non-professional users for both products.

A vendor that pays the enterprise fee would not have to report the number of such users on a monthly basis.[9] However, every six months, a vendor must provide the Exchange with a count of the total number of natural person users of each product, including both professional and non-professional users.

Lastly, the Exchange proposes to make certain technical corrections to clarify its fee schedule and to delete operative dates that are no longer needed.

The purpose of the foregoing changes is to encourage greater use of NYSE BBO and NYSE Trades by making them more affordable, to compete more effectively with similar products in the marketplace, and to clarify the fee schedule. The Exchange is eliminating the per quote option for display use of NYSE BBO for non-professional users because non-professional users are not electing to use it. The Exchange is not aware of any significant problems that persons affected are likely to have in complying with the proposed rule change.

The Exchange further believes that the proposed rule change is consistent with the market-based approach of the Securities and Exchange Commission (''Commission''). The decision of the United States Court of Appeals for the District of Columbia Circuit in *NetCoalition* v. *SEC,* 615 F.3d 525 (D.C. Cir. 2010), upheld reliance by the Commission upon the existence of competitive market mechanisms to set reasonable and equitably allocated fees for proprietary market data:

> In fact, the legislative history indicates that the Congress intended that the market system 'evolve through the interplay of competitive forces as unnecessary regulatory restrictions are removed' and that the SEC wield its regulatory power 'in those situations where competition may not be sufficient,' such as in the creation of a 'consolidated transactional reporting system.'

Id. at 535 (quoting H.R. Rep. No. 94–229 at 92 (1975), *as reprinted in* 1975 U.S.C.C.A.N. 323). The court agreed with the Commission's conclusion that ''Congress intended that 'competitive forces should dictate the services and practices that constitute the U.S. national market system for trading equity securities.' '' [10]

As explained below in the Exchange's Statement on Burden on Competition, the Exchange believes that there is substantial evidence of competition in the marketplace for data and that the Commission can rely upon such evidence in concluding that the fees established in this filing are the product of competition and therefore satisfy the relevant statutory standards.[11] In addition, the existence of alternatives to NYSE BBO and NYSE Trades, including real-time consolidated data, free delayed consolidated data, and proprietary data from other sources, as described below, further ensures that the Exchange cannot set unreasonable fees, or fees that are unreasonably discriminatory, when vendors and subscribers can elect such alternatives.

As the *NetCoalition* decision noted, the Commission is not required to undertake a cost-of-service or ratemaking approach, and the Exchange incorporates by reference into this proposed rule change its affiliate's analysis of this topic in another rule filing.[12]

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with the provisions of Section 6 of the Act,[13] in general, and Sections 6(b)(4) and 6(b)(5) of the Act,[14] in particular, in that it provides an equitable allocation of reasonable fees among its members, issuers, and other persons using its facilities and is not designed to permit unfair discrimination among customers, issuers, brokers, or dealers. The Exchange also believes that the proposed rule change is consistent with Section 11(A) of the Act [15] in that it is consistent with (i) fair competition among brokers and dealers, among exchange markets, and between exchange markets and markets other than exchange markets and (ii) the availability to brokers, dealers, and investors of information with respect to quotations for and transactions in securities. Furthermore, the proposed rule change is consistent with Rule 603 of Regulation NMS,[16] which provides that any national securities exchange that distributes information with respect to quotations for or transactions in an NMS stock do so on terms that are not unreasonably discriminatory.

The Exchange believes that lowering the professional and non-professional user fees for NYSE BBO and lowering the professional user fee for NYSE Trades is reasonable because it will make the products more affordable and result in their greater availability to professional and non-professional users.

offers two last sale market data products for distribution to non-professional users, NYSE Trades Digital Media and NYSE Realtime Reference Prices Digital Media. *See* Securities Exchange Act Release No. 69298 (Apr. 4, 2013), 78 FR 21464 (Apr. 10, 2013) (SR–NYSE–2013–24).

[9] Most professional users currently are subject to a per display device count, except for a small number of professional users that have qualified for the Exchange's Unit-of-Count Policy. *See* SR–NYSE–2010–30, *supra* n.6; Securities Exchange Act Release No. 59606 (Mar. 19, 2009), 74 FR 13293 (Mar. 26, 2009) (SR–NYSE–2009–04); Securities Exchange Act Release No. 59544 (Mar. 9, 2009), 74 FR 11162 (Mar. 16, 2009) (SR–NYSE–2008–131) (establishing Unit-of-Count Policy). That policy continues to apply to such professional users for display use only if the proposed enterprise fee does not apply. *See* Securities Exchange Act Release No. 69278 (April 2, 2013) 78 FR 20973 (April 8, 2013) (SR–NYSE–2013–25).

[10] *NetCoalition,* 615 F.3d at 535.

[11] Section 916 of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (the ''Dodd-Frank Act'') amended paragraph (A) of Section 19(b)(3) of the Act, 15 U.S.C. 78s(b)(3), to make clear that all exchange fees for market data may be filed by exchanges on an immediately effective basis.

[12] *See* Securities Exchange Act Release No. 63291 (Nov. 9, 2010), 75 FR 70311 (Nov. 17, 2010) (SR–NYSEArca–2010–97).

[13] 15 U.S.C. 78f(b).

[14] 15 U.S.C. 78f(b)(4), (5).

[15] 15 U.S.C. 78k–1.

[16] *See* 17 CFR 242.603.

The Exchange believes that introducing a non-professional fee for NYSE Trades is reasonable because it provides an additional method for retail investors to access NYSE last sale data and provides the same last sale data that is available to professional users, an option heretofore unavailable.[17] The Exchange believes it is reasonable to eliminate the per quote option for non-professional users of NYSE BBO because non-professional users have not elected this option.

In addition, the Exchange believes that the proposed fees are reasonable when compared to fees for comparable products offered by at least one other exchange and under the CTA and CQ Plans. Specifically, The NASDAQ Stock Market LLC (''NASDAQ'') offers NASDAQ Basic, which includes best bid and offer and last sale data, for a monthly fee of $10 per professional subscriber and $0.50 per non-professional subscriber; alternatively, a broker-dealer may purchase an enterprise license at a rate of $100,000 per month for distribution to an unlimited number of non-professional subscribers only.[18] The Exchange's proposed per-user fees are lower than NASDAQ's fees. While the Exchange's enterprise fee is higher, the Exchange will permit broader distribution of its data for this fee, *i.e.,* to both professional and non-professional users. Under the current CTA and CQ Plans, Tape A consolidated last sale and bid-ask data are offered together for a monthly fee of $18.75–$127.25 per device, depending on the number of professional subscribers, and $0.50–$1.00 per non-professional subscriber, depending on the number of non-professional subscribers.[19] A monthly enterprise fee of $660,000 is available under which a U.S. registered broker-dealer may distribute data to an unlimited number of its own employees and its nonprofessional subscriber brokerage account customers. Participants in the CTA and CQ Plans recently submitted an immediately effective filing with rate changes that are expected to be implemented September 1, 2013.[20] The Exchange is proposing professional and non-professional user fees and enterprise fees that are less than the fees currently charged or proposed by the CTA and CQ Plans, in most cases less than half of the CTA fee. In contrast to NASDAQ and the CTA and CQ Plans, the Exchange also will permit enterprise distribution by a non-broker-dealer.

The proposed enterprise fees for NYSE BBO and NYSE Trades also are reasonable because they could result in a fee reduction for vendors with a large number of professional and non-professional users, as described in the example above. If a vendor has a smaller number of professional users of NYSE BBO and/or NYSE Trades, then it may continue using the per user structure and benefit from the per user fee reductions. By reducing prices for vendors with a large number of professional and non-professional users, the Exchange believes that more vendors may choose to offer NYSE BBO and NYSE Trades, thereby expanding the distribution of this market data for the benefit of investors. The Exchange also believes that offering an enterprise fee will expand the range of options for offering NYSE BBO and NYSE Trades and will allow vendors greater choice in selecting the most appropriate level of data and fees for the professional and non-professional users they are servicing.

The Exchange further believes that the proposed enterprise fees are reasonable because they will simplify billing for certain recipients that have large numbers of professional and non-professional users. Firms that pay the proposed enterprise fees will not have to report the number of users on a monthly basis as they currently do, but rather will only have to count natural person users every six months; this is a significant reduction in administrative burdens and is a significant value. The Exchange believes that it is reasonable to charge a single enterprise fee for clients receiving both NYSE BBO and NYSE Trades because the Exchange has charged a single access fee for both products since 2010,[21] and the products will continue to be offered separately for vendors and users that so choose.

The Exchange believes that the proposed fees are equitable and not unfairly discriminatory because they will be charged uniformly to vendors and users that select these products. The Exchange notes that the fee structure of differentiated professional and non-professional fees has long been used by the Exchange for other products, by other exchanges for their products, and by the CTA and CQ Plans in order to reduce the price of data to retail investors and make it more broadly available.[22] The Exchange further believes that offering NYSE Trades to non-professional users with the same data available to professional users results in greater equity among data recipients. The Exchange believes that eliminating the per quote non-professional user fee for NYSE BBO is equitable and not unfairly discriminatory because non-professional users have not elected this option and the Exchange will continue offering other methods by which non-professional users can access this data. Finally, the Exchange believes that it is equitable and not unfairly discriminatory to establish an enterprise fee because it reduces the Exchange's costs and administrative burdens in tracking and auditing large numbers of users.

The proposed technical corrections to the fee schedule will benefit vendors and users by making the fee schedule clearer and easier to understand.

For these reasons, the Exchange believes that the proposed fees are reasonable, equitable, and not unfairly discriminatory.

B. Self-Regulatory Organization's Statement on Burden on Competition

In accordance with Section 6(b)(8) of the Act,[23] 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. An exchange's ability to price its proprietary data feed products is constrained by (1) The inherent contestability of the market for proprietary data and actual competition for the sale of such data, (2) the joint product nature of exchange platforms, and (3) the existence of alternatives to proprietary data.

The Existence of Actual Competition. The market for proprietary data products is currently competitive and inherently contestable because there is fierce competition for the inputs necessary to the creation of proprietary data and strict pricing discipline for the proprietary products themselves. Numerous exchanges compete with each other for listings and order flow and sales of market data itself, providing virtually limitless opportunities for entrepreneurs who wish to compete in any or all of those areas, including producing and distributing their own market data. Proprietary data products are produced and distributed by each

[17] *See supra* n.8.

[18] *See* NASDAQ Rule 7047.

[19] *See* CTA Plan dated July 25, 2012 and CQ Plan dated August 23, 2010, *available at https://cta.nyxdata.com/CTA.*

[20] *See* Securities Exchange Act Release No. 70010 (July 19, 2013) (File No. SR–CTA/CQ–2013–04). Monthly fees will be $20–50 for professional subscribers and $1 for non-professional subscribers for Tape A last sale and bid-ask data, and the monthly enterprise fee described above will be increased to $686,400.

[21] *See* SR–NYSE–2010–30, *supra* n.6.

[22] *See, e.g.,* Securities Exchange Act Release No. 20002, File No. S7–433 (July 22, 1983) (establishing nonprofessional fees for CTA data); NASDAQ Rules 7023(b), 7047.

[23] 15 U.S.C. 78f(b)(8).

individual exchange, as well as other entities, in a vigorously competitive market.

Competitive markets for listings, order flow, executions, and transaction reports provide pricing discipline for the inputs of proprietary data products and therefore constrain markets from overpricing proprietary market data. The U.S. Department of Justice also has acknowledged the aggressive competition among exchanges, including for the sale of proprietary market data itself. In announcing that the bid for NYSE Euronext by NASDAQ OMX Group Inc. and IntercontinentalExchange Inc. had been abandoned, Assistant Attorney General Christine Varney stated that exchanges ''compete head to head to offer real-time equity data products. These data products include the best bid and offer of every exchange and information on each equity trade, including the last sale.'' [24]

It is common for broker-dealers to further exploit this recognized competitive constraint by sending their order flow and transaction reports to multiple markets, rather than providing them all to a single market. As a 2010 Commission Concept Release noted, the ''current market structure can be described as dispersed and complex'' with ''trading volume . . . dispersed among many highly automated trading centers that compete for order flow in the same stocks'' and ''trading centers offer[ing] a wide range of services that are designed to attract different types of market participants with varying trading needs.'' [25]

In addition, in the case of products that are distributed through market data vendors, the market data vendors themselves provide additional price discipline for proprietary data products because they control the primary means of access to certain end users. These vendors impose price discipline based upon their business models. For example, vendors that assess a surcharge on data they sell are able to refuse to offer proprietary products that their end users do not or will not purchase in sufficient numbers. Internet portals, such as Google, impose price discipline by providing only data that they believe will enable them to attract ''eyeballs'' that contribute to their advertising revenue. Similarly, vendors will not offer NYSE BBO or NYSE Trades unless those products will help them maintain current users or attract new ones. For example, a broker-dealer will not choose to offer NYSE BBO or NYSE Trades to its retail customers unless the broker-dealer believes that the retail customers will use and value the data and the provision of such data will help the broker-dealer maintain the customer relationship, which allows the broker-dealer to generate profits for itself. Professional users will not request NYSE BBO or NYSE Trades from market data vendors unless they can use the data for profit-generating purposes in their businesses. All of these operate as constraints on pricing proprietary data products.

Joint Product Nature of Exchange Platform. Transaction execution and proprietary data products are complementary in that market data is both an input and a byproduct of the execution service. In fact, market data and trade executions are a paradigmatic example of joint products with joint costs. The decision whether and on which platform to post an order will depend on the attributes of the platforms where the order can be posted, including the execution fees, data quality, and price and distribution of their data products. The more trade executions a platform does, the more valuable its market data products become.

The costs of producing market data include not only the costs of the data distribution infrastructure, but also the costs of designing, maintaining, and operating the exchange's transaction execution platform and the cost of regulating the exchange to ensure its fair operation and maintain investor confidence. The total return that a trading platform earns reflects the revenues it receives from both products and the joint costs it incurs. Moreover, an exchange's broker-dealer customers view the costs of transaction executions and market data as a unified cost of doing business with the exchange.

Other market participants have noted that the liquidity provided by the order book, trade execution, core market data, and non-core market data are joint products of a joint platform and have common costs.[26] The Exchange agrees with and adopts those discussions and the arguments therein. The Exchange also notes that the economics literature confirms that there is no way to allocate common costs between joint products that would shed any light on competitive or efficient pricing.[27]

Analyzing the cost of market data product production and distribution in isolation from the cost of all of the inputs supporting the creation of market data and market data products will inevitably underestimate the cost of the data and data products. Thus, because it is impossible to obtain the data inputs to create market data products without a fast, technologically robust, and well-regulated execution system, system costs and regulatory costs affect the price of both obtaining the market data itself and creating and distributing market data products. It would be equally misleading, however, to attribute all of an exchange's costs to the market data portion of an exchange's joint products. Rather, all of an exchange's costs are incurred for the unified purposes of attracting order flow, executing and/or routing orders, and generating and selling data about market activity. The total return that an

[24] Press Release, U.S. Department of Justice, Assistant Attorney General Christine Varney Holds Conference Call Regarding NASDAQ OMX Group Inc. and IntercontinentalExchange Inc. Abandoning Their Bid for NYSE Euronext (May 16, 2011), available at *http://www.justice.gov/iso/opa/atr/speeches/2011/at-speech-110516.html.*

[25] Concept Release on Equity Market Structure, Securities Exchange Act Release No. 61358 (Jan. 14, 2010), 75 FR 3594 (Jan. 21, 2010) (File No. S7–02–10). This Concept Release included data from the third quarter of 2009 showing that no market center traded more than 20% of the volume of listed stocks, further evidencing the dispersal of and competition for trading activity. *Id.* at 3598.

[26] *See* Securities Exchange Act Release No. 62887 (Sept. 10, 2010), 75 FR 57092, 57095 (Sept. 17, 2010) (SR–Phlx–2010–121); Securities Exchange Act Release No. 62907 (Sept. 14, 2010), 75 FR 57314, 57317 (Sept. 20, 2010) (SR–NASDAQ–2010–110); and Securities Exchange Act Release No. 62908 (Sept. 14, 2010), 75 FR 57321, 57324 (Sept. 20, 2010) (SR–NASDAQ–2010–111) (''all of the exchange's costs are incurred for the unified purposes of attracting order flow, executing and/or routing orders, and generating and selling data about market activity. The total return that an exchange earns reflects the revenues it receives from the joint products and the total costs of the joint products.''); see also August 1, 2008 Comment Letter of Jeffrey S. Davis, Vice President and Deputy General Counsel, NASDAQ OMX Group, Inc., Statement of Janusz Ordover and Gustavo Bamberger (''because market data is both an input to and a byproduct of executing trades on a particular platform, market data and trade execution services are an example of 'joint products' with 'joint costs.' ''), attachment at pg. 4, available at *www.sec.gov/comments/34-57917/3457917-12.pdf.*

[27] *See generally* Mark Hirschey, Fundamentals of Managerial Economics, at 600 (2009) (''It is important to note, however, that although it is possible to determine the separate marginal costs of goods produced in variable proportions, it is impossible to determine their individual average costs. This is because common costs are expenses necessary for manufacture of a joint product. Common costs of production—raw material and equipment costs, management expenses, and other overhead—cannot be allocated to each individual by-product on any economically sound basis. . . . Any allocation of common costs is wrong and arbitrary.''). This is not new economic theory. *See, e.g.,* F. W. Taussig, ''A Contribution to the Theory of Railway Rates,'' Quarterly Journal of Economics V(4) 438, 465 (July 1891) (''Yet, surely, the division is purely arbitrary. These items of cost, in fact, are jointly incurred for both sorts of traffic; and I cannot share the hope entertained by the statistician of the Commission, Professor Henry C. Adams, that we shall ever reach a mode of apportionment that will lead to trustworthy results.'').

exchange earns reflects the revenues it receives from the joint products and the total costs of the joint products.

The level of competition and contestability in the market is evident in the numerous alternative venues that compete for order flow, including 12 equities self-regulatory organization (''SRO'') markets, as well as internalizing broker-dealers (''BDs'') and various forms of alternative trading systems (''ATSs''), including dark pools and electronic communication networks (''ECNs''). Competition among trading platforms can be expected to constrain the aggregate return that each platform earns from the sale of its joint products, but different platforms may choose from a range of possible, and equally reasonable, pricing strategies as the means of recovering total costs. For example, some platforms may choose to pay rebates to attract orders, charge relatively low prices for market data products (or provide market data products free of charge), and charge relatively high prices for accessing posted liquidity. Other platforms may choose a strategy of paying lower rebates (or no rebates) to attract orders, setting relatively high prices for market data products, and setting relatively low prices for accessing posted liquidity. In this environment, there is no economic basis for regulating maximum prices for one of the joint products in an industry in which suppliers face competitive constraints with regard to the joint offering.

Existence of Alternatives. The large number of SROs, BDs, and ATSs that currently produce proprietary data or are currently capable of producing it provides further pricing discipline for proprietary data products. Each SRO, ATS, and BD is currently permitted to produce proprietary data products, and many currently do or have announced plans to do so, including but not limited to the Exchange, NYSE MKT, NYSE Arca, NASDAQ OMX, BATS, and Direct Edge.

The fact that proprietary data from ATSs, BDs, and vendors can bypass SROs is significant in two respects. First, non-SROs can compete directly with SROs for the production and sale of proprietary data products. Second, because a single order or transaction report can appear in an SRO proprietary product, a non-SRO proprietary product, or both, the amount of data available via proprietary products is greater in size than the actual number of orders and transaction reports that exist in the marketplace. Because market data users can thus find suitable substitutes for most proprietary market data products, a market that overprices its market data products stands a high risk that users may substitute another source of market data information for its own.

Moreover, consolidated data provides two additional measures of pricing discipline for proprietary data products that are a subset of the consolidated data stream. First, the consolidated data is widely available in real-time at $0.50–$1 per month for non-professional users. Second, consolidated data is also available at no cost with a 15- or 20-minute delay. Because consolidated data contains marketwide information, it effectively places a cap on the fees assessed for proprietary data that is simply a subset of the consolidated data (such as NYSE Trades and NYSE BBO). The mere availability of low-cost or free consolidated data provides a powerful form of pricing discipline for proprietary data products that contain data elements that are a subset of the consolidated data by highlighting the optional nature of proprietary products.

Those competitive pressures imposed by available alternatives are clearly evident in the Exchange's proposed pricing. As noted above, the Exchange's proposed per-user fees are lower than NASDAQ's fees. While the Exchange's enterprise fee is higher, the Exchange will permit broader distribution of its data, *i.e.,* to both professional and non-professional users.[28] The Exchange's proposed user and enterprise fees are less (in most cases substantially less) than the fees charged by the CTA and CQ Plans, and the Exchange's enterprise fee also permits distribution by a non-broker-dealer.[29]

In addition to the competition and price discipline described above, the market for proprietary data products is also highly contestable because market entry is rapid and inexpensive. The history of electronic trading is replete with examples of entrants that swiftly grew into some of the largest electronic trading platforms and proprietary data producers: Archipelago, Bloomberg Tradebook, Island, RediBook, Attain, TrackECN, BATS Trading and Direct Edge. Today, BATS and Direct Edge provide certain market data at no charge on their Web sites in order to attract more order flow, and use revenue rebates from resulting additional executions to maintain low execution charges for their users.[30]

Further, data products are valuable to professional users only if they can be used for profit-generating purposes in their businesses and valuable to non-professional users only insofar as they provide information that such users expect will assist them in tracking prices and market trends and making order routing and trading decisions.[31] The Exchange believes that the proposed lower user fees and the enterprise fees, which may permit wider distribution of last sale and quote information at a lower cost to vendors with a large number of professional and non-professional users, may encourage more users to demand and more vendors to choose to offer NYSE BBO and NYSE Trades, thereby benefitting professional and non-professional users, including public investors. The Exchange also believes that offering NYSE Trades for non-professional users on a per user basis and providing the same information as is provided to professional users will create more choices for vendors that will allow them to offer products with the appropriate level of information at a range of prices, thereby encouraging wider distribution of the data.

In establishing the proposed fees, the Exchange considered the competitiveness of the market for proprietary data and all of the implications of that competition. The Exchange believes that it has considered all relevant factors and has not considered irrelevant factors in order to establish fair, reasonable, and not unreasonably discriminatory fees and an equitable allocation of fees among all users. The existence of numerous alternatives to the Exchange's products, including real-time consolidated data, free delayed consolidated data, and proprietary data from other sources, ensures that the Exchange cannot set unreasonable fees, or fees that are unreasonably discriminatory, when vendors and subscribers can elect these alternatives or choose not to purchase a specific proprietary data product if its cost to purchase is not justified by the returns any particular vendor or subscriber would achieve through the purchase.

[28] *See supra* n. 18.

[29] *See supra* nn. 19–20.

[30] This is simply a securities market-specific example of the well-established principle that in certain circumstances more sales at lower margins can be more profitable than fewer sales at higher margins; this example is additional evidence that market data is an inherent part of a market's joint platform.

[31] Rule 603(c) of Regulation NMS requires vendors to make the consolidated core data feeds available to customers when trading and order-routing decisions can be implemented. *See* 17 CFR 242.603(c).

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were solicited or received with respect to the proposed rule change.

III. 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) [32] of the Act and subparagraph (f)(2) of Rule 19b–4 [33] 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) [34] 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 (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov*. Please include File Number SR–NYSE–2013–58 on the subject line.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–NYSE–2013–58. 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 Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street NE., Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–NYSE–2013–58 and should be submitted on or before September 11, 2013.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[35]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2013–20337 Filed 8–20–13; 8:45 am]

BILLING CODE 8011–01–P

[32] 15 U.S.C. 78s(b)(3)(A).

[33] 17 CFR 240.19b–4(f)(2).

[34] 15 U.S.C. 78s(b)(2)(B).

[35] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–70207; File No. SR–OCC–2013–12]

Self-Regulatory Organizations; The Options Clearing Corporation; Notice of Filing of Proposed Rule Change To Revise Its By-Laws and Rules To Make Structural Changes to OCC's Membership/Risk Committee Regarding Public Directors and the Process for Designating Membership/Risk Committee Members

August 15, 2013.

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 August 2, 2013, The Options Clearing Corporation (''OCC'') 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 OCC. 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

OCC proposes to revise its By-Laws and Rules to make structural changes to OCC's Membership/Risk Committee (''MRC'') regarding Public Directors and the process for designating MRC members.

II. Clearing Agency's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, OCC 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. OCC has prepared summaries, set forth in sections (A), (B), and (C) below, of the most significant aspects of these statements.

(A) Clearing Agency's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

(1) Purpose

The purpose of this proposed rule change is to revise OCC's By-Laws and Rules to make structural changes to OCC's MRC regarding Public Directors [3] and the process for designating MRC members. The proposed rule change would require that at least one Public Director must serve on the MRC, that the MRC Chairman be a Public Director, and that all MRC members would be designated on an annual basis.

Currently, Article III, Section 9 of OCC's By-Laws specifies that at the first meeting of the Board of Directors that follows each annual meeting the Board must designate the Chairman of the Board, the Vice Chairman of the Board, and at least three other Member Directors to serve on the MRC. The By-Laws would be modified to provide that at least one Public Director must serve on the MRC and that the MRC Chairman must be a Public Director. These modifications would correspond to OCC's existing practice of having at least one Public Director serve on the MRC, and OCC believes that including this requirement in the By-Laws would help ensure that the MRC will continue

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] In relevant part, Article III, Section 6A of OCC's By-Laws defines a Public Director as a person who is ''not affiliated with any national securities exchange or national securities association or with any broker or dealer in securities[.]''

to operate in a manner that is appropriately free from outside influence and that therefore helps protect the interests of investors and the public.

The proposed rule change would also eliminate the requirement from the By-Laws that MRC members must be designated at the first meeting of OCC's Board of Directors that follows each annual meeting. Instead, the only timing requirement in the By-Laws would be for MRC members to be designated annually. OCC believes this change to the By-Laws would provide OCC's Board with appropriate flexibility to decide when it is best for new MRC member designations to be made.

As amended, Article III, Section 9 of OCC's By-Laws would provide that the Public Director(s) would be nominated to serve on the MRC by the Chairman of the Board and that any nomination would be subject to approval by the Board of Directors. Article III, Section 9 would also provide that the Chairman of the MRC would be required to be a Public Director. If more than one Public Director is nominated to serve on the MRC, the Chairman of the Board would nominate one of the Public Directors to serve as the MRC Chairman. Any such nomination by the Chairman of the Board would be subject to Board approval. OCC also proposes to make technical corrections in Article III, Section 9 to eliminate specific references to Article V of the By-Laws and Chapter VI of the Rules in order to avoid any erroneous inference that those are the only provisions of the By-Laws and Rules that set forth powers and duties of the MRC, which are in fact contained in many other provisions of the By-Laws and Rules as well.[4]

(2) Statutory Basis

OCC believes that the proposed rule change is consistent with Section 17A(b)(3)(F)[5] of the Act[6] and the rules and regulations thereunder, including Rule 17Ad–22(d)(8),[7] because these requirements with respect to Public Directors in OCC's By-Laws would protect investors and the public interest by promoting the continued operation of the MRC in a manner that is appropriately free from outside influence. By including in the By-Laws the existing practice of having at least one Public Director serve on the MRC and by further requiring that the MRC Chairman be a Public Director, the proposed modifications would help ensure that OCC's governance arrangements are clear and transparent, fulfill the public interests requirements in Section 17A, support the objectives of owners and participants, and promote the effectiveness of OCC's risk management procedures.[8] OCC further believes that the proposed change to the By-Laws to require a Public Director to serve as the MRC Chairman is consistent with explanatory note 3.2.14 to Principle 2 of the Principles for Financial Market Infrastructures that recommends that a risk committee be chaired by a sufficiently knowledgeable independent board member.

(B) Clearing Agency's Statement on Burden on Competition

OCC does not believe that the proposed rule change would impose a burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.[9] With respect to any burden on competition among clearing agencies, OCC is the only clearing agency that performs central counterparty services for the options markets.

Changes to the rules of a clearing agency may have an impact on the participants in a clearing agency and the markets that the clearing agency serves. This proposed rule change primarily affects OCC in that it would require at least one Public Director to serve on the MRC, the MRC Chairman to be a Public Director, and all MRC members to be designated on an annual basis. OCC does not believe that these changes with respect to governance would treat any clearing member or group of clearing members disparately or otherwise disparately affect access to or use of any of OCC's facilities or disadvantage or favor any user in relationship to any other such user. In fact, OCC believes that the proposed requirement that at least one member be a Public Director and that the MRC Chairman be a Public Director would promote competition by lessening the influence that any particular clearing member may have on the MRC.

For the foregoing reasons, OCC believes that the proposed rule change is in the public interest, that it would be consistent with the requirements of the Act applicable to clearing agencies, and would not impose any burden on competition that is unnecessary or inappropriate in furtherance of the purposes of the Act because the changes would help ensure that the MRC continues to operate in a manner that is appropriately free from outside influence and therefore help promote the purposes of the Act and Rule 17Ad–22(d)(8)[10] thereunder as described above.

(C) Clearing Agency's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

Written comments on the proposed rule change were not and are not intended to be solicited with respect to the proposed rule change and none have been received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 45 days of the date of publication of this notice in the **Federal Register** or within such longer period up to 90 days (i) as the Commission may designate if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

(A) By order approve or disapprove such proposed rule change, or

(B) institute proceedings to determine whether the proposed rule change should be disapproved.

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–OCC–2013–12 on the subject line.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549.

All submissions should refer to File Number SR–OCC–2013–12. 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 Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the

[4] For example, see Article I, Section G (6) of the By-Laws and Rules 214(b), 305(c), and 309(e).

[5] 15 U.S.C. 78q–1(b)(3)(F).

[6] 15 U.S.C. 78a *et. seq.*

[7] 17 CFR 240.17Ad–22(d)(8).

[8] *Id.*

[9] 15 U.S.C. 78q–1(b)(3)(I).

[10] 17 CFR 240.17Ad–22(d)(8).

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 Web site viewing and printing in the Commission's Public Reference Room, 100 F Street NE., Washington, DC 20549 on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of OCC and on OCC's Web site: *http://www.theocc.com/components/docs/legal/rules_and_bylaws/sr_occ_13_12.pdf.*

All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–OCC–2013–12 and should be submitted on or before September 11, 2013.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[11]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2013–20335 Filed 8–20–13; 8:45 am]

BILLING CODE 8011–01–P

[11] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–70218; File No. SR–NYSE–2013–33]

Self-Regulatory Organizations; New York Stock Exchange LLC; Notice of and Order Granting Accelerated Approval of Proposed Rule Change, as Modified by Amendment No. 1 to: (i) Delete the Sections in the Listed Company Manual (the ''Manual'') Containing the Listing Application Materials (Including the Listing Application and the Listing Agreement) and Adopt Updated Listing Application Materials that will be Posted on the Exchange's Web site; and (ii) Adopt As New Rules Certain Provisions that are Currently Included in the Various Forms of Agreements That Are in the Manual, As Well As Some Additional New Rules that Make Explicit Existing Exchange Policies with Respect to Initial Listings

August 15, 2013.

I. Introduction

On April 30, 2013, the New York Stock Exchange LLC (''NYSE'' or the ''Exchange'') filed with the Securities and Exchange Commission (''SEC'' or ''Commission''), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'')[1] and Rule 19b–4 thereunder,[2] proposed rule changes (''Proposal'') to (i) delete the sections in the Listed Company Manual (the ''Manual'') containing the listing application materials (including the listing application and the listing agreement) and adopt updated listing application materials that will be posted on the Exchange's Web site; and (ii) adopt as new rules certain provisions that are currently included in the various forms of agreements that are in the Manual, as well as some additional new rules that make explicit existing Exchange policies with respect to initial listings. The proposed rule change was published for comment in the **Federal Register** on May 17, 2013.[3] The Commission received one comment letter on the proposal.[4] On June 27, 2013, the Commission extended the time period in which to either approve, disapprove, or to institute proceedings to determine whether to disapprove the Proposals, to August 15, 2013.[5] On August 14, 2013, the Exchange filed Amendment No. 1 to the proposed rule change.[6] This order approves the proposed rule change, as modified by Amendment No. 1, on an accelerated basis.

II. Background

The Exchange proposes to: (i) delete the sections in the Manual containing the listing application materials (including the listing application and the listing agreement) and adopt updated listing application materials that will be posted on the Exchange's Web site; and (ii) adopt as new rules certain provisions that are currently included in the various forms of agreements that are in the Manual, as well as some additional new rules that make explicit existing Exchange policies with respect to initial listings.

Changes to the Listed Company Manual

The Exchange proposes changes to the Manual's requirements detailing the information an applicant is required to provide.[7] The Exchange has proposed to amend Sections 102.01C(F) and 103.01B(C) by adding language stating that the form of listing application and information regarding support documents required in connection with

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 69565 (May 13, 2013), 78 FR 29165 (''Notice'').

[4] *See* Letter to Elizabeth M. Murphy, Secretary, Commission, from Shinichi Yuhara, dated June 4, 2013.

[5] *See* Securities Exchange Act Release No. 69878, 78 FR 40260 (July 3, 2013) (SR–NYSE–2013–33) (''Notice''). This letter suggested changing the title of proposed Section 107.01 to ''Accounting Standards,'' a change made by the Exchange in Amendment No. 1.

[6] Amendment No. 1, in pertinent part, corrects some minor errors in the marking of the rule text included in the initial filing (although these changes were accurately explained in the Purpose section to the notice), amends the title of proposed new rule 107.01, and deletes two provisions, amends one provision included in the proposed forms of listing agreements included in the initial filing, and amends the statutory basis section of the initial rule filing to specify that Section 904.03 (''Due Bill'' Form Letter) will be renumbered as Section 904.01. This change was correctly reflected in the purpose section of the initial filing, however the statutory basis section of the initial filing inadvertently stated that Section 904.03 was being deleted rather than renumbered.

[7] All rule references in this filing are to sections of the Manual unless otherwise specified. In addition to the changes discussed herein, the Exchange proposes to amend the following sections of the Manual to remove cross-references therein to sections that are proposed to be deleted or amended and to state that the required documents are on the Exchange's Web site or available from the Exchange upon request: Sections 102.01C(F) (Minimum Numerical Standards—Domestic Companies—Equity Listings); 103.01B(C) (Minimum Numerical Standards Non-U.S. Companies Equity Listings); 103.04 (Sponsored American Depository Receipts or Shares (''ADRS'')); 204.00(B) (Notice to and Filings with the Exchange); 204.04 (Business Purpose Changed); 204.13 (Form or Nature of Listed Securities Changed); 204.18 (Name Change); and 204.23 (Rights or Privileges of Listed Security Changed Last Modified: 8/21/2006). *See* Notice, *supra* note 3.

adjustments to historical financial data will be available on the Exchange's Web site or from the Exchange upon request. Similar changes are proposed for Sections 103.04 (with respect to American Depository Receipts), 104.01 (Domestic Companies), and 104.02 (Non-U.S. Companies).

New Section 104.00 would describe a free confidential review of the eligibility for listing undertaken by the Exchange of any company that: (i) Requests such a review; and (ii) provides the documents listed in Section 104.01 (domestic companies) or Section 104.02 (non-U.S. companies). A company may submit an original listing application only after it has been cleared to do so by the Exchange following the completion of a confidential eligibility review.

New Section 107.00 (''Financial Disclosure and Other Information Requirements'') would specifically set forth in the Manual certain financial requirements that NYSE states it currently requires of companies listing on the Exchange. Specifically, (i) new Section 107.01 would outline the accounting standards applicable to listed companies, (ii) new Section 107.02 would require all companies applying for initial listing to be audited by an independent public accountant registered with the Public Company Accounting Oversight Board, (iii) new Section 107.03 would stipulate that no security will be approved for listing if the issuer has not, for the 12 months immediately prior to the date of listing, timely filed all periodic reports required to be filed with the Commission or Other Regulatory Authority (as defined in the rule), and (iv) new Section 107.04 would require all companies applying to list on the Exchange to provide the Exchange with any information or documentation necessary to make a determination regarding the initial listing.

The Exchange proposes to amend Sections 204.00, 204.04, 204.13, 204.18 and 204.23 to include a statement that the form of listing application and information regarding supporting documents required in connection with the listing application would be available on the Exchange's Web site or from the Exchange upon request.

The Exchange proposes to add a requirement to Section 311.01 that would stipulate that partial redemptions of listed securities must be done on a pro rata basis or by lot. In conjunction with this change, the Exchange has proposed to delete this requirement from the listing agreements for domestic and non-U.S. companies.

The Exchange proposes to add a requirement to Section 501.01 that would require listed companies to issue new certificates for listed securities replacing lost ones upon notification of loss of the original certificate and receipt of proper indemnity. In conjunction with this change, the Exchange has proposed to delete this requirement from the listing agreements for domestic and non-U.S. companies.

The Exchange further proposes to add a requirement to Section 501.02 that would require that, in the event of the issuance of any duplicate bond to replace a bond which has been alleged to be lost, stolen or destroyed and the subsequent appearance of the original bond in the hands of an innocent bondholder, either the original or the duplicate bond must be taken up and cancelled and the issuer must deliver to such holder another bond. In conjunction with this change, the Exchange has proposed to delete this requirement from the listing agreements for domestic and non-U.S. companies.

The Exchange has proposed to add certain requirements to Section 601.01 that were not previously embodied in any other rule. Provisions being added to Section 601.01(A) would require a transfer agent to comply with the rule of the Exchange, maintain officer for the purposes of transfer activities that are staffed by experienced personnel, provide adequate facilities foe the safekeeping of securities, maintain facilities to expedite transfers, and appoint an agent for service of process. A provision added to Section 601.01(B) would require the transfer agent to take immediate corrective action if the transfer agent's independent auditor specifies any material weaknesses, and provide a letter to the Exchange indicating that the material weaknesses have been corrected. The Exchange further proposes to delete Section 601.03 in its entirety, as it relates solely to the transfer agent and registrar agreements which the Exchange has also proposed to eliminate.

The Exchange proposes to amend Section 702.00 (Original Listing Application Securities of Other than Debt Securities) to replace the information currently in that section with a general outline of the listing process designed to be more descriptive of the listing process.[8] If, upon completion of this review, the Exchange determines that a company is eligible for listing, the Exchange will notify that company in writing (the ''clearance letter'') that it has been cleared to submit an original listing application.[9]

Upon receiving a clearance letter, a company choosing to list must file an original listing application.[10] Section 702.00 states that a company should submit drafts of the original listing application and other required documents as far in advance as possible of the time it seeks Exchange authorization of its application. Promptly after making a determination that a company is eligible to list but subject to payment of the Initial Application Fee, the Exchange shall inform such company in writing that it is entitled to receive a clearance letter upon payment of the applicable Initial Application Fee.[11]

In addition to the changes to Section 702.00 discussed above, the Exchange has proposed to delete Sections 702.01 (Introduction), 702.02 (Timetable for Original Listing of Securities Other than Debt Securities), 702.03 (Submission of Listing Application), 702.04 (Supporting Documents) and 702.05 (Printing of Application) and renumber subsequent sections. Section 702.01 describes the listing application as historically used, which was not on a set form and required companies to provide a narrative of the information relevant to the particular issue. The listing application form used going forward will be in the form of a questionnaire and the Exchange has stated that it will not require the sort of narrative that was historically included in the listing application, as this information, according to the Exchange, is typically all readily available in the company's Commission filings. In its filing, the NYSE stated that Section 702.02 is being eliminated because the timeline provided in that Section does not necessarily bear any relation to the listing experience of any individual company and, according to NYSE, is of

[8] The revised description states that a company that does not have any other class of securities listed on the Exchange must first seek a free confidential review of its listing eligibility as set forth in Section 104.00.

[9] A clearance letter is valid for nine months from its date of issuance. If a company does not list within the nine month period, but wishes to list thereafter, the Exchange will perform another confidential listing eligibility review as a condition to the issuance of a new clearance letter.

[10] The original listing application and other required supporting documents can be found on *www.nyx.com*.

[11] Section 902.03 requires certain categories of listing applicants to pay an Initial Application Fee as a prior condition to receipt of eligibility clearance. In its filing, the NYSE stated that the purpose of the notification in Section 702.00 is to assure any such company that it will not have to pay a non-refundable Initial Application Fee subject to any risk that it will not subsequently receive a clearance letter. Applicants that are not subject to the Initial Application Fee will not receive any similar notification, but rather will receive a clearance letter promptly after the Exchange has made an eligibility determination.

limited practical value. Section 702.03 (Submission of Listing Application) is being deleted as the Exchange's requirements with respect to the submission of copies of the listing application will, as a result of the NYSE's proposal, now be set forth in detail in listing checklists posted on the Exchange's Web site. Section 702.04 (Supporting Documents) is also being deleted since, to the extent that the documents described in Section 702.04 continue to be relevant to the listing process, the Exchange will request them from issuers pursuant to the listing application checklists that will be available on the NYSE's Web site.

The following supporting documents currently required by Section 702.04, in its current form, and a brief discussion of whether each individual document will continue to be required under the NYSE's proposal and, if not, why not is discussed below:

• *Signed Application:* The Exchange will continue to require copies of the signed application but will require two signed copies of the application going forward rather than the signed copy and five conformed copies specified in Section 702.04 as fewer copies are needed for internal record keeping purposes.

• *Charter and By-Laws:* The charter and by-laws will continue to be required, but the copies will no longer need to be certified as certification is not necessary for the Exchange's review.

• *Resolutions:* The Exchange will continue to require copies of the applicable board resolutions, although they will no longer need to be certified, as certification is not necessary to the Exchange's review.

• *Opinions of Counsel/Certificate of Good Standing:* These documents will continue to be required.

• *Stock Distribution Schedule:* The Exchange proposes to eliminate the stock distribution schedule requirement as the Exchange believes it is obsolete because distribution information is available from the applicant's public filings and from its transfer agent.

• *Certificate of Transfer Agent/ Certificate of Registrar:* The Exchange proposes to no longer require these documents because, according to the Exchange, the information about the applicant's outstanding shares is available in its prospectus or periodic Commission reports, as well as the report of the applicant's outstanding shares that will be required to be delivered to the Exchange once a quarter after listing.

• *Notice of Availability of Stock Certificates:* The Exchange proposes to no longer require this document as all transactions in listed securities in the national market system are conducted electronically through Depository Trust & Clearing Corporation (''DTCC'').

• *Specimens of the Securities for Which Listing Application is Made:* The Exchange proposes to continue to require copies of specimen certificates, if any.

• *Public Authority Certificate:* The Exchange proposes to continue to require public authority certificates, where applicable.

• *Prospectus:* The Exchange does not propose to continue to require applicants to provide copies of their final prospectuses, as they are publicly available through the Commission's EDGAR system.

• *Financial Statements:* The Exchange does not propose to continue to require applicants to provide copies of their financial statements, as they are included in the applicant's Commission filings which are publicly available through the Commission's EDGAR system.

• *Adjustments to Historical Financial Data:* The Exchange proposes to continue to require companies to provide copies of any adjusted financial data used in connection with the financial qualification for listing of the applicant.

• *Listing Agreement:* The Exchange proposes to require the applicable form of the proposed revised listing agreement as set forth in amended Exhibit 3 of the filing.

• *Memorandum with Respect to Unpaid Dividends, Unsettled Rights and Record Dates:* The Exchange proposes to no longer require this document, as all of the required information is included in the proposed revised listing application detailed in amended Exhibit 3 of the filing.

• *Registration form under the Securities Exchange Act of 1934:* The Exchange proposes to continue to require applicants to supply this document.

The Exchange noted that the second paragraph of Section 702.04 requires applicants to provide required documents at least one week prior to listing or, if this is not possible because of the nature of the document in question, as soon as practicable thereafter, but in any event prior to the first day of trading subject to the Exchange's conditional listing approval. Although the Exchange has proposed to delete Section 702.04, amended Section 702.00 will contain a similar requirement, with the exception of specifying the supporting documents be submitted one week before the Exchange needs to take action.

Section 702.05 (Printing of Application) is being deleted as it is obsolete and the Exchange has not distributed printed copies of approved listing applications for many years. In addition, the Exchange believes that the listing application has lost its relevance as a disclosure document in recent decades due to the development of the SEC's own comprehensive disclosure system.

Section 703.00 is being amended by modifying subsections 703.01 through 703.14, relating to the application process and the filing of the listing application and any supplemental, or supporting, documents. References to the form of supplemental listing application set forth in Section 903.02 and also the lists of documents required to be submitted in connection with the relevant supplemental listing application are being deleted from these subsections. Various subsections will no longer contain a listing of the supplemental documents to be provided to the Exchange, but will state that the form of listing application and information regarding supporting documents required in connection with supplemental listing applications and debt securities applications are available on the Exchange's Web site or from the Exchange upon request. Section 703.01 Parts 1(A) and 2(B) and (C) currently require, respectively, that the application be in the form of a memo from the company and four signed typewritten copies of the supplemental listing applications provided to the Exchange. Section 703.01 Part 2(B) is being revised to remove an obsolete reference to the Exchange's weekly bulletin. Furthermore, Section 703.01 Part 2 (D) and (E), which refer to data that is to be provided in any subsequent listing application and a statement that the application need not be typed, are being removed from the Manual.

Section 802.01D is being revised with a provision explicitly providing that the Exchange may delist a company for a breach of the terms of its listing agreement.

In addition to the above described changes, various sections of the Manual are being revised to remove, or update, obsolete or incorrect cross-references.[12]

Proposed Changes to Listing Agreements

The Exchange proposes to remove from the Manual the current form of listing agreements for various types of company. In addition, the Exchange seeks to update the listing agreements used to reflect current practices at the exchange. According to the NYSE, the

[12] *See,* Notice, *supra* note 3

current form of listing agreements contained in the Manual reflect practices at the Exchange and in the securities markets generally that are no longer prevalent, such as the transfer of physical securities in Exchange transactions rather than the contemporary system of book entry transfer through DTCC. Consequently, NYSE believes that there are provisions in the listing agreements that are obsolete and the Exchange has proposed to delete these provisions.

The Exchange proposes to eliminate the Listing Securities Fee Agreement set forth in Section 902.01 of the Manual in its entirety.

The form of original listing application supplemental listing application, and summary of such applications contained in Section 903.01, Section 903.02, and 903.03, respectively, are being deleted from the Manual in their entirety. A revised form of the original listing application and the existing forms of the supplemental listing applications for certain issuances were provided in Exhibit 3 as part of the filing and these forms will be provided on the Exchange's Web site.

The Stock Distribution Schedule in Section 904.01 is being deleted as the Exchange obtains the distribution information required in Section 904.01 from the company's transfer agent. Exchange proposes to require applicants to provide the information in Section 904.02 (Unpaid Dividends, Unsettled Rights, and Record Dates—Memorandum) in the revised form of original listing application and, therefore, is deleting Section 904.02. In addition, Sections 904.03 (''Due Bill'' Form Letter) and 904.04 (Foreign Currency Warrants and Currency Index Warrants and Stock Index Warrants membership Circular) will be renumbered Sections 904.01 and 904.02, respectively.

Listing Agreements

In addition to changes to the various Section of the Manual, the Exchange has also proposed to make changes to the various Listing Agreements contained in the Manual. The revised listing agreements will be available on the Exchange's Web site and were submitted as part of the rule filing in Exhibit 3, and the amended forms submitted in the Exhibit 3 to Amendment No. 1. Specifically, the Exchange is removing Sections 901.01 (Listing Agreement for Domestic Companies), 901.02 (Listing Agreement for Foreign Private Issuers), 901.03 (Listing Agreement for Depository of a Foreign Private Issuer), 901.04 (For Japanese Companies—Free Share Distribution Understanding), and 901.05 (Listing Agreement for Voting Trusts). Although the Exchange is removing each of these agreements from the Manual, the Exchange will still be using each of these agreements, although in the listing agreements for domestic companies in 901.01 and foreign companies in 901.02 will be modified.

The Exchange proposes to delete from the domestic and foreign private issuers listing agreement certain requirements contained elsewhere in either the Manual or SEC Rules.[13] Such provisions, among other things, relate to: (i) Changes in the general character or nature of the company's business; (ii) changes in the company's officers or directors; (iii) disposition of any property or of any stock interest in any subsidiary or controlled companies; and (iv) change in, or removal of, collateral deposited under any mortgage or trust indenture, under which securities of a company listed on the Exchange has been issued. The Exchange has also proposed to remove from the listing agreement the requirement that a company file with the Exchange: (i) four copies of all material mailed by a company to its stockholders with respect to any amendment or proposed amendment to its Certificate of Incorporation; (ii) a copy of any amendment to a company's Certificate of Incorporation, or resolution of Directors in the nature of an amendment, certified by the Secretary of the state of incorporation, as soon as such amendment or resolution shall have been filed in the appropriate state office; and (iii) a copy of any amendment to a company's By-Laws. The Exchange has also proposed to remove from the listing agreement the requirement that a company disclose: (i) in its annual report to shareholders certain information relating to options and options plan;[14] and (ii) certain information relating to the reacquisition or disposition of previously issued stock for the company's account, within ten days after the close of a fiscal quarter.[15]

In addition, the Exchange is proposing to delete the requirement that a company notify the Exchange of all facts relating to the purchase, direct or indirect, of any of its securities listed on the Exchange at a price in excess of the market price of such security prevailing on the Exchange at the time of such purchase.[16] The requirement prohibiting a company from selecting any of its securities listed on the Exchange for redemption otherwise than by lot or pro rata, and from setting a redemption date earlier than fifteen days after the date corporate action is taken to authorize the redemption is also being deleted.[17] The Exchange is further proposing to delete the requirement that a company give notice of any corporate action which will result in the redemption, cancellation or retirement, in whole or in part, of any of its securities listed on the Exchange. The requirement that a company notify the Exchange at least 10 days in advance of action taken to fix a stockholders' record date, or to close the transfer books, for any purpose, is being deleted because it already is contained in Sections 204.06, 204.17, 204.21 and 401.02 of the Manual.

The Exchange is also proposing to delete the requirement that, in case the securities to be listed are in temporary form, the company agrees to order permanent engraved securities within thirty days after the date of listing because all securities traded through the facilities of the Exchange are now traded electronically. The requirement prohibiting a company from making any change in the form or nature of any of its securities listed on the Exchange, nor in the rights or privileges of the holders thereof, without having given twenty days' prior notice to the Exchange of the proposed change, and having made application for the listing of the securities as changed if the Exchange shall so require, is being removed from the listing agreement.[18] The Exchange also proposes to delete the requirement that a company make available to the Exchange, upon request, the names of member firms of the Exchange which are registered owners of stock of the Corporation listed on the Exchange.

The requirement to notify the Exchange of any diminution in the supply of stock available for the market occasioned by deposit of stock under voting trust agreements or other deposit

[13] *See* Notice, *supra* note 3. The Commission notes that although these items are being removed from the listing agreement, the underlying obligation to provide this information continues to exist in some form either through NYSE rules or Commission requirements.

[14] According to the NYSE, this information is no longer necessary because Commission rules provide for comprehensive disclosure regarding options as the Commission previously approved removal of a similar requirement in an NYSE rule for that reason.

[15] According to the Exchange, this is no longer needed in the agreement because it is identical to requirement 204.25 of the Manual.

[16] *See* Notice, *supra* note 3, which discusses why the Exchange believes this isn't necessary.

[17] The Commission notes that the Exchange has proposed to add a requirement to Section 311.01 that would stipulate that partial redemptions of listed securities must be done on a pro rata basis or by lot. The other provisions being deleted are already in existing Section 204.22 and 311.01.

[18] The Commission notes that this requirement will continue to exist in Section 204.13 of the Manual.

agreements is also being deleted.[19] The Exchange has proposed to delete the requirement that a company make application to the Exchange for the listing of additional amounts of securities listed on the Exchange sufficiently prior to the issuance thereof to permit action in due course upon such application.[20]

The Exchange proposes to delete the provision requiring a company publish at least once a year and submit to its stockholders at least fifteen days in advance of the annual meeting of such stockholders, and not later than three months after the close of the last preceding fiscal year of the Corporation, certain balance sheets, a surplus and income statements.[21] As noted by the Exchange, this requirement is in some respects duplicative of Commission rules. In addition, the Exchange is deleting the requirement, in the listing agreement, that: (i) All financial statements contained in annual reports of a company to its stockholders be audited by independent public accountants qualified under the laws of some state or country, and will be accompanied by a copy of the certificate made by them with respect to their audit of such statements showing the scope of such audit and the qualifications, if any, with respect thereto; [22] and (ii) the company promptly notify the Exchange if it changes its independent public accountants regularly auditing the books and accounts of the company. The Commission notes that this requirement will continue to exist in Section 204.03. The requirement that all financial statements contained in a company's annual reports to its stockholders be in the same form as the corresponding statements contained in the company's listing application, and disclose any substantial items of unusual or non-recurrent nature, is also being deleted.

The requirement that a company or its subsidiaries not make any substantial charges against capital surplus, without notifying the Exchange is being removed from the listing agreement.[23] The requirement that a company or its subsidiaries not make any substantial change in accounting methods or policies as to depreciation and depletion, or in bases of valuation of inventories or other assets, without providing notice and disclosure of such change is being deleted. The Exchange also proposes to delete from the listing agreement the requirement that a company will maintain an audit committee in conformity with Exchange requirements.[24]

The requirement that a company maintain an office or agency for specified corporate purposes is being deleted along with the requirement that a company maintain registrar for specified corporate purposes. The requirement that a company have on hand at all times a sufficient supply of certificates to meet the demands for transfer and provide copies of preferences of stock classes in certain circumstances is being deleted. The Exchange proposes to delete certain requirements that a company publish information in connection with certain corporate actions along with the requirement for domestic companies that a company solicit proxies for all meetings of stockholders.[25] The foreign listing agreement will, however, be modified as noted below to include a solicitation requirement.

Some of the key provisions that will be included in the reformulated listing agreements for domestic companies and foreign private issuers are: (i) A certification by the issuer that it understands and agrees to comply with all current and future rules, listing standards, procedures and policies of the Exchange; (ii) an agreement by the issuer to promptly notify the Exchange in writing of any corporate action or other event which will cause the issuer to cease to be in compliance with Exchange listing requirements; (iii) the issuer agrees to maintain a transfer agent and registrar which satisfies the requirements set forth in Section 601.00 of the Manual et seq.; (iv) the issuer agrees to file all required periodic financial reports with the SEC, including annual reports and, where applicable, quarterly or semi-annual reports, by due date established by the SEC; (v) the issuer agrees to comply with all requirements under the federal securities laws and applicable SEC rules; and (vi) that nothing contained in, or inferred from the listing agreement shall be construed as constituting a contract for the continued listing of the company's securities and that the company understands that the Exchange may suspend the company's securities and commence delisting proceedings with or without prior notice upon failure of the company to comply with one or more sections of the listing agreement. In addition to the above key provisions, foreign private issuers must also agree to: (i) Solicit proxies from U.S. holders for all meetings of shareholders; and (ii) not appoint any successor or additional Depository unless such Depository has entered into a listing agreement with the Exchange.

Listing Application

The Exchange has proposed deleting from the Manual the form of original listing application contained in Section 903.01 (Listing Applications). The revised form of original listing application will be provided on the Exchange's Web site. In general, the information the Exchange proposes to remove from the Listing Application is being removed because the Exchange believes such information is available in the applicant's filings with the SEC, made pursuant to the Exchange Act or the Securities Act of 1933.[26] Information being removed from the Listing Application includes the following: (i) A discussion of the history and present business of the company; (ii) for public utilities, a description of the services renders, territory and population covered, and other segmented information about the utility; (iii) a description of the physical property of the company; (iv) information related to affiliated companies; (v) information related to 10% owners of the company; (vi) a description of control held by another company; (vii) information related to the management of the company, including names and titles of all directors and officers; (viii) a summary of the authorized stock

[19] The Commission notes that this requirement will continue to exist in Section 204.09 of the Manual.

[20] The Commission notes that this requirement will continue to exist in Section 703.01 Part 2 of the Manual.

[21] For foreign private issuers, the NYSE notes that eliminating this requirement is a substantive change. However, in its original filing, NYSE stated that the SEC's proxy rules are not applicable to foreign private issuers and, in conformity with that position, the NYSE does not intend to impose such requirements itself. The Commission notes that certain companies will still be required to comply with the Commission's proxy rules, applicable to domestic listed companies, contained in Regulation 14A—Solicitation of Proxies, which requires issuers to distribute annual reports when soliciting proxies. *See also,* note 38, *infra,* and accompanying text.

[22] The Commission notes that this requirement will continue to exist in new Section 107.02 of the Manual.

[23] The Commission notes that this requirement will continue to exist in Section 204.05 of the Manual.

[24] The Commission notes that this requirement will continue to exist in Sections 303A.06 and 303A.07 of the Manual. *See* Notice, *supra,* note 3.

[25] The Commission notes that these requirements will continue to exist in Sections 202.05, 202.06, 202.12 and 402.04 of the Manual. *See* Notice, *supra* note 3.

[26] 15 U.S.C. 77a. When listing a company in connection with its initial public offering or other securities offering, the Exchange relies on the company's Securities Act prospectus that registered the transaction. *See* Notice, *supra* note 3 for details of the types of filings NYSE relies on for companies transferring from another market or over-the-counter market, or listing in connection with certain transactions.

capitalization of the company since organization; (ix) a description of the funded debt of the company and any subsidiaries or controlled companies; (x) a summary of the rights, preferences, privileges and priorities of the stock of the company along with any indentures or restrictions related to the stock; (xi) a description of the number of employees along with a description of any work stoppages due to labor disagreements and any pension, retirement, bonus or other plans of benefit which may be in effect; (xii) a description of shareholder relations procedures that are followed; (xiii) a description of any dividends paid; (xiv) a description of the terms and conditions of any options, purchase warrants, conversion rights or other commitments which may require the company to issue its securities; (xv) a description of all pending litigation of a material nature; (xvi) information relating to the independent public accountants, Chief Executive Officer, Chief Financial Officer, any potential future commodity commitments the company may make, and other policies that could be material in determining the company's financial position; and (xvii) information relating to the financial statements of the company. Specific information that will continue to be required as part of the application, although in a different form, includes: (i) A statement that the application is the company's original listing application; and (ii) a description of the shares being offered (number, date of authorization, and purpose of authorized but unissued shares).

Transfer Agent Agreements

The Exchange has proposed to delete from the Manual the forms of transfer agent and registrar agreements currently set forth in Sections 906.01, 906.02 and 906.03 of the Manual. In both of its revised listing agreements, the Exchange has included an explicit agreement by the applicant issuer to abide by the transfer agent and registrar requirements set forth in Section 601.00 of the Manual *et seq.* The Exchange does not believe the use of transfer agent and registrar agreements is necessary because, as is detailed in the Notice, each provision contained in the transfer agent and registrar agreements can also be found in Section 601.00 of the Manual *et seq.* Furthermore, the Exchange does not believe it needs to enter into agreements with the transfer agent and registrar because any company whose transfer agent and registrar do not comply with Section 601.00 of the Manual *et seq,* would not be eligible for original, or continued, listing on the Exchange.

III. Discussion and Commission Findings

After careful review, the Commission finds that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange.[27] Specifically, the Commission finds that the Proposal is consistent with Section 6(b)(5) of the Act,[28] in that it is 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 facilitating transactions in securities, and to remove impediments to and perfect the mechanisms of a free and open market and a national market system, and, in general, to protect investors and the public interest. In particular, as discussed in more detail below, the Commission believes that the Proposal is consistent with the investor protection and public interest goals of the Exchange Act because the rules of the Exchange will continue to ensure that the NYSE has the information needed, whether through Commission filings or the applicant issuer, to conduct a rigorous review of an application for listing. In addition, among other things, and as discussed in more detail below, the rule changes should increase transparency in the listing process as well as further investor protection by codifying into the listing agreement the requirement that a listed company must comply with all the rules of the Exchange as well as the federal securities laws and rules thereunder.

The Commission finds that the changes proposed to Sections 102.01C, 103.01B, 103.04, 104.01, 104.02, 204.00, 204.04, 204.13, 204.18, 204.23, 703.01 (part 1), 703.02 (part 3), 703.04, 703.05, 703.06, 703.07, 703.08, 703.09, 703.10, 703.11, 703.12, 703.13, 703.14, each of which provide that the form of listing application and information regarding supporting documents are available on the Exchange's Web site or from the Exchange upon request, are consistent with the act in that they make the necessary forms widely available. The Commission notes, and the Exchange acknowledged in its original filing, that in the event that the Exchange makes any substantive changes to the documents being removed from the Manual,[29] the Exchange will be required, under Section 19b(1) of the Act, to submit a rule filing to obtain approval of such changes.[30] Furthermore, the Commission notes that the Exchange has represented that it will maintain all historical versions of those documents on its Web site after changes have been made in order to make it possible to review how each document has changed over time.[31]

The Exchange proposed to add new Section 104.00 describing the Exchange's free confidential review process. The application process is further described in Section 702.00 which describes the steps an issuer must follow in obtaining a clearance letter. Among other clarifications about the confidential review and listing process, the new language states that if a company has to pay an initial application fee, that it will be informed in writing that upon payment of the fee, it will receive a clearance letter to list. This process should give issuers certainty that they will not have to pay a non-refundable initial application fee if they will not be receiving a clearance letter to list. The Commission finds the addition of rule language describing the application process to be consistent with the protection of investor and the public interest in that it makes the listing application process more transparent for issuers.

The Exchange has proposed to amend Sections 104.01 and 104.02 to remove the requirement that the copy of the charter and by-laws (or equivalent constitutional documents) be certified and to require that specimens of bonds or stock certificates be provided only if they exist. The Commission finds these changes to be consistent with the protection of investors and the public interest in that they make it easier for issuers to comply with the listing application requirements without weakening the quality of information provided to the Exchange.

The Exchange believes that the provisions the Exchange proposes to

[27] In approving this proposed rule change, the Commission has considered the proposed rule's impact on efficiency, competition and capital formation. 15 U.S.C. 78c(f).

[28] 15 U.S.C. 78f(b)(5).

[29] As noted in the Notice, these documents include the listing application and the listing agreement. *See* 78 FR 29165. These documents were submitted as part of the NYSE's rule filing as Exhibit 3 and amended Exhibit 3 to the filing.

[30] *See* 78 FR 29165. The Exchange represented that in the event that the Exchange makes any substantive changes (including changes to the rights, duties, or obligations of the applicant or the Exchange, or that would otherwise require a rule filing), it will submit a rule filing to the Commission to obtain approval of such changes. The Exchange noted that it would not submit a rule filing if the changes made to a document are typographical or stylistic in nature.

[31] The Commission notes that this should allow it to monitor for compliance with Section 19(b) of the Act.

include in new Section 107.00 are consistent with the protection of investors and the public interest. The requirements included in proposed Section 107.00 are all policies the Exchange has long applied as part of its initial listing process and they are important in ensuring that only qualified companies are admitted to listing. These provisions specify the accounting standards upon which a listing determination will be made, require the issuer's auditor to be PCAOB registered, require the timely filing of periodic reports, and comply with any Exchange requests for additional information and documentation. The Commission finds these provisions to be consistent with the Act in that they provide the Exchange with additional abilities to ensure that only qualified companies are listed on the Exchange.

The Exchange further proposed to change Section 501.01 to require listed companies to issue new certificates for securities listed on the Exchange, replacing lost ones upon notification of the loss and receipt of proper indemnity. Amended Section 501.02(c) would require that, following the issuance of a duplicate bond issued to replace a lost, stolen or destroyed bond, should the original bond subsequently appear in the hands of an innocent bondholder, the original or duplicate bond must be taken up and cancelled. The Commission notes that these provisions are identical to those currently set forth in the existing forms of listing agreements, which the Exchange is proposing now to delete from the Manual in this filing. The Commission believes these provisions are consistent with the Act in that they are intended to protect shareholders and innocent bondholders.

The Exchange has proposed to delete Sections 906.01, 906.02 and 906.03 from the Manual and will no longer be entering into contracts with transfer agents. As a result, the Exchange proposed to amend Sections 601.01(A) and (B) to reflect the addition of certain provisions currently found in Sections 906.01, 906.02 and 906.03. The provisions being added to Sections 601.01(A) would require that the transfer agent: (i) Comply with the rules of the Exchange; (ii) maintain offices for the purposes of transfer activities that are staffed by experienced personnel; (iii) maintain adequate facilities for the safekeeping of securities; (iv) maintain facilities to expedite transfers; (v) appoint an agent for service of process. The provision being added to Section 601.01(B) would require the transfer agent to take immediate corrective action on any material weakness specified in the auditor's report and submit a subsequent letter indicating that the material weakness has been corrected. The provision also notes that no approval to act in a dual capacity as transfer agent or registrant will be approved until the auditor's report has been delivered. The Exchange is deleting Section 601.03 in its entirety since it merely contains cross-references to Sections 906.01, 906.02 and 906.03. The listing agreement will also require the issuer to maintain a registered transfer agent and a registrar, as necessary, which satisfies the requirements of Section 601.00. The Commission believes these changes are consistent with the protection of investors and the public interest since the specific requirements being deleted will still be included in Section 601.01 of the Manual. Furthermore, if a listed company does not use a transfer agent that is in compliance with the provisions contained in Section 601.01, which includes capital surplus requirements, such company would no longer meet the requirements set forth in the Manual and the listing agreement and could be delisted from the Exchange. The Commission believes this will ensure that a listed company will have a qualified transfer agent and registrar at all times while listed on the Exchange, protecting investors and the public interest.

The Exchange's proposed deletion of Section 702.01 of the Manual in its current form, as described above, is consistent with the protection of investors and the public interest, as it simply eliminates a description which is not accurate as it relates to the listing application process proposed to be adopted pursuant to this filing. The indicative timeline for the original listing of securities proposed to be deleted from Section 702.02 is very approximate and, according to NYSE, does not necessarily bear any relation to the listing experience of any individual company. The proposed changes to Sections 702.03, 702.04 and 702.05 of the Manual are consistent with the protection of investors and the public interest, as the information required to be included in the listing application that is detailed in these Sections will either continue to be required, or is readily available from another source (such as the Commission's EDGAR system).[32] As a result, the Exchange does not feel that it is necessary to include those requirements in the Manual. The Commission believes that the elimination of these Sections from the Manual is consistent with the protection of investors and the public interest as it simplifies the listing process without sacrificing any of the substantive information available to the Exchange. Furthermore, the elimination of these provisions could result in a cost savings for the issuer, and therefore investors, while not resulting in any significant weakening in the regulatory requirements.

The Commission believes that the proposed deletions from Sections 703.01 through 703.14, relating to the application process and the filing of the listing application and any supplemental, or supporting, documents, is consistent with the Act as the information required to be provided by these Sections would still be required as part of the Listing Application or are readily available from other sources (such as the Commission's EDGAR system).[33] In addition, the Exchange has retained certain language in its rules covering the listing application process and a suggested timetable for filing an application.[34]

The Commission believes that the proposed addition to the Exchange's continued listing criteria, Section 802.01D, of the stipulation that a listed company could face delisting if it breaches the terms of its listing agreement is consistent with the Act as it sets forth specifically in the Manual the Exchange's ability to remove unsuitable companies from its market for such violations. While, as NYSE notes, it currently has broad discretion to delist a company when its continued listing is inadvisable, the Commission believes that explicitly stating that a violation of the listing agreement may result in delisting provides transparency to listed companies and investors, and is consistent with the terms of the listing agreement. The Commission also believes that the removal of unsuitably listed companies serves to protect investors and the public interest.

The proposed modifications to the domestic and foreign listing agreements, and their removal from the Manual, are

[32] *See* Notice, *supra* note 3, for a detailed discussion of these items and whether they are retained or not and, if not, why. In addition the list of supporting documents to be retained was submitted as part of the rule filing in Exhibit 3, as amended.

[33] *See Notice, supra* note 3. In its filing, NYSE noted that each subsection of Section 703.00 would be modified to state that the form of listing application and the information regarding supporting documents required in connection with supplemental listing applications and debt securities applications would be available on the Exchange's Web site or from the Exchange upon request.

[34] *See,* for example, changes to 703.01 (Part 1) and 703.01 (Part 2) being proposed in the Exhibit 5 to the rule filing.

consistent with the protection of investors and the public interest because: (i) Certain provisions are duplicative and are already included elsewhere in the Manual; [35] (ii) certain provisions are no longer applicable and their removal is consistent with previous actions by the Commission to eliminate similar requirements; (iii) certain provisions are no longer relevant in light of changes to the structure and practices in the securities markets; [36] or (iv) certain provisions, as is discussed above, have been added to the Manual or new agreements. Removing Sections 901.00–901.05, 902.01 and 903 of the Manual and adding them to the Exchange's Web site are consistent with the protection of investors and the public interest, as the proposed changes streamline the Exchange's listing process, making it more easily understood, while at the same time do not result in a weakening of the Exchange's regulatory requirements.[37]

The Commission notes that certain key provisions, discussed above, are either being added or will remain in the reformulated listing agreements. These provisions include: (i) An acknowledgement by the issues that a violation of all current and future rules, listing standards, procedures and policies of the Exchange along with a failure by the issuer to promptly notify the Exchange of any corporation action or other event that causes the issuer to cease to be in compliance with the Exchange's listing requirements could result in removal of the issuer's securities from listing and trading on the Exchange; (ii) a requirement that the issuer file all required periodic financial reports with the Commission, including annual reports and, where applicable, quarterly or semi-annual reports by the due dates established by the Commission; and (iii) a requirement that the issuer agrees to comply with all requirements under the federal securities laws and applicable Commission rules. The Commission believes that the inclusion of these provisions is consistent with the Act in that each of these provisions aids in the protection of investors and the public interest. In addition, the Commission notes that the listing agreement for foreign private issuers includes the requirement that foreign private issuers solicit proxies from U.S. holders for all meetings of shareholders.[38] The Commission believes that this is an important provision consistent with the Act as it provides U.S. investors with information relating to the meetings of shareholders for companies that are not required to follow U.S. proxy rules, thus aiding in the protection of investors and the public interest.[39] The Commission believes that a listed company should deliver the proxy statement in a sufficient period of time before the shareholder meeting so as to allow shareholders time to receive, review and vote on the information set forth in the proxy materials and annual report.[40] In other words, the Commission expects that, in order to satisfy this requirement of the listing agreement, foreign private issuers would solicit proxies from U.S. investors sufficiently in advance of the shareholder meeting so as to allow U.S. investors a reasonable opportunity to vote.[41]

One key change being made to the listing agreements is the removal of certain requirements relating to disclosures about the issuers business, financial and accounting policies. Specifically, the Exchange has proposed to remove from the listing agreement the requirement that an issuer disclose how long the independent public accountant has audited the company's accounts; whether their audit is continuous or periodic, or the extent of their authority. However, the Commission notes that Regulation S–X contains requirements relating to auditor independence that provide assurances as to the independence and qualifications of the auditor that, in the Commission's opinion, more than adequately replace the requirements being deleted by the proposal. As a result, the Commission believes that these changes are consistent with the Act.

Many of the provisions that are being removed from the listing agreement, as noted above, are being removed because they are already included in other sections of the Manual or NYSE believes it no longer needs the issuer to provide additional information because it is obsolete or already receives the information through Commission filings and its monitoring of such through EDGAR. For example, one eliminated provision had required companies to provide four copies of all material mailed to stockholders with respect to amendments or proposed amendments to its certificate of incorporation. NYSE indicated that it has other rules that require companies to provide it with copies of notices to shareholders concerning charter amendments. In addition, NYSE noted that its rules require listed companies to submit to it copies of all proxy material submitted to shareholders. While the Commission notes that the current requirement in the listing agreement requires copies of all communications to shareholders concerning an amendment to its certificate of incorporation, we are satisfied that the requirements in NYSE's rules should provide it with adequate notice of changes to a company's certificate of incorporation for purposes of monitoring compliance with Exchange rules and corporate actions that could impact the trading of the company's securities. Another example concerns the deletion, from the listing agreement, of the requirement that a listed company promptly notify the Exchange of any action to fix a stockholders' record date, or to close the transfer books, and that it will give the Exchange at least ten days' notice in advance of such record date or closing of the books. In support of deleting these from the listing agreement the Exchange cited several existing Sections of the Manual that contain these requirements and also stated that it notifies companies of these requirements in a letter sent annually to all listed companies. The Commission continues to believe that notification to the Exchange 10 days in advance of fixing a date for taking a record of shareholders and the closing of the transfer books is important. As a result, the deletion from the listing agreement simply recognizes that this is already covered elsewhere in NYSE's rules.

Other provisions of the listing agreement that are being permitted to be deleted, such as a requirement that a

[35] *See* Exhibit 3 for a full list of supporting documents still required. We note that other Exchanges do not list the supporting documents required to be included with an application for listing.

[36] For example, public companies now make a significant number of disclosure via the Commission's EDGAR system, including the disclosure of the public company's annual and quarterly financial statements. NYSE has represented that, in addition to its other surveillance activities, it relies, in part, on information available in EDGAR when monitoring companies for compliance with listing standards and other Exchange rules, and when evaluating a prospective company for listing.

[37] The Commission notes that making certain agreements available via the Exchange's Web site would be consistent with the manner in which similar agreement are made available by other national securities exchanges.

[38] *See also,* NYSE Rule 402 and Section 203.01 of the Manual which applies to all listed companies, foreign and domestic.

[39] The Commission notes that other exchanges do not have specific requirements relating to the timeframes under which proxies must be provided to investors. Instead, exchanges generally rely on the rules of the Commission or the jurisdiction under which they have been incorporated.

[40] *See* Securities Exchange Act Release No. 33768 (March 16, 1994).

[41] The Commission notes that domestic issuers already have to do so under Commission proxy rules. The Commission, however, also notes that while foreign private issuers are not required to follow proxy rules promulgated by the Commission, Section 4 of the Listing Manual contains certain provisions regarding shareholders' meetings and proxies. *See* 17 CFR 240.3a–12–3(b).

listed company will not make any substantial change in accounting methods without notifying the Exchange and disclosing the effect of any such change in its next interim and annual report to its stockholders, are being done in recognition of the fact that, under Commission disclosure rules, any changes in accounting methods and its effect on the company would have to be disclosed in Commission filings, such as 10–Ks and 10–Qs. Exchange monitoring of such filings, as well as material news requirements under Exchange rules, should give the Exchange the information necessary to monitor for compliance with Exchange rules, and listing standards, along with any potential trading impact. As a result, the Commission believes it is consistent with investor protection and the public interest to remove this provision from the listing agreement. Finally, some of the requirements in the current listing agreement are being updated to reflect current requirements. For example, in terms of publishing quarterly statements of earnings to the same degree of consolidation as in the annual report, the Exchange is adding a provision that the listed company agrees to file all required periodic financial reports with the Commission, including annual reports and, where applicable, quarterly or semi- annual reports, by the due dates established by the Commission. In summary, the Commission notes that provisions being deleted from the Manual because they are covered elsewhere under Exchange rules, or under Commission requirements, are not meant to provide support that the Commission no longer believes these provisions are necessary. Rather, based on the NYSE's filing, we are satisfied these substantive provisions are covered elsewhere in Exchange or Commission rules.

The proposed deletions of Sections 904.01 through 904.03 of the Manual are consistent with the protection of investors and the public interest, as: (i) The Stock Distribution Schedule in Section 904.01 is obsolete because the Exchange has indicated it obtains the distribution information it needs from the company's transfer agent; (ii) the information required by Section 904.02 would still be required in the revised listing application.

The proposed modifications to the listing application are consistent with the protection of investors and the public interest, because the Exchange is simply eliminating from the application information requirements that are duplicative of disclosure requirements under the Federal securities laws or where similar disclosure provisions under the Federal securities laws provide information sufficient for the Exchange to make informed determinations about the suitability of issuers for listing.

A significant number of changes are technical in nature and relate to updating internal cross-references and rule numbering as a result of the changes described above. As a result, the Commission finds these changes consistent with the act as they work to protect investors and the public interest by removing confusion in the application and organization of the Manual.

IV. Accelerated Approval of Proposed Rule Changes, as Modified by Amendment No. 1

The Amendment No. 1 revised the proposal to, among other things, ensure that the rule text provided is properly marked, therefore reducing confusion when determining which rule changes have been proposed and remove unnecessary provisions from the listing agreements. In addition, changes proposed in Amendment No. 1 will clarify and strengthen the Exchange's proposal and listing application process, and avoid redundancies and ambiguities that exist in the original filing, thereby making the listing process more streamlined and efficient. Accordingly, the Commission also finds good cause, pursuant to Section 19(b)(2) of the Act,[42] for approving the proposal, as modified by Amendment No. 1, prior to the 30th day after the date of publication of notice in the **Federal Register**.

V. Conclusion

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,[43] that the proposed rule changes (SR–NYSE–2013–33), as modified by the Amendment No. 1, be, and hereby are, approved on an accelerated basis.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[44]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2013–20346 Filed 8–20–13; 8:45 am]

BILLING CODE 8011–01–P

[42] 15 U.S.C. 78s(b)(2).

[43] 15 U.S.C. 78s(b)(2).

[44] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–70213; File No. SR–NYSEARCA–2013–81]

Self-Regulatory Organizations; NYSE Arca, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Amending the Fees for Display Use of the NYSE Arca BBO and NYSE Arca Trades Market Data Products and Making Certain Technical Changes to the Fee Schedule

August 15, 2013.

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 August 1, 2013, NYSE Arca, Inc. (the ''Exchange'' or ''NYSE Arca'') filed with the Securities and Exchange Commission (the ''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend the fees for display use of the NYSE Arca BBO and NYSE Arca Trades market data products and make certain technical changes to the fee schedule. The changes will be operative on August 1, 2013. The text of the proposed rule change is available on the Exchange's Web site at *www.nyse.com,* at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

[1] 15 U.S.C. 78s(b)(1).

[2] 15 U.S.C. 78a.

[3] 17 CFR 240.19b–4.

A. Self-Regulatory Organization's Statement of the Purpose of, and the Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend the fees for display use of the NYSE Arca BBO [4] and NYSE Arca Trades [5] market data products and make certain technical changes to the fee schedule. The changes will be operative on August 1, 2013.

The Exchange currently charges $10 per month for professional users and $5 per month for non-professional users for display use of NYSE Arca BBO.[6] Alternatively, the Exchange charges $0.005 per quote for display use of NYSE Arca BBO for non-professional users, capped at $5 per month per non-professional user.[7] The Exchange currently charges $10 per month for professional users for display use of NYSE Arca Trades. The Exchange currently does not offer NYSE Arca Trades for non-professional users under a per-user fee structure.[8]

The Exchange also charges an access fee of $750 per month for NYSE Arca BBO and an access fee of $750 for NYSE Arca Trades. However, a single access fee applies for clients receiving both NYSE Arca BBO and NYSE Arca Trades.

Vendors that redistribute NYSE Arca Trades data pay a redistribution fee of $750 per month.

The Exchange proposes to lower the professional user fees for display use of NYSE Arca BBO from $10 per month to $4 per month, lower the non-professional user fees for display use of NYSE Arca BBO from $5 per month to $0.25 per month, and eliminate the per quote option for display use of NYSE Arca BBO for non-professional users. The Exchange also proposes to lower the professional user fee for display use of NYSE Arca Trades from $10 per month to $4 per month and introduce a fee for display use of NYSE Arca Trades by non-professional users of $0.25 per month.

The Exchange also proposes to establish a $175,000 per month enterprise fee for an unlimited number of professional and non-professional users for NYSE Arca BBO and a $175,000 per month enterprise fee for an unlimited number of professional and non-professional users for NYSE Arca Trades. A single enterprise fee will apply for vendors receiving both NYSE Arca BBO and NYSE Arca Trades.

As an example, under the current fee structure, if a firm had 9,000 professional users who each received NYSE Arca Trades at $10 per month and NYSE Arca BBO at $10 per month, then the firm currently pays $180,000 per month in professional user fees. Under the proposed enterprise fee, the firm will pay a flat fee of $175,000 for an unlimited number of professional and non-professional users for both products.

A vendor that pays the enterprise fee would not have to report the number of such users on a monthly basis.[9] However, every six months, a vendor must provide the Exchange with a count of the total number of natural person users of each product, including both professional and non-professional users.

Lastly, the Exchange proposes to make certain technical corrections to clarify its fee schedule and to delete operative dates that are no longer needed.

The purpose of the foregoing changes is to encourage greater use of NYSE Arca BBO and NYSE Arca Trades by making them more affordable, to compete more effectively with similar products in the marketplace, and to clarify the fee schedule. The Exchange is eliminating the per quote option for display use of NYSE Arca BBO for non-professional users because non-professional users are not electing to use it. The Exchange is not aware of any significant problems that persons affected are likely to have in complying with the proposed rule change.

The Exchange further believes that the proposed rule change is consistent with the market-based approach of the Securities and Exchange Commission (''Commission''). The decision of the United States Court of Appeals for the District of Columbia Circuit in *NetCoalition* v. *SEC,* 615 F.3d 525 (D.C. Cir. 2010), upheld reliance by the Commission upon the existence of competitive market mechanisms to set reasonable and equitably allocated fees for proprietary market data:

> In fact, the legislative history indicates that the Congress intended that the market system ''evolve through the interplay of competitive forces as unnecessary regulatory restrictions are removed'' and that the SEC wield its regulatory power ''in those situations where competition may not be sufficient,'' such as in the creation of a ''consolidated transactional reporting system.''

Id. at 535 (quoting H.R. Rep. No. 94–229 at 92 (1975), *as reprinted in* 1975 U.S.C.C.A.N. 323). The court agreed with the Commission's conclusion that ''Congress intended that 'competitive forces should dictate the services and practices that constitute the U.S. national market system for trading equity securities.'' '' [10]

As explained below in the Exchange's Statement on Burden on Competition, the Exchange believes that there is substantial evidence of competition in the marketplace for data and that the Commission can rely upon such evidence in concluding that the fees established in this filing are the product of competition and therefore satisfy the relevant statutory standards.[11] In addition, the existence of alternatives to NYSE Arca BBO and NYSE Arca Trades, including real-time consolidated data, free delayed consolidated data, and proprietary data from other sources, as

[4] NYSE Arca BBO is an NYSE Arca-only market data feed that allows a vendor to redistribute on a real-time basis the same best-bid-and-offer information that the Exchange reports under the Consolidated Quotation (''CQ'') Plan for inclusion in the CQ Plan's consolidated quotation information data stream. The data feed includes the best bids and offers for all securities that are traded on the Exchange and for which NYSE Arca reports quotes under the CQ Plan.

[5] NYSE Arca Trades is an NYSE Arca-only market data feed that allows a vendor to redistribute on a real-time basis the same last sale information that the Exchange reports under the Consolidated Tape Association (''CTA'') Plan for inclusion in the CTA Plan's consolidated data streams and certain other related data elements. Specifically, NYSE Arca Trades includes the real-time last sale price, time, size, and bid-ask quotations for each security traded on the Exchange and a stock summary message. The stock summary message updates every minute and includes NYSE Arca's opening price, high price, low price, closing price, and cumulative volume for the security.

[6] The Exchange applies the same criteria for qualification as a ''non-professional subscriber'' as the CTA and CQ Plan participants use. *See* Securities Exchange Act Release No. 62188 (May 27, 2010), 75 FR 31484 (June 3, 2010) (SR–NYSEArca–2010–23).

[7] *Id.* The cap is referenced in this filing, although it does not currently appear in the fee schedule.

[8] *See* Securities Exchange Act Release No. 59598 (Mar. 18, 2009), 74 FR 12919 (Mar. 25, 2009) (SR–NYSEArca–2009–05). When NYSE Arca Trades was initially offered, the Exchange had not observed a demand for non-professional use because an alternative product was available. *See id.* The Exchange now offers two last sale market data products for distribution to non-professional users, NYSE Arca Trades Digital Media and NYSE Arca Realtime Reference Prices Digital Media. *See* Securities Exchange Act Release No. 69299 (Apr. 4, 2013), 78 FR 21436 (Apr. 10, 2013) (SR–NYSEArca–2013–31).

[9] Most professional users currently are subject to a per display device count, except for a small number of professional users that have qualified for the Exchange's Unit-of-Count Policy. *See* SR–NYSEArca–2010–23, *supra* n.6; SR–NYSEArca–2009–05, *supra* n.8. That policy continues to apply to such professional users for display use only if the proposed enterprise fee does not apply. *See* Securities Exchange Act Release No. 69315 (Apr. 5, 2013), 78 FR 21668 (Apr. 11, 2013) (SR–NYSEArca–2013–37).

[10] *NetCoalition,* 615 F.3d at 535.

[11] Section 916 of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (the ''Dodd-Frank Act'') amended paragraph (A) of Section 19(b)(3) of the Act, 15 U.S.C. 78s(b)(3), to make clear that all exchange fees for market data may be filed by exchanges on an immediately effective basis.

described below, further ensures that the Exchange cannot set unreasonable fees, or fees that are unreasonably discriminatory, when vendors and subscribers can elect such alternatives.

As the *NetCoalition* decision noted, the Commission is not required to undertake a cost-of-service or ratemaking approach, and the Exchange incorporates by reference into this proposed rule change its analysis of this topic in another rule filing.[12]

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with the provisions of Section 6 of the Act,[13] in general, and Sections 6(b)(4) and 6(b)(5) of the Act,[14] in particular, in that it provides an equitable allocation of reasonable fees among its members, issuers, and other persons using its facilities and is not designed to permit unfair discrimination among customers, issuers, brokers, or dealers. The Exchange also believes that the proposed rule change is consistent with Section 11(A) of the Act [15] in that it is consistent with (i) fair competition among brokers and dealers, among exchange markets, and between exchange markets and markets other than exchange markets and (ii) the availability to brokers, dealers, and investors of information with respect to quotations for and transactions in securities. Furthermore, the proposed rule change is consistent with Rule 603 of Regulation NMS,[16] which provides that any national securities exchange that distributes information with respect to quotations for or transactions in an NMS stock do so on terms that are not unreasonably discriminatory.

The Exchange believes that lowering the professional and non-professional user fees for NYSE Arca BBO and lowering the professional user fee for NYSE Arca Trades is reasonable because it will make the products more affordable and result in their greater availability to professional and non-professional users. The Exchange believes that introducing a non-professional fee for NYSE Arca Trades is reasonable because it provides an additional method for retail investors to access NYSE Arca last sale data and provides the same last sale data that is available to professional users, an option heretofore unavailable.[17] The Exchange believes it is reasonable to eliminate the per quote option for non-professional users of NYSE Arca BBO because non-professional users have not elected this option.

In addition, the Exchange believes that the proposed fees are reasonable when compared to fees for comparable products offered by at least one other exchange and under the CTA and CQ Plans. Specifically, The NASDAQ Stock Market LLC (''NASDAQ'') offers NASDAQ Basic, which includes best bid and offer and last sale data, for a monthly fee of $10 per professional subscriber and $0.50 per non-professional subscriber; alternatively, a broker-dealer may purchase an enterprise license at a rate of $100,000 per month for distribution to an unlimited number of non-professional subscribers only.[18] The Exchange's proposed per-user fees are lower than NASDAQ's fees. While the Exchange's enterprise fee is higher, the Exchange will permit broader distribution of its data for this fee, *i.e.,* to both professional and non-professional users. Under the current CTA Plan, Tape B market data includes NYSE Arca and certain other exchanges' data. Monthly fees for professional users range from $13.60-$14.60 for consolidated last sale data and $13.65-$15.60 for bid-ask data; the monthly fee for each non-professional subscriber is $1.00 for both last sale and bid-ask data.[19] A monthly enterprise fee of $500,000 is available under which a U.S. registered broker-dealer may distribute data to an unlimited number of its own employees and its nonprofessional subscriber brokerage account customers. Participants in the CTA and CQ Plans recently submitted an immediately effective filing with rate changes that are expected to be implemented September 1, 2013.[20] The Exchange is proposing professional and non-professional user fees and enterprise fees that are substantially less than the fees currently charged and proposed for the CTA and CQ Plans. In contrast to NASDAQ and the CTA and CQ Plans, the Exchange also will permit enterprise distribution by a non-broker-dealer.

The proposed enterprise fees for NYSE Arca BBO and NYSE Arca Trades also are reasonable because they could result in a fee reduction for vendors with a large number of professional and non-professional users, as described in the example above. If a vendor has a smaller number of professional users of NYSE Arca BBO and/or NYSE Arca Trades, then it may continue using the per user structure and benefit from the per user fee reductions. By reducing prices for vendors with a large number of professional and non-professional users, the Exchange believes that more vendors may choose to offer NYSE Arca BBO and NYSE Arca Trades, thereby expanding the distribution of this market data for the benefit of investors. The Exchange also believes that offering an enterprise fee will expand the range of options for offering NYSE Arca BBO and NYSE Arca Trades and will allow vendors greater choice in selecting the most appropriate level of data and fees for the professional and non-professional users they are servicing.

The Exchange further believes that the proposed enterprise fees are reasonable because they will simplify billing for certain recipients that have large numbers of professional and non-professional users. Firms that pay the proposed enterprise fees will not have to report the number of users on a monthly basis as they currently do, but rather will only have to count natural person users every six months; this is a significant reduction in administrative burdens and is a significant value. The Exchange believes that it is reasonable to charge a single enterprise fee for clients receiving both NYSE Arca BBO and NYSE Arca Trades because the Exchange has charged a single access fee for both products since 2010,[21] and the products will continue to be offered separately for vendors and users that so choose.

The Exchange believes that the proposed fees are equitable and not unfairly discriminatory because they will be charged uniformly to vendors and users that select these products. The Exchange notes that the fee structure of differentiated professional and non-professional fees has long been used by the Exchange for other products, by other exchanges for their products, and by the CTA and CQ Plans in order to reduce the price of data to retail investors and make it more broadly available.[22] The Exchange further believes that offering NYSE Arca Trades to non-professional users with the same data available to professional users

[12] *See* Securities Exchange Act Release No. 63291 (Nov. 9, 2010), 75 FR 70311 (Nov. 17, 2010) (SR–NYSEArca–2010–97).

[13] 15 U.S.C. 78f(b).

[14] 15 U.S.C. 78f(b)(4), (5).

[15] 15 U.S.C. 78k–1.

[16] *See* 17 CFR 242.603.

[17] *See supra* n.8.

[18] *See* NASDAQ Rule 7047.

[19] *See* CTA Plan dated July 25, 2012 and CQ Plan dated August 23, 2010, *available at https://cta.nyxdata.com/CTA.*

[20] *See* Securities Exchange Act Release No. Release No. 70010 (July 19, 2013) (File No. SR–CTA/CQ–2013–04). Monthly fees will be $24 for professional subscribers and $1 for non-professional subscribers for Tape B last sale and bid-ask data, and the monthly enterprise fee described above will be increased to $520,000.

[21] *See* SR–NYSEArca-2010–23, *supra* n.6.

[22] *See, e.g.,* Securities Exchange Act Release No. 20002, File No. S7–433 (July 22, 1983) (establishing nonprofessional fees for CTA data); NASDAQ Rules 7023(b), 7047.

results in greater equity among data recipients. The Exchange believes that eliminating the per quote non-professional user fee for NYSE Arca BBO is equitable and not unfairly discriminatory because non-professional users have not elected this option and the Exchange will continue offering other methods by which non-professional users can access this data. Finally, the Exchange believes that it is equitable and not unfairly discriminatory to establish an enterprise fee because it reduces the Exchange's costs and administrative burdens in tracking and auditing large numbers of users.

The proposed technical corrections to the fee schedule will benefit vendors and users by making the fee schedule clearer and easier to understand.

For these reasons, the Exchange believes that the proposed fees are reasonable, equitable, and not unfairly discriminatory.

B. Self-Regulatory Organization's Statement on Burden on Competition

In accordance with Section 6(b)(8) of the Act,[23] 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. An exchange's ability to price its proprietary data feed products is constrained by (1) the inherent contestability of the market for proprietary data and actual competition for the sale of such data, (2) the joint product nature of exchange platforms, and (3) the existence of alternatives to proprietary data.

The Existence of Actual Competition. The market for proprietary data products is currently competitive and inherently contestable because there is fierce competition for the inputs necessary to the creation of proprietary data and strict pricing discipline for the proprietary products themselves. Numerous exchanges compete with each other for listings and order flow and sales of market data itself, providing virtually limitless opportunities for entrepreneurs who wish to compete in any or all of those areas, including producing and distributing their own market data. Proprietary data products are produced and distributed by each individual exchange, as well as other entities, in a vigorously competitive market.

Competitive markets for listings, order flow, executions, and transaction reports provide pricing discipline for the inputs of proprietary data products and therefore constrain markets from overpricing proprietary market data. The U.S. Department of Justice also has acknowledged the aggressive competition among exchanges, including for the sale of proprietary market data itself. In announcing that the bid for NYSE Euronext by NASDAQ OMX Group Inc. and IntercontinentalExchange Inc. had been abandoned, Assistant Attorney General Christine Varney stated that exchanges ''compete head to head to offer real-time equity data products. These data products include the best bid and offer of every exchange and information on each equity trade, including the last sale.'' [24]

It is common for broker-dealers to further exploit this recognized competitive constraint by sending their order flow and transaction reports to multiple markets, rather than providing them all to a single market. As a 2010 Commission Concept Release noted, the ''current market structure can be described as dispersed and complex'' with ''trading volume . . . dispersed among many highly automated trading centers that compete for order flow in the same stocks'' and ''trading centers offer[ing] a wide range of services that are designed to attract different types of market participants with varying trading needs.'' [25]

In addition, in the case of products that are distributed through market data vendors, the market data vendors themselves provide additional price discipline for proprietary data products because they control the primary means of access to certain end users. These vendors impose price discipline based upon their business models. For example, vendors that assess a surcharge on data they sell are able to refuse to offer proprietary products that their end users do not or will not purchase in sufficient numbers. Internet portals, such as Google, impose price discipline by providing only data that they believe will enable them to attract ''eyeballs'' that contribute to their advertising revenue. Similarly, vendors will not offer NYSE Arca BBO or NYSE Arca Trades unless those products will help them maintain current users or attract new ones. For example, a broker-dealer will not choose to offer NYSE Arca BBO or NYSE Arca Trades to its retail customers unless the broker-dealer believes that the retail customers will use and value the data and the provision of such data will help the broker-dealer maintain the customer relationship, which allows the broker-dealer to generate profits for itself. Professional users will not request NYSE Arca BBO or NYSE Arca Trades from market data vendors unless they can use the data for profit-generating purposes in their businesses. All of these operate as constraints on pricing proprietary data products.

Joint Product Nature of Exchange Platform. Transaction execution and proprietary data products are complementary in that market data is both an input and a byproduct of the execution service. In fact, market data and trade executions are a paradigmatic example of joint products with joint costs. The decision whether and on which platform to post an order will depend on the attributes of the platforms where the order can be posted, including the execution fees, data quality, and price and distribution of their data products. The more trade executions a platform does, the more valuable its market data products become.

The costs of producing market data include not only the costs of the data distribution infrastructure, but also the costs of designing, maintaining, and operating the exchange's transaction execution platform and the cost of regulating the exchange to ensure its fair operation and maintain investor confidence. The total return that a trading platform earns reflects the revenues it receives from both products and the joint costs it incurs. Moreover, an exchange's broker-dealer customers view the costs of transaction executions and market data as a unified cost of doing business with the exchange.

Other market participants have noted that the liquidity provided by the order book, trade execution, core market data, and non-core market data are joint products of a joint platform and have common costs.[26] The Exchange agrees

[23] 15 U.S.C. 78f(b)(8).

[24] Press Release, U.S. Department of Justice, Assistant Attorney General Christine Varney Holds Conference Call Regarding NASDAQ OMX Group Inc. and IntercontinentalExchange Inc. Abandoning Their Bid for NYSE Euronext (May 16, 2011), available at *http://www.justice.gov/iso/opa/atr/speeches/2011/at-speech-110516.html.*

[25] Concept Release on Equity Market Structure, Securities Exchange Act Release No. 61358 (Jan. 14, 2010), 75 FR 3594 (Jan. 21, 2010) (File No. S7–02–10). This Concept Release included data from the third quarter of 2009 showing that no market center traded more than 20% of the volume of listed stocks, further evidencing the dispersal of and competition for trading activity. *Id.* at 3598.

[26] *See* Securities Exchange Act Release No. 62887 (Sept. 10, 2010), 75 FR 57092, 57095 (Sept. 17, 2010) (SR–Phlx–2010–121); Securities Exchange Act Release No. 62907 (Sept. 14, 2010), 75 FR 57314, 57317 (Sept. 20, 2010) (SR–NASDAQ–2010–110); and Securities Exchange Act Release No. 62908 (Sept. 14, 2010), 75 FR 57321, 57324 (Sept. 20, 2010) (SR–NASDAQ–2010–111) (''all of the exchange's costs are incurred for the unified purposes of attracting order flow, executing and/or

Continued

with and adopts those discussions and the arguments therein. The Exchange also notes that the economics literature confirms that there is no way to allocate common costs between joint products that would shed any light on competitive or efficient pricing.[27]

Analyzing the cost of market data product production and distribution in isolation from the cost of all of the inputs supporting the creation of market data and market data products will inevitably underestimate the cost of the data and data products. Thus, because it is impossible to obtain the data inputs to create market data products without a fast, technologically robust, and well-regulated execution system, system costs and regulatory costs affect the price of both obtaining the market data itself and creating and distributing market data products. It would be equally misleading, however, to attribute all of an exchange's costs to the market data portion of an exchange's joint products. Rather, all of an exchange's costs are incurred for the unified purposes of attracting order flow, executing and/or routing orders, and generating and selling data about market activity. The total return that an exchange earns reflects the revenues it receives from the joint products and the total costs of the joint products.

The level of competition and contestability in the market is evident in the numerous alternative venues that compete for order flow, including 12 equities self-regulatory organization (''SRO'') markets, as well as internalizing broker-dealers (''BDs'') and various forms of alternative trading systems (''ATSs''), including dark pools and electronic communication networks (''ECNs''). Competition among trading platforms can be expected to constrain the aggregate return that each platform earns from the sale of its joint products, but different platforms may choose from a range of possible, and equally reasonable, pricing strategies as the means of recovering total costs. For example, some platforms may choose to pay rebates to attract orders, charge relatively low prices for market data products (or provide market data products free of charge), and charge relatively high prices for accessing posted liquidity. Other platforms may choose a strategy of paying lower rebates (or no rebates) to attract orders, setting relatively high prices for market data products, and setting relatively low prices for accessing posted liquidity. In this environment, there is no economic basis for regulating maximum prices for one of the joint products in an industry in which suppliers face competitive constraints with regard to the joint offering.

Existence of Alternatives. The large number of SROs, BDs, and ATSs that currently produce proprietary data or are currently capable of producing it provides further pricing discipline for proprietary data products. Each SRO, ATS, and BD is currently permitted to produce proprietary data products, and many currently do or have announced plans to do so, including but not limited to the Exchange, NYSE, NYSE MKT, NASDAQ OMX, BATS, and Direct Edge.

The fact that proprietary data from ATSs, BDs, and vendors can bypass SROs is significant in two respects. First, non-SROs can compete directly with SROs for the production and sale of proprietary data products. Second, because a single order or transaction report can appear in an SRO proprietary product, a non-SRO proprietary product, or both, the amount of data available via proprietary products is greater in size than the actual number of orders and transaction reports that exist in the marketplace. Because market data users can thus find suitable substitutes for most proprietary market data products, a market that overprices its market data products stands a high risk that users may substitute another source of market data information for its own.

Moreover, consolidated data provides two additional measures of pricing discipline for proprietary data products that are a subset of the consolidated data stream. First, the consolidated data is widely available in real-time at $0.50-$1 per month for non-professional users. Second, consolidated data is also available at no cost with a 15- or 20-minute delay. Because consolidated data contains marketwide information, it effectively places a cap on the fees assessed for proprietary data that is simply a subset of the consolidated data (such as NYSE Arca Trades and NYSE Arca BBO). The mere availability of low-cost or free consolidated data provides a powerful form of pricing discipline for proprietary data products that contain data elements that are a subset of the consolidated data by highlighting the optional nature of proprietary products.

Those competitive pressures imposed by available alternatives are clearly evident in the Exchange's proposed pricing. As noted above, the Exchange's proposed per-user fees are lower than NASDAQ's fees. While the Exchange's enterprise fee is higher, the Exchange will permit broader distribution of its data, *i.e.,* to both professional and non-professional users.[28] The Exchange's proposed user and enterprise fees are less (in most cases substantially less) than the fees charged by the CTA and CQ Plans, and the Exchange's enterprise fee also permits distribution by a non-broker-dealer.[29]

In addition to the competition and price discipline described above, the market for proprietary data products is also highly contestable because market entry is rapid and inexpensive. The history of electronic trading is replete with examples of entrants that swiftly grew into some of the largest electronic trading platforms and proprietary data producers: Archipelago, Bloomberg Tradebook, Island, RediBook, Attain, TrackECN, BATS Trading and Direct Edge. Today, BATS and Direct Edge provide certain market data at no charge on their Web sites in order to attract more order flow, and use revenue rebates from resulting additional executions to maintain low execution charges for their users.[30]

Further, data products are valuable to professional users only if they can be used for profit-generating purposes in their businesses and valuable to non-professional users only insofar as they provide information that such users

routing orders, and generating and selling data about market activity. The total return that an exchange earns reflects the revenues it receives from the joint products and the total costs of the joint products.''); see also August 1, 2008 Comment Letter of Jeffrey S. Davis, Vice President and Deputy General Counsel, NASDAQ OMX Group, Inc., Statement of Janusz Ordover and Gustavo Bamberger (''because market data is both an input to and a byproduct of executing trades on a particular platform, market data and trade execution services are an example of 'joint products' with 'joint costs.'''), attachment at pg. 4, available at *www.sec.gov/comments/34-57917/3457917-12.pdf.*

[27] *See generally* Mark Hirschey, *Fundamentals of Managerial Economics,* at 600 (2009) (''It is important to note, however, that although it is possible to determine the separate marginal costs of goods produced in variable proportions, it is impossible to determine their individual average costs. This is because common costs are expenses necessary for manufacture of a joint product. Common costs of production—raw material and equipment costs, management expenses, and other overhead—cannot be allocated to each individual by-product on any economically sound basis. . . . Any allocation of common costs is wrong and arbitrary.''). This is not new economic theory. *See, e.g.,* F. W. Taussig, ''A Contribution to the Theory of Railway Rates,'' Quarterly Journal of Economics V(4) 438, 465 (July 1891) (''Yet, surely, the division is purely arbitrary. These items of cost, in fact, are jointly incurred for both sorts of traffic; and I cannot share the hope entertained by the statistician of the Commission, Professor Henry C. Adams, that we shall ever reach a mode of apportionment that will lead to trustworthy results.'').

[28] *See supra* n.18.

[29] *See supra* nn.19–20.

[30] This is simply a securities market-specific example of the well-established principle that in certain circumstances more sales at lower margins can be more profitable than fewer sales at higher margins; this example is additional evidence that market data is an inherent part of a market's joint platform.

expect will assist them in tracking prices and market trends and making order routing and trading decisions.[31] The Exchange believes that the proposed lower user fees and the enterprise fees, which may permit wider distribution of last sale and quote information at a lower cost to vendors with a large number of professional and non-professional users, may encourage more users to demand and more vendors to choose to offer NYSE Arca BBO and NYSE Arca Trades, thereby benefitting professional and non-professional users, including public investors. The Exchange also believes that offering NYSE Arca Trades for non-professional users on a per user basis and providing the same information as is provided to professional users will create more choices for vendors that will allow them to offer products with the appropriate level of information at a range of prices, thereby encouraging wider distribution of the data.

In establishing the proposed fees, the Exchange considered the competitiveness of the market for proprietary data and all of the implications of that competition. The Exchange believes that it has considered all relevant factors and has not considered irrelevant factors in order to establish fair, reasonable, and not unreasonably discriminatory fees and an equitable allocation of fees among all users. The existence of numerous alternatives to the Exchange's products, including real-time consolidated data, free delayed consolidated data, and proprietary data from other sources, ensures that the Exchange cannot set unreasonable fees, or fees that are unreasonably discriminatory, when vendors and subscribers can elect these alternatives or choose not to purchase a specific proprietary data product if its cost to purchase is not justified by the returns any particular vendor or subscriber would achieve through the purchase.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were solicited or received with respect to the proposed rule change.

[31] Rule 603(c) of Regulation NMS requires vendors to make the consolidated core data feeds available to customers when trading and order-routing decisions can be implemented. *See* 17 CFR 242.603(c).

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)[32] of the Act and subparagraph (f)(2) of Rule 19b–4[33] 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)[34] 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 (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–NYSEARCA–2013–81 on the subject line.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–NYSEARCA–2013–81. 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 Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street NE., Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–NYSEARCA–2013–81and should be submitted on or before September 11, 2013.

[32] 15 U.S.C. 78s(b)(3)(A).

[33] 17 CFR 240.19b–4(f)(2).

[34] 15 U.S.C. 78s(b)(2)(B).

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[35]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2013–20340 Filed 8–20–13; 8:45 am]

BILLING CODE 8011–01–P

[35] 17 CFR 200.30–3(a)(12).

DEPARTMENT OF STATE

[Public Notice 8426]

30-Day Notice of Proposed Information Collection: Application for A, G, or NATO Visa

ACTION: Notice of request for public comment and submission to OMB of proposed collection of information.

SUMMARY: The Department of State has submitted the information collection described below to the Office of Management and Budget (OMB) for approval. 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 30 days for public comment.

DATES: Submit comments directly to the Office of Management and Budget (OMB) up to September 20, 2013.

ADDRESSES: Direct comments to the Department of State Desk Officer in the Office of Information and Regulatory Affairs at the Office of Management and Budget (OMB). You may submit comments by the following methods:

• *Email: oira_submission@ omb.eop.gov.* You must include the DS form number, information collection title, and the OMB control number in the subject line of your message.

• *Fax:* 202–395–5806. Attention: Desk Officer for Department of State.

FOR FURTHER INFORMATION CONTACT: Direct requests for additional information regarding the collection listed in this notice, including requests for copies of the proposed collection instrument and supporting documents, to Sydney Taylor, Visa Services, U.S. Department of State, 2401 E. Street NW., L–603, Washington, DC 20522, who may be reached at *PRA_BurdenComments@ state.gov.*

SUPPLEMENTARY INFORMATION:

• *Title of Information Collection:* Application for A, G, or NATO Visas

• *OMB Control Number:* 1405–0100

• *Type of Request:* Extension of a Currently Approved Collection

• *Originating Office:* CA/VO/L/R

• *Form Number:* DS–1648

• *Respondents:* All applicants for A, G or NATO visa reauthorizations, excluding A–3, G–5 or NATO applicants

• *Estimated Number of Respondents:* 30,000

• *Estimated Number of Responses:* 30,000

• *Average Time per Response:* 30 minutes

• *Total Estimated Burden Time:* 15,000 hours

• *Frequency:* Once per application

• *Obligation to Respond:* Required to Obtain Benefits

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

The Department of State will use Form DS–1648 to elicit information from applicants for a renewal of A, G, or NATO visas, excluding A–3, G–5 and NATO–7 applicants. INA sections 101(a)(15)(A) and (G), and 22 CFR 41.25, describe the criteria for these nonimmigrant visa classifications,

Methodology

The DS–1648 will be submitted electronically to the Department via the internet. The applicant will be instructed to print a confirmation page containing a bar coded record locator, which will be scanned at the time of processing.

Dated: August 6, 2013.

Don Heflin,

Managing Director for Visa Services, Bureau of Consular Affairs, Department of State.

[FR Doc. 2013–20408 Filed 8–20–13; 8:45 am]

BILLING CODE 4710–06–P

DEPARTMENT OF STATE

[Public Notice 8429]

Culturally Significant Objects Imported for Exhibition Determinations: ''Robert Motherwell: The Early Collages''

SUMMARY: Notice is hereby given of the following determinations: Pursuant to the authority vested in me by the Act of October 19, 1965 (79 Stat. 985; 22 U.S.C. 2459), Executive Order 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, as appropriate, Delegation of Authority No. 257 of April 15, 2003, I hereby determine that the objects to be included in the exhibition ''Robert Motherwell: The Early Collages,'' imported from abroad for temporary exhibition within the United States, are of cultural significance. The objects are imported pursuant to loan agreements with the foreign owners or custodians. I also determine that the exhibition or display of the exhibit objects at the Solomon R. Guggenheim Museum, New York, New York, from on or about September 27, 2013, until on or about January 5, 2014, and at possible additional exhibitions or venues yet to be determined, is in the national interest. I have ordered that Public Notice of these Determinations be published in the **Federal Register**.

FOR FURTHER INFORMATION CONTACT: For further information, including a list of the exhibit objects, contact Paul W. Manning, Attorney-Adviser, Office of the Legal Adviser, U.S. Department of State (telephone: 202–632–6469). The mailing address is U.S. Department of State, SA–5, L/PD, Fifth Floor (Suite 5H03), Washington, DC 20522–0505.

Dated: August 15, 2013.

Lee Satterfield,

Deputy Assistant Secretary for Professional and Cultural Exchanges, Bureau of Educational and Cultural Affairs, Department of State.

[FR Doc. 2013–20411 Filed 8–20–13; 8:45 am]

BILLING CODE 4710–05–P

DEPARTMENT OF STATE

[Public Notice 8430]

Culturally Significant Objects Imported for Exhibition Determinations: ''Silla: Korea's Golden Kingdom''

SUMMARY: Notice is hereby given of the following determinations: Pursuant to the authority vested in me by the Act of October 19, 1965 (79 Stat. 985; 22 U.S.C. 2459), Executive Order 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, as appropriate, Delegation of Authority No. 257 of April 15, 2003), I hereby determine that the objects to be included in the exhibition ''Silla: Korea's Golden Kingdom,'' imported from abroad for temporary exhibition within the United States, are of cultural significance. The objects are imported pursuant to a loan agreement with foreign owners or custodians. I also determine that the exhibition or display of the exhibit objects at The Metropolitan Museum of Art, New York, NY, from on or about November 4, 2013, until on or about February 23, 2014, and at possible additional exhibitions or venues yet to be determined, is in the national interest. I have ordered that Public Notice of these Determinations be published in the **Federal Register**.

FOR FURTHER INFORMATION CONTACT: For further information, including a list of the exhibit objects, contact Julie Simpson, Attorney-Adviser, Office of the Legal Adviser, U.S. Department of State (telephone: 202–632–6467). The mailing address is U.S. Department of State, SA–5, L/PD, Fifth Floor (Suite 5H03), Washington, DC 20522–0505.

Dated: August 14, 2013.

Lee Satterfield,

Deputy Assistant Secretary for Professional and Cultural Exchanges, Bureau of Educational and Cultural Affairs, Department of State.

[FR Doc. 2013–20431 Filed 8–20–13; 8:45 am]

BILLING CODE 4710–05–P

DEPARTMENT OF STATE

[Public Notice 8428]

Culturally Significant Objects Imported for Exhibition Determinations: ''Léger: Modern Art and the Metropolis''

SUMMARY: Notice is hereby given of the following determinations: Pursuant to the authority vested in me by the Act of October 19, 1965 (79 Stat. 985; 22 U.S.C. 2459), Executive Order 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, as appropriate, Delegation of Authority No. 257 of April 15, 2003, I hereby determine that the objects to be included in the exhibition ''Léger: Modern Art and the Metropolis,'' imported from abroad for temporary exhibition within the United States, are of cultural significance. The objects are imported pursuant to loan agreements with the foreign owners or custodians. I also determine that the exhibition or display of the exhibit objects at the Philadelphia Museum of Art, Philadelphia, Pennsylvania, from on or about October 10, 2013, until on or about January 5, 2014, and at possible additional exhibitions or venues yet to be determined, is in the national interest. I have ordered that Public Notice of these Determinations be published in the **Federal Register**.

FOR FURTHER INFORMATION CONTACT: For further information, including a list of the exhibit objects, contact Paul W. Manning, Attorney-Adviser, Office of the Legal Adviser, U.S. Department of State (telephone: 202–632–6469). The mailing address is U.S. Department of State, SA–5, L/PD, Fifth Floor (Suite 5H03), Washington, DC 20522–0505.

Dated: August 14, 2013.

Lee Satterfield,

Deputy Assistant Secretary for Professional and Cultural Exchanges, Bureau of Educational and Cultural Affairs, Department of State.

[FR Doc. 2013–20430 Filed 8–20–13; 8:45 am]

BILLING CODE 4710–05–P

DEPARTMENT OF STATE

[Public Notice 8432]

Culturally Significant Objects Imported for Exhibition Determinations: ''Nice: Luc Tuymans''

SUMMARY: Notice is hereby given of the following determinations: Pursuant to the authority vested in me by the Act of October 19, 1965 (79 Stat. 985; 22 U.S.C. 2459), Executive Order 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, as appropriate, Delegation of Authority No. 257 of April 15, 2003), I hereby determine that the objects to be included in the exhibition ''Nice: Luc Tuymans,'' imported from abroad for temporary exhibition within the United States, are of cultural significance. The objects are imported pursuant to loan agreements with foreign owners or custodians. I also determine that the exhibition or display of the exhibit objects at The Menil Collection, Houston, TX, from on or about September 26, 2013, until on or about January 5, 2014, and at possible additional exhibitions or venues yet to be determined, is in the national interest. I have ordered that Public Notice of these Determinations be published in the **Federal Register**.

FOR FURTHER INFORMATION CONTACT: For further information, including a list of the exhibit objects, contact Julie Simpson, Attorney-Adviser, Office of the Legal Adviser, U.S. Department of State (telephone: 202–632–6467). The mailing address is U.S. Department of State, SA–5, L/PD, Fifth Floor (Suite 5H03), Washington, DC 20522–0505.

Dated: August 14, 2013.

Lee Satterfield,

Deputy Assistant Secretary for Professional and Cultural Exchanges, Bureau of Educational and Cultural Affairs, Department of State.

[FR Doc. 2013–20435 Filed 8–20–13; 8:45 am]

BILLING CODE 4710–05–P

DEPARTMENT OF STATE

[Public Notice 8431]

Culturally Significant Objects Imported for Exhibition Determinations: ''Vasily Kandinsky: From Blaue Reiter to the Bauhaus, 1910–1925''

SUMMARY: Notice is hereby given of the following determinations: Pursuant to the authority vested in me by the Act of October 19, 1965 (79 Stat. 985; 22 U.S.C. 2459), Executive Order 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, and Delegation of Authority No. 236–3 of August 28, 2000 (and, as appropriate, Delegation of Authority No. 257 of April 15, 2003), I hereby determine that the objects to be included in the exhibition ''Vasily Kandinsky: From Blaue Reiter to the Bauhaus, 1910–1925,'' imported from abroad for temporary exhibition within the United States, are of cultural significance. The objects are imported pursuant to loan agreements with the foreign owners or custodians. I also determine that the exhibition or display of the exhibit objects at The Neue Galerie in New York, New York from on or about October 3, 2013, until on or about February 10, 2014, and at possible additional exhibitions or venues yet to be determined, is in the national interest. I have ordered that Public Notice of these Determinations be published in the **Federal Register**.

FOR FURTHER INFORMATION CONTACT: For further information, including a list of the exhibit objects, contact Ona M. Hahs, Attorney-Adviser, Office of the Legal Adviser, U.S. Department of State (telephone: 202–632–6473). The mailing address is U.S. Department of State, SA–5, L/PD, Fifth Floor (Suite 5H03), Washington, DC 20522–0505.

Dated: August 14, 2013.

Lee Satterfield,

Deputy Assistant Secretary for Professional and Cultural Exchanges, Bureau of Educational and Cultural Affairs, Department of State.

[FR Doc. 2013–20437 Filed 8–20–13; 8:45 am]

BILLING CODE 4710–05–P

DEPARTMENT OF STATE

[Public Notice 8427]

Culturally Significant Objects Imported for Exhibition Determinations: ''Charles Marville: Photographer of Paris''

SUMMARY: Notice is hereby given of the following determinations: Pursuant to the authority vested in me by the Act of October 19, 1965 (79 Stat. 985; 22 U.S.C. 2459), Executive Order 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, as appropriate, Delegation of Authority No. 257 of April 15, 2003, I hereby determine that the objects to be included in the exhibition ''Charles Marville: Photographer of Paris,'' imported from abroad for temporary exhibition within the United States, are of cultural significance. The objects are imported pursuant to loan agreements with the foreign owners or custodians. I also determine that the exhibition or

display of the exhibit objects at the National Gallery of Art, Washington, DC, from on or about September 29, 2013, until on or about January 5, 2014, the Metropolitan Museum of Art, New York, New York, from on or about January 27, 2014, until on or about May 4, 2014, and at possible additional exhibitions or venues yet to be determined, is in the national interest. I have ordered that Public Notice of these Determinations be published in the **Federal Register**.

FOR FURTHER INFORMATION CONTACT: For further information, including a list of the exhibit objects, contact Paul W. Manning, Attorney-Adviser, Office of the Legal Adviser, U.S. Department of State (telephone: 202–632–6469). The mailing address is U.S. Department of State, SA–5, L/PD, Fifth Floor (Suite 5H03), Washington, DC 20522–0505.

Dated: August 14, 2013.

Lee Satterfield,

Deputy Assistant Secretary for Professional and Cultural Exchanges, Bureau of Educational and Cultural Affairs, Department of State.

[FR Doc. 2013–20412 Filed 8–20–13; 8:45 am]

BILLING CODE 4710–05–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

[Docket No. FAA–2011–0183]

Access to Aircraft Situation Display to Industry (ASDI) and National Airspace System Status Information (NASSI) Data

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final Notice of the Process for Limiting Aircraft Data Displayed Via ASDI.

SUMMARY: In a proposal published on May 9, 2012, the FAA tentatively identified a process through which aircraft owners and operators could ask the FAA to limit the agency's dissemination of their aircraft data via the FAA's ASDI program.[1] The FAA noted that its final decision on the policy will replace the interim policy to which the FAA has adhered since publishing it on December 16, 2011.[2] After considering each of the comments submitted to the public docket in response to the proposal, the FAA is issuing this final policy with respect to the dissemination of aircraft data via ASDI.

If you wish to review the background documents or the comments received in this matter, you may go to *http://www.regulations.gov* at any time and follow the online instructions for accessing the electronic docket. You may also go to the U.S. Department of Transportation's Docket Operations in Room W12–140 on the ground floor of the West Building at 1200 New Jersey Avenue SE., Washington, DC, between 9:00 a.m. and 5:00 p.m., Monday through Friday, except Federal holidays.

DATES: The procedures described in this document will take effect on September 20, 2013.

FOR FURTHER INFORMATION CONTACT: You may direct any questions about adding aircraft to and removing aircraft from the ASDI block list to Mr. Damon Thomas by telephone at (202) 267–5300 or by electronic mail at *ASDIBlock@faa.gov.*

SUPPLEMENTARY INFORMATION:

I. Background

On November 18, 2011, the President signed into law H.R. 2112, the ''Consolidated and Further Continuing Appropriations Act, 2012,'' which provided the U.S. Department of Transportation's appropriation for the balance of fiscal year 2012. Section 119A of that statute provided that:

> [n]otwithstanding any other provision of law, none of the funds made available under this Act or any prior Act may be used to implement or to continue to implement any limitation on the ability of any owner or operator of a private aircraft to obtain, upon a request to the Administrator of the [FAA], a blocking of that owner's or operator's aircraft registration number from any display of the [FAA's ASDI and NASSI] data that is made available to the public, except data made available to a Government agency, for the noncommercial flights of that owner or operator.[3]

In light of this appropriation language, the FAA withdrew a prior policy that it published on June 3, 2011, which required owners or operators to submit a Certified Security Concern in order to have their aircraft blocked from the public's view on displays of ASDI and NASSI information. In connection with its withdrawal of the June 3 policy, the FAA published interim procedures by which the owners and operators of aircraft could request that the FAA block information about the operations of their aircraft from release to the public via the FAA's ASDI data feed.[4] At that time, the FAA noted that it would propose more detailed procedures for the ASDI blocking program and solicit public comment on the proposal. The FAA published the FAA's proposed procedures on May 9, 2012.[5] The FAA now summarizes and evaluates the written comments submitted to the public docket in this matter and sets forth the FAA's final decision on its policy related to the blocking of aircraft flight data from the ASDI data feed. In a separate action, the FAA will amend its memoranda of agreement with the subscribers who receive the information to clarify the subscriber responsibilities, consistent with the procedures described here.

II. Summary and Analysis of the Comments

The FAA received eight written comments on the FAA's proposed procedures. Out of the eight commenters, two are generically opposed to blocking aircraft information from the ASDI and NASSI data, and three are generically in favor of the ASDI aircraft blocking program. The three remaining commenters question certain aspects of the program and the FAA's proposal.

The FAA cannot accommodate the two commenters who oppose the blocking of aircraft information from the FAA's ASDI and NASSI data feed. The appropriations provision quoted above clearly precluded the use of appropriated funds to implement or to carry out any limitation on blocking from any display of the FAA's public data feed, on owner or operator request, the aircraft registration number of an aircraft conducting a noncommercial flight. In the absence of appropriated funds, the FAA cannot implement a policy or program that would limit owner or operator ability to block the specified aircraft from the FAA's data feed.

With respect to the commenters who raised questions with respect to the FAA program, an anonymous commenter questions the need and effectiveness of the option to request the blocking of aircraft data at the ASDI subscriber level. This commenter suggests that the convenience of allowing an intermediate level of blocking at the ASDI subscriber level could be counterbalanced by the potential harm from the inadvertent release of ASDI and NASSI data at that level.

In the FAA's notice inviting these comments, the FAA explained the rationale for the ASDI program's two

[1] 77 FR 27,269 (May 9, 2012).

[2] 76 FR 78,328 (Dec. 16, 2011).

[3] Public Law 112–55, § 119A, 125 Stat. 552, 649.

[4] 76 FR 78,328.

[5] 77 FR 27,269–71.

levels of aircraft blocking.[6] In summary, given the technology and the processes in place when the FAA established the ASDI program in 1997, some aircraft owners who desired to track their own blocked aircraft needed to contract with an ASDI subscriber to get that information, because there was no way for them to see the data if it were blocked at the FAA level. The option of requesting aircraft blocking at the ASDI subscriber level remains necessary for this purpose today, and the FAA will retain it. However, the commenter is correct to the extent that the FAA systems that convey aircraft data in the United States are changing rapidly. As a result, the FAA expects to update its data sharing policy as it continues to develop and deploy future systems that handle aircraft operational data.

The National Business Aviation Association (NBAA) inquires about the manner in which the FAA expects to protect blocked aircraft data from subscribers' intentional or inadvertent release. The FAA's agreement with subscribers requires each subscriber to demonstrate to the FAA's satisfaction the subscriber's ability to block selectively the display of any data related to any identified aircraft. In addition, the agreement has historically required ASDI data subscribers to honor the privacy and security interests of airspace system users under the legacy ASDI blocking program. In the notice announcing the FAA's interim policy, the FAA specified that it construes the current agreement to obligate ASDI subscribers to filter any aircraft data at the FAA's direction.[7] The potential remedy for a subscriber's failure to honor the privacy and security interests of system users has been the FAA's immediate termination of the agreement with that subscriber. This remedy has proven adequate. If any member of the public identifies an aircraft that should be blocked, yet continues to appear in the information that an ASDI subscriber releases, he or she can report the matter to FAA's ASDI program staff by the means identified in the ''For Further Information Contact'' section of this document.

NBAA also asks the FAA to identify clearly a process for removing aircraft from the ASDI block list. The FAA's May 2012 proposal states that the FAA was proposing that it would use the same process for adding as well as removing aircraft from the ASDI block list.[8] For example, in detailing the proposed substance of owner/operator requests, the FAA noted that the completeness of the information submitted could influence the FAA's ability to ''add or delete aircraft from the ASDI block list . . . .'' [9] In addition, the information that the FAA proposed for submission included ''[t]he registration number(s) of the aircraft to be blocked or unblocked . . . .'' [10] The FAA does not perceive that using an identical process to block and to unblock aircraft will be confusing or problematic for requestors, and the FAA will adopt that approach.

NBAA additionally suggests that the FAA should permit associations to consolidate and forward aircraft blocking and unblocking requests to the FAA. In the FAA's May 2012 proposal, the FAA tentatively determined that requests to block aircraft must come to the FAA from aircraft owners, aircraft operators, or their legally authorized agent and not from associations acting on their behalf. The FAA will adhere to this requirement. In proposing a minimum legal relationship between an ASDI block requestor and the aircraft owner or operator, the FAA determined that the requestor, if he or she is not the actual owner or operator, should have a fiduciary duty to adhere to the owner's or operator's express wishes. This is intended to ensure that the requestor has a legal duty to carry out promptly the owner's or operator's request, and the FAA expects this to result in a very close correlation between owner/operator preference and the composition of the ASDI block list. The FAA continues to believe that the threshold identified in the proposal is appropriate and will promote the ASDI block list's ongoing accuracy.

NBAA further notes that the FAA's proposal does not specify a type of documentation that the FAA needs in order to process a request related to aircraft blocking. The FAA did not prescribe a specific form for blocking and unblocking aircraft principally because the FAA intends this process to be as simple as possible; the FAA does not want to suggest that a particular form is necessary to effect the requesting owner's or operator's wishes. The FAA proposed the minimum amount of information that the FAA expects the program will need to process the request.[11] Elaborating slightly on the FAA's proposal, the FAA will be best equipped to process the request promptly if the request includes:

- The name of the requestor;
- the registration number(s) of the aircraft to be blocked or unblocked;
- a certification that the requestor is the owner or operator of the specified aircraft or is a legally authorized representative of the aircraft owner or operator;
- a telephone number or electronic mail address to which the FAA can direct any questions about the request; and
- for a request to block one or more aircraft, a statement indicating the requestor's desired level of ASDI blocking—either at the FAA source or at the ASDI subscriber level.

The request must be in writing and delivered either to the designated electronic mail address or to the designated regular mailing address for the ASDI blocking program.

An anonymous commenter asks the FAA to clarify the uses that ASDI subscribers can make of the ASDI data feed. The commenter states that the FAA should permit ASDI subscribers to pass along to ''aviation community'' users ASDI and NASSI near real time data that is further filtered only to protect basic privacy considerations. The commenter does not consider the aviation community user to correspond to the general public, instead defining the aviation community to include, for example, corporate aircraft operators and fixed base operators and perhaps also including all businesses and commercial entities providing air transportation related services. The commenter also asks that the FAA place no restriction on subscribers' retransmission of historical flight data, including the past operations of aircraft on the ASDI block list.

The permissible uses of ASDI and NASSI data that are subject to subscriber-level blocking is technically a concern that is separate from the present discussion. The notice underlying this matter was limited to the procedures by which aircraft owners and operators can request that the FAA block their aircraft from the ASDI data feed.[12] By contrast, the responsibilities of ASDI subscribers with respect to handling ASDI and NASSI data that is designated as blocked at the subscriber level are contained in the FAA's contractual memorandum of agreement with ASDI subscribers. In an effort that parallels the current procedural policy discussion, the FAA is reviewing its memoranda of agreement to ensure that they comport with the FAA's current overall data sharing policy. The FAA will communicate separately with ASDI subscribers in connection with that effort.

[6] *Id.,* at 27,270.

[7] 76 FR 78,328.

[8] 77 FR 27,269–70.

[9] *Id.,* at 27,269.

[10] *Id.*

[11] *Id.,* at 27,269–70.

[12] *Id.*

Nevertheless, the FAA notes potential pitfalls that could accompany the recommendations of the anonymous commenter. For example, the commenter's definition of an aviation community user could include the flight department of a company that is interested in the aircraft movements of a competitor's aircraft. This could presumably thwart a reason that the competing airspace user sought ASDI blocking in the first place. In addition, the FAA has not previously agreed that ASDI subscribers can display the historical movements of blocked aircraft. Aside from the absence of a clear line as to when such data becomes historical, the FAA did not propose to permit ASDI subscribers to retransmit the historical movements of blocked aircraft, and the commenter's suggestion therefore falls outside the scope of the proposal.

III. Conclusions

With respect to the procedures for aircraft owner and operator requests to block and unblock aircraft from inclusion in the FAA's ASDI data feed, the FAA concludes as follows:

1. *Requestors.* The FAA will honor each written request of an aircraft owner and operator, submitted in accordance with paragraphs 2 and 3 to block or unblock their aircraft's appearance in the FAA's public ASDI data feed. Aircraft owners and operators may submit their request on their own behalf, or they may do so through a legally authorized agent, including an attorney or an aircraft management company with a fiduciary duty to carry out the owner's or operator's express wishes with respect to the aircraft.

2. *Substance of Requests.* To assist the FAA in processing aircraft owner or operator requests promptly, all requests related to an aircraft's ASDI blocking or unblocking must include the following information:

- The name of the requestor;
- the registration number(s) of the aircraft to be blocked or unblocked;
- a certification that the requestor is the owner or operator of the specified aircraft or is a legally authorized representative of the aircraft owner or operator;
- a telephone number or electronic mail address to which the FAA can direct any questions about the request; and
- for a request to block one or more aircraft, a statement indicating the requestor's desired level of ASDI blocking—either at the FAA source or at the ASDI subscriber level.

3. *Addresses.* The FAA's primary electronic mailbox for all aircraft blocking and unblocking requests and for related inquiries directed to the ASDI blocking program is *ASDIBlock@faa.gov.* The FAA also will accept aircraft block and unblock requests submitted by regular mail at: FAA ASDI Blocking Request; ATO System Operation Services, AJR–0; Wilbur Wright Building, Room 3E1500; 600 Independence Avenue SW; Washington, DC 20597.

4. *FAA Monthly Implementation.* The FAA implements the ASDI block list updates on the first Thursday of each month. As a result, requests that the FAA receives on or before the 15th of the preceding month are likely to be processed in time to take effect in the month after the FAA receives them. However, it is possible that the volume of requests in a given month, a requestor's timeliness, or issues with the completeness and accuracy of the information that the FAA receives could preclude the FAA from processing some requests in time for them to take effect in the month following their submission. In that event, the FAA will process all requests in the order in which the FAA receives them, to the extent that it is possible.

5. *FAA Treatment of Aircraft That Are Currently Blocked.* Any aircraft that is currently on the ASDI block list, either by virtue of a certified security concern submitted after June 3, 2011, or a request submitted under the FAA's interim ASDI block policy, will remain indefinitely on the ASDI block list when the policies in this document take effect. It is not necessary for the owners or operators of these aircraft to resubmit their requests, unless they wish to change the blocking status of their aircraft or amend the level at which their aircraft is blocked.

Issued in Washington, DC, on August 14, 2013.

J. David Grizzle,

Chief Operating Officer, ATO.

[FR Doc. 2013–20375 Filed 8–20–13; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

Agency Information Collection Activities: Requests for Comments; Clearance of Renewed Approval of Information Collection: Certification and Operations

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 to renew an information collection. 14 CFR part 125 prescribes requirements for issuing operating certificates and for appropriate operating rules. In addition to the statutory basis, the collection of this information is necessary to issue, reissue, or amend applicant's operating certificates and operations specifications.

DATES: Written comments should be submitted by October 21, 2013.

FOR FURTHER INFORMATION CONTACT: Kathy DePaepe at (405) 954–9362, or by email at: *Kathy.DePaepe@faa.gov.*

SUPPLEMENTARY INFORMATION:

OMB Control Number: 2120–0085.

Title: Certification and Operations.

Form Numbers: There are no FAA forms associated with this collection.

Type of Review: Renewal of an information collection.

Background: 14 CFR part 125 prescribes requirements for leased aircraft, aviation service firms, and air travel. A letter of application and related documents which set forth an applicant's ability to conduct operations in compliance with the provisions of 14 CFR part 125 are submitted to the appropriate Flight Standards District Office (FSDO). Inspectors in FAA FSDO's review the submitted information to determine certificate eligibility.

Respondents: Approximately 163 certificated operators.

Frequency: Information is collected on occasion.

Estimated Average Burden per Response: 1.33 hours.

Estimated Total Annual Burden: 61,388 hours.

ADDRESSES: Send comments to the FAA at the following address: Ms. Kathy DePaepe, Room 126B, Federal Aviation Administration, AES–200, 6500 S MacArthur Blvd., Oklahoma City, OK 73169.

Public Comments Invited: You are asked to comment on any aspect of this information collection, including (a) Whether the proposed collection of information is necessary for FAA's performance; (b) the accuracy of the estimated burden; (c) ways for FAA to enhance the quality, utility and clarity of the information collection; and (d) ways that the burden could be minimized without reducing the quality of the collected information. The agency will summarize and/or include your

comments in the request for OMB's clearance of this information collection.

Issued in Washington, DC, on August 14, 2013.

Albert R. Spence,

FAA Assistant Information Collection Clearance Officer, IT Enterprises Business Services Division, AES–200.

[FR Doc. 2013–20372 Filed 8–20–13; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

Agency Information Collection Activities: Requests for Comments; Clearance of Renewed Approval of Information Collection: Airports Grants Program

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 to renew an information collection. The FAA collects information from airport sponsors and planning agencies in order to administer the Airports Grants Program. Data is used to determine eligibility, ensure proper use of Federal Funds, and ensure project accomplishment.

DATES: Written comments should be submitted by October 21, 2013.

FOR FURTHER INFORMATION CONTACT: Kathy DePaepe at (405) 954–9362, or by email at: *Kathy.A.DePaepe@faa.gov*.

SUPPLEMENTARY INFORMATION:

OMB Control Number: 2120–0569.

Title: Airports Grants Program.

Form Numbers: FAA forms 5100–100, 5100–101, 5100–108, 5100–125, 5100–126, and 5370–1.

Type of Review: Renewal of an information collection.

Background: Codification of Certain U.S. Transportation Laws at 49 U.S.C. (Pub. L. 103–272), which is referred to as the ''Act,'' provides funding for airport planning and development projects at airports included in the National Plan of Integrated Airport Systems. The Act also authorizes funds for noise compatibility planning and to carry out noise compatibility programs. The information required by this program is necessary to protect the Federal interest in safety, efficiency, and utility of the Airport. Data is collected to meet report requirements of 49 CFR part 18 for financial management and performance monitoring. Information is collected in the application, and grant agreement amendments; financial management; and performance reporting.

Respondents: Approximately 1,950 sponsors and planning agencies for grant projects.

Frequency: Information is collected on occasion.

Estimated Average Burden per Response: 6.75 hours.

Estimated Total Annual Burden: 80,569 hours.

ADDRESSES: Send comments to the FAA at the following address: Ms. Kathy DePaepe, Room 126B, Federal Aviation Administration, AES–200, 6500 S. MacArthur Blvd., Oklahoma City, OK 73169.

Public Comments Invited: You are asked to comment on any aspect of this information collection, including (a) Whether the proposed collection of information is necessary for FAA's performance; (b) the accuracy of the estimated burden; (c) ways for FAA to enhance the quality, utility and clarity of the information collection; and (d) ways that the burden could be minimized without reducing the quality of the collected information. The agency will summarize and/or include your comments in the request for OMB's clearance of this information collection.

Issued in Washington, DC, on August 14, 2013.

Albert R. Spence,

FAA Assistant Information Collection Clearance Officer, IT Enterprises Business Services Division, AES–200.

[FR Doc. 2013–20369 Filed 8–20–13; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

Agency Information Collection Activities: Requests for Comments; Clearance of Renewed Approval of Information Collection: Experimental Permits for Reusable Suborbital Rockets

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 to renew an information collection. The FAA collects information from applicants for experimental permits in order to determine whether they satisfy the requirements for obtaining an experimental permit under 14 CFR part 437.

DATES: Written comments should be submitted by October 21, 2013.

FOR FURTHER INFORMATION CONTACT: Kathy DePaepe at (405) 954–9362, or by email at: *Kathy.DePaepe@faa.gov.*

SUPPLEMENTARY INFORMATION:

OMB Control Number: 2120–0722.

Title: Experimental Permits for Reusable Suborbital Rockets.

Form Numbers: There are no FAA forms associated with this collection.

Type of Review: Renewal of an information collection.

Background: 14 CFR part 437 established requirements for the FAA's authority to issue experimental permits for reusable suborbital rockets to authorize launches for the purpose of research and development, crew training and showing compliance with the regulations. The information collected includes data required for performing a safety review, which includes a technical assessment to determine if the applicant can launch a reusable suborbital rocket without jeopardizing public health and safety and the safety of property. This information collection requirement is intended for incorporating acquired data into the experimental permit, which then becomes binding on the launch or reentry operator. The applicant is required to submit information that enables FAA to determine, before issuing a permit, if issuance of the experimental permit would jeopardize the foreign policy or national security interests of the U.S.

Respondents: Approximately 10 applicants for experimental permits.

Frequency: Information is collected on occasion.

Estimated Average Burden per Response: 18.6 hours.

Estimated Total Annual Burden: An estimated 2,567 hours annually.

ADDRESSES: Send comments to the FAA at the following address: Ms. Kathy DePaepe, Room 126B, Federal Aviation Administration, AES–200, 6500 S. MacArthur Blvd., Oklahoma City, OK 73169.

Public Comments Invited: You are asked to comment on any aspect of this information collection, including (a) Whether the proposed collection of information is necessary for FAA's performance; (b) the accuracy of the estimated burden; (c) ways for FAA to enhance the quality, utility and clarity of the information collection; and (d) ways that the burden could be

minimized without reducing the quality of the collected information. The agency will summarize and/or include your comments in the request for OMB's clearance of this information collection.

Issued in Washington, DC on August 14, 2013.

Albert R. Spence,

FAA Assistant Information Collection Clearance Officer, IT Enterprises Business Services Division, AES–200.

[FR Doc. 2013–20373 Filed 8–20–13; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

Agency Information Collection Activities: Requests for Comments; Clearance of Renewed Approval of Information Collection: Associate Administrator for Commercial Space Transportation (AST) Customer Service Survey

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 to renew an information collection. The FAA Office of the Associate Administrator for Commercial Space Transportation (AST) conducts this survey in order to obtain industry input on customer service standards which have been developed and distributed to industry customers.

DATES: Written comments should be submitted by October 21, 2013.

FOR FURTHER INFORMATION CONTACT: Kathy DePaepe at (405) 954–9362, or by email at: *Kathy.DePaepe@faa.gov.*

SUPPLEMENTARY INFORMATION:

OMB Control Number: 2120–0611.

Title: Associate Administrator for Commercial Space Transportation (AST) Customer Service Survey

Form Numbers: There are no FAA forms associated with this collection.

Type of Review: Renewal of an information collection.

Background: This information is being collected to obtain feedback from the companies and organizations that utilize the products and services of the Federal Aviation Administration's Office of Commercial Space Transportation (AST). The data collected will be analyzed by AST to determine the quality of services provided by AST to its industry and government customers, and to address any problems or issues found as a result of the data analysis.

Respondents: Approximately 50 industry customers.

Frequency: Information is collected on occasion.

Estimated Average Burden per Response: 1 hour.

Estimated Total Annual Burden: 50 hours.

ADDRESSES: Send comments to the FAA at the following address: Ms. Kathy DePaepe, Room 126B, Federal Aviation Administration, AES–200, 6500 S. MacArthur Blvd., Oklahoma City, OK 73169.

Public Comments Invited: You are asked to comment on any aspect of this information collection, including (a) Whether the proposed collection of information is necessary for FAA's performance; (b) the accuracy of the estimated burden; (c) ways for FAA to enhance the quality, utility and clarity of the information collection; and (d) ways that the burden could be minimized without reducing the quality of the collected information. The agency will summarize and/or include your comments in the request for OMB's clearance of this information collection.

Issued in Washington, DC on August 14, 2013.

Albert R. Spence,

FAA Assistant Information Collection Clearance Officer, IT Enterprises Business Services Division, AES–200.

[FR Doc. 2013–20374 Filed 8–20–13; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

34th Meeting: RTCA Special Committee 206, Aeronautical Information and Meteorological Data Link Services

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

ACTION: Meeting Notice of RTCA Special Committee 206, Aeronautical Information and Meteorological Data Link Services.

SUMMARY: The FAA is issuing this notice to advise the public of the thirty-fourth meeting of the RTCA Special Committee 206, Aeronautical Information and Meteorological Data Link Services.

DATES: The meeting will be held September 23–27, 8:30 a.m.–5:00 p.m.

ADDRESSES: The meeting will be held at United Airlines, 233 S. Wacker Drive, Chicago, IL 60606.

FOR FURTHER INFORMATION CONTACT: The RTCA Secretariat, 1150 18th Street NW., Suite 910, Washington, DC 20036, or by telephone at (202) 330–0652/(202) 833–9339, fax at (202) 833–9434, or Web site at *http://www.rtca.org.*

SUPPLEMENTARY INFORMATION: Pursuant to section 10(a)(2) of the Federal Advisory Committee Act (Pub. L. 92–463, 5 U.S.C., App.), notice is hereby given for a meeting of Special Committee 206. The agenda will include the following:

Sep 23, Monday—Opening Plenary

- Introduction and opening remarks
- Approval of previous meeting minutes and Action item review
- Review and approve meeting agenda
- Sub-Groups status and week's plan
- Presentations
- SESAR Update
- Wake Vortex Safety System: Today and Tomorrow
- Flight Simulation Evaluation of AIS/MET Data Link Services in the Terminal Area
- MIT/LL Winds Study to Support ATC Winds
- SC–214 Briefing
- TOR Changes
- Other business
- Sub-Groups meetings

Sep 24–26, Tuesday–Thursday—Sub-Groups Meetings (ALL SGs)

- Tuesday—SG4: Update on SE2020 Eddy Dissipation Rate (EDR)
- Turbulence Project (9:00–11:00 AM)
- Tuesday—SG1: Open session on wake progress (1:00 PM)
- Thursday—AIS and MET Delivery Architecture Recommendations review

Sep 27, Friday, Closing Plenary

- Sub-Groups reports
- Appoval for AIS and MET Delivery Architecture Recommendations document to enter FRAC
- Action item review
- Future meeting plans and dates
- Industry Coordination: Report on SAE G–10A ARP 6467 SFO
- Other business
- Adjourn

Attendance is open to the interested public but limited to space availability. With the approval of the chairman, members of the public may present oral statements at the meeting.

Persons wishing to present statements or obtain information should contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section. Members of the public may present a written statement to the committee at any time.

Issued in Washington, DC, on August 14, 2013.

Paige Williams,

Management Analyst, NextGen, Business Operations Group, Federal Aviation Administration.

[FR Doc. 2013–20433 Filed 8–20–13; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

Seventeenth Meeting: RTCA Special Committee 217—Aeronautical Databases Joint With EUROCAE WG–44—Aeronautical Databases

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

ACTION: Notice of RTCA Special Committee 217—Aeronautical Databases Joint with EUROCAE WG–44—Aeronautical Databases.

SUMMARY: The FAA is issuing this notice to advise the public of a meeting of RTCA Special Committee 217—Aeronautical Databases being held jointly with EUROCAE WG–44—Aeronautical Databases.

DATES: The meeting will be held September 8 through September 13, 2013, from 9:00 a.m. to 5 p.m.

ADDRESSES: The meeting will be held by Irish Aviation Authority (IAA), IAA Headquarters, The Times Building, 11–12 D'Olier Street, Dublin 2. Ireland

FOR FURTHER INFORMATION CONTACT: Sophie Bousquet, *SBousquet@rtca.org,* 202–330–0663 or The RTCA Secretariat, 1150 18th Street NW., Suite 910, Washington, DC 20036, or by telephone at (202) 833–9339, fax at (202) 833–9434, or Web site at *http://www.rtca.org.*

SUPPLEMENTARY INFORMATION: Pursuant to section 10(a)(2) of the Federal Advisory Committee Act (Pub. L. 92–463, 5 U.S.C., App.), notice is hereby given for a meeting of RTCA Special Committee 217—Aeronautical Databases held jointly with EUROCAE WG–44—Aeronautical Databases. The agenda will include the following:

Monday, September 9—Opening Plenary Session

- Co-Chairmen's remarks and introductions
- Housekeeping
- Approve minutes from 16th meeting
- Review and approve meeting agenda for 17th meeting
- Schedule and working arrangements for this week
- Review of joint WG–1/WG–2 Action Items
- Update on WorkSpace

Monday thru Thursday, Sep 9 through Sep 12—Working Group Sessions

Working Group One (WG1)—DO–200
Working Group Two (WG2)—DO–272/DO–276/DO–291

- Terms of Reference Date Change Discussion
- Report on July Meeting- European Committee for Standardization (CEN), Technical Committee (TC) 377 ''Air Traffic Management'' and WG2 ''Aerodrome Mapping Data''

Friday, Sep 13—Closing Plenary Session (9 a.m. to Noon)

- Presentation of WG1 and WG2 conclusions
- Working arrangements for the remaining work
- Review of action items
- Next meetings, dates and locations
- Any other business
- Adjourn

Attendance is open to the interested public but limited to space availability. With the approval of the chairman, members of the public may present oral statements at the meeting. Persons wishing to present statements or obtain information should contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section. Members of the public may present a written statement to the committee at any time.

Issued in Washington, DC, on August 14, 2013.

Paige L. Williams,

Management Analyst, Business Operations Group, ANG–A12, Federal Aviation Administration.

[FR Doc. 2013–20423 Filed 8–20–13; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

Seventh Meeting: RTCA Special Committee 227, Standards of Navigation Performance

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

ACTION: Meeting Notice of RTCA Special Committee 227, Standards of Navigation Performance.

SUMMARY: The FAA is issuing this notice to advise the public of the seventh meeting of the RTCA Special Committee 227, Standards of Navigation Performance.

DATES: The meeting will be held September 9–13, 2013 from 9:00 a.m.–5:00 p.m. Contact Dave Nakamura by telephone at 425–965–6896 or email *dave.nakamura@boeing.com.*

ADDRESSES: The meeting will be held at RTCA, 1150 18th Street NW., Suite 910, Washington, DC 20036.

FOR FURTHER INFORMATION CONTACT: The RTCA Secretariat, 1150 18th Street NW., Suite 910, Washington, DC 20036, or by telephone at (202) 330–0662 or (202) 833–9339, fax at (202) 833–9434, or Web site at *http://www.rtca.org.* In addition, Jennifer Iversen may be contacted directly at email: *jiversen@rtca.org.*

SUPPLEMENTARY INFORMATION: Pursuant to section 10(a)(2) of the Federal Advisory Committee Act (Pub. L. 92–463, 5 U.S.C., App.), notice is hereby given for a meeting of Special Committee 227. The agenda will include the following:

September 9–13, 2013

- Welcome/Introductions/Administrative Remarks
- Agenda Overview
- Review Committee Status and Revised TORs
  - Datacom Situation and Implications to SC227
  - Discussion, as appropriate
- Work Program for the Week
  - MASPS, Monday–Tuesday
  - MOPS, Wednesday–Friday
- Plenary Review/Discussion—MASPS/MOPS
  - Planned Work Schedule
  - 9:00AM to 4:00PM each day
- Technical Requirements Breakout Session (Everyday as appropriate)
- Other Business
- Adjourn

Attendance is open to the interested public but limited to space availability. With the approval of the chairman, members of the public may present oral statements at the meeting. Persons wishing to present statements or obtain information should contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section. Members of the public may present a written statement to the committee at any time.

Issued in Washington, DC, on August 14, 2013.

Paige Williams,

Management Analyst, NextGen, Business Operations Group, Federal Aviation Administration.

[FR Doc. 2013–20420 Filed 8–20–13; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

Twenty-Fourth Meeting: RTCA Special Committee 224, Airport Security Access Control Systems

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

ACTION: Meeting Notice of RTCA Special Committee 224, Airport Security Access Control Systems.

SUMMARY: The FAA is issuing this notice to advise the public of the twenty-fourth meeting of the RTCA Special Committee 224, Airport Security Access Control Systems.

DATES: The meeting will be held on September 9 from 9:00 a.m.–5:00 p.m.

ADDRESSES: The meeting will be held at RTCA, Inc., 1150 18th Street NW., Suite 910, Washington, DC 20036.

FOR FURTHER INFORMATION CONTACT: The RTCA Secretariat, 1150 18th Street NW., Suite 910, Washington, DC 20036, or by telephone at (202) 833–9339, fax at (202) 833–9434, or Web site at *http://www.rtca.org.*

SUPPLEMENTARY INFORMATION: Pursuant to section 10(a)(2) of the Federal Advisory Committee Act (Pub. L. 92–463, 5 U.S.C., App.), notice is hereby given for a meeting of Special Committee 224. The agenda will include the following:

September 9, 2013

- Welcome, Introductions & Administrative Remarks
- Review and Approve Summary of the Twenty-third Meeting
- Updates from TSA (as required)
- Final Review/Approval—Proposed Draft—Revised DO–230C—Integrated Security System Standard for Airport Access Control, RTCA Paper No. 168–13/SC224–048
- TOR Review—Status of Deliverables
- Time and Place of Next Meeting
- Any Other Business
- Adjourn

Attendance is open to the interested public but limited to space availability. With the approval of the chairman, members of the public may present oral statements at the meeting. Persons wishing to present statements or obtain information should contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section. Members of the public may present a written statement to the committee at any time.

Issued in Washington, DC, on September 9, 2013.

Paige Williams,

Management Analyst, NextGen, Business Operations Group, Federal Aviation Administration.

[FR Doc. 2013–20424 Filed 8–20–13; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

Notice of Opportunity for Public Comment on Surplus Property Release at George M. Bryan Airport Starkville, Mississippi

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of intent to rule on land release request.

SUMMARY: Under the provisions of Title 49, U.S.C. Section 47153(c), notice is being given that the FAA is considering a request from the Starkville Board of Alderman to waive the requirement that a 10.01-acre parcel of surplus property, located at the George M. Bryan Airport, be used for aeronautical purposes.

DATES: Comments must be received on or before September 20, 2013.

ADDRESSES: Comments on this notice may be mailed or delivered in triplicate to the FAA at the following address: Jackson Airports District Office, 100 West Cross Street, Suite B, Jackson, MS 39208–2307.

In addition, one copy of any comments submitted to the FAA must be mailed or delivered to Rodney Lincoln, Airport Manager, at the following address: George M. Bryan Airport, 120 Airport Rd., Starkville, MS 39759.

FOR FURTHER INFORMATION CONTACT: David Shumate, Program Manager, or Brian Hendry, Community Planner, at the Jackson Airports District Office, 100 West Cross Street, Suite B, Jackson, MS 39208–2307, (601)664–9882. The land release request may be reviewed in person at this same location.

SUPPLEMENTARY INFORMATION: The FAA is reviewing a request by George M. Bryan Airport to release 10.01 acres of surplus property at the Starkville/Oktibbeha County Airport. The property will be purchased by Golden Triangle Planning and Development District for a passive recreation park. The net proceeds from the sale of this property will be used for Airport Improvement Program eligible development.

Any person may inspect the request in person at the FAA office listed above under **FOR FURTHER INFORMATION CONTACT**. In addition, any person may, upon request, inspect the request, notice and other documents germane to the request in person at the George M. Bryan Airport.

Issued in Jackson, Mississippi on August 12, 2013.

Rans D. Black,

Manager, Jackson Airports District Office, Southern Region.

[FR Doc. 2013–20368 Filed 8–20–13; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Transit Administration

[FTA Docket No. FTA–2013–0033]

Agency Information Collection Activity Under OMB Review

AGENCY: Federal Transit Administration, DOT.

ACTION: Notice of request for comments.

SUMMARY: The Federal Transit Administration invites public comment about our intention to request the Office of Management and Budget's (OMB) approval to renew the following information collection:

49 CFR part 659—Rail Fixed Guideway Systems; State Safety Oversight

The information collected enables each SSO agency to monitor each rail transit agency's implementation of the State's requirements as specified in the Program Standard approved by FTA. The **Federal Register** Notice with a 60-day comment period soliciting comments was published on June 5, 2013.

DATES: Comments must be submitted before September 20, 2013 A comment to OMB is most effective if OMB receives it within 30 days of publication.

FOR FURTHER INFORMATION CONTACT: LaStar Matthews, Office of Administration, Office of Management Planning, (202) 366–2295.

SUPPLEMENTARY INFORMATION:

Title: 49 CFR part 659—Rail Fixed Guideway Systems; State Safety Oversight (*OMB Number: 2132–0558*).

Abstract: 49 U.S.C. 5330 requires States to designate a State Safety Oversight (SSO) agency to oversee the safety and security of each rail transit agency within the State's jurisdiction. To comply with Section 5330, SSO agencies must develop program standards which meet FTA's minimum requirements. In the Program Standard, which must be approved by FTA, each SSO agency must require each rail

transit agency in the State's jurisdiction to prepare and implement a System Safety Program Plan (SSPP) and System Security Plan (SSP). The SSO agency also requires the rail transit agencies in its jurisdiction to conduct specific activities, such as accident investigation, implementation of a hazard management program, and the management of an internal safety and security audit process. SSO agencies review and approve the SSPPs and SSPs of the rail transit agencies. Once every three years, States conduct an on-site review of the rail transit agencies in their jurisdictions to assess SSPP/SSP implementation and to determine whether these plans are effective and if they need to be updated. SSO agencies develop final reports documenting the findings from these on-site reviews and require corrective actions. SSO agencies also review and approve accident investigation reports, participate in the rail transit agency's hazard management program, and oversee implementation of the rail transit agency's internal safety and security audit process. SSO agencies review and approve corrective action plans and track and monitor rail transit agency activities to implement them.

Collection of this information enables each SSO agency to monitor each rail transit agency's implementation of the State's requirements as specified in the Program Standard approved by FTA. Without this information, States would not be able to oversee the rail transit agencies in their jurisdictions. Recommendations from the National Transportation Safety Board (NTSB) and the Government Accountability Office (GAO) have encouraged States and rail transit agencies to devote additional resources to these safety activities and safety oversight in general.

SSO agencies also submit an annual certification to FTA that the State is in compliance with Section 5330 and an annual report documenting the State's safety and security oversight activities. States also submit annual grant applications for Federal transit assistance and report quarterly on the progress of those activities. FTA uses the annual information submitted by the States to monitor implementation of the program. If a State fails to comply with Section 5330, FTA may withhold up to five percent of the funds appropriated for use in a State or urbanized area in the State under section 5307. The information submitted by the States ensures FTA's compliance with applicable federal laws, OMB Circular A–102, and 49 CFR Part 18, ''Uniform Administrative Requirements for Grants and Cooperative Agreements with State and Local Governments.''

Estimated Total Annual Burden: 177,820 hours.

ADDRESSES: All written comments must refer to the docket number that appears at the top of this document and be submitted to the Office of Information and Regulatory Affairs, Office of Management and Budget, 725—17th Street NW. Washington, DC 20503, Attention: FTA Desk Officer.

Comments are Invited On: Whether the proposed collection of information is necessary for the proper performance of the functions of the Department, including whether the information will have practical utility; the accuracy of the Department'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 collection of information on respondents, including the use of automated collection techniques or other forms of information technology.

Matthew M. Crouch,

Deputy Associate Administrator for Administration.

[FR Doc. 2013–20283 Filed 8–20–13; 8:45 am]

BILLING CODE P

DEPARTMENT OF TRANSPORTATION

Federal Transit Administration

[FTA Docket No. FTA–2013–0032]

Agency Information Collection Activity Under OMB Review

AGENCY: Federal Transit Administration, DOT.

ACTION: Notice of request for comments.

SUMMARY: The Federal Transit Administration invites public comment about our intention to request the Office of Management and Budget's (OMB) approval to renew the following information collection: Transit Investments in Greenhouse Gas and Energy Reduction (TIGGER) Program.

The information collected is necessary to ensure that recipients of TIGGER funds are meeting program objectives and are complying with FTA Circular 5010.1D, ''Grant Management Requirements'' and other federal requirements. The **Federal Register** Notice with a 60-day comment period soliciting comments was published on May 17, 2013.

DATES: Comments must be submitted before September 20, 2013 A comment to OMB is most effective if OMB receives it within 30 days of publication.

FOR FURTHER INFORMATION CONTACT: LaStar Matthews, Office of Administration, Office of Management Planning, (202) 366–2295.

SUPPLEMENTARY INFORMATION:

Title: Transit Investments in Greenhouse Gas and Energy Reduction (TIGGER) Program (*OMB Number: 2132–0566*).

Abstract: The American Recovery and Reinvestment Act of 2009 (ARRA) established the Transit Investments in Greenhouse Gas and Energy Reduction (TIGGER) Program with $100 million in new discretionary grant program funding to support public transit agencies in making capital investments that would assist in the reduction of energy consumption or greenhouse gas emissions within their public transportation systems. In two subsequent years, The Transportation, Housing and Urban Development, Related Agencies Appropriations Act, The Department of Defense and Full-Year Continuing Appropriations Act appropriated an additional $75 million and $49.9 million, respectively, for FY 2010 and FY 2011. The TIGGER Program has awarded 87 competitively selected projects, implementing a wide variety of technologies to meet program goals. The awarded projects are geographically diverse, covering 35 states and 67 different transit agencies in both urban and rural settings.

The information that's currently being collected for this program is submitted as part of the Project Management reporting requirements for TIGGER. The collection of Project Management information provides documentation that the recipients of TIGGER funds are meeting program objectives and are complying with FTA Circular 5010.1D, ''Grant Management Requirements'' and other federal requirements. Estimated Total Annual Burden: 17,052 hours.

ADDRESSES: All written comments must refer to the docket number that appears at the top of this document and be submitted to the Office of Information and Regulatory Affairs, Office of Management and Budget, 725—17th Street NW., Washington, DC 20503, Attention: FTA Desk Officer.

Comments are Invited On: Whether the proposed collection of information is necessary for the proper performance of the functions of the Department, including whether the information will have practical utility; the accuracy of the Department'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 collection of information on respondents, including the use of automated collection techniques or other forms of information technology.

Matthew M. Crouch,

Deputy Associate Administrator for Administration.

[FR Doc. 2013–20282 Filed 8–20–13; 8:45 am]

BILLING CODE P

DEPARTMENT OF TRANSPORTATION

Federal Transit Administration

Urbanized Area Formula Grants; Passenger Ferry Grant Program

AGENCY: Federal Transit Administration (FTA), DOT.

ACTION: Notice of Funding Availability (NOFA): Solicitation of Project Proposals for the Passenger Ferry Grant Program.

SUMMARY: The Federal Transit Administration (FTA) announces the availability of Section 5307 Urbanized Area Formula Grant program funds in support of the Discretionary Passenger Ferry Grant program. This grant opportunity will be funded using $29.9 million in FY 2013 Urbanized Area Formula Grants program funds authorized by the Moving Ahead for Progress in the 21st Century Act (MAP–21), Public Law 112–141, July 6, 2012.

The Passenger Ferry Grant program (Ferry program), as authorized, is available to urbanized areas for the same general authority provided under 49 U.S.C. 5307 (Section 5307). However, within the authority provided to the Secretary of Transportation to develop a competitive process, FTA is limiting this discretionary opportunity to capital projects. These funds constitute a core investment in the enhancement and revitalization of public ferry systems in the Nation's urbanized areas. This notice solicits proposals to compete for Fiscal Year (FY) 2013 funding under the Ferry program and may include additional funds made available under future appropriations.

This notice also includes priorities established by FTA for these discretionary funds, criteria FTA will use to identify meritorious projects for funding, and the process to apply for funding. This announcement is available on the FTA Web site at: *http//www.fta.dot.gov.* FTA may announce final selections on the Web site and in the **Federal Register**. Additionally, a synopsis of this funding opportunity will be posted in the FIND module of the government-wide electronic grants (GRANTS.GOV) Web site at *http://www.grants.gov.*

DATES: Complete proposals for Ferry program projects must be submitted by 11:59 p.m. EDT on October 21, 2013. All proposals must be submitted electronically through the GRANTS.GOV APPLY function. Any agency intending to apply should initiate the process of registering on the GRANTS.GOV site immediately to ensure completion of registration before the submission deadline. Instructions for applying can be found on FTA's Web site at *http://www.fta.dot.gov/grants/13093_3561.html* and in the ''FIND'' module of GRANTS.GOV.

FOR FURTHER INFORMATION CONTACT: Contact the appropriate FTA Regional Office found at *http://www.fta.dot.gov* for proposal-specific information and issues. For program-specific questions, please contact Vanessa Williams, Office of Program Management, (202) 366–4818, email: *Vanessa.williams@dot.gov.* A TDD is available at 1–800–877–8339 (TDD/FIRS).

SUPPLEMENTARY INFORMATION:

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A. FTA Ferry Program Authority

Section 5307(h) of Title 49, United States Code, as established by MAP–21, authorizes FTA's Passenger Ferry Grant program. The program authorizes FTA to solicit grant applications and make grants for eligible projects on a competitive basis subject to the Section 5307 terms and conditions, unless noted otherwise in the competitive solicitation.

B. Program Description and Purpose

Improving and maintaining the Nation's public ferry systems is a key strategic goal of the U.S. Department of Transportation (DOT) and FTA. The Ferry program is intended to contribute to the improvement of the condition of the public ferry systems by providing financial assistance for capital projects. As part of the program and as evidenced in the criteria established for the program, FTA intends to prioritize ferry projects that aim to improve a system's state of good repair and that support the connection of ferry service with multiple modes of transportation, including but not limited to: rail, bus, intercity bus, and private transportation providers.

C. Program Information

1. Eligible Proposers

Eligible proposers and eventual grant applicants under this initiative must be eligible direct recipients of Section 5307 funds engaged in providing a public transportation passenger ferry service. Ferry systems that accommodate cars must also accommodate walk-on passengers.

2. Eligible Projects

Under this competitive program, eligible projects are capital projects including ferries, terminals, and related infrastructure. Capital projects include, but are not limited to, the purchase, replacement, or rehabilitation of, ferries and terminals and related equipment. Funds made available under this Notice of Funding Availability (NOFA) may not be used to fund operating expenses, planning, or preventive maintenance. FTA's Section 5307 formula funds may be used for these activities.

3. Cost Sharing or Matching

Costs will be shared at the following ratio:

i. The Federal share is 80 percent for capital projects with exceptions explained below:

○ The Federal share is 85 percent for net project costs for acquiring vehicles (including clean-fuel or alternative fuel) attributable to compliance with the Clean Air Act (CAA) or attributable to compliance with the Americans with Disabilities Act (ADA) of 1990.

○ The Federal share is 90 percent for net project costs for vehicle-related equipment or facilities (including clean-fuel or alternative-fuel vehicle-related equipment or facilities) attributable to compliance with the Clean Air Act (CAA) or Americans with Disabilities Act (ADA) of 1990.

FTA considers vehicle-related equipment to be equipment on and attached to the vehicle. The award recipient may itemize the cost of specific, discrete, vehicle-related equipment being purchased to be in compliance with ADA or CAA.

4. Eligible Sources of Match

After the appropriate Federal share is established, the applicant must provide the local share of the net project cost in

cash (or in-kind) and must document in its grant application the source of the local match. The local match may include:

i. Cash from non-governmental sources other than revenues from providing public transportation services;

ii. Non-farebox revenues from the operation of public transportation service, such as the sale of advertising and concession revenues. A voluntary or mandatory fee that a college, university, or similar institution imposes on all its students for free or discounted transit service is not farebox revenue;

iii. Amounts received under a service agreement with a State or local social service agency or private social service organization;

iv. Undistributed cash surpluses, replacement or depreciation cash funds, reserves available in cash, or new capital;

v. Amounts appropriated or otherwise made available to a department or agency of the Government (other than the U.S. Department of Transportation); and

vi. In-kind contribution such as the market value of in-kind contributions integral to the project may be counted as a contribution toward local share.

vii. Revenue bond proceeds for a capital project, with prior FTA approval.

viii. Transportation Development Credits (formerly referred to as Toll Revenue Credits).

D. Proposal Submission Process

Project proposals must be submitted electronically through *http://www.GRANTS.GOV* by 11:59 p.m. on October 21, 2013. Mail and fax submissions will not be accepted. A complete proposal submission will consist of at least two files: (1) The SF 424 Mandatory form (downloaded from GRANTS.GOV) and (2) the Applicant and Proposal Profile supplemental form for the Passenger Ferryboat program (supplemental form) found on the FTA Web site at *http://www.fta.dot.gov/grants/13093_3561.html.* The supplemental form provides guidance and a consistent format for proposers to respond to the criteria outlined in this NOFA. Once completed, the supplemental form must be placed in the attachments section of the SF 424 Mandatory form. Proposers must use the supplemental form designated for the Ferry program and attach it to their submission in GRANTS.GOV to successfully complete the application process. A proposal submission may contain additional supporting documentation as attachments.

Within 24–48 hours after submitting an electronic application, the applicant should receive three email messages from GRANTS.GOV: (1) Confirmation of successful transmission to GRANTS.GOV, (2) confirmation of successful validation by GRANTS.GOV and (3) confirmation of successful validation by FTA. If confirmations of successful validation are not received and a notice of failed validation or incomplete materials is received, the applicant must address the reason for the failed validation, as described in the email notice, and resubmit before the submission deadline. If making a resubmission for any reason, include all original attachments regardless of which attachments were updated and check the box on the supplemental form indicating this is a resubmission.

Complete instructions on the application process can be found at *http://www.fta.dot.gov/grants/13093_3561.html.* Important: FTA urges proposers to submit their applications at least 72 hours prior to the due date to allow time to receive the validation messages and to correct any problems that may have caused a rejection notification. FTA will not accept submissions after the stated submission deadline. GRANTS.GOV scheduled maintenance and outage times are announced on the GRANTS.GOV Web site at *http://www.GRANTS.GOV.* Deadlines will not be extended due to scheduled maintenance or outages.

Proposers are encouraged to begin the process of registration on the GRANTS.GOV site well in advance of the submission deadline. Registration is a multi-step process, which may take several weeks to complete before an application can be submitted. Registered proposers may still be required to take steps to keep their registration up to date before submissions can be made successfully: (1) Registration in the System for Award Management (SAM) is renewed annually and (2) persons making submissions on behalf of the Authorized Organization Representative (AOR) must be authorized in GRANTS.GOV by the AOR to make submissions. Instructions on the GRANTS.GOV registration process are listed in Appendix A.

Proposers may submit one proposal for each project or one proposal containing multiple projects. Proposers submitting multiple projects in one proposal must be sure to clearly define each project by completing a supplemental form for each project. Supplemental forms must be added within the proposal by clicking the ''add project'' button in Section II of the supplemental form.

Information such as proposer name, Federal amount requested, local match amount, description of areas served, etc. may be requested in varying degrees of detail on both the SF 424 form and supplemental form. Proposers must fill in all fields unless stated otherwise on the forms. Proposers should use both the ''Check Package for Errors'' and the ''Validate Form'' validation buttons on both forms to check all required fields on the forms, and ensure that the federal and local amounts specified are consistent. The following information MUST be included on the SF 424 and supplemental forms for all requests for the Ferry program funding:

E. Proposal Information

1. Name of applicant and, if applicable, the specific ferry agency submitting the application.

2. Dun and Bradstreet (D&B) Data Universal Numbering System (DUNS) number.

3. Contact information including: Contact name, title, address, congressional district, fax and phone number, and email address if available.

4. Description of public transportation services including areas currently served by the ferry system, if any.

5. Name of person (s) authorized to apply on behalf of the system (attach a signed transmittal letter) must accompany the proposal.

F. Proposal Content

For complete and up to date guidance on the project information and project evaluation criteria that must be documented, refer to the applicable program on the FTA Web site: *http://www.fta.dot.gov/grants/13093_3561.html.* At a minimum, every proposal must:

1. Submit an SF–424 with the correct supplemental form attached.

2. State the project title and describe the project scope to be funded in the executive summary.

3. Address whether project will need a Buy America waiver.

4. Choose the type of service provided, project type and fleet information.

5. Address each evaluation criterion separately, demonstrating how the project responds to each criterion.

6. Provide a line-item budget for the total project, with enough detail to indicate the various key components of the project. As FTA may elect to fund only part of some project proposals, the budget should provide for the minimum amount necessary to fund specific project components of independent utility.

7. Provide the Federal amount requested.

8. Document the matching funds, including amount and source of the match (may include local or private sector financial participation in the project).

9. Provide support documentation, including financial statements, bond-ratings, and documents supporting the commitment of non-federal funding to the project, or a timeframe upon which those commitments would be made.

10. Address whether other Federal funds have been sought for the project.

11. Provide a project time-line, including significant milestones such as the date anticipated to issue a request for proposals for the project components or contract for purchase of ferry(s), and actual or expected delivery date or notice of request for proposal and notice to proceed for capital replacement/rehabilitation projects.

12. Provide Congressional district information for the project's place of performance.

G. Evaluation Criteria

Projects will be evaluated by FTA based on the proposals submitted according to the following criteria. Each proposer is encouraged to demonstrate the responsiveness of a project to any and all criteria with the most relevant information that the proposer can provide, regardless of whether such information has been specifically requested, or identified in this notice.

1. Demonstration of Need

FTA will evaluate each project to determine its need for resources. In addition to the project-specific criteria below, it will include evaluating the project's impact on service delivery and whether the project represents a one-time or periodic need that cannot reasonably be funded from FTA program formula allocations or State and/or local resources.

i. For vessel replacement or rehabilitation projects:

- The age of the asset to be replaced or rehabilitated by the proposed project, relative to its useful life.
- Condition and performance of the asset to be replaced by the proposed project, as ascertained through inspections or otherwise, if available.

ii. For infrastructure (facility) improvements or related-equipment acquisitions:

- The age of the facility or equipment to be rehabilitated or replaced relative to its useful life.
- The degree to which the proposed project will enable the agency to improve the maintenance and condition of the agency's fleet and/or other related ferry assets.

iii. For expansion requests (vessel or facility-related):

- The degree to which the proposed project addresses a current capacity constraint that is limiting the ability of the agency to provide reliable service, meet ridership demands, or maintain vessels and related-equipment in a state of good repair.

In this section, the proposal should also demonstrate the needs of the ferry passengers and discuss how the proposed project will address the identified needs.

2. Demonstration of Benefits

In this section, proposals should identify expected project benefits. Possible examples include how the project: will improve the state of good repair of the system, impact ridership, increase reliability of service, improve operations or maintenance capabilities, or provide more mobility options, intermodal connections, or economic benefits to the community. Benefits can be demonstrated quantifiably or qualitatively. Proposers should document, explain or show the benefits in whatever format is reasonable to present them.

3. Planning and Local/Regional Prioritization

In this section, the applicant should describe how the proposed project is consistent with planning documents and local priorities. This will involve assessing whether:

i. The project is consistent with the transit priorities identified in the long-range plan and/or contingency/illustrative projects. Proposer should note if the project could not be included in the financially constrained Transportation Improvement Plan (TIP)/Statewide Transportation Improvement Program (STIP) due to lack of funding (if selected, project must be in federally approved STIP before grant award).

ii. Local support is demonstrated by availability of local match for this and/or related projects and letters of support.

iii. In an area with both ferry and other public transit operators, the proposal demonstrates coordination with and support of other related projects within the proposer's Metropolitan Planning Organization (MPO) or the geographic region within which the proposed project will operate.

4. Project Readiness

In this section, the applicant should describe the extent to which the project is ready to be implemented. This will involve assessing whether:

i. The project is a Categorical Exclusion (CE) or required environmental work has been initiated or completed for construction projects requiring an Environmental Assessment (EA) or Environmental Impact Statement (EIS).

ii. Project implementation plans are ready, including initial design of facility projects.

iii. The TIP/STIP can be amended (evidenced by MPO/State endorsement).

iv. Project funds can be obligated and the project implemented quickly, if selected.

v. The project will require a Buy America waiver.

The applicant demonstrates the ability to carry out the proposed project successfully.

5. Technical, Legal, and Financial Capacity To Implement the Particular Project Proposed

In this section, the applicant should address all of the following points:

i. The proposer has the technical capacity to administer the project.

ii. There are no outstanding legal, technical, or financial issues with the proposer that would make this a high-risk project to implement quickly.

iii. The proposer has good financial systems in place that meet generally acceptable accounting standards that can be audited and has identified the source of local match if selected (no deferred local share will be allowed).

iv. The grantee is in fundable status for grant-making purposes.

6. Connectivity to Other Modes of Transportation

The proposals should include information about transfer connections to other modes of transportation, including but not limited to: rail, bus, intercity bus, and private transportation providers. Supporting documentation should include data that supports the number of trips (passengers and vehicles), the number of walk-on passengers, and transfers to other modes (if applicable).

H. Review and Selection Process

In addition to other FTA staff that may review the proposals, a technical evaluation committee will review proposals under the project evaluation criteria. Members of the technical evaluation committee and other involved FTA staff reserve the right to screen and rate the applications it receives and to seek clarification from any applicant about any statement in its application that FTA finds ambiguous and/or request additional documentation to be considered during

the evaluation process to clarify information contained within the proposal.

After consideration of the findings of the technical evaluation committee, the FTA Administrator will determine the final selection and amount of funding for each project. Geographic diversity and the applicant's receipt of other Federal funding for ferries may be considered in FTA's award decisions. FTA expects to announce the selected projects and notify successful proposers by September 2013.

I. Award Information

Ferry program funds are available to eligible direct recipients of Section 5307 funds. There is no minimum or maximum grant award level; however, FTA intends to fund as many meritorious projects as possible. Only proposals from eligible recipients for eligible activities will be considered for funding. Due to funding limitations, proposers that are selected for funding may receive less than the amount originally requested. In those cases, applicants must be able to demonstrate that the proposed projects are still viable and can be completed with the amount awarded.

J. Award Administration

1. Award Notices

At the time the project selections are announced, FTA will extend pre-award authority for the selected projects. There is no blanket pre-award authority for these projects before announcement.

2. Administrative and National Policy Requirements

i. Grant Requirements

If selected, awardees will apply for a grant through FTA's Transportation Electronic Awards Management System (TEAM) and adhere to the customary FTA grant requirements of the Section 5307 Urbanized Area Formula Grant program, including those of FTA Circular 9030.1E, Circular 5010.1D, and the labor protections of 49 U.S.C. Section 5333(b). All discretionary grants, regardless of award amount, will be subject to the Congressional Notification and release process. Technical assistance regarding these requirements is available from each FTA regional office.

ii. Buy America

FTA requires that all capital procurements meet FTA's Buy America requirements that require all iron, steel, or manufactured products be produced in the U.S., to help create and protect manufacturing jobs in the U.S. The Ferry program will have a significant economic impact toward meeting the objectives of the Buy America law. The Buy America requirements can be found in 49 CFR Part 661. Any proposal that will require a waiver must identify the items for which a waiver will be sought in the application. Applicants should not proceed with the expectation that waivers will be provided.

iii. Planning

FTA encourages proposers to notify the appropriate State Departments of Transportation and MPOs in areas likely to be served by the project funds made available under these initiatives and programs. Selected projects must be incorporated into the long-range plans and transportation improvement programs of States and metropolitan areas before they are eligible for FTA funding.

iv. Standard Assurances

The applicant assures that it will comply with all applicable Federal statutes, regulations, executive orders, FTA circulars, and other Federal administrative requirements in carrying out any project supported by the FTA grant. The applicant acknowledges that it is under a continuing obligation to comply with the terms and conditions of the grant agreement issued for its project with FTA. The applicant understands that Federal laws, regulations, policies, and administrative practices might be modified from time to time and may affect the implementation of the project. The applicant agrees that the most recent Federal requirements will apply to the project, unless FTA issues a written determination otherwise. The applicant must submit the Certifications and Assurances before receiving a grant if it does not have current certifications on file.

v. Reporting

Post-award reporting requirements include submission of Federal Financial Reports and Milestone Reports in TEAM on a quarterly basis for all projects.

K. Technical Assistance and Other Program Information

This program is not subject to Executive Order 12372, ''Intergovernmental Review of Federal Programs.'' FTA will consider applications for funding only from eligible recipients for eligible projects listed in Section C.

Complete applications must be submitted through GRANTS.GOV by 11:59 p.m. EDT on October 21, 2013. Contact information for FTA's regional offices can be found on FTA's Web site at *www.fta.dot.gov.*

Therese W. McMillan,

Deputy Administrator.

Appendix A

Registering in SAM and GRANTS.GOV

Registration in Brief

Registration takes approximately 3–5 business days, but allow 4 weeks for completion of all steps.

STEP 1: Obtain DUNS Number

Same day. If requested by phone (1–866–705–5711) DUNS is provided immediately. If your organization does not have one, you will need to go to the Dun & Bradstreet Web site at *http://fedgov.dnb.com/webform [EXIT Disclaimer]* to obtain the number. **Information for Foreign Registrants.*Webform requests take 1–2 business days.*

STEP 2: Register With SAM

Three to five business days or up to two weeks. If you already have a TIN, your SAM registration will take 3–5 business days to process. If you are applying for an EIN please allow up to 2 weeks. Ensure that your organization is registered with the *System for Award Management (SAM)* at *System for Award Management (SAM).* If your organization is not, an authorizing official of your organization must register.

STEP 3: Username & Password

Same day. Complete your AOR (Authorized Organization Representative) profile on Grants.gov and create your username and password. You will need to use your organization's DUNS Number to complete this step. *https://apply07.grants.gov/apply/OrcRegister.*

STEP 4: AOR Authorization

*Same day. The E-Business Point of Contact (E-Biz POC) at your organization must login to Grants.gov to confirm you as an Authorized Organization Representative (AOR). Please note that there can be more than one AOR for your organization. In some cases the E-Biz POC is also the AOR for an organization. **Time depends on responsiveness of your E-Biz POC.*

STEP 5: Track AOR Status

At any time, you can track your AOR status by logging in with your username and password. Login as an Applicant (enter your username & password you obtained in Step 3) using the following link: *applicant_profile.jsp.*

[FR Doc. 2013–20278 Filed 8–20–13; 8:45 am]

BILLING CODE P

DEPARTMENT OF TRANSPORTATION

Pipeline and Hazardous Materials Safety Administration

Notice of Applications for 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 (49 CFR Part 107, Subpart B), notice is hereby given that the Office of Hazardous Materials Safety has received the application described herein. 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.

DATES: Comments must be received on or before September 20, 2013

Address Comments To: 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: Copies of the applications are available for inspection in the Records Center, East Building, PHH–30, 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 August 15, 2013.

Don Burger,

Chief, General Approvals and Permits.

Application No.	Docket No.	Applicant	Regulation(s) affected	Nature of special permits thereof
15889–N		E.I. DuPont de Nemours & Company, Inc. WILMINGTON, DE.	49 CFR 173.32(e)	To authorize the one-time transportation in commerce of a portable tank that was filled past its required periodic reinspection date. (mode 1).
15890–N		Carleton Technologies Inc. Westminster, MD.	49 CFR 173.302a, 173.304a and 180.209.	To authorize the manufacture, mark, sale and use of non-DOT specification fully wrapped carbon-fiber reinforced aluminum lines cylinders for the transportation in commerce of certain Division 2.1 and 2.2 materials. (modes 1, 2, 3, 4, 5).
15899–N		HRD Aero Systems, Inc. Valencia, CA.	49 CFR 173.302a	To authorize the manufacture, mark and sell of non-DOT specification cylinder for the transportation in commerce of a Division 2.2 gas. (modes 1, 3, 4, 5).
15931–N		ATK Small Caliber Systems (SCS), Lake City Army Ammunition Plant (LCAAP) Independence, MO.	49 CFR 172.201(a)(1); Subpart F of Part 172; 172.203(a), 172.301(c), 174.59 and 174.61(a),.	To authorize the transportation in commerce of certain packages containing only the residue of Class 1 smokeless powders without complete shipping papers and placarding. (modes 1, 2).
15955–N		Thompson Tank, Inc. Lakewood, CA.	49 CFR 173.315	To authorize the manufacture, marking, sale and use of non-DOT specification cargo tanks manufactured to ASME Section XII stamped with a ''T'' Stamp instead of the ''U'' stamp. (mode 1).
15957–N		Ball Metal Food & Household Products Danville, IL.	49 CFR 171.2(g)	To authorize the filling and use of approximately 51,500 non-DOT specification inner metal receptacles which are incorrectly marked ''DOT–2Q'' for the transportation in commerce of aerosol products. (modes 1, 2, 3, 4).
15961–N		Arktis Radiation Detectors Ltd. Malvern, PA.	49 CFR 173.310	To authorize the transportation in commerce of radiation detectors containing a Division 2.2 material that exceed the pressure authorized. (modes 1, 4).

[FR Doc. 2013–20268 Filed 8–20–13; 8:45 am]

BILLING CODE 4910–60–P

DEPARTMENT OF TRANSPORTATION

Pipeline and Hazardous Materials Safety Administration

Notice of Actions on Special Permit Applications

AGENCY: Pipeline And Hazardous Materials Safety Administration (PHMSA), DOT.

ACTION: Notice of actions on Special Permit Applications.

In accordance with the procedures governing the application for, and the processing of, special permits from the Department of Transportation's Hazardous Material Regulations (49 CFR part 107, Subpart B), notice is hereby given of the actions on special permits applications in (July to July 2013). The mode of transportation involved are identified 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. Application numbers prefixed by the letters EE represent applications for Emergency Special Permits. It should be noted that some of the sections cited were those in effect at the time certain special permits were issued.

Issued in Washington, DC, on August 8, 2013.

Don Burger,

Chief, General Approvals and Permits.

S.P No.	Applicant	Regulation(s)	Nature of special permit thereof
		Modification Special Permit Granted	
15136–M	Luxfer Gas Cylinders, Riverside, CA.	49 CFR 173.302a, 173.304a, and 180.205	To modify the special permit to authorize a new maximum allowable volume and allowable contents.
14149–M	Digital Wave Corporation, Centennial, CO.	49 CFR 172.203(a), 172.301(c), and 180.205	To modify the special permit to authorize ultrasonic equipment with a five sensor head with sensors positioned to perform all required straight and angle beam examinations in a single pass.
14206–M	Digital Wave Corporation, Centennial, CO.	49 CFR 172.203(a), 172.301(c), and 180.205	To modify the special permit to authorize ultrasonic equipment with a five sensor head with sensors positioned to perform all required straight and angle beam examinations in a single pass.
11952–M	U.S. Department of Defense, Scott AFB, IL.	49 CFR 173.306(a)	To modify the special permit to authorize a greater maximum weight limit when up to eight metal containers are transported.
11667–M	Weldship Corporation, Bethlehem, PA.	49 CFR 173.34(e), and 173.302(c)(2),(3), and (4)	To modify the special permit to authorize neck thread requirements that are consistent with CGA Pamphlet C–23.
12184–M	Weldship Corporation, Bethlehem, PA.	49 CFR 173.34(e)(1), 173.302(c)(2)(3)(4), 173.34(e)(3), 173.34(e)(4), and 173.34(e)(6).	To modify the special permit to authorize neck thread requirements that are consistent with CGA Pamphlet C–23.
10704–M	Air Liquide America Specialty Gases LLC, Plumsteadville, PA.	49 CFR 173.302(a)(1), Part 172 Subpart C, E and F, Part 174, and Part 177.	To modify the special permit to authorize a lower minimum burst pressure and pressure rating.
9847–M	FIBA Technologies, Inc., Millbury, MA.	49 CFR 180.209(a), 180.205(c), (f), (g), and (i); 173.302a (b)(2), (3), (4), and (5); and 180.213.	To modify the special permit so that the neck thread requirements in paragraph 7.b.(2) are consistent with CGA Pamphlet C–23.
10922–M	FIBA Technologies, Inc., Millbury, MA.	49 CFR 172.301a and 180.205	To modify the special permit so that the neck thread requirements in paragraph 7.k. are consistent with CGA Pamphlet C–23.
14453–M	FIBA Technologies, Inc., Millbury, MA.	49 CFR 180.209	To modify the special permit so that the neck thread requirements in paragraph 7.b.(1) are consistent with CGA Pamphlet C–23.
14661–M	FIBA Technologies, Inc., Millbury, MA.	49 CFR 180.209(a) and 180.209(b)	To modify the special permit to authorize new corrosion requirements to be consistent with CGA Pamphlet C–23 and require neck thread requirements to be consistent with CGA Paphlet C–23.
15793–M	Northern Air Cargo, Anchorage, AK.	49 CFR 172.101 Column (9B)	To reissue the special permit originally issued on an emergency basis.
15817–M	C L Smith Company, Saint Louis, MO.	49 CFR 173.13(a), 173.13(b), 173.13(c)(1)(ii), 173.13(c)(l)(iv), and 173.13(d).	To reissue the special permit originally issued on an emergency basis.
15871–M, ...	Shell Chemical LP, Deer Park, TX.	49 CFR 171.2(g)	To modify the special permit to authorize a 16 week extension to the expiration date.
		New Special Permit Granted	
15755–N	Micronesian Aviation Corporation dba Americopters, Saipan, MP.	49 CFR § 172.101 Column (9B), § 172.204(c)(3), § 173.27(b)(2), § 175.30(a)(1), §§ 172.200, 172.300, 172.400, 173.302(f)(3) and § 175.75.	To authorize the transportation in commerce of certain hazardous materials by Part 133 Rotorcraft External Load Operations, attached to or suspended from an aircraft, in remote areas of the U.S. without meeting certain hazard communication and stowage requirements. (mode 4)
15727–N	Blackhawk Helicopters, El Cajon, CA.	49 CFR § 172.101 Column (9B), § 172.204(c)(3), § 173.27(b)(2), § 175.30(a)(1), §§ 172.200, 172.300, 172.400, 173.302(f)(3) and § 175.75.	To authorize the transportation in commerce of certain hazardous materials by Part 133 Rotorcraft External Load Operations, attached to or suspended from an aircraft, in remote areas of the US without meeting certain hazard communication and stowage requirements. (mode 4)
15809–N	Olin Corporation, Oxford, MS.	49 CFR 173.63(b)(2)(v)	To authorize the transportation in commerce of .17 caliber rim-fire cartridges loosely packed in strong outside packagings. (modes 1, 2, 3, 4, 5)

S.P No.	Applicant	Regulation(s)	Nature of special permit thereof
15811–N	Bluesky Helicopters, Inc., Redlands, CA.	49 CFR 49 CFR Table § 172.101, Column(9B), § 172.204(c)(3), § 173.27(b)(2), § 175.30(a)(1), §§ 172.200, 172.300, and 172.400.	To authorize the transportation in commerce of certain hazardous materials by 14 CFR Part 133 Rotorcraft External Load Operations transporting hazardous materials attached to or suspended from an aircraft, in remote areas of the US only, without being subject to hazard communication requirements, quantity limitations and certain loading and stowage requirements. (mode 4)
15788–N	Amtrol-Alfa, Metalomecanica SA, Portugal.	49 CFR 173.302a(a)(1), 180.205	To authorize the manufacture, marking, sale, and use of non-DOT specification fully-wrapped carbon fiber reinforced welded steel lined cylinders that meets all requirements of ISO 11119–2. (modes 1, 2, 3, 4, 5)
15837–N	Department of Defense, Scotts AFB, IL.	49 CFR 173.304a	To authorize the transportation in commerce of a Submarine High Data Rate (HDR)/Advanced Communications Mast (ACM) configured with a non-DOT specification pressure vessel containing anhydrous ammonia. (modes 1, 2, 3, 4)
15859–N	Heli-Jet Corporation, Nampa, ID.	49 CFR 49 CFR Table § 172.101, Column(9B), § 172.204(c)(3), § 173.27(b)(2), § 175.30(a)(1), §§ 172.200, 172.300, and 172.400.	To authorize the transportation in commerce of certain hazardous materials by 14 CFR Part 133 Rotorcraft External Load Operations transporting hazardous materials attached to or suspended from an aircraft, in remote areas of the US only, without being subject to hazard communication requirements, quantity limitations and certain loading and stowage requirements. (mode 4)
15866–N	General Motors LLC, Warren, MI.	49 CFR 173.185	To authorize the transportation in commerce of certain damaged or defective lithium batteries. (modes 1, 2, 3)
Emergency Special Permit Granted			
15789–N	Sartomer USA LLC, King of Prussia, PA.	49 CFR 173.24(c)	To authorize the transportation in commerce of a 485 gallon reactor containing approximately 300 gallons of predominately solid polymer that may contain pockets of liquid containing Toluene Diisocyanate. (mode 1)
15884–N, ...	Suttles Truck Leasing LLC, Avenel, NJ.	49 CFR 173.244	To authorize the one time one way transportation of a DOT 407 cargo tank containing residual amounts of Waste Trichlorosilane for cleaning and purging. (mode 1)
New Special Permit Withdrawn			
15857–N	Otter Products, LLC, d/b/a OtterBox, Fort Collins, CO.	49 CFR 172.101(c)	To authorize the transportation in commerce of a lithium ion battery which is permanently installed in a cell phone case as "Lithium batteries contained in equipment." (modes 1, 4, 5)
Denied			
11296–M	Request by Clean Earth of North Jersey, Inc. South Kearny, NJ July 31, 2013. To modify the special permit to authorize an additional packaging (cubic yard box).		
15800–N	Request by EQ Industrial Services, Inc. Ypsilanti, MI July 11, 2013. To authorize the transportation of damaged small arms cartridges, flares, and other similar explosives that have been desensitized to remove their explosive characteristics, as Division 4.1 flammable solids.		

[FR Doc. 2013–20266 Filed 8–20–13; 8:45 am]

BILLING CODE 4909–60–P

DEPARTMENT OF TRANSPORTATION

Pipeline and Hazardous Materials Safety Administration

Notice of Applications for Modification of 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 (49 CFR Part 107, Subpart B), notice is hereby given that the Office of Hazardous Materials Safety has

received the applications described herein. This notice is abbreviated to expedite docketing and public notice. Because the sections affected, modes of transportation, and the nature of application have been shown in earlier **Federal Register** publications, they are not repeated here. Requests for modification of special permits (e.g. to provide for additional hazardous materials, packaging design changes, additional mode of transportation, etc.) are described in footnotes to the application number. Application numbers with the suffix ''M'' denote a modification request. These applications have been separated from the new application for special permits to facilitate processing.

DATES: Comments must be received on or before September 5, 2013.

Address Comments To: 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: Copies of the applications are available for inspection in the Records Center, East Building, PHH–30, 1200 New Jersey Avenue Southeast, Washington DC or at *http://regulations.gov.*

This notice of receipt of applications for modification of 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 August 8, 2013.

Don Burger,

Chief, General Approvals and Permits.

Application No.	Docket No.	Applicant	Regulation(s) Affected	Nature of Special Permit Thereof
Modification Special Permits				
10232–M		ITW Sexton Decatur, AL	49 CFR 173.304(d) and 173.306(a)(3).	To modify the special permit to authorize a Division 2.1 material
11373–M		Marlin Company, Inc. Lenoir, NC.	49 CFR 177.848(d)	To modify the special permit to authorize 1H2 drums as additional packaging.
14188–M		IDQ Operating Inc. Tarrytown, NY.	49 CFR 173.304(d), 173.306(a)(3) and 178.33a.	To modify the special permit to reflect current statutes and regulations pertaining to consumer commodities.
14770–M		Nova Chemicals Corporation Moon Township, PA.	49 CFR 173.242	To modify the special permit to reference Silvan Industries' portable tank drawings in paragraph 7.a. of the special permit.
14867–M		GTM Manufacturing, LLC Amarillo, TX.	49 CFR 173.302a and 173.304.	To modify the special permit to authorize a 30 year service life for the cylinders.
15797–M		Veolia ES Technical Solutions, L.L.C. Flanders, NJ.	49 CFR 172.320 and 173.56(b).	To modify the special permit originally issued on an emergency basis to routine with a two year renewal.

[FR Doc. 2013–20267 Filed 8–20–13; 8:45 am]

BILLING CODE 4910–60–P

DEPARTMENT OF TRANSPORTATION

Pipeline and Hazardous Materials Safety Administration

List of Applications Delayed

AGENCY: Pipeline and Hazardous Materials Safety Administration (PHMSA), DOT.

ACTION: List of applications delayed more than 180 days.

SUMMARY: In accordance with the requirements of 49 U.S.C. 5117(c), PHMSA is publishing the following list of special permit applications that have been in process for 180 days or more. The reason(s) for delay and the expected completion date for action on each application is provided in association with each identified application.

FOR FURTHER INFORMATION CONTACT: Ryan Paquet, Director, Office of Hazardous Materials Special Permits and Approvals, Pipeline and Hazardous Materials Safety Administration, U.S. Department of Transportation, East Building, PHH–30, 1200 New Jersey Avenue Southeast, Washington, DC 20590–0001, (202) 366–4535.

Key to ''Reason for Delay''

1. Awaiting additional information from applicant
2. Extensive public comment under review
3. Application is technically complex and is of significant impact or precedent-setting and requires extensive analysis
4. Staff review delayed by other priority issues or volume of special permit applications

Meaning of Application Number Suffixes

N—New application

M—Modification request

R—Renewal Request

P—Party To Exemption Request

Issued in Washington, DC, on August 8, 2013.

Don Burger,

Chief, General Approvals and Permits.

Application No.	Applicant	Reason for delay	Estimated date of completion
New Special Permit Applications			
15720–N	Digital Wave Corporation, Centennial, CO	3,1	07–31–2013
15767–N	Union Pacific Railroad Company, Omaha, NE	1	07–31–2013
15807–N	U.S. Department of Defense (DOD), Scott AFB, IL	4	08–31–2013
15747–N	UPS, Inc., Atlanta, GA	2,3	07–31–2013

Application No.	Applicant	Reason for delay	Estimated date of completion
	Renewal Special Permits Applications		
15251–R	Suburban Air Freight, Inc., Omaha, NE	3	07–31–2013
9198–R	Washington State Department of Natural Resources, Olympia, WA	4	08–31–2013
14996–R	Skydance Helicopters of Northern Nevada, Minden, NV	1,4	07–31–2013
11136–R	Fireworks by Grucci, Brookhaven, NY	4	07–31–2013

[FR Doc. 2013–20265 Filed 8–20–13; 8:45 am]

BILLING CODE 4910–60–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Proposed Collection; Comment Request Regulation Project

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice and request for comments.

SUMMARY: The Department of the Treasury, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995, Public Law 104–13 (44 U.S.C. 3506(c)(2)(A)). Currently, the IRS is soliciting comments concerning regulations governing practice before the Internal Revenue Service.

DATES: Written comments should be received on or before October 21, 2013 to be assured of consideration.

ADDRESSES: Direct all written comments to Yvette B. Lawrence, Internal Revenue Service, room 6129, 1111 Constitution Avenue NW., Washington, DC 20224.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the form and instructions should be directed to Gerald J. Shields at Internal Revenue Service, room 6129, 1111 Constitution Avenue NW., Washington, DC 20224, or through the internet at *Gerald.J.Shields@irs.gov.*

SUPPLEMENTARY INFORMATION:

Title: Regulations Governing Practice Before the Internal Revenue Service.

OMB Number: 1545–1916.

Form Number: REG–138367–06.

Abstract: This collection of information is necessary to ensure practitioners comply with minimum standards when writing a State or local bond opinion. A practitioner may provide a single opinion or may provide a combination of documents, but only if the documents, taken together, satisfy the requirements of 31 CFR 10.39. In addition, the collection of information will assist the Commissioner, through the Office of Professional Responsibility, to ensure that practitioners properly advise taxpayers regarding state or local bonds. On September 17, 2012, Treasury and the IRS published a notice of proposed rulemaking that would amend the regulations at 31 CFR Part 10. That notice of proposed rulemaking also withdrew the notice of proposed rulemaking (REG–159824–04) that was published in the **Federal Register** on December 20, 2004 (69 FR 75887). See 77 FR 57055.

Current Actions: There is no change in the paperwork burden previously approved by OMB. This information collection is being submitted for renewal purposes only.

Type of Review: Extension of a currently approved collection.

Affected Public: Individuals and Households.

Estimated Number of Respondents: 1,500.

Estimated Time per Respondent: 2 hours.

Estimated Total Annual Burden Hours: 30,000.

The following paragraph applies to all of the collections of information covered by this notice:

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.

Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

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: (a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on respondents, including through the use of 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.

Approved: August 15, 2013.

Allan M. Hopkins,

IRS Tax Analyst.

[FR Doc. 2013–20286 Filed 8–20–13; 8:45 am]

BILLING CODE 4830–01–P

UNITED STATES SENTENCING COMMISSION

Sentencing Guidelines for United States Courts

AGENCY: United States Sentencing Commission.

ACTION: Notice of final priorities.

SUMMARY: In May 2013, the Commission published a notice of possible policy priorities for the amendment cycle ending May 1, 2014. See 78 FR 32533 (May 30, 2013). After reviewing public comment received pursuant to the notice of proposed priorities, the Commission has identified its policy priorities for the upcoming amendment cycle and hereby gives notice of these policy priorities.

FOR FURTHER INFORMATION CONTACT: Jeanne Doherty, Public Affairs Officer, 202–502–4502, *pubaffairs@ussc.gov.*

SUPPLEMENTARY INFORMATION: The United States Sentencing Commission is an independent commission in the judicial branch of the United States Government. The Commission promulgates sentencing guidelines and policy statements for federal sentencing courts pursuant to 28 U.S.C. 994(a). The Commission also periodically reviews and revises previously promulgated guidelines pursuant to 28 U.S.C. 994(o) and submits guideline amendments to the Congress not later than the first day

of May each year pursuant to 28 U.S.C. 994(p).

Pursuant to 28 U.S.C. 994(g), the Commission intends to consider the issue of reducing costs of incarceration and overcapacity of prisons, to the extent it is relevant to any identified priority.

As part of its statutory authority and responsibility to analyze sentencing issues, including operation of the federal sentencing guidelines, the Commission has identified its policy priorities for the amendment cycle ending May 1, 2014. The Commission recognizes, however, that other factors, such as the enactment of any legislation requiring Commission action, may affect the Commission's ability to complete work on any or all of its identified priorities by the statutory deadline of May 1, 2014. Accordingly, it may be necessary to continue work on any or all of these issues beyond the amendment cycle ending on May 1, 2014.

As so prefaced, the Commission has identified the following priorities:

(1) Continuation of its work with Congress and other interested parties on statutory mandatory minimum penalties to implement the recommendations set forth in the Commission's 2011 report to Congress, titled *Mandatory Minimum Penalties in the Federal Criminal Justice System,* including its recommendations regarding the severity and scope of mandatory minimum penalties, consideration of expanding the ''safety valve'' at 18 U.S.C. 3553(f), and elimination of the mandatory ''stacking'' of penalties under 18 U.S.C. 924(c), and to develop appropriate guideline amendments in response to any related legislation.

(2) Review, and possible amendment, of guidelines applicable to drug offenses, including possible consideration of amending the Drug Quantity Table in§ 2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy) across drug types.

(3) Continuation of its work with the congressional, executive, and judicial branches of government, and other interested parties, with respect to the Commission's December 2012 report to Congress, titled *The Continuing Impact of United States* v. *Booker on Federal Sentencing,* and development of appropriate guideline amendments in response to any related legislation.

(4) Continuation of its work on economic crimes, including (A) a comprehensive, multi-year study of § 2B1.1 (Theft, Property Destruction, and Fraud) and related guidelines, including examination of the loss table and the definition of loss, and (B) consideration of any amendments to such guidelines that may be appropriate in light of the information obtained from such study.

(5) Continuation of its multi-year study of statutory and guideline definitions relating to the nature of a defendant's prior conviction (*e.g.,* ''crime of violence,'' ''aggravated felony,'' ''violent felony,'' and ''drug trafficking offense'') and the impact of such definitions on the relevant statutory and guideline provisions (*e.g.,* career offender, illegal reentry, and armed career criminal), possibly including recommendations to Congress on any statutory changes that may be appropriate and development of guideline amendments that may be appropriate.

(6) Continuation of its comprehensive, multi-year study of recidivism, including (A) Examination of circumstances that correlate with increased or reduced recidivism; (B) possible development of recommendations for using information obtained from such study to reduce costs of incarceration and overcapacity of prisons; and (C) consideration of any amendments to the *Guidelines Manual* that may be appropriate in light of the information obtained from such study.

(7) Undertaking a multi-year review of federal sentencing practices pertaining to violations of conditions of probation and supervised release, including possible consideration of amending the policy statements in Chapter Seven of the *Guidelines Manual.*

(8) Possible consideration of amending the policy statement pertaining to ''compassionate release,'' § 1B1.13 (Reduction in Term of Imprisonment as a Result of Motion by Director of Bureau of Prisons).

(9) Continuation of its work with Congress and other interested parties on child pornography offenses to implement the recommendations set forth in the Commission's December 2012 report to Congress, titled *Federal Child Pornography Offenses,* and to develop appropriate guideline amendments in response to any related legislation.

(10) Implementation of the Violence Against Women Reauthorization Act of 2013, Pub. L. 113–4, and any other crime legislation enacted during the 112th or 113th Congress warranting a Commission response.

(11) Resolution of circuit conflicts, pursuant to the Commission's continuing authority and responsibility, under 28 U.S.C. 991(b)(1)(B) and *Braxton* v. *United States,* 500 U.S. 344 (1991), to resolve conflicting interpretations of the guidelines by the federal courts.

(12) Consideration of any miscellaneous guideline application issues coming to the Commission's attention from case law and other sources.

Authority: 28 U.S.C. 994(a), (o); USSC Rules of Practice and Procedure 5.2.

Patti B. Saris,

Chair.

[FR Doc. 2013–20356 Filed 8–20–13; 8:45 am]

BILLING CODE 2210–40–P

UNITED STATES SENTENCING COMMISSION

Sentencing Guidelines for United States Courts

AGENCY: United States Sentencing Commission.

ACTION: Notice of final action regarding technical and conforming amendments to federal sentencing guidelines effective November 1, 2013.

SUMMARY: On April 30, 2013, the Commission submitted to the Congress amendments to the sentencing guidelines and official commentary, which become effective on November 1, 2013, unless Congress acts to the contrary. Such amendments and the reasons for amendment subsequently were published in the **Federal Register**. 78 FR 26425 (May 6, 2013). The Commission has made technical and conforming amendments, set forth in this notice, to commentary provisions and policy statements related to those amendments.

DATES: The Commission has specified an effective date of November 1, 2013, for the amendments set forth in this notice.

FOR FURTHER INFORMATION CONTACT: Jeanne Doherty, Public Affairs Officer, (202) 502–4502, *pubaffairs@ussc.gov.*

SUPPLEMENTARY INFORMATION: The United States Sentencing Commission, an independent commission in the judicial branch of the United States government, is authorized by 28 U.S.C. 994(a) to promulgate sentencing guidelines and policy statements for federal courts. Section 994 also directs the Commission to review and revise periodically promulgated guidelines and authorizes it to submit guideline amendments to Congress not later than the first day of May each year. *See* 28 U.S.C. 994(o), (p). Absent an affirmative disapproval by Congress within 180 days after the Commission submits its amendments, the amendments become

effective on the date specified by the Commission (typically November 1 of the same calendar year). *See* 28 U.S.C. 994(p).

Unlike amendments made to sentencing guidelines, amendments to commentary and policy statements may be made at any time and are not subject to congressional review. To the extent practicable, the Commission endeavors to include amendments to commentary and policy statements in any submission of guideline amendments to Congress. Occasionally, however, the Commission determines that technical and conforming changes to commentary and policy statements are necessary. This notice sets forth technical and conforming amendments to commentary and policy statements that will become effective on November 1, 2013.

Authority: USSC Rules of Practice and Procedure 4.1.

Patti B. Saris,

Chair.

1. Amendment

The Commentary to § 1B1.8 captioned ''Application Notes'' is amended in Note 3 by striking ''(Inadmissibility of Pleas'' and inserting ''(Pleas''.

The Commentary to § 2M3.1 captioned ''Application Notes'' is amended in Note 1 by striking ''12958'' and inserting ''13526''.

The Commentary to § 8B2.1 captioned ''Background'' is amended by striking ''805(a)(2)(5)'' and inserting ''805(a)(5)''.

The Commentary to § 8D1.2 captioned ''Application Note'' is amended in Note 1 by striking ''3561(b)'' and inserting ''3561(c)''.

Reason for Amendment

This proposed amendment makes certain technical changes to Commentary in the *Guidelines Manual.* The changes amend—

(1) Application Note 3 to § 1B1.8 (Use of Certain Information) to reflect a change to the heading of Rule 410 of the Federal Rules of Evidence;

(2) Application Note 1 to § 2M3.1 (Gathering or Transmitting National Defense Information to Aid a Foreign Government) to ensure that the Executive Order to which it refers is the most recent Executive Order; and

(3) the Background Commentary to § 8B2.1 (Effective Compliance and Ethics Program) and Application Note 1 to § 8D1.2 (Term of Probation—Organizations) to correct typographical errors in citations to certain statutes.

2. Amendment

The Commentary to § 1B1.11 captioned ''Background'' is amended in the first paragraph by striking ''Although aware'' and all that follows through ''punishment.'' and inserting ''However, the Supreme Court has held that the *ex post facto* clause applies to sentencing guideline amendments that subject the defendant to increased punishment. *See Peugh* v. *United States,* 133 S. Ct. 2072, 2078 (2013) (holding that 'there is an *ex post facto* violation when a defendant is sentenced under Guidelines promulgated after he committed his criminal acts and the new version provides a higher applicable Guidelines sentencing range than the version in place at the time of the offense').''; and in the paragraph that begins ''Subsection (b)(3)'' by striking '', *cert. denied,* 493 U.S. 1062 (1990)''.

Reason for Amendment

The Commission's policy statement at § 1B1.11 (Use of Guidelines Manual in Effect on Date of Sentencing) provides that the court should apply the Guidelines Manual in effect on the date the defendant is sentenced unless the court determines that doing so would violate the *ex post facto* clause, in which case the court shall apply the Guidelines Manual in effect on the date the offense of conviction was committed. *See* § 1B1.11(a), (b)(1).

This proposed amendment updates the Background Commentary to § 1B1.11 to reflect the Supreme Court's decision in *Peugh* v. *United States,* 133 S. Ct. 2072 (2013), which held that ''there is an *ex post facto* violation when a defendant is sentenced under Guidelines promulgated after he committed his criminal acts and the new version provides a higher applicable Guidelines sentencing range than the version in place at the time of the offense.'' *Id.* at 2078. The amendment inserts new language to refer to the Supreme Court's decision in *Peugh* and deletes obsolete language.

[FR Doc. 2013–20360 Filed 8–20–13; 8:45 am]

BILLING CODE 2210–40–P

FEDERAL REGISTER

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No. 162 August 21, 2013

Part II

Securities and Exchange Commission

17 CFR Part 240

Financial Responsibility Rules for Broker-Dealers; Final Rule

SECURITIES AND EXCHANGE COMMISSION

17 CFR Part 240

[Release No. 34–70072; File No. S7–08–07]

RIN 3235–AJ85

Financial Responsibility Rules for Broker-Dealers

AGENCY: Securities and Exchange Commission.

ACTION: Final rule.

SUMMARY: The Securities and Exchange Commission (''Commission'') is adopting amendments to the net capital, customer protection, books and records, and notification rules for broker-dealers promulgated under the Securities Exchange Act of 1934 (''Exchange Act''). These amendments are designed to address several areas of concern regarding the financial responsibility requirements for broker-dealers. The amendments also update certain financial responsibility requirements and make certain technical amendments.

DATES: *Effective Date:* October 21, 2013.

FOR FURTHER INFORMATION CONTACT: Michael A. Macchiaroli, Associate Director, at (202) 551–5525; Thomas K. McGowan, Deputy Associate Director, at (202) 551–5521; Randall Roy, Assistant Director, at (202) 551–5522; Raymond Lombardo, Branch Chief, at (202) 551–5755; Sheila Dombal Swartz, Special Counsel, (202) 551–5545; Carrie A. O'Brien, Special Counsel, (202) 551–5640; or Kimberly N. Chehardy, Attorney Advisor, (202) 551–5791; Division of Trading and Markets, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549–7010.

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VII. Statutory Authority

I. Background

The Commission is adopting amendments to the broker-dealer net capital rule (Rule 15c3–1),[1] customer protection rule (Rule 15c3–3),[2] books and records rules (Rules 17a–3 and 17a–4), and notification rule (Rule 17a–11).[3] The Commission proposed these rule changes on March 9, 2007.[4] The Commission re-opened the public comment period on May 3, 2012.[5] The Commission received a total of 97 comment letters on the proposed amendments.[6] Sixty comment letters

[1] 17 CFR 240.15c3–1.

[2] 17 CFR 240.15c3–3.

[3] 17 CFR 240.17a–3; 17 CFR 240.17a–4; and 17 CFR 240.17a–11.

[4] *See Amendments to Financial Responsibility Rules for Broker-Dealers,* Exchange Act Release No. 55431 (Mar. 9, 2007), 72 FR 12862 (Mar. 19, 2007) (''*Amendments to Financial Responsibility Rules*''). As part of this release, the Commission also requested comment on three additional matters: reducing the Rule 17a–11 (17 CFR 240.17a–11) early warning level for broker-dealers that carry over $10 billion in debits; harmonization of the net capital deductions required by paragraph (c)(2)(iv)(B) of Rule 15c3–1 for securities lending and borrowing transactions with the deductions required under paragraph (c)(2)(iv)(F) for securities repurchase and reverse repurchase agreement transactions (17 CFR 240 240.15c3–1(c)(2)(iv)(B) and (c)(2)(iv)(F), respectively); and accounting for third-party liens on customer securities held at a broker-dealer. As discussed below in section III. of this release, the Commission received comments in response to these requests but has determined to defer consideration of actions with respect to these specific matters at this time.

[5] *Amendments to Financial Responsibility Rules for Broker-Dealers,* Exchange Act Release No. 66910 (May 3, 2012), 77 FR 27150 (May 9, 2012).

[6] Comments on the amendments are *available at http://www.sec.gov/comments/s7-08-07/s70807.shtml. See also* letter dated April 22, 2007 from Peter G. Crane, President, Crane Data LLC (''*Crane Data Letter*''); letter dated April 22, 2007 from David Michael Bishop (''*Bishop Letter*''); letter dated April 27, 2007 from Ted Beer, Broker/Dealer Principal (''*Beer Letter*''); letter dated April 28, 2007 from Ted Beer, Broker/Dealer Principal (''*Beer 2 Letter*''); letter dated April 29, 2007 from R.A. Lowenstein, FinOps Compliance Consultant (''*Lowenstein Letter*''); letter dated April 29, 2007 from G. Kirk Ellis (''*Ellis Letter*''); letter dated May 1, 2007 from Stuart J. Kaswell and David J. Harris, Dechert LLP on behalf of Federated Investors (''*Federated Letter*''); letter dated May 2, 2007 from Daniel R. Levene, President, small NASD broker-dealer (''*Levene Letter*''); letter dated May 4, 2007 from Gerard J. Quinn, Vice President and Associate General Counsel, SIFMA (''*SIFMA Letter*''); letter dated May 7, 2007 from Michael Bell, President and CEO, Curian Clearing, LLC (''*Curian Clearing Letter*''); letter dated May 10, 2007 from Richard B. Franz II, Senior Vice-President, Treasurer and Chief Financial Officer, Raymond James & Associates (''*Raymond James Letter*''); letter dated May 16, 2007 from Steven R. Gerbel, Chicago Capital Management LP (''*Chicago Capital Letter*''); letter dated May 17, 2007 from Jeffrey L. Kiss, Principal, PackerKiss Securities, Inc. (''*PackerKiss Letter*''); letter dated May 17, 2007 from Josephine Wang, General Counsel, SIPC (''*SIPC Letter*''); letter dated May 18, 2007 from Kimberly Taylor, Managing Director and Clearing House President, Chicago Mercantile Exchange Inc. (''*CME Letter*''); letter dated May 18, 2007 from Diane V. Esheleman, Executive Vice President, JP Morgan Chase Bank, N.A. (''*JP Morgan Letter*''); letter dated May 21, 2007 from Faith Colish, Carter Ledyard Milburn LLP (''*Colish Letter*''); letter dated May 23, 2007 from Charles R. Manzoni, Jr., General Counsel, FAF Advisors, Inc. (''*FAF Advisors Letter*''); letter dated May 27, 2007 from Joyce Glenn (''*Glenn Letter*''); letter dated May 28, 2007 from William Bare (''*Bare Letter*''); letter dated May 29, 2007 from Robert Keenan, CEO, St. Bernard Financial Services, Inc. (''*St. Bernard Financial Services Letter*''); letter dated May 31, 2007 from John C. Melton, Sr., Executive Vice President, Coastal Securities (''*Coastal Letter*''); letter dated June 3, 2007 from Anonymous (''*Anonymous Letter*''); letter dated June 5, 2007 from Kelly S. McEntire, Executor, Retired State Administrator/Executor of Janus Capital Investments (''*McEntire Letter*''); letter dated June 13, 2007 from Bruce Bent, Chairman, The Reserve (''*Reserve Letter*''); letter dated June 14, 2007 from Amal El Said, Accounting and Regulatory, Abbey National (''*Abbey National Letter*''); letter dated June 14, 2007 from Frank A. Perrone, Senior Vice President, Brown Brothers Harriman & Co. (''*Brown Brothers Harriman Letter*''); letter dated June 15, 2007 from James J. Angel, Ph.D., CFA, Associate Professor of Finance, McDonough School of Business, Georgetown University (''*Angel Letter*''); letter dated June 15, 2007 from Matthew M. Hughey, Chief Financial Officer, First Clearing, LLC (''*First Clearing Letter*''); letter dated June 15, 2007 from Marshall J. Levinson, Senior Managing Director, Bear, Stearns & Co. Inc., Chair, SIFMA Capital Committee (''*SIFMA 2 Letter*''); letter dated June 15, 2007 from Christopher Williams, Director and Senior Counsel, and Barbara Brooks, Principal Financial Officer, Dresdner Kleinwort (''*Dresdner Kleinwort Letter*''); letter dated June 18, 2007 from Michael Dworkin (''*Dworkin Letter*''); letter dated June 18, 2007 from Keith Weller, Executive Director and Senior Associate General Counsel, UBS Global Asset Management (Americas) Inc. (''*UBS Letter*''); letter dated June 18, 2007 from Marcelo Riffaud, Managing Director, Legal Department, Deutsche Bank Securities Inc. (''*Deutsche Bank Securities Letter*''); letter dated June 18, 2007 from Jill Gross and Rahat Sarmast, Pace Investor Rights Project (''*Pace Letter*''); letter dated June 18, 2007 from Robert E. Putney, III, Director and Senior Counsel, BlackRock, Inc. (''*BlackRock Letter*''); letter dated June 18, 2007 from James S. Keller, Chief Regulatory, the PNC Financial Services Group, Inc. (''*PNC Letter*''); letter dated June 18, 2007 from Sarah A. Miller, General Counsel, American ABA Securities Association (''*ABASA Letter*''); letter dated June 18, 2007 from David Hirschmann, Executive Vice President, National Chamber Foundation of U.S. Chamber of Commerce (''*National Chamber Foundation Letter*''); letter dated June 18, 2007 from Michael W. Fields, Chief Fixed Income Officers, American Beacon Advisors (''*American Beacon Letter*''); letter dated June 18, 2007 from David Lonergan, Head of U.S. Cash Management, Barclays Global Investors (''*Barclays Letter*''); letter dated June 18, 2007 from Howard Spindel, Senior Managing Directors, Integrated Management Solutions (''*Integrated Management Letter*''); letter dated June 18, 2007 from Jane G. Heinrichs, Associate Counsel, Investment Company Institute (''*ICI Letter*''); letter dated June 18, 2007 from Jeffrey P. Neubert, CEO, Clearinghouse Association L.L.C. (''*Clearing House Letter*''); letter dated June 19, 2007 from James T. McHale, Associate General Counsel, E*Trade Brokerage Holdings, Inc. (''*E*Trade Letter*''); letter dated June 25, 2007 from Cliff Verron, Managing Director, Deputy Chief Financial Officers and John Ramsay, Managing Director, Deputy General Counsel, Citigroup Global Markets Inc. (''*Citigroup Letter*''); letter dated June 25, 2007 from AMEX, CBOE, ISE, OCC, and NYSE/ARCA (''*AMEX Letter*''); letter dated July 3, 2007 from Keith F. Higgins, Chair, Committee on Federal Regulation of Securities, American Bar Association (''*American Bar Association Letter*''); letter dated July 23, 2007 from Charles S. Morrison, Senior Vice President and Money Market Group Leader, Fidelity Management & Research Company, and John Valenti, Vice President, National Financial Securities LLC (''*Fidelity/NFS Letter*''); letter dated August 6, 2007 from Stuart Kaswell, Dechert LLP, on behalf of Federated Investors, Inc. (''*Federated 2 Letter*''); letter dated October 9, 2007 from Stuart Kaswell, Dechert LLP on behalf of Federated Investors, Inc. (''*Federated 3 Letter*''); letter dated November 16, 2007 from Marshall J. Levinson, Chair, Capital Committee, SIFMA (''*SIFMA 3 Letter*''); letter dated January 7, 2008 from Stuart J. Kaswell, Dechert LLP, on behalf of Federated Investors, Inc. (''*Federated 4 Letter*''); letter dated August 7, 2008 from Stuart J. Kaswell, Bryan Cave LLP, on behalf of Federated Investors, Inc. (''*Federated 5 Letter*''); letter dated November 10, 2008 from Lee A. Pickard, Pickard & Djinis LLP on behalf of Federated Investors (''*Federated 6 Letter*''); letter dated November 25, 2008 from Lee A. Pickard, Pickard & Djinis LLP on behalf of Federated Investors (''*Federated 7 Letter*''); Continued

were received prior to the re-opening of the comment period, and 37 were received after it. The Commission carefully considered all of the comment letters, and as discussed in detail below, modified the amendments in certain respects in light of the comments received. In addition, the Commission has determined to defer consideration of action at this time with respect to certain of the proposed amendments.

II. Amendments

A. Amendments to the Customer Protection Rule

1. Background

The Commission adopted Rule 15c3–3 in 1972 in response to a congressional directive to strengthen the financial responsibility requirements for broker-dealers that hold securities and cash for customers.[7] In particular, Rule 15c3–3 is designed ''to give more specific protection to customer funds and securities, in effect forbidding brokers and dealers from using customer assets to finance any part of their businesses unrelated to servicing securities customers; *e.g.,* a firm is virtually precluded from using customer funds to buy securities for its own account.'' [8] To meet this objective, Rule 15c3–3 requires a broker-dealer that maintains custody of customer securities and cash (a ''carrying broker-dealer'') to take two primary steps to safeguard these assets. The steps are designed to protect customers [9] by segregating their securities and cash from the broker-dealer's proprietary business activities. If the broker-dealer fails financially, the securities and cash should be readily available to be returned to the customers. In addition, if the failed broker-dealer is liquidated in a formal proceeding under the Securities Investor Protection Act of 1970 (''SIPA''), the securities and cash would be isolated and readily identifiable as ''customer property'' and, consequently, available to be distributed to customers ahead of other creditors.[10]

The first step required by Rule 15c3–3 is that a carrying broker-dealer must maintain physical possession or control over customers' fully paid and excess margin securities.[11] Physical possession or control means the broker-dealer must hold these securities in one of several locations specified in Rule 15c3–3 and free of liens or any other interest that could be exercised by a third party to secure an obligation of the broker-dealer.[12] Permissible locations include a bank, as defined in section 3(a)(6) of the Exchange Act, and a clearing agency.[13]

The second step is that a carrying broker-dealer must maintain a reserve of cash or qualified securities in an account at a bank that is at least equal in value to the net cash owed to customers, including cash obtained from the use of customer securities.[14] The account must be titled ''Special Reserve Bank Account for the Exclusive

letter dated December 18, 2008 from Lee A. Pickard, Pickard & Djinis LLP on behalf of Federated Investors (''*Federated 8 Letter*''); letter dated July 28, 2009 from Richard J. McDonald, Chief Regulatory Counsel, Susquehanna International Group LLP (''*SIG Letter*''); letter dated June 8, 2010 from The Honorable Gregory W. Meeks (''*Meeks Letter*''); letter dated October 14, 2011 from The Honorable Gregory W. Meeks (''*Meeks 2 Letter*''); letter dated May 5, 2012 from Edward P. Cernocky (''*Cernocky Letter*''); letter dated May 11, 2012 from Chris Barnard (''*Barnard Letter*''); letter dated May 15, 2012 from Helen M. Saarinen (''*Saarinen Letter*''); letter dated May 18, 2012 from Laura H. Hearne (''*Hearne Letter*''); letter dated May 24, 2012 from Dick Fuld (''*Fuld Letter*''); letter dated May 30, 2012 from Bruce J. Womack (''*Womack Letter*''); letter dated June 1, 2012 from Lee A. Pickard, Pickard & Djinis LLP, on behalf of Federated Investors (''*Federated 9 Letter*''); letter dated June 4, 2012 from Michael Scillia, Director, National Investment Banking Association (''*NIBA Letter*''); letter dated June 7, 2012 from Anthony Fitzgerald (''*Fitzgerald Letter*''); letter dated June 7, 2012 from Tom Vincent, Senior V.P., Corporate Governance and Wealth Management Compliance, BOK Financial Corporation (''*BOK Letter*''); letter dated June 8, 2012 from Denise Dolphin (''*Dolphin Letter*''); letter dated June 8, 2012 from Colin W. McKechnie, Managing Director, JP Morgan Chase Bank, N. A (''*JP Morgan 2 Letter*''); letter dated June 8, 2012 from William A. Jacobson, Associate Clinical Professor, Cornell Law School, and Director, Cornell Securities Law Clinic, Ithaca, New York (''*Cornell Letter*''); letter dated June 8, 2012 from Ryan K. Bakhtiari, Aidikoff, Uhl & Bakhtiari, on behalf of the Public Investors Arbitration Bar Association (''*PIABA Letter*''); letter dated June 8, 2012 from Kenneth E. Bentsen, Jr., Executive Vice President, Public Policy and Advocacy, SIFMA (''*SIFMA 4 Letter*''); letter dated June 8, 2012 from Sarah A. Miller, Chief Executive Officer, Institute of International Bankers (''*IIB Letter*''); letter dated June 8, 2012 from James T. McHale, Global Head of Compliance, E*TRADE Financial Corporation (''*E*Trade 2 Letter*''); letter dated June 11, 2012 from Steve M. Brewer, Sr., ASG Securities, LLC, Houston, Texas (''*ASG Securities Letter*''); letter dated June 25, 2012 from Gene L. Finn (''*Finn Letter*''); letter dated June 26, 2012 from Cindy Walsh (''*Walsh Letter*''); letter dated July 12, 2012 from Michael Scillia, Director, National Investment Banking Association (''*NIBA 2 Letter*''); letter dated July 18, 2012 from Gene L. Finn (''*Finn 2 Letter*''); letter dated July 30, 2012 from David Waddell (''*Waddell Letter*''); letter dated August 6, 2012 from Gene Finn (''*Finn 3 Letter*''); letter dated August 15, 2012 from Echeal R. Sigan (''*Sigan Letter*''); letter dated August 26, 2012 from Mark Irwin (''*Irwin Letter*''); letter dated September 17, 2012 from Gene L. Finn (''*Finn 4 Letter*''); letter dated September 27, 2012 from Jeff S. Clark (''*Clark Letter*''); letter dated September 28, 2012 from Robert LaPlante, M.P.A. (''*LaPlante Letter*''); letter dated October 19, 2012 from Rick Louderbough (''*Louderbough Letter*''); letter dated October 24, 2012 from Paul L. Matecki, Senior Vice President, General Counsel, Raymond James Financial, Inc. (''*Raymond James 2 Letter*''); letter dated October 25, 2012 from Eric Gamble, Ph.D. (''*Gamble Letter*''); letter dated November 1, 2012 from Percy R. Moorman, Esq. (''*Moorman Letter*''); letter dated January 4, 2013 from Marquis Wilkins (''*Wilkins Letter*''); letter dated January 5, 2013 from Anonymous SEC Fan (''*Anonymous SEC Letter*''); letter dated January 24, 2013 from Robert Fournier (''*Fournier Letter*''); and letter dated January 28, 2013 from Scott E. Shjefte (''*Shjefte Letter*''). Comment letters and specific comments outside the scope of this rulemaking are not addressed in this release.

[7] *See Broker-dealers; Maintenance of Certain Basic Reserves,* Exchange Act Release No. 9856 (Nov. 10, 1972), 37 FR 25224 (Nov. 29, 1972).

[8] *See Net Capital Requirements for Brokers and Dealers,* Exchange Act Release No. 21651 (Jan. 11, 1985), 50 FR 2690, 2690 (Jan. 18, 1985). *See also Broker-Dealers; Maintenance of Certain Basic Reserves,* Exchange Act Release No. 9856 (Nov. 10, 1972), 37 FR 25224, 25224 (Nov. 29, 1972).

[9] Rule 15c3–3 defines *customer* as ''any person from whom or on whose behalf a broker or dealer has received or acquired or holds funds or securities for the account of that person.'' The rule excludes certain categories of persons from the definition, including broker-dealers, municipal securities dealers, and government securities broker-dealers. It also excludes general partners, directors, and principal officers of the broker-dealer and any other person to the extent that the person has a claim for property or funds which by contract, agreement or understanding, or by operation of law, is part of the capital of the broker-dealer or is subordinated to the claims of creditors of the broker-dealer. 17 CFR 240.15c3–3(a)(1).

[10] *See* 15 U.S.C. 78aaa *et seq.*

[11] *See* 17 CFR 240.15c3–3(b) and (d). The term *fully paid securities* includes all securities carried for the account of a customer in a special cash account as defined in Regulation T promulgated by the Board of Governors of the Federal Reserve System, as well as margin equity securities within the meaning of Regulation T which are carried for the account of a customer in a general account or any special account under Regulation T during any period when section 8 of Regulation T (12 CFR 220.8) specifies that margin equity securities shall have no loan value in a general account or special convertible debt security account, and all such margin equity securities in such account if they are fully paid: provided, however, that the term *fully paid securities* shall not apply to any securities which are purchased in transactions for which the customer has not made full payment. 17 CFR 240.15c3–3(a)(3). The term *margin securities* means those securities carried for the account of a customer in a general account as defined in Regulation T, as well as securities carried in any special account other than the securities referred to in paragraph (a)(3) of Rule 15c3–3. 17 CFR 240.15c3–3(a)(4). The term *excess margin securities* means those securities referred to in paragraph (a)(4) of Rule 15c3–3 carried for the account of a customer having a market value in excess of 140 percent of the total of the debit balances in the customer's account or accounts encompassed by paragraph (a)(4) of Rule 15c3–3 which the broker-dealer identifies as not constituting margin securities. 17 CFR 240.15c3–3(a)(5). As discussed in section II.F. of this release, the Commission is adopting technical amendments to the definitions of the terms *fully paid securities* and *margin securities* under Rule 15c3–3. *See* paragraphs (a)(3) and (4) of Rule 15c3–3, as adopted.

[12] *See* 17 CFR 240.15c3–3(c). Customer securities held by the carrying broker-dealer are not assets of the firm. Rather, the carrying broker-dealer holds them in a custodial capacity and the possession and control requirement is designed to ensure that the carrying broker-dealer treats them in a manner that allows for their prompt return.

[13] *Id.*

[14] 17 CFR 240.15c3–3(e). The term *qualified security* is defined in Rule 15c3–3 to mean a security issued by the United States or a security in respect of which the principal and interest are guaranteed by the United States. *See* 17 CFR 240.15c3–3(a)(6).

Benefit of Customers.'' [15] The amount of net cash owed to customers is computed pursuant to a formula set forth in Exhibit A to Rule 15c3–3.[16] Under the customer reserve formula, the broker-dealer adds up customer credit items (*e.g.,* cash in customer securities accounts and cash obtained through the use of customer margin securities) and then subtracts from that amount customer debit items (*e.g.,* margin loans).[17] If credit items exceed debit items, the net amount must be on deposit in the customer reserve account in the form of cash and/or qualified securities.[18] A broker-dealer cannot make a withdrawal from the customer reserve account until the next computation and even then only if the computation shows that the reserve requirement has decreased.[19] The broker-dealer must make a deposit into the customer reserve account if the computation shows an increase in the reserve requirement.

In addition, the customer reserve formula permits the broker-dealer to offset customer credit items only with customer debit items.[20] This means the broker-dealer can use customer cash to facilitate customer transactions such as financing customer margin loans and borrowing securities to make deliveries of securities that customers have sold short.[21] Broker-dealer margin rules require securities customers to maintain a minimum level of equity in their securities accounts.[22] In addition to protecting the broker-dealer from the consequences of a customer default, this equity serves to over-collateralize the customers' obligations to the broker-dealer and thereby protect customers whose cash was used to facilitate the broker-dealer's financing of securities purchases and short sales by other customers. For example, if the broker-dealer fails, the customer debits, because they generally are over-collateralized, should be attractive assets for another broker-dealer to purchase or, if not purchased by another broker-dealer, they should be able to be liquidated to a net positive equity.[23] The proceeds of the debits sale or liquidation can be used to repay the customer cash used to finance the customer obligations. This cash plus the funds and/or qualified securities held in the customer reserve account should equal or exceed the total amount of customer credit items (*i.e.,* the total amount owed by the broker-dealer to its customers).[24]

2. Proprietary Accounts of Broker-Dealers

A carrying broker-dealer may carry accounts that hold proprietary securities and cash of other broker-dealers (''PAB accounts''). As noted above, broker-dealers are not within the definition of *customer* for purposes of Rule 15c3–3.[25] Accordingly, a carrying broker-dealer that carries PAB accounts is not required to treat these accounts as customer accounts for the purposes of Rule 15c3–3. This means the carrying broker-dealer is not required to maintain possession or control of the securities of PAB account holders that are not securing margin loans to the account holders (''non-margin securities'') or include credit and debit items associated with those accounts in its customer reserve computation. The definition of *customer* in SIPA, however, is broader than the definition in Rule 15c3–3 in that the SIPA definition does not exclude broker-dealers.[26] Customers under SIPA (''SIPA customers'') generally are entitled to a number of protections, including the right to share *pro rata* with other SIPA customers in the customer property held by the broker-dealer and, if the customer property is insufficient to make each SIPA customer whole, the entitlement to receive an advance from the Securities Investor Protection Corporation (''SIPC'') of up to $500,000 (of which $250,000 currently can be used to cover cash claims).[27] Broker-dealers as SIPA customers have the right to a *pro rata* share of the customer property, but are not entitled to receive an advance from the SIPC fund.[28] Consequently, when a carrying broker-dealer is liquidated in a SIPA proceeding, each customer (including a SIPA customer that is a broker-dealer) has a claim on the customer property. Because the possession and control and customer reserve account provisions of Rule 15c3–3 do not apply to PAB account holders by virtue of the definition of *customer* in the rule, the carrying broker-dealer is not restricted by Rule 15c3–3 from using the securities and cash in these accounts for its own business purposes.

The treatment of PAB account holders as SIPA customers but not as customers for the purposes of Rule 15c3–3

[15] *See* 17 CFR 240.15c3–3(e)(1). The purpose of giving the account this title is to alert the bank and creditors of the broker-dealer that this account is to be used to meet the broker-dealer's obligations to customers (and not the claims of general creditors) in the event the broker-dealer must be liquidated in a formal proceeding.

[16] 17 CFR 240.15c3–3a.

[17] *Id.*

[18] 17 CFR 240.15c3–3(e). Customer cash is a balance sheet item of the carrying broker-dealer (*i.e.,* the amount of cash received from a customer increases the amount of the carrying broker-dealer's assets and creates a corresponding liability to the customer). The customer reserve formula is designed to isolate these broker-dealer assets so that an amount equal to the net liabilities to customers is held as a reserve in the form of cash or qualified securities. The requirement to establish this reserve is designed to effectively prevent the carrying broker-dealer from using customer funds for proprietary business activities such as investing in securities. The goal is to put the carrying broker-dealer in a position to be able to readily meet its cash obligations to customers by requiring the firm to make deposits of cash and/or qualified securities into the customer reserve account in the amount of the net cash owed to customers. *Capital, Margin, and Segregation Requirements for Security-Based Swap Dealers and Major Security-Based Swap Participants and Capital Requirements for Broker-Dealers,* Exchange Act Release No. 68071 (Oct. 18, 2012), 77 FR 70213, 70277 n.671 (Nov. 23, 2012).

[19] *See* 17 CFR 240.15c3–3(e). Under paragraph (e), broker-dealers are generally required to perform the customer reserve computation as of the close of business on the last business day of the week. Broker-dealers from time to time may perform a mid-week computation if it would permit them to make a withdrawal. 17 CFR 240.15c3–3(g).

[20] *See* 17 CFR 240.15c3–3a.

[21] For example, if a broker-dealer holds $100 for customer A, the broker-dealer can use that $100 to finance a security purchase of customer B. The $100 the broker-dealer owes customer A is a credit in the formula and the $100 customer B owes the broker-dealer is a debit in the formula. Therefore, under the customer reserve formula there would be no requirement to maintain cash and/or U.S. government securities in the customer reserve account. However, if the broker-dealer did not use the $100 held in customer A's account for this purpose, there would be no offsetting debit and, consequently, the broker-dealer would need to have on deposit in the customer reserve account cash and/or qualified securities in an amount at least equal to $100.

[22] Broker-dealers are subject to margin requirements in Regulation T promulgated by the Federal Reserve (*see* 12 CFR 220.1, *et seq.*), in rules promulgated by the self-regulatory organizations (''SROs'') (*see, e.g.,* FINRA Rules 4210–4240), and with respect to security futures, in rules jointly promulgated by the Commission and the CFTC (*see* 17 CFR 242.400–406).

[23] The attractiveness of the over-collateralized debits facilitates the bulk transfer of customer accounts from a failing or failed broker-dealer to another broker-dealer.

[24] *See Net Capital Requirements for Broker-Dealers; Amended Rules,* Exchange Act Release No. 18417 (Jan. 13, 1982), 47 FR 3512, 3513 (Jan. 25, 1982) (''The alternative method is founded on the concept that if the debit items in the Reserve Formula can be liquidated at or near their contract values, these assets, along with any cash required to be on deposit under the [customer protection] rule, will be sufficient to satisfy all customer-related liabilities (which are represented as credit items in the Reserve Formula'').

[25] 17 CFR 240.15c3–3(a)(1).

[26] *See* 15 U.S.C. 78*lll*(2).

[27] *See* 15 U.S.C. 78fff–2(c) and 15 U.S.C. 78fff–3(a), respectively. Under SIPA, customer property includes ''cash and securities (except customer name securities delivered to the customer) at any time received, acquired, or held by or for the account of the debtor from or for the securities accounts of a customer, and the proceeds of any such property transferred by the debtor, including property unlawfully converted.'' 15 U.S.C. 78*lll*(4). Therefore, customer property includes those securities positions that are held for customers and the cash that is owed to customers.

[28] *See* 15 U.S.C. 78fff–2(c); *see also* 15 U.S.C. 78fff–3(a).

increases the risk that, in the event a carrying broker-dealer is liquidated under SIPA, the claims of SIPA customers (*i.e.,* customers and PAB account holders) will exceed the amount of customer property available and, thereby, expose the SIPC fund and potentially SIPA customers to losses. In addition, if the customer property is insufficient to fully satisfy all SIPA customer claims and losses are incurred, the PAB account holders could be placed in financial distress causing adverse impacts to the securities markets beyond those resulting from the failure of the carrying broker-dealer.[29]

To address the disparity in treatment between customers and PAB account holders, the Commission proposed amendments to Rules 15c3–3 and 15c3–3a that would have required a broker-dealer that carries PAB accounts to perform a PAB reserve computation with respect to those accounts, generally as of the close of business on the last business day of the week.[30] The amendments, as proposed, would have required the carrying broker-dealer to add up the debits and credits relating to PAB accounts—including credits arising from the use of securities held in PAB accounts—and maintain cash or qualified securities in a PAB reserve account in an amount equal to or greater than the amount that the credits exceed the debits.

Seven commenters responded to the Commission's request for comment on the proposed amendments.[31] As discussed below, the Commission has modified the final rule in certain respects to address, among other things, issues raised by commenters. As adopted, the Commission's amendments to Rules 15c3–3 and 15c3–3a require carrying broker-dealers to: (1) Perform a separate reserve computation for PAB accounts (in addition to the customer reserve computation currently required for Rule 15c3–3 customer accounts); (2) establish and fund a separate reserve account for the benefit of PAB account holders; and (3) obtain and maintain physical possession or control of non-margin securities carried for PAB accounts unless the carrying broker has provided written notice to the PAB account holders that it will use those securities in the ordinary course of its securities business, and has provided opportunity for the PAB account holder to object to such use.[32]

These amendments, in part, incorporate many of the provisions of a no-action letter regarding PAB accounts issued by Commission staff in 1998.[33] The *PAIB Letter* stated that the staff would not recommend enforcement action to the Commission if a broker-dealer did not take a net capital deduction under Rule 15c3–1 for cash held in a securities account at another broker-dealer,[34] provided the other broker-dealer agrees to: (1) Perform a reserve computation for PAB accounts;[35] (2) establish a separate special reserve bank account; and (3) maintain cash or qualified securities in the reserve account equal to the computed reserve requirement (''PAIB agreement''). Broker-dealers that carry PAB accounts have the incentive to enter into PAIB agreements to prevent their PAB account holders from choosing to open an account or enter into a clearing agreement with another broker-dealer. Because many of the provisions in the *PAIB Letter* are being incorporated in this rulemaking, the Commission is directing the Commission staff to withdraw the *PAIB Letter* as of the effective date of these rule amendments.

i. Definition of ''PAB Account'' Under Rule 15c3–3(a)(16)

The Commission proposed, among other things, to add paragraph (a)(16) to Rule 15c3–3 that would have defined the term *PAB account* as ''a proprietary securities account of a broker or dealer (which includes a foreign broker or dealer, or a foreign bank acting as a broker or dealer), but shall not include an account where the account owner is a guaranteed subsidiary of the carrying broker or dealer, the account owner guarantees all liabilities and obligations of the carrying broker or dealer, or the account is a delivery-versus-payment account or receipt-versus-payment account.''[36] Two commenters raised concerns about the proposed definition because—by including proprietary accounts of foreign broker-dealers and foreign banks acting as broker-dealers within the term *PAB account*—it differed from provisions in the *PAIB Letter,* which excluded such accounts from a PAIB computation.[37] One of these commenters stated that broker-dealers (including foreign banks acting as broker-dealers) should be allowed to opt-out of PAB account treatment because they do not require the same protections as *customers* as defined in Rule 15c3–3.[38] The commenter stated that broker-dealers are able to understand the insolvency risk of the broker-dealers at which they maintain proprietary accounts.[39] This commenter noted that broker-dealer customers often self-insure or otherwise account for such exposure regardless of their status under SIPA.[40] The second commenter stated that foreign broker-dealers and foreign banks acting as broker-dealers should be allowed to subordinate their claims to customers and creditors of the broker-dealer in order to remove their accounts from PAB account treatment because under SIPA foreign broker-dealers and foreign banks acting as broker-dealers, under certain circumstances, will not be deemed customers and, therefore, would not be entitled to a *pro rata* share of the estate of customer property in a SIPA liquidation.[41] More specifically, the commenter suggested that the Commission modify the definition of *PAB account,* to exclude ''any foreign broker-dealer and foreign bank to the extent that such entity has a claim for cash or securities that is subordinated to the claims of creditors of the carrying broker-dealer'' in order to parallel the

[29] As noted above, while broker-dealers are customers for the purposes of SIPA, they are not entitled to the advances from the SIPC fund to make up for shortfalls after the *pro rata* distribution of customer property. 15 U.S.C. 78fff–3(a)(5).

[30] *See Amendments to Financial Responsibility Rules,* 72 FR at 12863. A broker-dealer that does not carry an account of a *customer* as defined under Rule 15c3–3 or conduct a proprietary trading business would be permitted to make the computation monthly rather than weekly. *See* paragraph (e)(3)(iii) of Rule 15c3–3, as adopted.

[31] *See SIFMA 2 Letter; SIFMA 4 Letter; Dresdner Kleinwort Letter; Deutsche Bank Securities Letter; SIPC Letter; Abbey National Letter; First Clearing Letter; Cornell Letter.*

[32] *See infra* section II.A.2.ii. of this release for a discussion of the Commission's rationale for the change in the final rule to require a carrying broker-dealer provide notice to, rather than obtain written permission from, a PAB account holder in order for its securities to be used in the ordinary course of the carrying firm's securities business.

[33] *See* Letter from Michael A. Macchiaroli, Associate Director, Division of Market Regulation, Commission, to Raymond J. Hennessy, Vice President, NYSE, and Thomas Cassella, Vice President, NASD Regulation, Inc. (Nov. 3, 1998) (''*PAIB Letter*'').

[34] Under Rule 15c3–1, broker-dealers are generally required to deduct unsecured receivables from their net worth when computing their net capital.

[35] Under new paragraph (e)(3), broker-dealers will be required to perform the PAB reserve account computation (and its customer reserve account computation, if applicable) on a weekly basis, as of the close of business on the last business day of the week. With regard to PAB accounts, a broker-dealer that does not carry an account of a *customer* as defined under Rule 15c3–3 or conduct a proprietary trading business may make the PAB reserve account computation monthly rather than weekly. *See* new paragraph (e)(3)(iii) of Rule 15c3–3.

[36] *See Amendments to Financial Responsibility Rules,* 72 FR at 12895.

[37] *See Dresdner Kleinwort Letter; Deutsche Bank Securities Letter.* Though SIFMA initially raised concerns about the proposed definition, it later withdrew its recommendation that proprietary accounts of affiliated non-U.S. broker-dealers and non-U.S. banks be excluded from the *PAB account* definition. *See SIFMA 2 Letter; SIFMA 4 Letter.*

[38] *See Dresdner Kleinwort Letter.*

[39] *Id.*

[40] *See Dresdner Kleinwort Letter.*

[41] *See Deutsche Bank Securities Letter.*

language in SIPA.[42] This commenter also recommended requiring the ''subordinating'' broker-dealer to follow the requirements for non-conforming subordinated loans to remove an account from PAB account treatment.[43]

Another commenter stated that the Commission's desire to close the gap between Rule 15c3–3 and SIPA must be balanced against the potentially significant practical issues the Commission's proposal would raise in the case of accounts carried for affiliated entities operating in non-U.S. jurisdictions.[44] In a subsequent letter, this commenter stated that while it would prefer a more flexible solution that would allow broker-dealers and non-U.S. banks acting as broker-dealers (especially non-U.S. affiliates) to opt to have their accounts treated as neither customer accounts under SIPA nor PAB accounts, the commenter recognized that there is a clear need for an immediate solution that cannot be delayed until appropriate amendments to SIPA are adopted.[45] Consequently, the commenter withdrew its recommendation that the proprietary accounts of affiliated non-U.S. broker-dealers and affiliated non-U.S. banks be excluded from the ''PAB account'' definition, but continued to endorse its previous comments to achieve the goal of correcting the gap between Rule 15c3–3 and SIPA without creating undue or unintended burdens.[46]

The goal of the proposed amendments is to create a process that protects Rule 15c3–3 customers and PAB account holders of a failed carrying broker-dealer. The amendments are designed to provide such protection by mitigating the risk that there will be insufficient customer property to fully satisfy all customer claims in a SIPA liquidation. The entitlement of PAB account holders to a *pro rata* share of the fund of customer property places all SIPA customers at risk if the carrying firm does not establish a PAB reserve account for excess credits owed to PAB account holders.

At the same time, the Commission appreciates the need to consider both the practical issues raised by commenters and its objective to eliminate the inconsistency between Rule 15c3–3 and SIPA.[47] Accordingly, in response to commenters, the final rule adopted by the Commission excludes from the definition of *PAB account* in paragraph (a)(16) of Rule 15c3–3 ''an account that has been subordinated to the claims of creditors of the carrying broker or dealer.''[48] A PAB account holder that has subordinated its claims with respect to that account to claims of creditors of the carrying broker-dealer will not be entitled to SIPA protection for that account.[49] Consequently, this provision will provide flexibility to carrying broker-dealers and their broker-dealer affiliates to structure their PAB account relationships in a manner that permits operational efficiencies (*i.e.,* the ability to exclude these accounts from the PAB reserve computation) while still promoting the goal of the amendments to have a consistent treatment of these accounts under Rule 15c3–3 and SIPA, and thereby protect accounts holders that are ''customers'' under SIPA.[50] If a U.S. broker-dealer, however, chooses to subordinate its claims to assets in that account to the claims of other creditors of the carrying broker-dealer, it will not be able to include those assets as allowable for its own net capital computation.[51]

Further, as was proposed, the definition of *PAB account* in the final rule excludes accounts that operate on a delivery-versus-payment or a receipt-versus-payment basis, or ''DVP/RVP'' basis, because these accounts generally hold securities and cash for short durations.[52] The provision relating to DVP/RVP accounts is being adopted substantially as proposed, though paragraph (a)(16), as adopted, has been modified by splitting the text into two sentences. As adopted, the reference to the DVP/RVP accounts provision was moved to the first sentence. The Commission is not adopting the proposed exclusions from the PAB reserve computation requirement related to accounts established by a PAB account holder that fully guarantee the obligations of, or whose accounts are fully guaranteed by, the carrying broker-dealer. Rather than create a specific exemption for such account holders, the Commission believes the better approach is to allow these accounts to enter into subordination agreements with the carrying broker-dealer, in order for these accounts to be excluded from the definition of *PAB account.* This approach simplifies the final rule, while continuing to provide a means for these account holders to be excluded from its scope. Consequently, as adopted, paragraph (a)(16) to Rule 15c3–3 defines the term *PAB account* to mean ''a proprietary securities account of a broker or dealer (which includes a foreign broker or dealer, or a foreign bank acting as a broker or dealer) other than a delivery-versus-payment account or a receipt-versus-payment account.''[53] The definition of *PAB Account* does not include accounts that have been subordinated to the claims of a carrying broker-dealer's creditors.[54]

ii. Written Permission To Use PAB Account Securities

Because PAB account holders are not customers for purposes of Rule 15c3–3, a carrying broker-dealer is not required to maintain possession or control of their non-margin securities. Consequently, it has been a long-

[42] The definition of *customer* in SIPA excludes any person, to the extent that ''such person has a claim for cash or securities which by contract, agreement, or understanding, or by operation of law, is part of the capital of the debtor, or is subordinated to the claims of any and all creditors of the debtor, notwithstanding that some grounds exist for declaring such contract, agreement, or understanding void or voidable in a suit between the claimant and the debtor.'' *See* 15 U.S.C. 78lll(2)(C)(iii).

[43] *See Deutsche Bank Securities Letter. See also* SIFMA 4 Letter. Under Rule 15c3–1, a broker-dealer can exclude liabilities that are subordinated to the claims of creditors pursuant to a satisfactory subordination agreement, as defined in Appendix D to Rule 15c3–1, for purposes determining its net capital. *See* 17 CFR 240.15c3–1(c)(2)(ii) and 17 CFR 240.15c3–1d. *See also* 17 CFR 240.15c3–1(c)(i)(x). A non-conforming subordination agreement generally would not meet all the requirements of Appendix D to Rule 15c3–1, and, therefore, a broker-dealer could not exclude the liability resulting from the loan agreement in computing its net capital. *See* 17 CFR 240.15c3–1(c)(2)(ii).

[44] *See SIFMA 2 Letter.* This commenter specifically raised concerns that it would be cumbersome to subject transactions between a carrying broker-dealer and its foreign affiliates to the proposed PAB requirements because of the integrated securities processing and settlement activities of these entities, which would limit the ability of the group as a whole to provide competitive services to U.S. investors.

[45] *See SIFMA 4 Letter.*

[46] *See SIFMA 4 Letter.* Among other things, the commenter suggested that the Commission modify the proposed definition of *PAB account* to exclude any *customer* as defined in Rule 15c3–3 and also to exclude the other types of persons who are specifically excluded from the definition of *customer.* This suggestion included excluding accounts whose claims are subordinated to the claims of other creditors of the carrying broker-dealer. *Id.*

[47] *See Amendments to Financial Responsibility Rules,* 72 FR at 12863.

[48] The agreement would not need to be conforming for purposes of Exchange Act Rule 15c3–1d (Satisfactory Subordination Agreements).

[49] *See* 15 U.S.C. 78*lll*(2).

[50] *See* 17 CFR 240.15c3–3(a)(1) and 15 U.S.C. 78*lll*(2)(C)(ii). These accounts will be excluded from both the definition of *PAB account,* as well from the definition of *customer* under SIPA. *See Amendments to Financial Responsibility Rules,* 72 FR at 12863. Consequently, these account holders will not be entitled to the protections in SIPA applicable to customers.

[51] *See* 17 CFR 240.15c3–1(c)(2)(iv)(E).

[52] *See Amendments to Financial Responsibility Rules,* 72 FR at 12863, n.17 (''[T]he amendment would exclude delivery-versus-payment and receipt-versus-payment accounts. These types of accounts pose little risk of reducing the estate of customer property in a SIPA liquidation since they only hold assets for short periods of time.'').

[53] *See* paragraph (a)(16) to Rule 15c3–3, as adopted.

[54] *Id.*

standing industry practice for carrying broker-dealers to use these PAB securities in their business activities. Under the final rule, a carrying broker-dealer that uses these PAB securities will need to include the market value of the securities as a credit in the formula when performing the PAB reserve computation. Thus, the amount that the carrying broker-dealer must maintain in its PAB reserve account will increase by the amount of these credits because there would be no corresponding debit item.[55]

Using non-margin securities of PAB account holders presents the risk that securities may increase in market value between PAB reserve computations and, therefore, the amount of the credit items in the formula may be less than the value of the securities for a short period of time. To accommodate industry practice, however, the Commission did not propose amending Rule 15c3–3 to apply the possession or control requirements to PAB accounts. The Commission proposed adding paragraph (b)(5) to Rule 15c3–3 that would have required the carrying broker-dealer to obtain written permission from a PAB account holder before it could use the PAB account holder's securities in the ordinary course of its securities business. In this way, the Commission proposed increasing the protections for PAB account holders without interfering with long-standing industry practice of carrying broker-dealers using the securities of their broker-dealer account holders. However, securities not being used by the broker-dealer must be maintained in accordance with the possession or control requirements of Rule 15c3–3.

One commenter stated that this provision should be eliminated from the proposed amendments, arguing that ''[t]he proposal interferes unnecessarily in the contractual arrangements between broker-dealers, which are capable of understanding the terms of standard industry custodial relationships.'' [56] The commenter also noted that the *PAIB Letter* did not contain any such requirement.[57] The Commission agrees with the commenter that broker-dealers should be able to understand the implications of granting another broker-dealer the ability to use their non-margin securities and, therefore, the final rule requires written notice rather than written permission. An appropriate level of protection for the PAB account holder may be achieved without requiring the carrying broker-dealer to maintain possession or control of securities carried for a PAB account, provided that the carrying broker-dealer gives written notice to its PAB account holders that it may use their non-margin securities.[58]

The Commission acknowledges that this change, as compared to the proposed rule, will shift the burden to the PAB account holder to proactively object to the carrying broker-dealer using the account holder's securities. However, the new written notice requirement increases the protections for PAB account holders from the status quo without imposing substantial burdens on existing account relationships. The revised rule is intended to provide to the PAB account holders the opportunity to negotiate different terms if they do not want their securities used, while eliminating the need for, and the costs that would result from, carrying broker-dealers reworking existing contracts.

As adopted, the Commission is modifying the final rule to add the phrase ''and has provided an opportunity for the account holder to object'' following the phrase ''ordinary course of its securities business.'' [59] This language was added to the final rule to impose a requirement that the carrying broker-dealer provide the PAB account holders an opportunity to object to the use of their non-margin securities after they receive the written notice from the carrying broker-dealer. The rule does not prescribe the form in which a PAB account holder must provide notice to the carrying broker-dealer of its objection. This will provide the PAB account holder with flexibility to communicate the objection in a manner the account holder determines is most effective in terms of conveying such objection to the carrying broker-dealer. If the PAB account holder objects, the carrying broker-dealer could not use the securities. Further, the PAB account holder could seek to move the account to another carrying broker-dealer or negotiate different terms with the carrying broker-dealer with regard to the use of its securities.

Finally, the Commission has modified proposed paragraph (b)(5) to clarify in the final rule that a broker-dealer is affirmatively required to maintain possession and control of non-margin securities unless the broker-dealer has provided written notice to the PAB account holder.[60] As modified, paragraph (b)(5) reads: ''A broker or dealer is required to obtain and thereafter maintain the physical possession or control of securities carried for a PAB account, unless the broker or dealer has provided written notice to the account holder that the securities may be used in the ordinary course of its securities business, and has provided an opportunity for the account holder to object.'' [61]

iii. PAB Reserve Bank Accounts

The Commission proposed amendments to paragraph (e) of Rule 15c3–3 to require a carrying broker with PAB accounts to establish and maintain a PAB reserve account for PAB accounts, perform a separate PAB reserve computation for PAB accounts, and maintain cash or qualified securities in the PAB reserve account in an amount equal to the PAB reserve requirement.[62] The Commission also proposed amendments to paragraph (f) of Rule 15c3–3 to require carrying broker-dealers with PAB accounts to notify the bank about the status of the PAB reserve account and obtain an agreement and notification from the bank that the PAB reserve account will be maintained for the benefit of the PAB account holders.[63] The Commission is adopting these amendments to paragraphs (e) and (f) of Rule 15c3–3 substantially as proposed, with some technical modifications suggested by one commenter, including making terminology consistent throughout the paragraphs.[64] In addition, the Commission is adopting substantially as proposed the amendments to paragraph (g) of Rule 15c3–3 which specifies when the carrying broker-dealer can make withdrawals from a PAB reserve account.[65] Finally, the Commission is

[55] 17 CFR 240.15c–3–3a.

[56] *See SIFMA 2 Letter.*

[57] *Id.*

[58] The Commission has deleted the phrase ''obtained the written permission of the account owner to use the securities in the ordinary course of its securities business'' from paragraph (b)(5) of the final rule and replaced it with ''provided written notice to the account holder that the securities may be used in the ordinary course of its securities business, and has provided an opportunity for the account holder to object.''

[59] *See* paragraph (b)(5) of Rule 15c3–3, as adopted.

[60] The modifications replaced the phrase ''shall not be required'' with the phrase ''is required'' and replaced the phrase ''provided that'' with the word ''unless.''

[61] *See* paragraph (b)(5) of Rule 15c3–3, as adopted.

[62] *See* section II.A.3. of this release for a discussion of changes to paragraph (e)(5) of Rule 15c3–3 with respect to banks where customer or PAB reserve accounts may be held.

[63] 17 CFR 240.15c3–3(f).

[64] *See SIFMA 2 Letter.*

[65] 17 CFR 240.15c3–3(g). In this paragraph, the Commission deleted the phrase ''his Reserve Bank Accounts'' and replaced it with the phrase ''a Customer Reserve Bank Account and PAB Reserve Bank Account.'' The Commission also deleted the phrase ''each Reserve Bank Account'' and replaced it with the phrase ''the Customer Reserve Bank Account and PAB Reserve Bank Account.'' These were the only changes made to the final rule in paragraph (g) of Rule 15c3–3.

adopting, as proposed, new paragraph (e)(4) to Rule 15c3–3, which allows a carrying broker-dealer to use credits related to PAB accounts to finance Rule 15c3–3 customer debits, but does not allow a carrying broker-dealer to use Rule 15c3–3 customer credits to finance PAB debits.

iv. Other PAB Issues Raised by Commenters

In addition to specific comments on the proposed rule language, one commenter had other interpretive questions and comments about the proposed PAB requirements.[66] The commenter requested that the Commission clarify whether PAB account holders must obtain from their carrying broker-dealers a written agreement to perform the calculation as required by the *PAIB Letter*.[67] Under the amendments, there is no requirement that PAB account holders obtain a written agreement from the carrying firm that it will perform the PAB reserve computation. Rule 15c3–3, as amended, requires the carrying firm to perform the PAB reserve computation. As stated above, Rule 15c3–3 prescribes the requirements for carrying firms with respect to PAB accounts, and the *PAIB Letter* is being withdrawn.[68]

In addition, the commenter requested the Commission to clarify that existing PAIB reserve accounts need not be re-titled to comply with the proposed amendments.[69] Item 4 of the *PAIB Letter* required that a carrying broker-dealer, ''establish and maintain a separate 'Special Reserve Account for the Exclusive Benefit of Customers' with a bank in conformity with the standards of paragraph (f) of Rule 15c3–3.'' Paragraph (e)(1) of Rule 15c3–3, however, requires that a carrying broker-dealer establish and maintain a ''Special Reserve Bank Account for Brokers and Dealers.'' Given the small differences in nomenclature and the time and expense associated with broker-dealers re-titling these accounts, a carrying broker-dealer that has properly established PAB reserve account in the manner described in Item 4 of the *PAIB Letter* need not re-title the account and obtain a new notification from the bank.[70] However, all PAB reserve accounts established on or after the effective date of these amendments must title the account in accordance with paragraph (e)(1) of Rule 15c3–3.

Finally, the commenter urged the Commission to clarify whether, for purposes of Rule 15c3–1, the term *aggregate debit items* means total aggregate debit items computed in accordance with the customer reserve formula or the total aggregate debit items computed in accordance with both the customer reserve formula and the PAB reserve formula.[71] Aggregate debit items are used in the net capital rule to determine the minimum net capital requirement for broker-dealers that elect to use the alternative standard in computing their minimum net capital requirement. Specifically, the net capital rule requires broker-dealers using the alternative standard to maintain net capital of at least the greater of $250,000 or 2% of aggregate debit items.[72] Including PAB aggregate debit items in this computation would significantly increase net capital requirements for broker-dealers that use the alternative method. The intended purpose of this rule change is to address the inconsistencies between Rule 15c3–3 and SIPA—not to increase net capital requirements. Consequently, the requirements in Rules 15c3–1, 15c3–1d, and 17a–11 that refer to aggregate debit items continue to be based only on aggregate debit items computed in accordance with the customer reserve computation, and do not include aggregate debit items computed in accordance with the PAB reserve computation.[73]

v. Amendment to Rule 15c3–1(c)(2)(iv)(E) Related to PAB Accounts

Finally, the Commission proposed an amendment to Rule 15c3–1[74] that would have required a broker-dealer, when calculating net capital, to deduct from net worth cash and securities held in a securities account at another broker-dealer if the other broker-dealer does not treat the account, and the assets therein, in compliance with the applicable PAB reserve account requirements of Rules 15c3–3 and 15c3–3a.[75] A commenter suggested modifying this proposed amendment,[76] arguing that ''[a]lthough the Proposing Release states that the Commission 'would not expect broker-dealers to audit or examine their carrying broker-dealers to determine whether the carrying broker-dealer is in compliance with [the proposed rules],' the text of the proposed amendment suggests that they in fact would have such an obligation.''[77] The commenter also stated that a broker-dealer should not be deemed to have violated Rule 15c3–1 merely because its carrying firm fails to properly perform requirements solely applicable to the carrying firm and that paragraph (c)(2)(iv)(E) under Rule 15c3–1 should be explicitly modified to clarify that cash and securities held in a securities account at another broker-dealer are not subject to the deduction specified in that paragraph.[78]

While the Commission did not intend to impose any monitoring requirement on the PAB account holder, the Commission recognizes that the language, as proposed, could have implied such a requirement and agrees with the commenter that a broker-dealer should not be deemed to have violated Rule 15c3–1 with respect to requirements that are solely applicable to the carrying broker-dealer. To address this concern, the Commission has modified the language in paragraph (c)(2)(iv)(E) under Rule 15c3–1 to eliminate the proposed capital charge of Rule 15c3–1 that would have resulted from a failure of a carrying broker-dealer to comply with the PAB requirements in Rule 15c3–3.[79]

Instead, the Commission has adopted amendments to Rule 15c3–1 providing that a broker-dealer need not deduct cash and securities held in a securities account at a carrying broker-dealer except where the account has been subordinated to the claims of creditors of the carrying broker-dealer.[80] This provision is intended to prevent broker-dealers from including assets in their net capital that may not be readily available to be returned because they

[66] *See SIMFA 2 Letter.*

[67] *Id.*

[68] As discussed above in this section II.A.2., the Commission is directing the staff to withdraw the *PAIB Letter* as of the effective date of these rules.

[69] *See SIFMA 2 Letter.*

[70] *See PAIB Letter.*

[71] *See SIFMA 2 Letter; SIFMA 4 Letter.*

[72] 17 CFR 240.15c3–1(a)(1)(ii). In addition, certain other financial responsibility rules require that a broker-dealer that computes net capital pursuant to the alternative method either report to the Commission, limit its ability to obtain, pre-pay, or repay subordinated debt, or limit its business if its net capital falls below a certain level based on a percentage of aggregate debit items (*see, e.g.,* Rules 15c3–1(e)(2)(vi), 15c3–1d(b)(6)(iii), 15c3–1d(b)(7), 15c3–1d(b)(8)(i)(A), 15c3–1d(b)(10)(ii)(B), 15c3–1d(c)(2), 15c3–1d(c)(5)(ii)(A), and 17a–11(c)(2)).

[73] Under paragraph (e)(4) to Rule 15c3–3, a carrying broker-dealer will be permitted to use credits related to PAB accounts to finance Rule 15c3–3 customer debits. This rule, however, does not affect the use of aggregate debit items in computing a broker-dealer's net capital under the alternative standard pursuant to paragraph (a)(1)(ii) of Rule 15c3–1.

[74] 17 CFR 240.15c3–1(c)(2)(iv)(E).

[75] *See Amendments to Financial Responsibility Rules,* 72 FR at 12864.

[76] *See SIFMA 2 Letter.*

[77] *Id.*

[78] *Id.*

[79] More specifically, the Commission has deleted the proposed language referring to ''cash and securities held in a securities account at another broker-dealer if the other broker-dealer does not treat the account, and the assets therein in compliance with paragraphs (b)(5) and (e) of § 240.15c3–3. . . .''

[80] 17 CFR 240.15c3–1(c)(2)(iv)(E).

would not be subject to the PAB account provisions discussed above. Accordingly, the amendments to paragraph (c)(2)(iv)(E) of Rule 15c3–1 are consistent with the exclusions from the definition of *PAB account* in paragraph (a)(16) of Rule 15c3–3.[81]

3. Banks Where Special Reserve Deposits May Be Held

As amended, paragraph (e) of Rule 15c3–3 requires a broker-dealer to deposit cash or qualified securities into the customer or PAB reserve account,[82] which must be maintained at a bank.[83] While cash deposits at a bank are fungible and may be used by the bank in its lending and investment activities, paragraph (f) of Rule 15c3–3 requires that a broker-dealer obtain a written contract from the bank wherein the bank agrees not to re-lend or hypothecate securities deposited into the reserve account.[84] This means the bank cannot use the securities in its business, which provides a measure of protection by requiring that the securities will be available to the broker-dealer if the bank falls into financial difficulty. Cash deposits, however, may be freely used in the course of the bank's commercial activities.[85] Therefore, to the extent a broker-dealer deposits cash in a reserve account, there is a risk the cash could become inaccessible if the bank experiences financial difficulties.[86] This could adversely impact the broker-dealer and its customers.[87] To limit these risks, the Commission proposed amendments to Rule 15c3–3 that would have: (1) Prohibited a broker-dealer from maintaining cash deposits in the reserve accounts for customers and PAB account holders if the bank was affiliated; and (2) limited the amount of cash that could be deposited in both types of reserve accounts at non-affiliated banks.[88] These restrictions would not have applied to securities held in the reserve accounts because, as noted above, the bank must agree not to use the securities in its business. The goal of the proposals was to limit cash reserve account deposits to reasonably safe amounts as measured against the capitalization of the broker-dealer and the bank.[89]

Specifically, as proposed, paragraph (e)(5) of 15c3–3 provided that a carrying broker-dealer would have been required to exclude the amount of cash deposited into reserve accounts at affiliated banks when determining whether it maintained the minimum amount required to be on deposit in the reserve accounts for its customers and PAB account holders. In addition, the proposed amendment would have required a carrying broker-dealer to exclude cash deposited in a reserve account at an unaffiliated bank to the extent the amount of the cash deposited exceeded: (1) 50% of the broker-dealer's excess net capital (based on the broker-dealer's most recently filed FOCUS Report); [90] or (2) 10% of the bank's equity capital (based on the bank's most recently filed Call Report or Thrift Financial Report).[91]

The Commission is adopting the amendments with modifications designed to address issues identified by commenters. Twenty-three commenters addressed the proposed amendments.[92] Fifteen commenters urged the Commission not to adopt the proposed prohibition on broker-dealers maintaining cash in reserve accounts at affiliated banks.[93] These commenters generally stated that, with regard to cash in reserve accounts, affiliated banks should be treated the same as unaffiliated banks because both groups are subject to the same financial regulation.[94] These commenters noted that banks are subject to safety and soundness requirements of their respective banking regulators and, therefore, the commenters argued that the proposed restriction with respect to affiliated banks is unwarranted.

One commenter also stated that the Commission's distinction between affiliated and unaffiliated banks was not sufficiently supported in the proposing release.[95] More specifically, this commenter stated that the Commission's ''bare statement that a broker-dealer 'may not exercise due diligence with the same degree of impartiality when assessing the soundness of an affiliate bank as it would with a non-affiliate . . .' does not suffice to justify the disparate treatment'' with regard to the treatment of affiliated banks under the proposed rule.[96] This commenter also stated that it is just as easy to argue that broker-dealers are in a much better position to know about the soundness of an affiliated bank then to learn about the soundness of a unaffiliated bank, which may not be willing to provide complete and accurate information.[97] In addition, another commenter stated that the Commission cited no empirical or anecdotal evidence to support its reasons for prohibiting cash reserve deposits at an affiliated bank.[98] This commenter also stated that the Commission's concerns discount the operational efficiencies to be gained between an affiliated broker-dealer and its bank, including: Commonality between certain policies and procedures; greater ease in communication internally; and greater operational efficiencies leading to reduced operational risk in the transfer of funds to and from the bank.[99]

One commenter stated that it took no issue with the proposed restriction on

[81] 17 CFR 15c3–3(a)(16).

[82] The PAB reserve account and the customer reserve account are collectively referred to as the ''reserve accounts'' or a ''reserve account.''

[83] The term *bank* is defined in paragraph (a)(7) of Rule 15c3–3 as a ''bank as defined in section 3(a)(6) of the Exchange Act and will also mean any building and loan, savings and loan or similar banking institution subject to the supervision by a Federal banking authority.'' *See* paragraph (a)(7) to Rule 15c3–3, as adopted.

[84] *See* 17 CFR 240.15c3–3(f).

[85] *See Amendments to Financial Responsibility Rules,* 72 FR at 12864.

[86] *Id.*

[87] *Id.*

[88] *Id.*

[89] *Id.*

[90] Under Rule 17a–5, broker-dealers must file periodic reports on Form X–17a–5 (Financial and Operational Combined Uniform Single Reports) (''FOCUS Reports''). *See* 17 CFR 240.17a–5(a). The FOCUS Report requires, among other financial information, a balance sheet, income statement, and net capital and customer reserve computations. Excess net capital is the amount that a broker-dealer's net capital exceeds its minimum requirement.

[91] *See Amendments to Financial Responsibility Rules,* 72 FR at 12864. On July 21, 2011, supervisory responsibility for federal savings associations was transferred from the Office of Thrift Supervision (''OTS'') to the Office of the Comptroller of the Currency (''OCC''). As of the quarter ending March 31, 2012, savings associations were required to file a Call Report in lieu of a Thrift Financial Report. *See Proposed Agency Information Collection Activities; Comment Request,* 76 FR 7082 (Feb. 8, 2011). The Call Report includes a line item for total bank equity capital. A report for a specific institution is *available at https://cdr.ffiec.gov/public/. See also, FINRA, Interpretations of Financial and Operational Rules,* Interpretations 15c3–3(e)(1)/01 and/011 (establishing similar threshold restrictions on using money market deposit accounts or time deposits, respectively, to meet customer reserve account requirements), and Interpretation 15c3–3(e)(3)/051 (establishing similar threshold restrictions with respect to meeting the customer reserve requirement by depositing cash at an affiliated bank).

[92] *See Federated Letter; Curian Clearing Letter; Raymond James Letter; JP Morgan Letter; Reserve Letter; Dresdner Kleinwort Letter; SIFMA 2 Letter; SIFMA 4 Letter; First Clearing Letter; Clearing House Letter; ICI Letter; Barclays Letter; ABASA Letter; PNC Letter; BlackRock Letter; Deutsche Bank Securities Letter; E*Trade Letter; Citigroup Letter; American Bar Association Letter; Fidelity/NFS Letter; BOK Letter; JP Morgan 3 Letter; IIB Letter; Raymond James 2 Letter.*

[93] *See Federated Letter; JP Morgan Letter; Dresdner Kleinwort Letter; SIFMA 4 Letter; First Clearing Letter; ICI Letter; ABASA Letter; E*Trade Letter; Citigroup Letter; American Bar Association Letter; Fidelity/NFS Letter; Curian Letter; BOK Letter; JP Morgan 2 Letter; IIB Letter.*

[94] *Id.*

[95] *See Dresdner Kleinwort Letter.*

[96] *Id.*

[97] *Id.*

[98] *See Citigroup Letter.*

[99] *Id.*

affiliated banks.[100] Another commenter noted that the financial industry has seen a remarkable consolidation of the banking and securities industries, and, as a result, the number of broker dealers affiliated with banks has increased, along with the number of those broker-dealers maintaining deposits at affiliated banks.[101] This commenter stated that broker-dealers would be required to move deposits from one institution and divide that amount among several banks, resulting in credit risk to the broker-dealer, as well as an increase in operational risk.[102] Finally, the commenter observed that the Commission did not provide any specific examples of bank failures impacting affiliated broker-dealers, which led the commenter to question whether there is any realistic benefit to offset the increased risk that broker-dealers would be required to take on as a result of the proposal to place restrictions on cash deposits in reserve accounts at affiliated and unaffiliated banks.[103]

The Commission recognizes that all banks, whether or not affiliated with a broker-dealer, are subject to regulation by their respective banking regulators. The Commission's continuing concern, however, is that a carrying broker-dealer may not exercise due diligence with the same degree of impartiality and care when assessing the financial soundness of an affiliated bank as it would with an unaffiliated bank.[104] Moreover, the goal of protecting the carrying broker-dealer's customers through the Rule 15c3–3 reserve requirement may be undermined in the event a holding company becomes insolvent, with corresponding adverse consequences to both the bank and broker-dealer subsidiaries.

In some cases, a broker-dealer may have access to more information about an affiliated bank in comparison to an unaffiliated bank for purposes of conducting due diligence. However, having more information would not be of benefit if the individuals making the decision on where to maintain the reserve account are not objective in their decision making. The Commission is concerned that a broker-dealer's decision to hold cash in a reserve account at an affiliated bank may be driven in part by profit or reasons based on the affiliation, regardless of any due diligence it may conduct or the overall safety and soundness of the bank.

In addition, in response to the comments regarding affiliated banks, the Commission notes that substantial numbers of banks have failed or required government assistance in recent years.[105] While a particular bank failure may not have materially impacted an affiliated broker-dealer to date,[106] the risk remains that the financial difficulty of an entity that is part of a holding company structure may adversely impact other affiliated entities, including affiliated broker-dealers and banks.[107] Therefore, the final rule retains the prohibition on maintaining customer reserve cash deposits at an affiliated bank.[108]

This prohibition does not apply to securities on deposit at an affiliated bank, but only cash deposits because, as noted above, the latter are fungible with other deposits carried by the bank and may be freely used in the course of the bank's commercial activities.[109] Consequently, to the extent that operational or other efficiencies can be achieved through the use of an affiliated bank, the carrying broker-dealer can use qualified securities held at an affiliated bank to meet its reserve deposit requirements.[110] The ability to use qualified securities alleviates concerns that a broker-dealer would be required to take deposits from one institution and divide that amount among several banks, resulting in credit risk to the broker-dealer, as well as an increase in operational risk.[111]

In summary, while the Commission acknowledges concerns raised by commenters, the Commission continues to believe that it is appropriate to exclude cash deposited in affiliated banks from the calculation to determine whether a broker-dealer has met its reserve account requirements. Therefore, the final rule excludes the amount of any cash on deposit in an affiliated bank of the broker-dealer from being used to meet the reserve requirements.[112] Broker-dealers that use affiliated banks for holding cash customer reserve accounts will need to either deposit qualified securities into the accounts or move their accounts to non-affiliated banks.

As for the limits on the amounts of cash that could be deposited in one unaffiliated bank, some commenters argued that the proposed thresholds were too restrictive. One commenter urged the Commission to reconsider the proposed limits, noting that the proposed amendment will impose significant costs on broker-dealers and potentially adversely impact the broker-dealers' customers.[113] Several commenters suggested that the Commission allow cash reserve deposits without the percentage restrictions at unaffiliated banks that are well-capitalized or for which the broker-dealer has performed due diligence.[114] One commenter suggested that the Commission consider higher percentages for cash deposits at large money-center banks.[115] This commenter stated that this would strike a better balance between the Commission's concerns regarding the safety of cash deposits and the costs imposed on broker-dealers arising from having to use qualified securities (as opposed to cash) to meet deposit requirements or having to maintain reserve accounts at multiple banks.[116] This commenter also stated that the percentage thresholds would negatively impact smaller broker-dealers because they would exceed the 50% of excess net capital threshold at lower deposit levels.[117] Two

[100] *See Raymond James Letter.* In a subsequent comment letter, this commenter stated that if this proposal is adopted, registered broker-dealers holding customer funds may be required to move their reserve accounts if those accounts are currently held at affiliated banks, which would increase costs. *See Raymond James 2 Letter.*

[101] *See BOK Letter.*

[102] *Id.*

[103] *Id.*

[104] *See Amendments to Financial Responsibility Rules,* 72 FR at 12864.

[105] According to the FDIC, the number of FDIC-insured institutions that failed in the U.S. over the last four years are: (1) 140 in 2009; (2) 157 in 2010; (3) 92 in 2011; and (4) 51 in 2012. A complete list of failed banks since October 1, 2000, is *available at www.fdic.gov/bank/individual/failed/banklist.html.*

[106] *See BOK Letter; Dresdner Kleinwort Letter.*

[107] *See, e.g., Lehman Brothers Inc.—Trustee's Preliminary Investigation Report and Recommendations* (Case No. 08–01420 (JMP) SIPA), *available at http://bankrupt.com/misc/sipareport0904.pdf.*

[108] *Id.*

[109] *See* Federal Reserve, Division of Banking Supervision and Regulation, *Commercial Bank Examination Manual, Section 3000.1, Deposit Accounts* (stating that deposits are the primary funding source for most banks and that banks use deposits in a variety of ways, primarily to fund loans and investments), *available at http://www.federalreserve.gov/boarddocs/supmanual/cbem/3000.pdf. See also* OCC Banking Circular (BC–196), Securities Lending (May 7, 1985) (stating securities should be lent only pursuant to a written agreement between the lender institution and the owner of the securities specifically authorizing the institution to offer the securities for loan), *available at http://www.occ.gov/static/news-issuances/bulletins/pre-1994/banking-circulars/bc-1985-196.pdf.*

[110] *See Citigroup Letter.*

[111] *See BOK Letter.* Based on FOCUS Report data, as of December 31, 2011, 79% of the total customer reserve requirement across all carrying broker-dealers was met using qualified securities.

[112] *See* paragraph (e)(5) of Rule 15c3–3, as adopted.

[113] *See Raymond James 2 Letter.*

[114] *See Raymond James Letter; JP Morgan Letter; Clearing House Letter; ABASA Letter; PNC Letter; Deutsche Bank Securities Letter; E*Trade Letter; JP Morgan 2 Letter.*

[115] *See SIFMA 2 Letter; SIFMA 4 Letter.*

[116] *See SIFMA 2 Letter.*

[117] *Id.*

commenters noted that the proposed 10% bank equity capital limitation appears to be derived from a 1988 NYSE staff interpretation, which stated that customer reserve accounts may be maintained in money market deposit accounts if the total of such deposits in any one bank does not exceed 50% of the broker-dealer's excess net capital or 10% of the bank's equity capital.[118] These commenters pointed out that significant changes have taken place with respect to federal bank regulatory agency oversight of the safety and soundness of banks since 1988, including the imposition of prompt corrective action provisions.[119] These commenters stated that the concerns that gave rise to the 1988 interpretation have been mitigated by current statutes and regulations requiring prompt corrective action in the event that a bank's capital position deteriorates.[120]

As stated above, substantial numbers of banks have failed or required government assistance in recent years.[121] Consequently, the rule, as adopted, establishes requirements designed to avoid the situation where a carrying broker-dealer's cash deposits constitute a substantial portion of the bank's deposits. At the same time, the proposal has been modified to mitigate concerns raised by commenters that broker-dealers would have to maintain reserve accounts at multiple banks. First, the Commission has eliminated the provision that would have excluded the amount of a cash deposit that exceeds 50% of the broker-dealer's excess net capital. As noted by comments, this provision likely would have disproportionately impacted small and mid-size broker-dealers when they deposited cash into large commercial banks since they would exceed the excess net capital threshold well before exceeding the bank equity capital threshold.[122] Also, based on staff experience monitoring larger broker-dealers, firms that maintain large amounts of cash in their customer reserve accounts generally use more than one non-affiliated bank to maintain these accounts.

The bank equity capital threshold is the more important metric since it relates directly to the financial strength of the bank, which is the entity holding the account. Thus, this metric more directly addresses the risk at issue: The potential impairment of the bank's ability to quickly return the customer reserve deposit to the broker-dealer.

Second, with respect to the bank equity capital threshold, in response to comments, the Commission has increased the threshold from 10% to 15% of the bank's equity capital. The increase of the threshold to 15% is designed to address concerns raised by commenters that the proposed percentage tests were unduly restrictive in certain respects and should be modified, particularly with respect to large broker-dealers with large deposit requirements. Consequently, the increase from 10% to 15% is designed to mitigate commenters' concerns that the 10% threshold would require broker-dealers to spread out cash deposits over a number of banks, while still providing adequate protection against the risk that arises when a bank's deposit base is overly reliant on a single depositor.

The elimination of the 50% of excess net capital threshold and increase in the bank capital threshold from 10% to 15% is intended to address concerns raised by commenters that they would have to substantially alter their current cash deposit practices in light of the goal of the rule to promote the broker-dealer's ability to have quick access to the deposit.

As proposed, the equity capital threshold would have been based on equity capital ''as reported by the bank in its most recent Call Report or Thrift Financial Report.'' Under the Dodd-Frank Wall Street Reform and Consumer Protection Act (''Dodd-Frank Act''),[123] the supervision of savings associations was transferred from the OTS to the OCC (for federal savings associations) and the FDIC (for state savings associations).[124] Also, beginning in the period ending March 31, 2012, savings associations began to file a Call Report in lieu of a Thrift Financial Report, thereby ending the use of the Thrift Financial Report.[125] Therefore, due to the passage of the Dodd-Frank Act and the elimination of the Thrift Financial Report, as well as to provide more flexibility with regard to any successor reports that may be required to be filed by a bank, the Commission is modifying the phrase ''Call Report or Thrift Financial Report'' to read ''Call Report or any successor form the bank is required to file by its appropriate Federal banking agency (as defined by section 3 of the Federal Deposit Insurance Act (12 U.S.C. 1813))''.

Two commenters expressed concern about the use of a Call Report to determine a bank's ''equity capital'' under the rule.[126] These commenters noted that there is no equity capital line item in the Call Reports of U.S. branches of foreign banks due to these branches not being separately incorporated legal entities.[127] Therefore, the proposed Call Report provision potentially excluded U.S. branches of foreign banks from holding reserve accounts. The commenters stated that for foreign banks, the equity capital can be found in other forms, such as Form FR Y–7, Form FR Y–70, Form 6–K, and Form F–20, among other financial statements filed with U.S. regulators.[128] One commenter suggested the Commission revise the proposed provision to read: ''The amount of the deposit exceeds 10% of the bank's equity capital (as reported by the bank in its most recent Call Report or Thrift Financial Report if such report includes a line item for 'equity capital').''[129] Alternatively, these commenters suggested that in lieu of a Call Report a U.S. branch of a foreign bank could periodically obtain a certificate from the bank stating its equity capital (or stating that its equity capital exceeds a specified level).[130]

The Commission recognizes that the U.S. branches of some foreign banks may meet the definition of *bank* under section (3)(a)(6) of the Exchange Act and, therefore, also under paragraph (a)(7) of Rule 15c3–3.[131] However, the

[118] *See PNC Letter; ABASA Letter.*

[119] *See PNC Letter; ABASA Letter.*

[120] *Id.*

[121] *See www.fdic.gov/bank/individual/failed/banklist.html.*

[122] *See SIFMA 2 Letter; JP Morgan 2 Letter.*

[123] Public Law 111–203, 124 Stat. 1376 (2010).

[124] *Id.* at §§ 300–378. *See also List of OTS Regulations to be Enforced by the OCC and the FDIC Pursuant to the Dodd-Frank Act,* OCC, FDIC, (June 14, 2011), 76 FR 39246 (July 6, 2011). Supervision of savings and loan holding companies and their subsidiaries (other than depository institutions) was transferred from the OTS to the Federal Reserve.

[125] *See Proposed Agency Information Collection Activities; Comment Request,* 76 FR 7082 (Feb. 8, 2011).

[126] *See IIB Letter; SIFMA 4 Letter.*

[127] *Id.*

[128] *Id.*

[129] *See IIB Letter.*

[130] *See IIB Letter; SIFMA 4 Letter.*

[131] The term *bank* as defined in section 3(a)(6) of the Exchange Act is limited to banks directly regulated by U.S. state or federal bank regulators. The determination whether any particular financial institution meets the requirements of section 3(a)(6) is the responsibility of the financial institution and its counsel. *See* 15 U.S.C. 78c(a)(6); *cf. Securities Issued Or Guaranteed By United States Branches Or Agencies of Foreign Banks; Interpretive Release,* Securities Act Release No. 6661 (Sept. 23, 1986), 51 FR 34460 (Sept. 29, 1986) (determination as to whether branch or agency of foreign bank falls within the definition of *bank* under section 3(a)(2) of Securities Act of 1933, 15 U.S.C. 77c(a)(2), is responsibility of issuers and their counsel). However, section 4(d) of the International Banking Act, 12 U.S.C. 3102(d), expressly prohibits agencies of foreign banks established under federal law from receiving deposits or exercising fiduciary powers, criteria necessary for qualification as a bank under section 3(a)(6)(C) of the Exchange Act. *See* 12 U.S.C. 3102(d); *see also Conference of State Bank Supervisors* v. *Conover,* 715 F.2d 604 (D.C. Cir. 1983), cert. denied, 466 U.S. 927 (1984) (stating that

Commission is retaining the requirement that the bank's equity be determined using its most recent Call Report because U.S. branches of foreign banks generally are not FDIC-insured.[132] Consequently, deposits at these institutions would not receive the protections of FDIC insurance in the event of a bank failure. FDIC insurance provides additional protections to cash deposited in a reserve account at a bank in the event of a bank failure that would not be available at an uninsured bank.[133] The Commission, however, will consider requests for exemptive relief from broker-dealers that wish to hold a reserve account at a U.S. branch of a foreign bank.

For these reasons, the Commission is adopting the final rule to exclude, when determining whether a broker-dealer maintains the minimum deposits required under paragraph (e) of Rule 15c3–3, cash deposited with an affiliated bank as well as cash deposited with an unaffiliated bank ''to the extent that the amount of the deposit exceeds 15% of the bank's equity capital as reported by the bank in its most recent Call Report or any successor form the bank is required to file by its appropriate Federal banking agency (as defined by section 3 of the Federal Deposit Insurance Act (12 U.S.C. 1813)).'' [134] As discussed above, the Commission is deleting from the final rule the provision that would have excluded the amount of cash on deposit that exceeds 50% of the broker-dealer's excess net capital.

4. Allocation of Customers' Fully Paid and Excess Margin Securities to Short Positions

Paragraph (d) of Rule 15c3–3 currently sets forth steps a broker-dealer must take to retrieve securities from non-control locations if there is a shortfall in the fully paid or excess margin securities it is required to hold for its customers. The actions prescribed in the rule do not include a requirement that the broker-dealer obtain possession or control of a fully paid or excess margin security that is reflected on the broker-dealer's stock record as a long position of a customer that allocates to a broker-dealer or non-customer short position. In the simplest case, this occurs when the carrying broker-dealer as principal sells short a security to its own customer. Currently, in such a case, the broker-dealer is not required to have possession or control of the security even though its customer has paid for the security in full. Rather, the broker-dealer must include the mark-to-market value of the security as a credit item in the reserve formula. The broker-dealer can use the cash paid by the customer to purchase the security to make any increased deposit requirement caused by the credit item.[135] As the Commission stated in the proposing release, this permits the broker-dealer, in effect, to partially monetize the customer's security.[136] This result is contrary to the customer protection goals of Rule 15c3–3, which seek to ensure that broker-dealers do not use customer assets for proprietary purposes.[137]

To address these concerns, the Commission proposed an amendment to Rule 15c3–3 that would have required a broker-dealer to obtain physical possession or control of customer fully paid and excess margin securities that allocate to a broker-dealer short position.[138] Specifically, the proposed amendment would have added a fifth step to take when a deficit arose in the amount of securities the broker-dealer was required to maintain in possession or control; namely that for ''[s]ecurities included on [the broker-dealer's] books or records as a proprietary short position or as a short position for another person, excluding positions covered by paragraph (m) of this section, for more than 10 business days (or more than 30 calendar days if the broker or dealer is a market maker in the securities), [. . .] the broker or dealer shall, not later than the business day following the day on which the determination is made, take prompt steps to obtain physical possession or control of such securities.'' [139]

Eleven commenters addressed this proposed amendment.[140] Three commenters urged the Commission to disallow naked short selling of securities and one argued that the Commission should force short sellers to pre-borrow.[141] Three commenters generally opposed the proposed rule. They argued that the credit item added to the reserve formula computation when a customer's fully paid or excess margin security allocates to a short position provides the customer with adequate protection.[142] Two of these commenters requested that the 30 calendar days allowed for a broker-dealer acting as a market maker to obtain possession or control over securities allocating to a short position be expanded to include all situations where a broker-dealer must act pursuant to the rule (*i.e.,* not be limited to market maker positions).[143] These commenters argued that it would be difficult to distinguish between market maker and non-market maker positions in complying with the proposed rule. Another commenter requested that the Commission reevaluate the proposed amendment because of its potential effects on investment and hedging strategies in addition to the heavy

federally-chartered agencies of foreign banks are prohibited from receiving deposits from foreign, as well as domestic, sources).

[132] The FDIC protects depositors' funds in the event of the financial failure of their bank or savings institution. FDIC deposit insurance covers the balance of each depositor's account, dollar-for-dollar, up to the insurance limit, including principal and any accrued interest through the date of the insured bank's closing. No depositor has suffered a loss of insured deposits since the FDIC was created in 1933. *See* FDIC, When a Bank Fails—Facts for Depositors, Creditors, and Borrowers, *available at http://fdic.gov/consumers/banking/facts/index.html. See also* Federal Reserve, Structure and Share Data for U.S. Offices of Foreign Banks, *available at http://www.federalreserve.gov/releases/iba/.*

[133] *Id.* Therefore, the availability of FDIC insurance could also be a contributing factor to mitigating the risk that an impairment of the reserve deposit at an unaffiliated bank will have a material negative impact on the broker-dealer's ability to meet its obligations to customers and PAB account holders. *See Amendments to Financial Responsibility Rules,* 72 FR at 12864.

[134] *See* paragraph (e)(5) of Rule 15c3–3, as adopted.

[135] In effect, the broker-dealer has monetized the customer's security and has to purchase or borrow it, at a future date, to return the customer's fully paid securities.

[136] *See Amendments to Financial Responsibility Rules,* 72 FR at 12865.

[137] *See, e.g., Customer Protection Rule,* Exchange Act Release No. 22499 (Oct. 3, 1985), 50 FR 41337 (Oct. 10, 1985).

[138] *See Amendments to Financial Responsibility Rules,* 72 FR at 12865.

[139] *Id.* at 12895.

[140] *See Glenn Letter; Bare Letter; Anonymous Letter; SIFMA 2 Letter; First Clearing Letter; Hearne Letter; Deutsche Bank Securities Letter; Citigroup Letter; AMEX Letter; SIFMA 4 Letter; Federated 6 Letter; Raymond James 2 Letter.*

[141] *See Glenn Letter; Bare Letter; Anonymous Letter; Hearne Letter.* The Commission has taken a number of measures to strengthen investor protections against potentially abusive ''naked'' short selling, including adopting rules requiring that fails to deliver resulting from short sales immediately be closed-out and expressly targeting fraud in short selling transactions. *See Amendments to Regulation SHO,* Exchange Act Release No. 60388 (July 27, 2009), 74 FR 38266 (July 31, 2009); ''*Naked*'' *Short Selling Antifraud Rule,* Exchange Act Release No. 58774 (Oct. 14, 2008), 73 FR 61666 (Oct. 17, 2008). In addition, the Commission adopted a short sale-related price test that, if triggered, imposes a restriction on the prices at which securities may be sold short. *See Amendments to Regulation SHO,* Exchange Act Release No. 61595 (Feb. 26, 2010), 75 FR 11232 (Mar. 10, 2010).

[142] *See First Clearing Letter; Deutsche Bank Securities Letter; Citigroup Letter.*

[143] *See Citigroup Letter; Deutsche Bank Securities Letter.*

burden it will impose on short sales.[144] One commenter supported the amendments noting that it had ''come to believe . . . that the Commission's proposal is consistent with the direction of the Commission's other short sale regulations. . . .'' [145]

As discussed above in section II.A.2.ii. of this release, the Commission has determined that a credit item is sufficient to protect PAB account holders if the carrying broker-dealer provides them with notice that it may be using their non-margin securities, as well as the opportunity to object to such use. The use of the non-margin securities of PAB account holders is a long-standing industry practice. In contrast, customers under Rule 15c3–3, which include the carrying broker-dealer's retail customers, have an expectation that the fully paid and excess margin securities reflected on their account statements are, in fact, in the possession or control of the carrying broker-dealer. However, as described above, this expectation may be frustrated where the securities are allocated to a short position carried by the broker-dealer, as the securities are not in the possession or control of the broker-dealer.

This gap in the existing rule, in effect, permits the broker-dealer to partially monetize the customer's security. Also, under some circumstances (*e.g.,* a change in the market value of the securities), the amount the broker-dealer may have on deposit in the customer reserve account as a consequence of the credit item may be less than the value of the securities. Consequently, if the broker-dealer fails, sufficient funds may not be readily available to purchase the securities to return them to customers. The use of customer securities in this manner is contrary to the customer protection goals of Rule 15c3–3 and the expectations of a broker-dealer's customers.[146] For these reasons, the Commission is adopting the amendment.[147] The Commission agrees, however, that the proposed distinction based upon a broker-dealer's market maker status could present operational challenges and, consequently, the final rule has been modified to allow a uniform period of 30 calendar days before the possession and control requirement is triggered.

Specifically, as adopted, paragraph (d)(4) of Rule 15c3–3 requires a broker-dealer to take prompt steps to obtain physical possession or control over securities of the same issue and class as those included ''on the broker's or dealer's books or records that allocate to a short position of the broker or dealer or a short position for another person, excluding positions covered by paragraph (m) of this section, for more than 30 calendar days. . . .'' [148] The Commission does not believe that lengthening the time from 10 *business* days to 30 *calendar* days for non-market maker positions will significantly diminish the protections provided by the new rule.[149] Therefore, the Commission is adopting a uniform 30 calendar day time period in the final rule.

Three commenters requested that the Commission clarify that the aging process begins when the Rule 15c3–3 possession and control deficit arises and not when the short transaction is executed.[150] The proposed amendment was designed to require that the aging process commence at the time a deficit in securities allocating to a short position arises. One commenter [151] also requested that the Commission modify the proposed amendment to specifically exclude an underwriter's short position created in connection with a distribution of securities until after the later of the completion of such underwriter's participation in the distribution (as defined in Rule 100 of Regulation M) [152] or the delivery date for securities acquired in the exercise of any overallotment option (or ''Green Shoe'').[153] The Commission agrees with the commenter that there should be consistency between the final rule and Regulation M.[154] Consequently, the Commission has added a sentence to the final rule to clarify that the 30 calendar day period with respect to a syndicate short position established in connection with an offering does not begin to run until the underwriter's participation in the distribution is complete as determined pursuant to Rule 100(b) of Regulation M.[155] Finally, the Commission is adopting the revision to paragraph (n) as proposed to permit broker-dealers to apply to their designated examining authority (''DEA'') for extensions of time related to paragraph (d)(4).[156]

5. Importation of Rule 15c3–2 Requirements Into Rule 15c3–3 and Treatment of Free Credit Balances

i. Importation of Rule 15c3–2

Rule 15c3–2 requires a broker-dealer holding free credit balances to provide its *customers* (defined as any person other than a broker-dealer) at least once every three months with a statement of the amount due the customer and a notice that: (1) the funds are not being segregated, but rather are being used in the broker-dealer's business; and (2) the funds are payable on demand. The rule was adopted in 1964, before the

[144] *See Raymond James 2 Letter.*

[145] *See SIFMA 4 Letter.* SIFMA originally opposed the proposed amendments. *See SIFMA 2 Letter.*

[146] *See supra* notes 12 and 18, and accompanying text.

[147] Current paragraph (d)(4) of Rule 15c3–3 is being re-designated paragraph (d)(5), as proposed.

[148] *See Amendments to Financial Responsibility Rules,* 72 FR at 12865–12866. The amendment will not apply to securities that are sold long for a customer but not obtained from the customer within ten days after the settlement date. This circumstance is addressed by paragraph (m) of Rule 15c3–3, which requires the broker-dealer to close the transaction by purchasing securities of like kind and quantity. 17 CFR 240.15c3–3(m).

[149] For example, the rule currently has a thirty calendar day time period for securities failed to receive and a forty-five calendar day time period for securities receivable as a result of corporate actions (*e.g.,* stock splits) before the broker-dealer must take prompt steps to obtain possession or control of such securities. *See* 17 CFR 240.15c3–3(d)(2)–(3).

[150] *See Deutsche Bank Securities Letter; Citigroup Letter; SIFMA 2 Letter.*

[151] *See SIFMA 2 Letter.* The commenter stated: ''Regulation M embodies a carefully crafted scheme for the regulation of secondary market transactions by underwriters and other distribution participants, including the regulation of 'syndicate covering transactions,' which should not be disrupted by proposed paragraph (d)(4).'' *Id.* In addition, SIFMA commented that where an underwriter sells short to a customer in anticipation of obtaining the securities through the exercise of an overallotment option, paragraph (d)(4) should not require the premature exercise of the overallotment option or the use of secondary market purchases instead of the overallotment option. *Id.*

[152] 17 CFR 242.100 through 242.105. More specifically, Rule 100 of Regulation M provides: ''For purposes of regulation M . . . the following definitions shall apply: . . . *Completion of participation in a distribution.* . . . A person shall be deemed to have completed its participation in a distribution as follows: . . . (2) [a]n underwriter, when such person's participation has been distributed, including all other securities of the same class that are acquired in connection with the distribution, and any stabilization arrangements and trading restrictions in connection with the distribution have been terminated; Provided, however, that an underwriter's participation will not be deemed to have been completed if a syndicate overallotment option is exercised in an amount that exceeds the net syndicate short position at the time of such exercise. . . .'' 17 CFR 242.100(b).

[153] A green shoe or overallotment option is a provision contained in an underwriting agreement that gives the underwriting syndicate the right to purchase additional shares from the issuer or selling security holders (in addition to those initially underwritten by the syndicate) for the purpose of covering any overallotments that are made on behalf of the syndicate in connection with an offering of securities.

[154] Rule 100 of Regulation M also provides that an underwriter's participation will not be deemed to have been completed if a syndicate overallotment option is exercised in an amount that exceeds the net syndicate short position at the time of exercise. 17 CFR 242.100(b).

[155] 17 CFR 242.100(b).

[156] SROs generally have procedures in place for broker-dealers to apply for extensions of time under paragraph (n) of Rule 15c3–3. *See, e.g.,* FINRA Rule 4230.

adoption of Rule 15c3–3 in 1972.[157] Since the adoption of Rule 15c3–3, broker-dealers have been limited in their use of customer free credit balances. The Commission proposed importing requirements in Rule 15c3–2 [158] into Rule 15c3–3 and eliminating Rule 15c3–2 as a separate rule in the Code of Federal Regulations.[159] The Commission received two comments supporting the proposal.[160]

The Commission is adopting the amendments substantially as proposed—deleting Rule 15c3–2 and adding paragraph (j)(1) to Rule 15c3–3. The Commission believes it is appropriate to eliminate Rule 15c3–2 as a separate rule because it is largely irrelevant in light of the requirements in Rule 15c3–3. Further, the provisions in Rule 15c3–2 that the Commission wishes to retain are being re-codified in Rule 15c3–3. These provisions include the requirement that broker-dealers inform customers of the amounts due to them and that such amounts are payable on demand.[161] Consequently, the Commission is amending Rule 15c3–3 to add new paragraph (j)(1), which provides that ''[a] broker or dealer must not accept or use any free credit balance carried for the account of any customer of the broker or dealer unless such broker or dealer has established adequate procedures pursuant to which each customer for whom a free credit balance is carried will be given or sent, together with or as part of the customer's statement of account, whenever sent but not less frequently than once every three months, a written statement informing the customer of the amount due to the customer by the broker or dealer on the date of the statement, and that the funds are payable on demand of the customer.'' [162]

ii. Treatment of Free Credit Balances

Free credit balances are funds payable by a broker-dealer to its customers on demand.[163] They may result from cash deposited by the customer to purchase securities, proceeds from the sale of securities or other assets held in the customer's account, or earnings from dividends and interest on securities and other assets held in the customer's account. Broker-dealers may, among other things, pay interest to customers on their free credit balances or offer to routinely transfer (''sweep'') them to a money market fund or bank account. On occasion, broker-dealers have changed the product to which a customer's free credit balances are swept—in recent years, most frequently from a money market fund to an interest bearing bank account. Because of differences in these two types of products, including the type of protection afforded the customer in the event of insolvency, there may be investment consequences to the customer when changing from one product to the other. The money market shares—as securities—would receive up to $500,000 in SIPA protection in the event the broker-dealer failed. The bank deposits—as cash—would receive up to $250,000 in protection from the FDIC in the event the bank failed. On the other hand, the money market fund shares may incur market losses; whereas, the full amount of the bank deposit would be guaranteed up to the FDIC's $250,000 limit. There also may be differences in the amount of interest earned from the two products. In short, there may be consequences to moving a customer's free credit balances from one product to another, and, accordingly, customers should have a sufficient opportunity to make an informed decision.[164]

The Commission proposed amendments to Rule 15c3–3 that would have established conditions required to be met in order for a broker-dealer to use or transfer free credit balances in a customer's securities account.[165] More specifically, as initially proposed, the amendments would have structured the new rule to make it unlawful for a broker-dealer to convert, invest, or otherwise transfer to another account or institution free credit balances held in a customer's account except as provided in the proposed rule.[166] The proposed rule then prescribed three conditions to address three different scenarios involving the use or transfer of customer free credit balances. The first scenario involved the use or transfer of free credit balances outside the context of a routine sweep to a money market fund or bank. As discussed below, proposed paragraph (j)(2)(i) would have prohibited the use or transfer of free credit balances in this scenario unless the customer had specifically ordered or authorized the transaction. The second and third scenarios involved the use or transfer of free credit balances in the context of a program to routinely sweep them to a money market fund or bank account (a ''sweep program''). As discussed below, proposed paragraph (j)(2)(ii) would have addressed sweep program requirements for accounts opened after the effective date of the rule (''new accounts'') and proposed paragraph (j)(2)(iii) would have addressed sweep program requirements for accounts existing as of the effective date of the rule (existing accounts). The Commission is adopting new paragraph (j)(2) to Rule 15c3–3 with substantial modifications from the proposed rule in response to comments and to clarify certain portions of the rule.[167]

As proposed, the first sentence of paragraph (j)(2) of the rule would have established the prohibition with respect to the treatment of free credit balances by providing that ''[i]t shall be unlawful for a broker or dealer to convert, invest, or otherwise transfer to another account or institution, free credit balances held in a customer's account except as provided in paragraphs (j)(2)(i), (ii) and (iii).'' [168] The Commission received one comment in response to the proposed text of this first sentence.[169] The commenter expressed concern that the proposed text in the first sentence of paragraph (j)(2) could be construed broadly, in effect, to prohibit a broker-dealer from using, investing, or transferring cash deposits that are not swept to other investments or products (and are included as credits in the reserve formula) in the normal course of the broker-dealer's business, as is currently permitted by Rule 15c3–3. The commenter suggested that the text be

[157] *See Customers' Free Credit Balances,* Exchange Act Release No. 7266 (Mar. 12, 1964), 29 FR 7239 (June 3, 1964).

[158] 17 CFR 240.15c3–2.

[159] *See Amendments to Financial Responsibility Rules,* 72 FR at 12867.

[160] *See SIFMA 2 Letter; SIFMA 4 Letter.*

[161] Rule 15c3–2 contains an exemption for broker-dealers that also are banking institutions supervised by a Federal authority. This exemption will not be imported into Rule 15c3–3 because there are no broker-dealers left that fit within the exemption. Further, the definition of *customer* for purposes of the imported 15c3–2 requirements will be the definition of *customer* in Rule 15c3–3, which is somewhat narrower than the definition in Rule 15c3–2.

[162] *See* paragraph (j)(1) of Rule 15c3–3, as adopted. The Commission also modified the phrase ''[i]t shall be unlawful for a broker or dealer to'' to the phrase ''[a] broker or dealer must not'' in order to avoid using the term ''unlawful.'' Any violation of the rules and regulations promulgated under the Exchange Act is unlawful and therefore it is unnecessary to use this phrase in the final rule.

[163] *See* 17 CFR 240.15c3–3(a)(8).

[164] *See Amendments to Financial Responsibility Rules,* 72 FR at 12866.

[165] *Id.* at 12866–12867.

[166] *Id.* at 12866.

[167] In 2005, the NYSE addressed the issue of disclosure in a sweep program context by issuing an information memo to its members discussing, among other things, the disclosure responsibilities of a broker-dealer offering a sweep program to its customers. *See* Information Memo 05–11 (Feb. 15, 2005). The memo stated that broker-dealers should disclose material differences in interest rates between the different sweep products and, with respect to the bank sweep program, further disclose the terms and conditions, risks and features, conflicts of interest, current interest rates, manner by which future interest rates will be determined, and the nature and extent of FDIC and SIPC protection.

[168] *See Amendments to Financial Responsibility Rules,* 72 FR at 12896.

[169] *See SIFMA 2 Letter.*

revised to clarify the scope of the proposed rule by prohibiting a broker-dealer from deducting a free credit balance from the customer's account at the broker-dealer and transferring it to another institution and investing it in another instrument on behalf of the customer, except as permitted under paragraph (j)(2).[170]

In response to the comment, as a preliminary matter, cash balances in customer securities accounts must be included as credits in the customer reserve formula. Further, the net amount of the credits over debits must be deposited in a customer reserve account in the form of cash or qualified securities. However, cash credit items that are net of debit items can be used by the broker-dealer for the limited purpose of facilitating transactions of its customers.[171] The commenter suggested that proposed paragraph (j)(2) of Rule 15c3–3 could be interpreted to impose new limits on a broker-dealer's ability to use cash that is an asset on the firm's balance sheet. In response to this concern, the Commission notes that the prohibition in the first sentence of proposed paragraph (j)(2) of Rule 15c3–3 is intended to place conditions only on the broker-dealer's ability to convert the cash asset of the customer (*i.e.,* a receivable from the broker-dealer) into a different type of asset (*e.g.,* a security or an obligation of another institution outside the context of a sweep program) or to transfer the customer's cash asset to another account.

The Commission is adopting paragraph (j)(2) of Rule 15c3–3 with certain technical modifications.[172] As adopted paragraph (j)(2) reads: ''A broker or dealer must not convert, invest, or transfer to another account or institution, credit balances held in a customer's account except as provided in paragraphs (j)(2)(i) and (ii) of this section.''[173]

a. Treatment of Free Credit Balances Outside of a Sweep Program

As proposed, paragraph (j)(2)(i) of Rule 15c3–3 would have permitted a broker-dealer to convert, invest or otherwise transfer to another account or institution free credit balances held in a customer's account only upon a specific order, authorization, or draft from the customer, and only in the manner, and under the terms and conditions, specified in the order, authorization, or draft.[174] This catchall provision would have applied to any use or transfer of customer free credit balances outside the context of a sweep program.

The Commission proposed paragraph (j)(2)(i) in order to comprehensively cover the range of possibilities with respect to the disposition of free credit balances in a customer account other than pursuant to a sweep program. The Commission received two comments recommending that proposed paragraph (j)(2)(i) be clarified to permit a broker-dealer to obtain a one-time consent to ongoing transfers of any free credit balances to a customer to another account, entity or product (outside of a sweep program).[175] The commenters noted that customers, for example, may prefer that free credit balances be regularly transferred to a linked account in their name at another broker-dealer or bank that is not part of a sweep program, and that this clarification would enable a broker-dealer to efficiently handle such customer requests by eliminating the need to obtain individual ''specific orders'' for repeated transfers that are substantially identical.[176] The Commission agrees with the commenters that a customer may consent to ongoing routine transfers from the customer's account outside of a sweep program without obtaining the customer's specific consent for each individual transfer, provided the customer has consented to the ongoing transfers under paragraph (j)(2)(i) of Rule 15c3–3. This scenario would already be covered by the proposed rule, and, therefore, the Commission is adopting paragraph (j)(2)(i) substantially as proposed, with certain technical modifications.[177] As adopted, paragraph (j)(2)(i) of Rule 15c3–3 reads: ''A broker or dealer is permitted to invest or transfer to another account or institution, free credit balances in a customer's account only upon a specific order, authorization, or draft from the customer, and only in the manner, and under the terms and conditions, specified in the order, authorization, or draft.''[178]

Finally, one commenter stated that both regulators and firms need the flexibility to remove funds from a reserve account to cover extraordinary requests for payment of customer free credit balances.[179] However, the commenter noted that ''in light of recent market events, we withdraw our earlier proposal to allow such withdrawals under specified conditions and instead recommend that such withdrawals be permitted only by approval of Commission staff or a broker-dealer's [DEA].''[180] Broker-dealers currently may make withdrawals under paragraph (g) of Rule 15c3–3.[181] In light of the risks that could arise to customer funds, the Commission does not believe it would be appropriate at this time to expand a firm's ability to make additional withdrawals from its reserve account.

b. Treatment of Free Credit Balances in a Sweep Program

The second and third set of conditions in the proposed rules addressed using or transferring free credit balances in the context of a sweep program.[182] In particular, the Commission proposed four conditions with respect to using or transferring free credit balances in a sweep program. A broker-dealer would have been required to meet: (1) all four conditions with respect to free credit balances in new accounts;[183] and (2) the second, third, and fourth conditions with respect to

[170] *Id.*

[171] *See* 17 CFR 240.15c3–3(e)(2) (''It shall be unlawful for any broker or dealer to accept or use any of the amounts under items comprising Total Credits under the formula referred to in paragraph (e)(1) of this section except for the specified purposes indicated under items comprising Total Debits under the formula, and, to the extent Total Credits exceed Total Debits, at least the net amount thereof shall be maintained in the Reserve Bank Account pursuant to paragraph (e)(1) of this section.'').

[172] Specifically, the Commission is replacing the phrase ''[i]t shall be unlawful for a broker or dealer to'' with the phrase ''[a] broker or dealer must not'' because—as noted above—any violation of the rules and regulations promulgated under the Exchange Act is unlawful and therefore it is unnecessary to use this phrase in the final rule. The Commission also is replacing the phrase ''free credit balance'' with the phrase ''credit balances'' to clarify that this provision covers both free credit balances and other credit balances. *See* 17 CFR 240.15c3–3(a)(8)–(9) (defining *free credit balances* and *other credit balances*). The Commission is deleting the word ''otherwise'' because it would be redundant. Finally, the rule text does not include a reference to paragraph (j)(2)(iii), as proposed, because this paragraph was deleted from the final rule text.

[173] *See* paragraph (j)(2) of Rule 15c3–3, as adopted.

[174] *See Amendments to Financial Responsibility Rules,* 72 FR at 12866.

[175] *See SIFMA 2 Letter; E*Trade 2 Letter.*

[176] *Id.*

[177] *See* paragraph (j)(2)(i) of Rule 15c3–3, as adopted. The technical changes delete the words ''convert'' and ''otherwise'' from the final rule because a broker-dealer would be prohibited from ''converting'' a customer's free credit balances and, therefore, it is not necessary to include the word in the final rule. The word ''otherwise'' is redundant.

[178] *Id.*

[179] *See SIFMA 4 Letter.*

[180] *Id.* In its June 15, 2007 comment letter, SIFMA urged ''the Commission to consider allowing a broker-dealer to remove funds from a reserve account to cover a large same-day request for payment of a free credit balance, as long as the free credit balance was included in the latest Rule 15c3–3 reserve computation and the broker-dealer begins a new reserve computation as of that date.'' *See SIFMA 2 Letter.*

[181] 17 CFR 240.15c3–3(g).

[182] *See Amendments to Financial Responsibility Rules,* 72 FR at 12866.

[183] *See* paragraph (j)(2)(ii)(A)–(D) of Rule 15c3–3, as adopted.

free credit balances in existing accounts.[184] The four conditions were:

1. The customer has previously affirmatively consented to such treatment of the free credit balances after being notified of the different general types of money market mutual fund and bank account products in which the broker or dealer may transfer the free credit balances and the applicable terms and conditions that would apply if the broker or dealer changes the product or type of product in which free credit balances are transferred;

2. The broker or dealer provides the customer on an ongoing basis with all disclosures and notices regarding the investment and deposit of free credit balances as required by the self-regulatory organizations for which the broker or dealer is a member;

3. The broker or dealer provides notice to the customer as part of the customer's quarterly statement of account that the money market mutual funds or bank deposits to which the free credit balances have been transferred can be liquidated on the customer's demand and held as free credit balances; and

4. The broker or dealer provides the customer with at least 30 calendar days notice before the free credit balances would begin being transferred to a different product, different product type, or into the same product but under materially different terms and conditions. The notice must describe the new money market fund, bank deposit type, or terms and conditions, and how the customer can notify the broker or dealer if the customer chooses not to have the free credit balances transferred to the new product or product type, or under the new terms and conditions.

Commenters generally agreed with the fundamental principle embodied in the proposal—that customer free credit balances should not be transferred from an obligation of the broker-dealer to an obligation of another entity without the customer's authorization.[185] Other commenters supported the proposed disclosures but suggested additional disclosures be made to customers, including clarification with respect to other protections available to the customer.[186] Two commenters stated that the practice of sweep programs should be banned entirely or that the Commission should adopt a ''harder stance'' and require more than just disclosure.[187] One commenter responded to the Commission's request for comment as to the cost burdens that would result if the first condition (set forth in proposed paragraph (j)(2)(ii)(A)) to obtain a new customer's prior agreement were to be applied to existing customers. The commenter stated that such costs would be substantial because broker-dealers would be required to amend their agreements with all existing customers.[188] One commenter stated that the amendments in the proposing release did not adequately address situations in which broker-dealers change customer account elections without first obtaining customer authorization.[189]

In adopting the final rule, the Commission has made some modifications to the language in the proposed rule in response to commenters and to clarify its application. For clarification and in response to comments, the Commission has defined the term *Sweep Program* in paragraph (a)(17) of Rule 15c3–3 to identify the types of transactions and products to which the new provisions apply.

Commenters raised concerns about limitations on the types of products broker-dealers could use for sweep arrangements under the proposed amendments. Three commenters suggested that the Commission should not limit the types of products broker-dealers can use for sweep arrangements to money market funds and bank deposit products.[190]

Sweep programs provide a mechanism for excess cash in a customer's securities account to be held in a manner that allows the customer to earn interest on the funds but retain the flexibility to quickly access that cash to purchase securities or withdraw it.[191] In effect, transferring this excess cash to a bank account or money market fund is an alternative to retaining a credit balance in the customer's securities account. The final rule is designed to accommodate this alternative by providing broker-dealers with flexibility in the operation of sweep programs. The Commission believes it is appropriate to confine this flexibility to products that approximate the holding of a customer's excess cash in a securities account. The Commission does not view sweep accounts as a mechanism for investing customers' excess cash without their specific consent in longer term or more volatile assets. For these reasons, the Commission does not believe it would be appropriate to expand the products covered by the final rule beyond money market funds as described in Rule 2a–7 under the Investment Company Act of 1940 or an account at an insured bank as described in paragraph (a)(17) of Rule 15c3–3.

Consequently, paragraph (a)(17) of Rule 15c3–3, as adopted, states ''[t]he term *Sweep Program* means a service provided by a broker or dealer where it offers to its customers the option to automatically transfer free credit balances in the securities account of the customer to either a money market mutual fund product as described in [Rule 2a–7] or an account at a bank whose deposits are insured by the Federal Deposit Insurance Corporation.'' [192] The Commission intended that the definition of *Sweep Program* provide that the bank to which free credits are swept be insured by the FDIC.[193] The revised text of the rule makes this explicit. Finally, under this definition, a one-time or other special transfer of a customer's free credit balances would not qualify as a Sweep Program.

Three commenters raised the issue of bulk transfers.[194] They argued that the rule should allow broker-dealers to process bulk transfers of customer assets between, for instance, one money market fund and another money market fund or a bank deposit product and a money market fund. These commenters identify a potential ambiguity in the rule as proposed; namely, how transfers from one Sweep Program product to another Sweep Program product are to be handled under the rule if they do not involve passing funds through the

[184] *See* paragraph (j)(2)(iii)(A)–(C) of Rule 15c3–3, as adopted.

[185] *See SIFMA 2 Letter; First Clearing Letter; Pace Letter.*

[186] *See SIPC Letter.*

[187] *See Ellis Letter; Dworkin Letter.* One commenter stated that broker-dealers profit from ''excessive'' fees charged to clients who opt out of the sweep programs. *See Ellis Letter.* The second commenter suggested that the broker-dealer's ''customer has been effectively denied the opportunity to opt out of bank account sweeps by [the broker-dealer] preventing him or her from utilizing any other vehicle to park his or her free credit balances. . . .'' *See Dworkin Letter.* The commenter noted that by opting out of the sweep, the customer is ''confined to a situation where the free credit balance cannot earn any kind of return at all[.]'' *Id.*

[188] *See SIFMA 2 Letter.*

[189] *See Waddell Letter.*

[190] *See SIFMA 2 Letter; First Clearing Letter; Raymond James 2 Letter.*

[191] *See Ellis Letter; Dworkin Letter.*

[192] *See* paragraph (a)(17) of Rule 15c3–3, as adopted.

[193] *See Amendments to Financial Responsibility Rules,* 72 FR at 12866 (''[T]he bank deposit would be guaranteed up to the FDIC's $100,000 limit.''). FDIC insurance covers all deposit accounts, including checking and savings accounts, money market deposit accounts and certificates of deposit. The standard insurance amount is currently $250,000 per depositor, per insured bank, for each account ownership category. 12 CFR 330.1(o).

[194] *See SIFMA 2 Letter; First Clearing Letter; E*Trade 2 Letter.*

customer's securities account. To address this issue, paragraph (j)(2)(ii) of Rule 15c3–3 is being modified from the proposal to clarify that the conditions for operating a Sweep Program (which are set forth in paragraphs (j)(2)(ii)(A) and (B)) will apply to: (1) The transfer of free credit balances from a customer's securities account to a product in a Sweep Program; and (2) the transfer of a customer's interest in one Sweep Program product to another Sweep Program product. This will address both bulk transfers [195] of customer positions from one product (*e.g.,* a money market fund) to another (*e.g.,* a bank deposit product) and transfers of individual customer positions from one product to another.

The Commission is modifying paragraph (j)(2)(ii) of Rule 15c3–3 from the proposal to delete the phrase ''to either a money market mutual fund as described in § 270.2a–7 of this chapter or an interest bearing account at a bank without a specific order, authorization or draft for each such transfer, provided'' and instead to use the term *Sweep Program* as defined in paragraph (a)(17) of the final rule. The Commission also replaced the phrase ''the account of a customer'' with the phrase ''a customer's securities account'' to clarify that paragraph (j)(2)(ii) and its required conditions apply to the transfer of free credit balances in connection with a customer's securities account, in addition to the bulk transfers described above.[196] As adopted, paragraph (j)(2)(ii) to Rule 15c3–3 reads, in pertinent part: ''[a] broker or dealer is permitted to transfer free credit balances held in a customer's securities account to a product in its Sweep Program or to transfer a customer's interest in one product in a Sweep Program to another product in a Sweep Program, *provided*'' the conditions set forth in paragraphs (j)(2)(ii)(A) and (B) are met.[197]

As adopted, paragraphs (j)(2)(ii)(A) and (B) establish four conditions that must be met to lawfully transfer a customer's free credit balances to a product in a Sweep Program or to transfer a customer's interest directly from one product in a Sweep Program to another product in a Sweep Program. The first condition—set forth in paragraph (j)(2)(ii)(A)—applies only with respect to accounts opened on or after the effective date of the rule. This addresses the burden that would have been associated with having broker-dealers re-document existing accounts. The remaining three conditions—set forth in paragraph (j)(2)(ii)(B)(*1*) through (*3*)—apply to both existing and new accounts.

Paragraph (j)(2)(ii)(A), as adopted, provides that for an account opened on or after the effective date of the rule, the customer must give prior written affirmative consent to having free credit balances in the customer's securities account included in the Sweep Program after being notified: (1) Of the general terms and conditions of the products available through the Sweep Program; and (2) that the broker or dealer may change the products available under the Sweep Program.[198]

As stated above, the Commission has modified paragraph (j)(2)(ii)(A) in the final rule to read ''the customer gives prior written affirmative consent to having free credit balances in the customer's securities account included in the Sweep Program after being notified. . . .'' [199] The Commission modified this paragraph to incorporate the term *Sweep Program* as defined in paragraph (a)(17) of the rule and the reference to the ''customer's securities account'' to make this paragraph consistent with other modifications to paragraph (j)(2) of the final rule. Additionally, the Commission modified this paragraph to clarify that the customer's consent must be written, consistent with the discussion in the proposing release, which noted customer consent could be given in an account opening agreement.[200]

The Commission received one comment stating that the text of proposed paragraph (j)(2)(ii)(A) that would have required the disclosure of ''applicable terms and conditions that will apply if the broker or dealer changes the product or type of product'' could be read to require highly specific disclosure about product terms and conditions that may only be established or modified in the future and, therefore, are unknown at the time the customer opens an account with the broker-dealer.[201] In addition, the commenter stated that under proposed paragraph (j)(2)(ii)(D), a broker-dealer would already be required to describe any changes to the terms and conditions it makes contemporaneously with such changes. Given this type of notice, the commenter stated that there is no need for the type of generalized (and therefore less effective) disclosure that would have been required by paragraph (j)(2)(ii)(A). The Commission agrees with the commenter and, therefore, has deleted the phrase ''transfer the free credit balances and the applicable terms and conditions that will apply if the broker or dealer changes the product or type of product in which the free credit balances are transferred. . . .'' In its place, the Commission is adopting language in paragraph (j)(2)(ii)(A)(*2*) of Rule 15c3–3 under which the broker-dealer must notify the customer that the broker or dealer may change the products available under the Sweep Program.[202]

Paragraph (j)(2)(ii)(B), as adopted, prescribes the following three conditions to sweeping the customer's free credit balances in a new or existing account:

- The broker-dealer provides the customer with the disclosures and notices regarding the Sweep Program required by each SRO of which the broker-dealer is a member; [203]
- The broker-dealer provides notice to the customer, as part of the customer's quarterly statement of account, that the balance in the bank deposit account or shares of the money market mutual fund in which the customer has a beneficial interest can be liquidated on the customer's order and the proceeds

[195] *See also* NASD Rule 2510 (Discretionary Accounts) (providing an exception from the NASD rule for ''bulk exchanges at net asset value of money market mutual funds . . . utilizing negative response letters provided: (A) The bulk exchange is limited to situations involving mergers and acquisitions of funds, changes of clearing members and exchanges of funds used in sweep accounts; (B) The negative response letter contains a tabular comparison of the nature and amount of the fees charged by each fund; (C) The negative response letter contains a comparative description of the investment objectives of each fund and a prospectus of the fund to be purchased; and (D) The negative response feature will not be activated until at least 30 days after the date on which the letter was mailed.'').

[196] The final rule also deletes the phrase ''opened on or after the effective date of this paragraph'' from paragraph (j)(2)(ii) and moves it to paragraph (j)(2)(ii)(A), as described below.

[197] *See* paragraph (j)(2)(ii) of Rule 15c3–3, as adopted.

[198] *See* paragraph (j)(2)(ii)(A) of Rule 15c3–3, as adopted.

[199] *Id.* The proposed rule stated the ''customer has previously affirmatively consented to such treatment of the free credit balances after being notified of . . . .'' In addition, as noted above, the phrase ''accounts opened on or after the effective date of this paragraph'' was deleted from proposed paragraph (j)(2)(ii) and moved to paragraph (j)(2)(ii)(A), with the reference to specific paragraph (j)(2)(ii) inserted after the word ''paragraph.'' Moving this phrase to paragraph (j)(2)(ii)(A) simplifies the final rule by eliminating the necessity of codifying two largely overlapping sets of conditions, with three of the conditions being repeated in both paragraphs. The effect of this change is to make the first condition only applicable to new accounts and the remaining conditions (paragraph (j)(2)(ii)(B)(*1*) through (*3*)) applicable to both new and existing accounts. The word ''accounts'' also has been replaced with the phrase ''an account.''

[200] *See Amendments to Financial Responsibility Rules,* 72 FR at 12866 (''[T]he customer would need to agree prior to the change (*e.g.,* in the account opening agreement) that the broker-dealer could switch the sweep option between those two types of products.'').

[201] *See SIFMA 2 Letter.*

[202] *See* paragraph (j)(2)(ii)(A)(*2*) of Rule 15c3–3, as adopted.

[203] *See* paragraph (j)(2)(ii)(B) of Rule 15c3–3, as adopted.

returned to the securities account or remitted to the customer;[204] and

• The broker-dealer provides the customer with written notice at least 30 calendar days before: (1) Making changes to the terms and conditions of the Sweep Program; (2) making changes to the terms and conditions of a product currently available through the Sweep Program; (3) changing, adding or deleting products available through the Sweep Program; or (4) changing the customer's investment through the Sweep Program from one product to another; and the notice describes the new terms and conditions of the Sweep Program or product or the new product, and the options available to the customer if the customer does not accept the new terms and conditions or product.[205]

As proposed, paragraph (j)(2)(ii)(B) of Rule 15c3–3 would have required that the broker-dealer provide these disclosures and notices ''on an ongoing basis.'' Three commenters stated that there are no current SRO requirements that broker-dealers make disclosures concerning sweep arrangements on an ''ongoing basis'' and that the Commission should clarify the source and meaning of this requirement.[206] The Commission has deleted the phrase ''ongoing basis'' from the final rule. As adopted, the Commission has also modified the text in paragraph (j)(2)(ii)(B), now paragraph (j)(2)(ii)(B)(*1*), to delete the phrase ''investment and deposit of free credit balances as'' and inserted the phrase ''Sweep Program'' to incorporate the definition in paragraph (a)(17). Finally, the Commission has modified the phrase ''the self-regulatory organizations'' to read ''each self-regulatory organization of'' to clarify that the broker-dealer must provide the notices and disclosures required by each SRO of which it is a member (including an SRO that is not its DEA).[207]

As adopted, paragraph (j)(2)(ii)(B)(*2*) states that the broker-dealer must provide information on a quarterly basis with respect to the customer's balance in an account or fund ''in which the customer has a beneficial interest.''[208] The rule text has been modified to account for the fact that customers can have a beneficial interest in accounts in their name and in omnibus accounts in the name of a custodian in which the assets of multiple customers are commingled.

The Commission also modified language in paragraph (j)(2)(ii)(B)(*2*) of Rule 15c3–3 to replace the phrase ''on the customer's demand'' with the phrase ''on the customer's order'' to address concerns by two commenters that the former phrase could lead customers to believe that they will receive immediate re-payment of those funds, or they could revert to holding those funds as free credit balances at the broker-dealer.[209] These commenters pointed out that the disclosed terms of most sweep programs allow the money market fund or bank up to seven days to meet requests for withdrawals. Further, there are some broker-dealers that do not allow customers to maintain free credit balances in securities accounts. In response to these comments, the Commission has deleted the phrase ''demand and held as free credit balances'' and replaced it with the phrase ''and the proceeds returned to the securities account or remitted to the customer.'' This language is designed to account for broker-dealers that do not offer customers the option of having their funds held as free credit balances. In such cases, the broker-dealer would remit the funds withdrawn from the bank or derived from redeeming money market shares directly to the customer (*e.g.,* by transferring them to the customer's bank account).

Proposed paragraphs (j)(2)(ii)(D) and (iii)(C)—now paragraph (j)(2)(ii)(B)(*3*)—would have required the broker-dealer to provide the customer with notice at least thirty days before the broker-dealer begins transferring the customer's free credit balances to a different product or product type, or into the same product but under materially different terms and conditions.[210] As adopted, paragraph (j)(2)(ii)(B)(*3*) will require broker-dealers to provide customers written notice at least 30 calendar days before the broker-dealer: (1) Makes changes to the terms and conditions of the Sweep Program; (2) makes changes to the terms and conditions of a product currently available through the Sweep Program; (3) changes, adds, or deletes products available through the Sweep Program; or (4) changes the customer's investment through the Sweep Program from one product to another.[211] This modification to the final rule is in response to commenters' requests that the Commission provide clarity with respect to when the thirty day notice requirement would be triggered.[212] In response to comments, the final rule is designed to make clear that the triggering event for the thirty day notice is not exclusively related to the transfer of the customer's free credit balances, but rather changes relating to the terms and conditions of the Sweep Program, as well as, the products available through the Sweep Program. This greater specificity should enhance the protections under the final rule by providing greater certainty that the customer will have time to evaluate available options before a change to the Sweep Program is put into effect.

In addition, paragraphs (j)(2)(ii)(B)(*3*)(*i*)(*A*)–(*D*) of Rule 15c3–3 require the broker-dealer to provide the customer with written notice at least 30 calendar days before: (1) Making changes to the terms and conditions of the Sweep Program; (2) making changes to the terms and conditions of a product currently available through the Sweep Program; (3) changing, adding or deleting products available through the Sweep Program; or (4) changing the customer's investment through the Sweep Program from one product to another.[213] Collectively, these provisions provide more specificity about the types of disclosures and notices required under the final rule than under the proposal. Further, the final rule includes the word ''written'' before the word ''notice'' to make explicit that a written notice is required.

As adopted, paragraph (j)(2)(ii)(B)(*3*)(*ii*) requires that ''[t]he notice must describe the new terms and conditions of the Sweep Program or product or the new product, and the options available to the customer if the customer does not accept the new terms and conditions or product.''[214] The Commission modified the final rule in response to a comment regarding the text of proposed paragraphs (j)(2)(ii)(D) and (iii)(C).[215] The commenter stated that, as drafted, proposed paragraphs (j)(2)(ii)(D) and (iii)(C) would have required a broker-dealer to disclose

[204] *Id.*

[205] *Id.*

[206] *See SIFMA 2 Letter; First Clearing Letter; Raymond James 2 Letter.*

[207] *See* 17 CFR 240.17d–1.

[208] *See* paragraph (j)(2)(ii)(B)(*2*) of Rule 15c3–3, as adopted. More specifically, the Commission modified the phrase ''that the money market mutual funds or bank deposits to which the free credit balances have been transferred'' to read ''that the balance in the bank deposit account or shares of the money market mutual fund in which the customer has a beneficial interest. . . .''

[209] *See SIFMA 2 Letter.*

[210] *See Amendments to Financial Responsibility Rules,* 72 FR at 12896.

[211] A broker-dealer could request exemptive relief from the rule in unusual or emergency cases where it may be impractical or contrary to investor protection for a broker-dealer to first provide customers 30 days' written notice under the rule before taking one of these actions. *See, e.g.,* paragraph (k)(3) to Rule 15c3–3.

[212] *See SIFMA 2 Letter; First Clearing Letter; Cornell Letter; E*Trade Letter.*

[213] See paragraph (j)(2)(ii)(B)(*3*)(*i*) of Rule 15c3–3, as adopted. The requirements set forth in final paragraph (j)(2)(ii)(B)(*3*)(*i*) were proposed as paragraphs (j)(2)(ii)(D) and (iii)(C).

[214] *See* paragraph (j)(2)(ii)(*B*)(*ii*) of Rule 15c3–3, as adopted. The final rule codifies this text in a separate paragraph in order to emphasize the specific items the notice must contain.

[215] *See SIFMA 2 Letter.*

''how the customer can notify the [broker-dealer] if the customer chooses not to have the free credit balances transferred to the new product or product type, or under new terms and conditions.'' [216] The commenter stated that these paragraphs appear to assume that the customer will have the option of continuing to have free credit balances treated as they were prior to the change to the sweep arrangement.[217] The commenter pointed out that, in fact, the broker-dealer may elect not to continue offering the prior sweep options and not to offer another sweep product.[218] To account for this possibility, the Commission has revised the text in paragraph (j)(2)(ii)(B)(*3*)(*ii*) [219] to require the broker-dealer to provide the customer with a notice that contains a description of the options available to the customer if the customer does not wish to accept the new terms and conditions or product.[220] This is intended to give customers sufficient opportunity to make an informed decision in connection with a Sweep Program.

6. ''Proprietary Accounts'' Under the Commodity Exchange Act

Some broker-dealers also are registered as futures commission merchants under the Commodity Exchange Act (''CEA''). These firms carry both securities and commodities accounts for customers. The definition of *free credit balances* in paragraph (a)(8) of Rule 15c3–3 does not include funds carried in commodities accounts that are segregated in accordance with the requirements of the CEA.[221] However, regulations promulgated under the CEA exclude certain types of accounts (''proprietary accounts'') from the CEA's segregation requirements.[222] This exclusion from the segregation requirements under the CEA has raised a question as to whether a broker-dealer must treat payables to customers in proprietary commodities accounts as ''free credit balances'' when performing a customer reserve computation.[223]

In response to this question, the Commission notes that the objective of the customer reserve requirement in Rule 15c3–3 is to require broker-dealers to hold sufficient funds or qualified securities to facilitate the prompt return of customer property to customers either before or during a liquidation proceeding if the firm fails.[224] Under SIPA, customer property generally does not include funds held in a commodities account.[225] Therefore, funds held in a proprietary commodities account generally would not constitute customer property and persons having claims to those funds would not be customers under SIPA.[226] Moreover, the regulations under the CEA similarly provide the persons having claims to funds in proprietary commodities accounts are not customers for purposes of those regulations.[227] For these reasons, the Commission proposed a specific amendment to the definition of the term *free credit balances* in paragraph (a)(8) of Rule 15c3–3 that would have clarified that funds held in a commodities account meeting the definition of a *proprietary account* under CEA regulations are not to be included as free credit balances in the customer reserve formula.[228] As discussed below, the Commission is adopting the amendment substantially as proposed.

The Commission received three comments in support of the proposed rule change.[229] One commenter requested that the Commission clarify that the relevant definition of *proprietary account* for these purposes is the definition contained in Rule 1.3(y) under the CEA. While Rule 1.3(y) under the CEA currently contains the relevant definition of *proprietary account* for the purpose of the amendment, the definition could be codified in a different rule in the future. Consequently, the Commission is adopting the final rule amendment to paragraph (a)(8) of Rule 15c3–3, as proposed. Thus, the final rule does not include specific references to a specific rule. Rather, the amendment to paragraph (a)(8) to Rule 15c3–3, as adopted, more generally refers to a ''proprietary account as that term is defined in regulations under the Commodity Exchange Act.''

As stated above, this amendment to paragraph (a)(8) of Rule 15c3–3 is designed to clarify that funds held in a commodities account meeting the definition of a *proprietary account* under CEA regulations are not to be included as ''free credit balances'' in the customer reserve formula. Under Item 1 of Rule 15c3–3a, however, cash balances that do not meet the definition of *free credit balances* (*e.g.,* because they are not subject to immediate payment) are included in the customer reserve formula if they meet the definition of *other credit balances* under paragraph

[216] *Id.*

[217] *Id.*

[218] *Id.*

[219] More specifically, paragraph (j)(2)(ii)(B)(*3*)(*ii*) provides that ''the notice must describe the new terms and conditions of the Sweep Program or product or the new product, and the options available to the customer if the customer does not accept the new terms and conditions or product.'' A customer that does not accept the new terms and conditions or product would need to change how free credit balances are treated by, for example, selecting investments outside the Sweep Program or having the balances transferred to an account at another financial institution.

[220] *See Dworkin Letter.*

[221] 17 CFR 240.15c3–3(a)(8).

[222] Rule 1.20 requires a futures commission merchant to segregate customer funds. *See* 17 CFR 1.20. Rule 1.3(k) defines the term *customer* for this purpose. *See* 17 CFR 1.3(k). The definition of *customer* excludes persons who own or hold a *proprietary account* as that term is defined in Rule 1.3(y). *See* 17 CFR 1.3(y). Generally, the definition of *proprietary account* refers to persons who have an ownership interest in the futures commission merchant. *Id.*

[223] *See Part 241-Interpretive Releases Relating to the Securities Exchange Act of 1934 and General Rules and Regulations Thereunder,* Exchange Act Release No. 9922 (Jan. 2, 1973), 38 FR 1737 (Jan. 18, 1973) (interpreting the credit balance used in Item 1 of the Rule 15c3–3a formula ''to include the net balance due to customers in non-regulated commodities accounts reduced by any deposits of cash or securities with any clearing organization or clearing broker in connection with the open contracts in such accounts'').

[224] *See Capital, Margin, and Segregation Requirements for Security-Based Swap Dealers and Major Security-Based Swap Participants and Capital Requirements for Broker-Dealers,* Exchange Act Release No. 68071 (Oct. 18, 2012), 77 FR 70214, 70274 (Nov. 23, 2012) (describing rationale and requirements of Rule 15c3–3 segregation requirements). *See also Broker-Dealers; Maintenance of Certain Basic Reserves,* Exchange Act Release No. 9856 (Nov. 10, 1972), 37 FR 25224, 25225 (Nov. 29, 1972) (stating that the intent of Rule 15c3–3 is, among other things, to ''facilitate the liquidations of insolvent broker-dealers and to protect customer assets in the event of a SIPC liquidation through a clear delineation in Exchange Act Rule 15c3–3 of specifically identifiable property of customers.''); *Amendments to Financial Responsibility Rules,* 72 FR at 12862, 12868.

[225] As noted above, customer property under SIPA includes ''cash and securities (except customer name securities delivered to the customer) at any time received, acquired, or held by or for the account of the debtor from or for the securities accounts of a customer, and the proceeds of any such property transferred by the debtor, including property unlawfully converted.'' 15 U.S.C. 78*lll*(4). To receive protection under SIPA, a claimant must first qualify as a *customer* as that term is defined in the statute. Generally, a *customer* is any person who has: (1) ''a claim on account of securities received, acquired, or held by the [broker-dealer];'' (2) ''deposited cash with the debtor for the purposes of purchasing securities;'' (3) ''a claim against the debtor for. . .[positions]. . .received, acquired, or held in a portfolio margin account carried as a securities account pursuant to a portfolio margining program approved by the Commission;'' or (4) ''a claim against the [broker-dealer] arising out of sales or conversions of such securities.'' *See* 15 U.S.C. 78*lll*(2)(A)–(B). The definition of *security* in SIPA specifically excludes commodities and non-securities futures contracts and, thus, a person with a claim for such assets (not held in a portfolio margin account carried as a securities account) would not meet the definition of *customer. See* 15 U.S.C. 78*lll*(14).

[226] *Id.*

[227] *See* 17 CFR 1.3(k).

[228] *See Amendments to Financial Responsibility Rules,* 72 FR at 12868. The Commission proposed additional amendments to paragraph (a)(8) of Rule 15c3–3 related to portfolio margining. *See also* discussion below in section II.B. of this release.

[229] *See SIPC Letter; SIFMA 2 Letter; SIFMA 4 Letter.*

(a)(9) of Rule 15c3–3.[230] Therefore, in order to remove any ambiguity as to the proper exclusion of proprietary accounts under the CEA from Rule 15c3–3, the Commission also is amending the definition of the term *other credit balances* in the final rule to delete the words ''as aforesaid'' and insert the phrase ''in accordance with the Commodity Exchange Act or in a similar manner, or funds carried in a proprietary account as that term is defined in regulations under the Commodity Exchange Act.'' [231] Consequently, the amendments clarify that both *free credit balances* and *other credit balances* as defined in Rule 15c3–3 do not include funds carried in proprietary accounts under the CEA.

One commenter also suggested that due to the changes to the swap markets mandated by Title VII of the Dodd-Frank Act, swap accounts (in addition to commodities accounts) are now subject to customer protection rules under the CEA.[232] This commenter suggested that the Commission make it clear that funds in swap accounts also do not constitute free credit balances, whether those funds are required to be segregated by rules under the CEA (*e.g.,* cleared swap accounts or uncleared swap accounts that have opted for segregation) or excepted from segregation under the CEA (*e.g.,* cleared swaps proprietary accounts or uncleared swap accounts that have not opted for segregation). The commenter noted this treatment ''would be consistent with the treatment of funds in commodities accounts and with the regulation of swap accounts under the CEA.'' [233] The Commission agrees there may be additional accounts under the CEA, as amended by the Dodd-Frank Act, that should explicitly be excluded from the definition of *free credit balances* under Rule 15c3–3. However, the amendments today are designed to clarify the specific question raised with respect to the treatment of funds in proprietary commodities accounts under the CEA and, consequently, the suggestions by the commenter are beyond the scope of this rulemaking.

7. Expansion of the Definition of ''Qualified Securities'' To Include Certain Money Market Funds

A broker-dealer is limited to depositing cash or qualified securities into the bank account it maintains to meet its customer (and now PAB account) reserve deposit requirements under Rule 15c3–3. Paragraph (a)(6) of Rule 15c3–3 defines *qualified securities* to mean securities issued by the United States or guaranteed by the United States with respect to principal and interest.[234] This strictly limits the types of assets that can be used to fund a broker-dealer's customer or PAB reserve account. The strict limitation is designed to further the purpose of Rule 15c3–3; namely, that customer assets be segregated and held in a manner that makes them readily available to be returned to the customer. As the Commission noted when first proposing Rule 15c3–3:

> The operative procedures of the Special [Reserve] Account are designed to protect the integrity of customer-generated funds by insulating them against inroads from the broker-dealer's firm activities, whether they be underwriting, market making, other trading, investing, or mere speculation in securities, meeting overhead or any other nature whatever. The Special [Reserve] Account should achieve a virtual 100% protection to customers with respect to the carrying and use of customers' deposits or credit balances which is mandated by Section 7(d) of the SIPC Act.[235]

In response to a petition for rulemaking,[236] the Commission proposed a limited expansion of the definition of *qualified security* to include shares of an unaffiliated money market fund that: (1) Is described in Rule 2a–7 under the Investment Company Act of 1940; (2) invests solely in securities issued by the United States or guaranteed by the United States as to interest and principal; (3) agrees to redeem fund shares in cash no later than the business day following a redemption request by a shareholder; and (4) has net assets equal to at least 10 times the value of the shares deposited by the broker-dealer in its customer reserve account.[237] Twenty commenters addressed the proposed amendment.[238] A majority of commenters supported the proposal and generally argued that the definition of *qualified security* should be expanded further to include more types of instruments. One commenter noted that permitting the use of certain money market funds to make up the required reserve account deposit would introduce ''an intermediary (namely, the holding company or money market fund) at which problems might arise.'' [239] The commenter also noted that a number of SIPA liquidations have involved the mishandling of money market or mutual fund shares or the confirmations of purchases of nonexistent ''money market funds.'' [240]

The Commission recently has proposed substantial amendments to its rules on money market funds.[241] In light

[230] Item 1 of Rule 15c3–3a requires a broker-dealer to include in the customer reserve formula ''free credit balances and other credit balances in customers' security accounts.'' Paragraph (a)(9) of Rule 15c3–3 defines *other credit balances* as ''cash liabilities of a broker or dealer to customers other than free credit balances and funds in commodities accounts segregated as aforesaid.'' 17 CFR 240.15c3–3(a)(9).

[231] *See* paragraph (a)(9) to Rule 15c3–3. *See also* comments and additional amendments to paragraph (a)(9) of Rule 15c3–3 discussed in section II.B. of this release.

[232] *See SIFMA 4 Letter.*

[233] *Id.*

[234] 17 CFR 240.15c3–3(a)(6).

[235] *Reserves and Related Measures Respecting the Financial Responsibility of Brokers and Dealers,* Exchange Act Release No. 9388 (Nov. 8, 1971), 36 FR 22312 (Nov. 24, 1971).

[236] As discussed in the proposing release, Federated submitted a petition for rulemaking on April 3, 2003, which it later amended on April 4, 2005. *See Amendments to Financial Responsibility Rules,* 72 FR at 12865, 12874. More specifically, Federated's petition requested that the Commission amend: (i) Rule 15c3–1 to lower the haircut for certain money market funds to 0%; and (ii) Rule 15c3–3 to: (a) permit a broker-dealer to pledge such money market funds when borrowing fully paid or excess margin securities from a customer under paragraph (b)(3); and (b) treat such money market funds as ''qualified securities'' that may be deposited into a broker-dealer's customer reserve account. On February 9, 2009, Federated submitted another request for rulemaking (Petition 4–577), reiterating its first petition with respect to amending Rule 15c3–3 to allow a broker-dealer to treat certain money market funds as ''qualified securities'' that may be deposited into a reserve account. However, this new petition changed the definition of the types of funds that could be treated as qualified securities. More specifically, the new petition proposed amending Rule 15c3–3(a)(6) to define the term *qualified securities* to include, ''a redeemable security of an investment company registered under the Investment Company Act of 1940 and described in 17 CFR 270.2a–7, unaffiliated with the broker-dealer and which limits its investments to securities issued or guaranteed by the United States Government or its agencies or instrumentalities (including repurchase transactions).'' *See Amendments to Financial Responsibility Rules,* 72 FR at 12874 and n.112; *see also* Public Petitions for Rulemaking No. 4–478 (Apr. 3, 2003) (*available at http://www.sec.gov/rules/petitions/petn4-478.htm*), as amended (Apr. 4, 2005) (amendment *available at http://www.sec.gov/rules/petitions/petn4-478a.pdf*), and No. 4–577 (Feb. 3, 2009) (*available at http://www.sec.gov/rules/petitions/2009/petn4-577.pdf*).

[237] *See Amendments to Financial Responsibility Rules,* 72 FR at 12865.

[238] *See Federated Letter; Federated 2 Letter; Federated 3 Letter; Federated 4 Letter; Federated 5 Letter; Federated 6 Letter; Federated 7 Letter; Federated 8 Letter; Meeks Letter; Meeks 2 Letter; Crane Data Letter; SIPC Letter; Curian Letter; FAF Letter; Reserve Letter; Brown Brothers Letter; SIFMA Letter; First Clearing Letter; ICI Letter; Barclays Letter; American Beacon Letter; Chamber of Commerce Letter; ABASA Letter; UBS Letter; Fidelity/NFS Letter; Barnard Letter; Federated 9 Letter; BOK Letter; Cornell Letter.*

[239] *See SIPC Letter.*

[240] *Id.*

[241] *Money Market Fund Reform; Amendments to Form PF,* Release No. IC–30551 (June 5, 2013), 78 FR 36834 (June 19, 2013) (The rule proposal includes two principal alternative reforms that could be adopted alone or in combination. One alternative would require a floating net asset value or ''NAV'' for prime institutional money market

Continued

of these proposed amendments,[242] the Commission is deferring consideration of any further expansion of the definition of *qualified security* in Rule 15c3–3 at this time. This will allow the Commission to assess the potential impact of any money market fund reforms it may adopt and whether any such impact would have consequences for the customer protection objective of the reserve account requirement in Rule 15c3–3.

B. Holding Futures Positions in a Securities Portfolio Margin Account

Under SRO portfolio margin rules (''portfolio margin rules''),[243] a broker-dealer can combine securities and futures positions in a portfolio margin securities account to compute margin requirements based on the net market risk of all positions in the account.[244] Until the passage of the Dodd-Frank Act, however, SIPA only protected customer claims for securities and cash, and specifically excluded from protection futures contracts that are not also securities. This fact created a potential ambiguity as to how futures positions in a portfolio margin securities account would be treated in a SIPA liquidation. Consequently, the Commission proposed amendments to Rule 15c3–3 to accommodate the holding of futures positions in a securities account that is margined on a portfolio basis.[245]

Subsequent to the Commission's proposals, the Dodd-Frank Act amended the definitions of *customer, customer property,* and *net equity* in section 16 of SIPA to take into account futures and options on futures held in a portfolio margin account carried as a securities account pursuant to a Commission-approved portfolio margining program.[246] As a result, persons who hold futures positions in a portfolio margining account carried as a securities account are now entitled to SIPA protection.

While the Dodd-Frank Act addressed the protection under SIPA of futures and futures options held in a securities portfolio margin account, the Commission's proposed amendments to Rule 15c3–3 and 15c3–3a will still serve an important purpose. In particular, they complement the Dodd-Frank SIPA amendments, and will provide additional protections to customers by requiring broker-dealers to treat these futures positions in accordance with the segregation requirements in Rules 15c3–3 and 15c3–3a. Consequently, the Commission is adopting the amendments with modifications to address, in part, comments.

To accommodate securities and futures portfolio margining, the Commission's proposals included several amendments. First, the Commission proposed amending the definition of *free credit balance* in paragraph (a)(8) of Rule 15c3–3 to provide that the term shall also include such liabilities carried in a securities account pursuant to an SRO portfolio margining rule approved by the Commission under section 19(b) of the Act (''SRO portfolio margining rule''), including daily marks to market, and proceeds resulting from closing out futures contracts and options thereon, and, in the event the broker-dealer is the subject of a proceeding under SIPA, the market value as of the *filing date* as that term is defined in SIPA (15 U.S.C. 78*lll*(7)) of any long options on futures contracts.

In addition, the Commission proposed amendments to treat the unrealized value of a futures option in a portfolio margin account on the SIPA filing date[247] as a free credit balance for purposes of Rule 15c3–3. This amendment was designed to clarify that the market value of such assets should be included in determining a customer's net equity claim in a SIPA proceeding. Unlike futures contracts, futures options do not generate cash balances on a daily basis in the account (*i.e.,* they have unrealized market value at the end of a trading day). Since the broker-dealer is not holding cash for the customer, there is no need to treat the futures options as a free credit balance for purposes of the reserve formula. However, if the broker-dealer was liquidated under SIPA, the unrealized gains or losses of the futures options should be included in calculating the customer's net equity in the account (along with the securities positions and all futures-related and securities-related cash balances).[248] The proposed amendments were designed to provide for this outcome by defining the market value of the futures options as a free credit balance as of the filing date of a SIPA liquidation of the broker-dealer. As free credit balances, funds originating from futures transactions (*e.g.,* margin deposits and daily marks to market) and the market value of futures options as of the SIPA filing date would constitute claims for cash in a SIPA proceeding and, therefore, become a part of a customer's net equity claim entitling the customer to up to $250,000 in advances to make up for shortfalls.

The Commission received six comments on the proposed amendments.[249] Three commenters generally supported the amendments.[250] One commenter stated that the amendments represent a positive step forward in resolving certain regulatory obstacles in connection with the inclusion of futures contracts in a portfolio margin account.[251] Another commenter stated that it supported the Commission's efforts to facilitate the cross-margining of futures and securities in the portfolio margin account by clarifying the treatment of futures and options positions under SIPA.[252] A commenter expressed support for the development of rules for portfolio margining, and supported the

funds. The other alternative would allow the use of liquidity fees and redemption gates in times of stress. The proposal also includes additional diversification and disclosure measures that would apply under either alternative.). *See also* Division of Risk, Strategy, and Financial Innovation, Commission, *Responses to Questions Posed by Commissioners Aguilar, Paredes, and Gallagher* (Nov. 30, 2012) (responding to questions posed by Commissioners Aguilar, Paredes, and Gallagher regarding effectiveness of the 2010 money market fund reforms, as well as how future reforms might affect demand for investments in money market fund substitutes and the implications for investors, financial institutions, corporate borrowers, municipalities, and states that sell their debt to money market funds), *available at http://www.sec.gov/news/studies/2012/money-market-funds-memo-2012.pdf.*

[242] *Money Market Fund Reform; Amendments to Form PF,* Release No. IC–30551 (June 5, 2013), 78 FR 36834 (June 19, 2013).

[243] *See* Exchange Act Release No. 55471 (Mar. 14, 2007), 72 FR 13149 (Mar. 20, 2007) (SR–NASD–2007–013); Exchange Act Release No. 54918 (Dec. 12, 2006), 72 FR 1044 (Jan. 9, 2007) (SR–NYSE–2006–13); Exchange Act Release No. 54919 (Dec. 12, 2006), (SR–CBOE–2006–14); Exchange Act Release No. 54125 (July 11, 2006), 71 FR 40766 (July 18, 2006) (SR–NYSE–2005–93); Exchange Act Release No. 52031 (July 14, 2005), 70 FR 42130 (July 21, 2005) (SR–NYSE–2002–19); Exchange Act Release No. 52032 (July 14, 2005), 70 FR 42118 (July 21, 2005) (SR–CBOE–2002–03); *see also* Exchange Act Release No. 58251 (July 30, 2008), 73 FR 46111 (Aug. 7, 2008) (SR–FINRA–2008–041); Exchange Act Release No. 58243 (July 28, 2008), 73 FR 45505 (Aug. 5, 2008) (SR–CBOE–2008–73); and Exchange Act Release No. 58261 (July 30, 2008), 73 FR 46116 (Aug. 7, 2008) (SR–NYSE–2008–66) (making portfolio margin rules permanent).

[244] *See, e.g.,* FINRA Rule 4210(g) and CBOE Rule 12.4.

[245] *See Amendments to Financial Responsibility Rules,* 72 FR at 12868–12870.

[246] *See* Public Law 111–203 § 983.

[247] The term *filing date* is defined in SIPA as, generally, being the date a SIPA proceeding is commenced. *See* 15 U.S.C. 78*lll*(7).

[248] *See* 15 U.S.C 78*lll*(11); *see also* Public Law 111–203 § 983 (revising definition of *net equity*).

[249] *See SIFMA 2 Letter; CME Letter; SIPC Letter; Citigroup Letter; American Bar Association Letter; SIFMA 4 Letter.* The comment letters received as a result of the original solicitation of comment pre-date the Dodd-Frank Act. As such, these comment letters address the proposed amendments prior to the enactment of the Dodd-Frank SIPA amendments related to portfolio margining. The comment letters received subsequent to the passage of the Dodd-Frank Act address the SIPA amendments.

[250] *See SIFMA 2 Letter; Citigroup Letter; American Bar Association Letter.*

[251] *See Citigroup Letter.*

[252] *See American Bar Association Letter.*

Commission's effort to provide greater legal certainty regarding the SIPA treatment of futures positions in a portfolio margin account.[253] In a subsequent comment letter, however, this commenter stated that this amendment is no longer necessary in light of the Dodd-Frank Act amendments, and recommended the Commission withdraw it.[254] Another commenter stated that the Commission's proposal is premature in that including futures in a portfolio margin account, which is a securities account, would conflict with the segregation provisions under the CEA [255] and that SIPC has not determined that protection should be extended to futures.[256]

The Commission agrees, in part, with the commenter who stated that the Dodd-Frank Act SIPA amendments make the Commission's proposed amendments to Rules 15c3–3 and 15c3–3a unnecessary.[257] As noted above, the definitions of *customer, customer property,* and *net equity* in section 16 of SIPA were amended by the Dodd-Frank Act to take into account futures and options on futures held in a portfolio margin account carried as a securities account pursuant to a Commission-approved portfolio margining program.[258] Consequently, in a proceeding under SIPA, futures and options on futures positions held in a portfolio margin account carried as a securities account would be included in determining a customer's net equity claim.[259] Therefore, the proposed amendment relating to the unrealized value of a futures option is not necessary to achieve the objective of providing SIPA protection for such positions. As a result, the Commission is modifying the final rule to delete the proposed language in paragraph (a)(8) of Rule 15c3–3 that would have treated the unrealized value of a futures option in a portfolio margin account on the filing date of a SIPA proceeding as a free credit balance for purposes of Rule 15c3–3.[260]

As stated above, however, the remaining rule amendments to Rules 15c3–3 and 15c3–3a complement the amendments to SIPA and provide additional protections to customers. Consequently, the Commission is adopting them with some technical modifications in response to suggestions offered by commenters.

One commenter suggested a change to paragraph (a)(8) of Rule 15c3–3 that would expand the definition of *free credit balances* to include cash balances related to futures positions and the value of futures options positions on the SIPA filing date.[261] First, the commenter noted that paragraph (a)(8) of Rule 15c3–3 concerns free credit balances, which are funds subject to immediate payment (among other limitations).[262] The commenter expressed concern that the Commission's proposal could have been construed as excluding cash balances in a portfolio margin account that are not subject to immediate payment. The Commission agrees that the proposal could have been interpreted as requiring that futures-related cash balances be treated differently depending on whether or not they are subject to immediate payment.

The amendments to Rule 15c3–3 are designed to provide the same treatment to futures-related cash balances in a portfolio margin account as applies to securities-related cash balances. As discussed above, under Item 1 of Rule 15c3–3a, cash balances that do not meet the definition of *free credit balances* (*e.g.,* because they are not subject to immediate payment) are included in the customer reserve formula if they meet the definition of *other credit balances* under paragraph (a)(9) of Rule 15c3–3.[263]

Consequently, to remove any ambiguity as to the effect of the rule changes in response to the comments noted above, the Commission is amending paragraph (a)(9) of Rule 15c3–3—which defines *other credit balances*—to include futures-related cash balances other than free credit balances. In addition, the Commission has deleted the phrase ''shall include such liabilities,'' in the amendment to proposed paragraph (a)(8) and replaced it with ''includes, if subject to immediate cash payment to customers on demand, funds . . .'' to clarify that this paragraph relates to cash balances in a portfolio margin account that are subject to immediate payment and, hence, that paragraph (a)(9) relates to other cash balances in a portfolio margin account.

One commenter suggested changes with respect to the marks to market language in the rule, stating that the phrase relating to daily marks to market be modified to read ''variation margin or initial margin marks to market'' and the phrase in the proposal that read ''proceeds resulting from closing out futures contracts and options thereon'' be modified to read ''proceeds resulting from margin paid or released in connection with closing out, settling or exercising futures contracts and options thereon.'' [264] The Commission agrees with these technical suggestions because they clarify the rule by incorporating appropriate futures terminology.

Consequently, as adopted, the text in paragraphs (a)(8) and (a)(9) of Rule 15c3–3 expands the terms *free credit balance* and *other credit balances* to include ''funds carried in a securities account pursuant to a self-regulatory organization portfolio margin rule approved by the Commission . . . including variation margin or initial margin, marks to market, and proceeds resulting from margin paid or released in connection with closing out, settling or exercising futures contracts and options thereon.'' [265] The amendments, as adopted, more precisely capture the Commission's intent in terms of identifying the types of futures-related cash balances that may be held in a portfolio margin account than the language in the proposed rule.

On the debit side of the customer reserve formula, the Commission is adopting, substantially as proposed, an amendment to Rule 15c3–3a Item 14 that permits a broker-dealer to include as a debit item the amount of customer margin required and on deposit at a derivatives clearing organization related to futures positions carried in a portfolio

[253] *See SIFMA 2 Letter.*

[254] *See SIFMA 4 Letter.*

[255] *See, e.g.,* 17 CFR 1.20–1.29.

[256] *See CME Letter. See also SIPC Letter* (expressing ''grave concerns'' about potential conflict between the proposed amendments and SIPA).

[257] *See SIFMA 4 Letter.*

[258] *See* Public Law 111–203 § 983.

[259] Under the Dodd-Frank Act SIPA amendments, a customer's net equity now includes all positions in futures contracts and options on futures contracts held in a portfolio margining account carried as a securities account pursuant to a portfolio margining program approved by the Commission, including all property collateralizing such positions, to the extent that such property is not otherwise included herein. *See* 15 U.S.C. 78*lll*(11)(A)(ii). Further, the amendment provided that a claim for a commodity futures contract received, acquired, or held in a portfolio margining account pursuant to a portfolio margining program approved by the Commission or a claim for a security futures contract, shall be deemed to be a claim with respect to such contract as of the filing date, and such claim shall be treated as a claim for cash. *See* 15 U.S.C. 78*lll*(11).

[260] Specifically, the final rule does not include the proposed language: '', and, in the event the broker-dealer is the subject of a proceeding under SIPA, the market value as of the ''filing date'' as that term is defined in SIPA (15 U.S.C. 78*lll*(7)) of any long options on futures contracts.''

[261] *See SIFMA 2 Letter.*

[262] *Id.*

[263] Item 1 of Rule 15c3–3a requires a broker-dealer to include in the customer reserve formula free credit balances and other credit balances in customers' securities accounts. Paragraph (a)(9) of Rule 15c3–3 defines *other credit balances* as ''cash liabilities of a broker or dealer to customers other than free credit balances and funds in commodities accounts segregated as aforesaid.'' 17 CFR 240.15c3–3(a)(9).

[264] *See SIFMA 2 Letter.*

[265] *See also* section II.A.6. of this release.

margin account.[266] Under SIPA, the term *customer property* includes, ''resources provided through the use or realization of customers' debit cash balances and other customer-related debit items as defined by the Commission by rule,'' as well as, ''in the case of a portfolio margining account of a customer that is carried as a securities account pursuant to a portfolio margining program approved by the Commission, a futures contract or an option on a futures contract received, acquired, or held by or for the account of a debtor from or for such portfolio margining account, and the proceeds thereof.'' [267] Under this provision of SIPA, this amendment to Rule 15c3–3 makes the margin required and on deposit at a derivatives clearing organization part of the ''customer property'' in the event the broker-dealer is placed in a SIPA liquidation. Thus, it would be available for distribution to the failed firm's customers.

Finally, one commenter suggested changes to Commission rules beyond those in the proposing release. This commenter urged the Commission to consider amending Rules 8c–1, 15c2–1, and 15c3–3 to provide that their provisions could be waived by customers that are entitled to engage in derivative transactions in a portfolio margin account, provided the customer agrees in writing to waive SIPA protection.[268] According to the commenter, a customer executing such a waiver would not be entitled to the protections under SIPA for customers and would be deemed a general creditor of the broker-dealer with respect to claims arising from their portfolio margin accounts. At this time, the Commission does not believe it would be appropriate to amend the rules as recommended by the commenter because such changes are beyond the scope of this rulemaking.

C. Amendments With Respect to Securities Lending and Borrowing and Repurchase/Reverse Repurchase Transactions

In the proposing release, the Commission noted two concerns about stock lending that arose from the failure of the registered broker-dealer MJK Clearing, Inc. (''MJK''); [269] namely: (1) That broker-dealers with principal liability in a stock loan transaction may purport to be acting in an agency capacity and, consequently, not taking appropriate capital charges; and (2) that broker-dealers that historically have not been active in stock loan activities may rapidly expand their balance sheets with such transactions and, thereby, increase leverage to a level that poses significant financial risk to the firm and its counterparties. In response, the Commission proposed, and is now adopting, amendments to Rules 15c3–1 and 17a–11.

With respect to the Rule 15c3–1 proposal, the Commission is adopting the amendment, as proposed. This amendment to subparagraph (c)(2)(iv)(B) of Rule 15c3–1 clarifies that broker-dealers providing securities lending and borrowing settlement services are deemed, for purposes of the rule, to be acting as principal and are subject to applicable capital deductions.[270] Under the amendment, these deductions can be avoided if a broker-dealer takes certain steps to disclaim principal liability. In particular, the final rule provides that ''a broker or dealer that participates in a loan of securities by one party to another party will be deemed a principal for the purpose of the deductions required under this section, [*i.e.,* deductions from net worth] unless the broker or dealer has fully disclosed the identity of each party to the other and each party has expressly agreed in writing that the obligations of the broker or dealer do not include a guarantee of performance by the other party and that such party's remedies in the event of a default by the other party do not include a right of setoff against obligations, if any, of the broker or dealer.'' [271]

The Commission received five comments on the proposed amendment.[272] Two commenters objected to this amendment, stating that they believed the standard legal documents used in securities lending transactions provide sufficient legal certainty on the status of the parties.[273] The Commission, in recognition of standard stock loan agreement templates, designed the amendment to accommodate the continued use of these industry model agreements by incorporating their use into the rule's requirements. For the purposes of establishing a broker-dealer's status as agent or lender, these agreements may be sufficiently detailed to satisfy the new requirements. However, it would be the broker-dealer's responsibility to ensure that any ''standard'' agreement contains the necessary provisions to comply with this amendment, and that such provisions are not weakened by any other language in the agreement or any subsequent amendment. The goal is to avoid ambiguity about a broker-dealer's status as agent or principal regarding the applicability of the stock loan charges in the net capital rule. As the failure of MJK illustrated, disputes can arise over whether a broker-dealer is acting as a principal or agent in a stock loan transaction.[274] Under the formulation of the rule, a broker-dealer is presumed to be acting in a principal capacity unless it can demonstrate through its agreements with the other participants in the transaction that it is acting as agent. In this regard, a broker-

[266] The Commission also is amending Item 14 of Rule 15c3–3a to replace the phrase ''Security futures products'' with the phrase ''security futures products.'' In addition, the Commission adopting some non-substantive amendments to Note G to Item 14, including: (1) In paragraph (a) replacing the word ''shall'' with the word ''must''; (2) in paragraph (b) replacing the word ''shall'' with the word ''will''; in the second line in paragraph (b)(2) inserting the phrase ''futures in a'' before the phrase ''portfolio margin account'' and deleting the word ''margin''; (3) in paragraph (b)(2) replacing the word ''shall'' with the word ''will'' in three places; (4) in the sixth and seventh lines of paragraph (b)(2), inserting the phrase ''futures in a'' before the phrase ''portfolio margin account'' and deleting the phrase ''futures margin''; in paragraph (b)(3)(iv) replacing the word ''securities'' with the word ''security'', inserting the phrase ''futures in a'' before the phrase ''portfolio margin account'' and deleting the word ''futures''; and (4) in paragraph (c), replacing the word ''shall'' with the word ''will'', inserting the phrase ''futures in a'' before the phrase ''portfolio margin account'' and deleting the word ''futures.''

[267] 15 U.S.C. 78*lll*(4)(B) and (D); *see also* Dodd-Frank Act Section 983.

[268] *See American Bar Association Letter.*

[269] *See Amendments to Financial Responsibility Rules,* 72 FR at 12869. The failure of MJK raised several concerns regarding securities lending transactions. As explained in more detail in the proposing release, at the time of its failure, MJK owed cash collateral to several borrowing broker-dealers. *Id.* at 12862, 12869–12870. These broker-dealers suffered losses caused by MJK's failures and, in later proceedings related to these losses, questions arose as to whether these broker-dealers were acting as principal or agent.

[270] A broker-dealer is required to deduct from net worth most unsecured receivables, including the amount that the market value of a securities loan exceeds the value of collateral obtained for the loan. *See* 17 CFR 240.15c3–1(c)(2)(iv)(B). Similarly, with respect to repo transactions, a broker-dealer obligated to resell securities must, in computing net capital, deduct the amount that the market value of the securities is less than the resale price. *See* 17 CFR 240.15c3–1(c)(2)(iv)(F). A broker-dealer obligated to repurchase securities must, in computing net capital, deduct the amount that the market value of the securities is greater than the repurchase price to the extent the excess is greater than certain percentages. *See* 17 CFR 240.15c3–1(c)(2)(iv)(F).

[271] *See* paragraph (c)(2)(iv)(B) of Rule 15c3–1, as adopted. Standard master securities loan agreements (including the annexes thereto) commonly used by the parties to a securities lending transaction contain provisions for establishing agent (as opposed to principal) status in a securities lending and borrowing transaction that are consistent with the requirements in paragraph (c)(2)(iv)(B) of Rule 15c3–1, as amended. *See, e.g.,* 2000 Master Securities Loan Agreement, Annex I, published by SIFMA, *available at www.sifma.org.*

[272] *See Abbey National Letter; Dresdner Kleinwort Letter; SIFMA 2 Letter; Citigroup Letter; Cornell Letter.*

[273] *See SIFMA 2 Letter; Citigroup Letter.*

[274] *See, e.g., Nomura* v. *E*Trade,* 280 F.Supp.2d 184 (S.D.N.Y. 2003).

dealer will be responsible for determining that its agreements are fully consistent with the standards of the rule.

One commenter asked for clarification on the timing of when the agent lender must disclose the principal parties to one another in order to disclaim principal liability under the rule.[275] This commenter stated that the amendment should be modified so as not to require pre-trade disclosure of the identity of the principal, since under the agency annex to standardized master lending agreements such disclosure can be made on the next business day.[276] The amendment is intended to accommodate the continued use of these industry model agreements by incorporating their use into the rule's requirements. Consequently, disclosure of principals in conformance with the requirements of the ''standard'' stock loan agreement templates would be consistent with the requirements of the rule (as long as the identity of the borrower and the lender is disclosed within one business day after the trade date), which is designed to ensure that firms are taking the required net capital charges related to the securities lending activity to the extent they have principal liability.

The Commission also is adding new paragraph (c)(5) to Rule 17a–11 to help identify broker-dealers with highly leveraged non-government securities lending and borrowing and repurchase operations.[277] This new provision requires a broker-dealer to notify the Commission whenever the total amount of money payable against all securities loaned or subject to a repurchase agreement, or the total contract value of all securities borrowed or subject to a reverse repurchase agreement, exceeds 2,500 percent of tentative net capital; provided that, for purposes of this leverage threshold, transactions involving *government securities* as defined in section 3(a)(42) of the Exchange Act, are excluded from the calculation.[278] The amendment is designed to alert regulators to a sudden increase in a broker-dealer's stock loan and repo positions, which could indicate that the broker-dealer is taking on new risk that it may have limited experience in managing.

One commenter supported the proposed amendment and believes the notification could serve as ''an early warning'' that a firm is approaching insolvency and generally supports the Commission's efforts to protect customers from broker-dealers who recklessly rely on excessively leveraged transactions.[279]

In the proposing release, the Commission estimated that a leverage threshold of 25 times tentative net capital would be triggered by 21 broker-dealers on a regular basis.[280] The Commission stated that this establishes a threshold high enough to only capture on a regular basis those few firms highly active in securities lending and repo transactions. The Commission did not receive any comments regarding the 2,500% tentative net capital threshold in the proposing release. Based on FOCUS Report data, as of December 31, 2011, there were six broker-dealers whose securities loaned and securities borrowed transactions exceeded 25 times their tentative net capital. The Commission continues to believe that the 2,500% threshold is an appropriate notice trigger for a firm that historically has not been as active in these transactions but rapidly leverages up its securities lending and repo positions. Given the updated estimates of how many broker-dealers would trigger this threshold, the Commission believes the proposed threshold is high enough to capture on a regular basis only those few firms highly active in securities lending and repo transactions. Therefore, the Commission is retaining this 2,500% threshold in the final rule without revision.

As proposed, the amendment to Rule 17a–11 also would have provided that a broker-dealer that submitted a monthly report of its stock loan and repo activity to its DEA need not file the notices. This provision was designed to accommodate large broker-dealers that are active in this business and regularly maintain stock loan and repo balances that exceed the threshold. The Commission expects that these broker-dealers have experience in managing the risks specific to these types of transactions and have established controls to address those risks. Consequently, a notice under paragraph (c)(5) from these broker-dealers might not be as useful in providing risk assessment information to regulators. Instead, the monthly reports will provide the Commission and other financial regulators with information with which to develop trend analysis, when deemed appropriate. They could use this analysis to identify leverage levels that are outside the normal trend range, and which may be indicative of a material change in the firm's business model that could indicate it was taking on higher levels of leverage, branching into new products, or experiencing operational or financial difficulties (*e.g.,* the firm could be reducing leverage rapidly because creditors were not willing to enter into new transactions).

Three commenters addressed the proposed monthly notification requirement.[281] They stated that the monthly report in lieu of the notification should be provided as part of the monthly FOCUS report many broker-dealers file with their DEA.[282] The Commission agrees that the FOCUS report may be an appropriate mechanism for reporting stock loan and repo positions in lieu of the proposed monthly notification requirement.[283] Consequently, the Commission has modified the final rule to delete the phrase ''submits a monthly report of'' and replace it with ''reports monthly.''[284] In addition, as adopted, in order to provide that the monthly report be sent to a broker-dealer's DEA, the Commission added the phrase ''to its designated examining authority in a form acceptable'' before ''to its designated examining authority.''[285] This language, as adopted, will provide each DEA with the flexibility to prescribe how the monthly reports are to be made and will accommodate a DEA that opts to use the FOCUS report as the reporting mechanism.[286] In summary, as adopted, the notice exemption in paragraph (c)(5) will state ''provided further, however, that a broker or dealer will not be required to send the notice required by this paragraph (c)(5) if it reports monthly its securities lending and borrowing and repurchase and reverse repurchase activity (including the total amount of money payable against securities loaned or subject to a repurchase agreement and the total contract value of securities borrowed or subject to a reverse repurchase agreement) to its designated

[275] *See SIFMA 2 Letter.*

[276] *See, e.g., www.sifma.org* for sample Master Securities Loan Agreements (and annex).

[277] *See* paragraph (c)(5) of Rule 17a–11, as adopted.

[278] 15 U.S.C. 78c(a)(42). ''Government securities'' generally present less market risk than other types of securities used in securities lending and repo transactions. Consequently, they are excluded from the scope of the rule.

[279] *See Cornell Letter.*

[280] *See Amendments to Financial Responsibility Rules,* 72 FR at 12870 (providing rationale for 2,500% threshold).

[281] *See Abbey National Letter; Citigroup Letter; SIFMA 2 Letter; SIFMA 4 Letter.*

[282] *See Abbey National Letter; Citigroup Letter; SIFMA 2 Letter.*

[283] Carrying broker-dealers generally are required to submit FOCUS reports on a monthly basis.

[284] *See* paragraph (c)(5) of Rule 17a–11, as adopted.

[285] *Id.*

[286] *See also SIFMA 4 Letter.*

examining authority in a form acceptable to its designated examining authority.'' [287]

A commenter asked the Commission to clarify that the new reporting provision of paragraph (c)(5) of Rule 17a–11 is triggered only by principal activity meeting or exceeding stated thresholds.[288] The notification provision applies when a broker-dealer is acting as principal and exceeds the stated thresholds, and a broker-dealer will not need to include transactions for which it does not have principal liability in determining whether the notification threshold has been triggered.

D. Documentation of Risk Management Procedures

It is important for broker-dealers to document the controls they establish for managing the material risk exposures that arise from their business activities. For example, a broker-dealer active in securities lending is exposed to a variety of risks, including market risk,[289] credit risk,[290] and liquidity risk.[291] Other broker-dealer activities give rise to these risks as well, including managing a repo book, dealing in OTC derivatives, trading proprietary positions, and lending on margin. A well-documented system of internal controls designed to manage material risk exposures reflects the determination of a firm's management as to how its business activities should be conducted in light of such exposures. It also enables management to better identify, analyze, and manage the risks inherent in the firm's business activities with a view to preventing material losses and to review whether the firm's activities are being conducted in a manner that is consistent with such procedures and controls as well as in accordance with the Federal securities laws. Risk management controls are particularly important for the largest broker-dealers, which generally engage in a wide range of highly complex activities across many different markets and geographical locations.

While most broker-dealers already have well-documented procedures and controls for managing risks as a matter of business practice, it is important to reinforce the practice and make it easier for regulators to understand a broker-dealer's procedures and controls so that they can review whether the broker-dealer is adhering to them. Consequently, the Commission proposed an amendment to Rule 17a-3 that would have required a broker-dealer to create a record documenting its ''internal risk management controls.'' [292]

Commenters raised concerns that the proposed amendment would be ''overly broad and ambiguous'' [293] and ''so broad as to create uncertainty.'' [294] Three commenters argued that the requirement, if adopted, should be limited to market, credit, and liquidity risk management.[295] Another commenter recommended that the Commission propose the minimum elements required to be documented, such as market risk, credit risk, liquidity risk, and operational risk.[296] While market, credit, and liquidity risk were among the specific examples of risk identified in the proposed rule,[297] the Commission agrees that the phrase ''risk controls'' could be interpreted very broadly. To address this concern, the Commission has modified the final rule to clarify its application. The final rule requires the documentation of controls established specifically to manage market, credit, and liquidity risk, ''which have more commonly understood meanings within the industry.'' [298] This also focuses the rule on the key risks inherent in conducting a securities business.

Commenters also requested that the Commission clarify that, when a broker-dealer is part of a corporate family, risk management controls could be applicable to multiple entities within the corporate family, including the broker-dealer.[299] In response, the final rule does not specify the type of controls a broker-dealer must establish to manage these risks. It simply requires the documentation of the procedures the broker-dealer has established. Broker-dealers that are part of holding companies may be subject to procedures that are used globally throughout the organization. As long as the broker-dealer maintains documented procedures of controls pertaining to the designated entity, the requirements of the rule would be met.

Other commenters requested that the Commission clarify that the risk management controls do not have to include any minimum elements [300] and that the rule does not impose any qualitative requirements.[301] Two commenters suggested that because there were no stated content requirements for the risk management controls, it would be difficult for a firm to prove that their risk management procedures were adequate, which could lead to a ''subjective process'' [302] or to examiners applying a ''one size fits all'' best practices standard.[303] One commenter suggested that to address this issue, the Commission should articulate the process that examiners will follow when examining risk management controls.[304] Finally, one commenter encouraged the Commission to consider strengthening this requirement in terms of both its scope and applicability.[305]

The Commission is not mandating any specific controls, procedures, or policies that must be established by a broker-dealer to manage market, credit, or liquidity risk, nor is it requiring any minimum elements or specifying any procedures that would be required to be included in a firm's market, credit, and liquidity risk management policies. Rather, the Commission is requiring that a control, procedure, or policy be documented if it is in place. Based on staff experience monitoring large broker-dealers, the Commission anticipates that most brokers-dealers that will be subject to this rule already have documented controls, procedures, and policies as part of their overall risk management processes. The purpose of this amendment is not to change the controls, procedures, and policies that are in place, but to require that they be adequately documented.

For the foregoing reasons, paragraph (a)(23) to Rule 17a–3, as adopted, requires certain broker-dealers to make and keep current a record documenting the credit, market, and liquidity risk

[287] *See* paragraph (c)(5) of Rule 17a–11, as adopted. The Commission also inserted the text ''(c)(5)'' in the final rule before the phrase ''if it reports monthly'' to make the paragraph reference more explicit.

[288] *See Dresdner Kleinwort Letter.*

[289] Generally, market risk is the risk that prices, values, or rates will adversely change.

[290] Generally, credit risk is the risk of loss resulting from a counterparty or other type of obligor failing to meet an obligation, including an obligation with respect to a loan, security, swap, option, or settlement.

[291] Generally, funding liquidity risk is the risk that a firm will not be able to meet cash demands as they become due and asset liquidity risk is the risk that an asset will not be able to be sold quickly at its market value.

[292] *See Amendments to Financial Responsibility Rules,* 72 FR at 12899.

[293] *See E*Trade Letter.*

[294] *See Citigroup Letter.*

[295] *See E*Trade Letter; SIFMA 2 Letter; Citigroup Letter.*

[296] *See Barnard Letter.*

[297] *See Amendments to Financial Responsibility Rules,* 72 FR at 12870.

[298] *E*Trade Letter.* The final rule also deletes the term ''internal'' because it would be redundant.

[299] *See E*Trade Letter; SIFMA 2 Letter; Citigroup Letter.*

[300] *See SIFMA 2 Letter.*

[301] *See Citigroup Letter.*

[302] *See Coastal Securities Letter.*

[303] *See American Bar Association Letter.*

[304] *Id.*

[305] *See Cornell Letter.*

management controls established and maintained by the broker-dealer to assist it in analyzing and managing the risks associated with its business activities.[306] This documentation requirement applies only to broker-dealers that have more than (1) $1,000,000 in aggregate credit items as computed under the customer reserve formula of Rule 15c3–3, or (2) $20,000,000 in capital, including debt subordinated in accordance with Appendix D to Rule 15c3–1.[307]

The Commission also proposed adding paragraph (e)(9) to Rule 17a–4 to require a broker-dealer to retain the documented risk management controls or procedures until three years after the broker-dealer terminates the use of the system of controls or procedures documented therein. One commenter stated that given the minimal cost of electronic storage, the commenter believes that the retention period could be extended beyond three years.[308] Conversely, two commenters suggested that Rule 17a–4 be revised so that a broker-dealer would not be required to maintain outdated versions of its risk management controls.[309]

The Commission is adding paragraph (e)(9) to Rule 17a–4, with a minor modification from the proposed amendment. Specifically, the final rule is modified to require retention of the records until three years after termination of the use of the risk management controls documented therein by replacing the phrase ''systems of controls or procedures'' with the phrase ''risk management controls.'' [310] This modification maintains consistency with the terminology in paragraph (a)(23) of Rule 17a–3, as adopted, which requires broker-dealers to make and keep current a ''record documenting the credit, market, and liquidity risk management controls established and maintained by the broker or dealer.'' [311] Finally, the three year retention period is designed to establish an audit trail between the risk management controls that have most recently been made inoperative and the risk management controls currently in effect to provide sufficient opportunity to review the former during the broker-dealer's exam cycle. Three years also is consistent with the retention period for many of the records required to be preserved under Rule 17a–4.[312]

Finally, one commenter noted that the proposed amendment does not impose any requirements beyond those applicable under Rule 15c3–4.[313] Accordingly, the commenter urged the Commission to create an exception from the proposed amendment to Rule 17a–3 for a broker-dealer that is effectively subject to Rule 15c3–4. With the modifications to the final rule to include only market, credit, and liquidity risk, a broker-dealer subject to the conditions of Rule 15c3–4 would already comply with this amendment given that these risks are included in the risks a broker-dealer would be required to address under Rule 15c3–4. Therefore, an exception from the rule is unnecessary.

E. Amendments to the Net Capital Rule

Under Rule 15c3–1, broker-dealers are required to maintain, at all times, a minimum amount of net capital.[314] The capital standard in Rule 15c3–1 is a net liquid assets test. This standard is designed to allow a broker-dealer the flexibility to engage in activities that are part of conducting a securities business (*e.g.,* taking securities into inventory) but in a manner that places the firm in the position of holding at all times more than one dollar of highly liquid assets for each dollar of unsubordinated liabilities (*e.g.,* money owed to customers, counterparties, and creditors).[315] For example, Rule 15c3–1 allows securities positions to count as allowable net capital, subject to standardized or model-based deductions (''haircuts'').[316] The rule, however, does not permit most unsecured receivables to count as allowable net capital.[317] This aspect of the rule severely limits the ability of broker-dealers to engage in activities that generate unsecured receivables (*e.g.,* lending money without obtaining collateral). The rule also does not permit fixed assets or other illiquid assets to count as allowable net capital, which creates disincentives for broker-dealers to own real estate and other fixed assets that cannot be readily converted into cash.[318] For these reasons, Rule 15c3–1 incentivizes broker-dealers to confine their business activities and devote capital to activities such as underwriting, market making, and advising on and facilitating customer securities transactions.[319]

Rule 15c3–1 requires broker-dealers to maintain a minimum level of net capital (meaning highly liquid capital) at all times.[320] The rule requires that a broker-dealer perform two calculations: (1) A computation of the minimum amount of net capital the broker-dealer must maintain; [321] and (2) a computation of the amount of net capital the broker-dealer is maintaining.[322] The minimum net capital requirement is the greater of a fixed-dollar amount specified in the rule and an amount determined by applying one of two financial ratios: The 15-to-1 aggregate indebtedness to net

[306] *See* paragraph (a)(23) of Rule 17a–3, as adopted.

[307] The Commission also has modified paragraph (a)(23) of Rule 17a–3 from the proposed rule to delete the reference to the term ''member'' in two places in the final rule because the reference to ''member'' is unnecessary. *Id.*

[308] *Id.*

[309] *See E*Trade Letter; SIFMA 2 Letter.*

[310] *See* paragraph (e)(9) of Rule 17a–4, as adopted. The Commission also modified the final rule to delete the phrase ''paragraph (a)(23) of'' and insert ''(a)(23)'' immediately following ''17a–3'' to make the referenced citation consistent with other parts of the rule.

[311] *See* paragraph (a)(23) of Rule 17a–3, as adopted.

[312] *See* 17 CFR 240.17a–4(b).

[313] *See SIFMA 2 Letter. See also* 17 CFR 240.15c3–4.

[314] *See* 17 CFR 240.15c3–1.

[315] *See, e.g., Interpretation Guide to Net Capital Computation for Brokers and Dealers,* Exchange Act Release No. 8024 (Jan. 18, 1967), 32 FR 856 (Jan. 25, 1967) (''Rule 15c3–1 (17 CFR 240.15c3–1) was adopted to provide safeguards for public investors by setting standards of financial responsibility to be met by brokers and dealers. The basic concept of the rule is liquidity; its object being to require a broker-dealer to have at all times sufficient liquid assets to cover his current indebtedness.'') (Footnotes omitted); *Net Capital Treatment of Securities Positions, Obligations and Transactions in Suspended Securities,* Exchange Act Release No. 10209 (June 8, 1973), 38 FR 16774 (June 26, 1973) (Commission release of a letter from the Division of Market Regulation) (''The purpose of the net capital rule is to require a broker or dealer to have at all times sufficient liquid assets to cover its current indebtedness. The need for liquidity has long been recognized as vital to the public interest and for the protection of investors and is predicated on the belief that accounts are not opened and maintained with broker-dealers in anticipation of relying upon suit, judgment and execution to collect claims but rather on a reasonable demand one can liquidate his cash or securities positions.''); *Net Capital Requirements for Brokers and Dealers,* Exchange Act Release No. 15426 (Dec. 21, 1978), 44 FR 1754 (Jan. 8, 1979) (''The rule requires brokers or dealers to have sufficient cash or liquid assets to protect the cash or securities positions carried in their customers' accounts. The thrust of the rule is to insure that a broker or dealer has sufficient liquid assets to cover current indebtedness.''); *Net Capital Requirements for Brokers and Dealers,* Exchange Act Release No. 26402 (Dec. 28, 1989), 54 FR 315 (Jan. 5, 1989) (''The rule's design is that broker-dealers maintain liquid assets in sufficient amounts to enable them to satisfy promptly their liabilities. The rule accomplishes this by requiring broker-dealers to maintain liquid assets in excess of their liabilities to protect against potential market and credit risks.'') (Footnote omitted).

[316] *See* 17 CFR 240.15c3–1(c)(2)(vi); 17 CFR 240.15c3–1e; 17 CFR 240.15c3–1f .

[317] *See* 17 CFR 240.15c3–1(c)(2)(iv).

[318] *See, e.g.,* 17 CFR 240.15c3–1(c)(2)(iv)(A).

[319] *See Capital, Margin, and Segregation Requirements for Security-Based Swap Dealers and Major Security-Based Swap Participants and Capital Requirements for Broker-Dealers,* Exchange Act Release No. 68071 (Oct. 18, 2012), 77 FR 70214, 70219 (Nov. 23, 2012).

[320] *See* 17 CFR 240.15c3–1.

[321] *See* 17 CFR 240.15c3–1(a).

[322] *See* 17 CFR 240.15c3–1(c)(2). The computation of net capital is based on the definition of *net capital* in paragraph (c)(2) of Rule 15c3–1. *Id.*

capital ratio or the 2% of aggregate debit items ratio.[323]

In computing net capital, the broker-dealer must, among other things, make certain adjustments to net worth such as deducting illiquid assets, taking other capital charges, and adding qualifying subordinated loans.[324] The amount remaining after these adjustments is defined as *tentative net capital*.[325] The final step in computing net capital is to take prescribed percentage deductions (''standardized haircuts'') from the mark-to-market value of the proprietary positions (*e.g.,* securities, money market instruments, and commodities) that are included in its tentative net capital.[326] The standardized haircuts are designed to account for the market risk inherent in these positions and to create a buffer of liquidity to protect against other risks associated with the securities business.[327] Alternative Net Capital or ''ANC'' broker-dealers and a type of limited purpose broker-dealer that deals solely in OTC derivatives (''OTC derivative dealers'') are permitted, with Commission approval, to, among other things, use internal models as the basis for taking market risk charges as an alternative approach in lieu of the standardized haircuts for classes of positions for which they have been approved to use models.[328] Rule 15c3–1 imposes substantially higher minimum capital requirements for ANC broker-dealers and OTC derivatives dealers, as compared to other types of broker-dealers, because, among other reasons, the use of internal models to compute net capital can substantially reduce the deductions for securities and money market positions as compared with the standardized haircuts.[329]

1. Requirement To Deduct From Net Worth Certain Liabilities or Expenses Assumed by Third Parties

In the proposing release, the Commission expressed concern that some broker-dealers may be excluding from their calculations of net worth certain liabilities that relate directly to expenses or debts incurred by the broker-dealer.[330] The accounting justification for the exclusion is that a third party (usually a parent or affiliate) has assumed responsibility for these expenses and debts through an expense sharing agreement.[331] In some cases, however, the third party does not have the resources —independent of the broker-dealer's revenues and assets—to assume these liabilities. Thus, the third party is dependent on the resources of the broker-dealer to pay the expenses and debts. Excluding liabilities from the broker-dealer's net worth calculation in these situations may misrepresent the firm's actual financial condition, deceive the firm's customers, and hamper the ability of regulators to monitor the firm's financial condition.[332]

To address this issue, the Commission proposed—and is now adopting substantially as proposed—an amendment to Rule 15c3–1 to add a new paragraph (c)(2)(i)(F) that will require a broker-dealer, in calculating net capital, to take into account any liabilities that are assumed by a third party if the broker-dealer cannot demonstrate that the third party has the resources—independent of the broker-dealer's income and assets—to pay the liabilities.[333]

The Commission received five comments regarding this proposal.[334] Two commenters stated that the amendment was overly burdensome and that it would not result in a more accurate picture of a broker-dealer's financial condition than obtained through current requirements.[335] One of these commenters added that any implementation and enforcement of the amendments ''should not be made retroactive.''[336] This commenter stated that it is unclear how, and unlikely that, this amendment would achieve any of the desired results and argued that it could conversely impair a firm's ability to continue as a going concern.[337] Finally, this commenter also argued that this amendment would affect capital transactions that originate at the holding company level.[338] Two commenters agreed in principle with the amendments but urged the Commission to carefully consider the potential consequences of implementation and to provide clarification on the standard for demonstrating that the third party has adequate financial resources, including factors beyond those referred to in the proposing release that they believed would be potentially relevant.[339] One commenter supported the Commission's goal of clarifying disclosures relating to expense sharing or obligations.[340]

As with the proposal, the amendment, as adopted, is designed to prohibit a practice that could misrepresent a broker-dealer's actual financial condition, deceive the firm's customers, and hamper the ability of regulators to monitor the firm's financial condition. Moreover, the amendment, as adopted, should not impose undue burdens or present serious implementation difficulties because the requirement is consistent with prior staff guidance regarding the treatment of broker-dealer expenses assumed by a third party.[341] Finally, as compared to staff guidance, a federal regulation offers broker-dealers greater certainty as to how to treat expense sharing agreements under Rule 15c3–1.

In response to the comments discussed above, and as the Commission explained in the proposing release, a broker-dealer can demonstrate the adequacy of the third party's financial

[323] *See* 17 CFR 240.15c3–1(a).

[324] *See* 17 CFR 240.15c3–1(c)(2)(i)–(xiii).

[325] *See* 17 CFR 240.15c3–1(c)(15).

[326] *See* 17 CFR 240.15c3–1(c)(2)(vi).

[327] *See, e.g., Uniform Net Capital Rule,* Exchange Act Release No. 13635 (June 16, 1977), 42 FR 31778 (June 23, 1977) (''[Haircuts] are intended to enable net capital computations to reflect the market risk inherent in the positioning of the particular types of securities enumerated in [the rule]''); *Net Capital Rule,* Exchange Act Release No. 22532 (Oct. 15, 1985), 50 FR 42961 (Oct. 23, 1985) (''These percentage deductions, or 'haircuts', take into account elements of market and credit risk that the broker-dealer is exposed to when holding a particular position.''); *Net Capital Rule,* Exchange Act Release No. 39455 (Dec. 17, 1997), 62 FR 67996 (Dec. 30, 1997) (''Reducing the value of securities owned by broker-dealers for net capital purposes provides a capital cushion against adverse market movements and other risks faced by the firms, including liquidity and operational risks.'') (Footnote omitted).

[328] *See* 17 CFR 240.15c3–1(a)(5) and (a)(7); 17 CFR 240.15c3–1e; 17 CFR 240.15c3–1f.

[329] *See* 17 CFR 240.15c3–1(a)(5) and (a)(7). *See also Capital, Margin, and Segregation Requirements for Security-Based Swap Dealers and Major Security-Based Swap Participants and Capital Requirements for Broker-Dealers,* Exchange Act Release No. 68071, 77 FR at 70219 (''[T]he use of internal models to compute net capital can substantially reduce the deductions for securities and money market positions as compared with the standardized haircuts.''); *Alternative Net Capital Requirements for Broker-Dealers that are Part of Consolidated Supervised Entities,* Exchange Act Release No. 49830 (June 8, 2004), 69 FR 34428, 34431 (June 21, 2004) (''We expect that use of the alternative net capital computation will reduce deductions for market and credit risk substantially for broker-dealers that use that method.'').

[330] *See Amendments to Financial Responsibility Rules,* 72 FR at 12871.

[331] *See, e.g.,* Letter from Michael A. Macchiaroli, Associate Director, Division of Market Regulation, Commission, to Elaine Michitsch, Member Firm Operations, NYSE, and Susan DeMando, Director, Financial Operations, NASD Regulation, Inc. (July 11, 2003) (''*Third Party Expense Letter*''); *see also* FINRA Notice to Members 03–63, *Expense-Sharing Agreements* (Oct. 2003) (discussing the issuance of the *Third Party Expense Letter*).

[332] *See Amendments to Financial Responsibility Rules,* 72 FR at 12871.

[333] As adopted, the final rule does not include the ''-'' in the phrase ''third-party.'' In addition, the final rule uses the phrase ''broker or dealer'' in the place of the phrase ''broker-dealer'' (which appeared in two places) to maintain consistency throughout Rule 15c3–1, which uses the phrase ''broker or dealer.''

[334] *See Beer Letter; Levene Letter; Lowenstein Letter; SIFMA 2 Letter; NIBA 2 Letter.*

[335] *See Beer Letter; Levene Letter.*

[336] *See Levene Letter.*

[337] *Id.*

[338] *Id.*

[339] *See Lowenstein Letter; SIFMA 2 Letter.*

[340] *See NIBA 2 Letter.*

[341] *See, e.g., Third Party Expense Letter.*

resources by maintaining records such as the third party's most recent (*i.e.,* as of a date within the previous twelve months) audited financial statements, tax returns, or regulatory filings containing financial reports.[342] Given that the entity to which the broker-dealer is seeking to shift one or more liabilities typically is an affiliate, the staff's experience is that such records should be available to the broker-dealer. Further, because the proposed rule change is consistent with prior staff guidance regarding the need to be able to demonstrate the third party's financial adequacy,[343] a broker-dealer seeking to shift a liability to a third party already would be expected to provide such evidence of the third party's financial resources. For these reasons, the change from staff guidance to Commission rule should not result in implementation and burden concerns of the magnitude raised by the two commenters.[344]

Finally, one commenter noted it would be helpful if the Commission would clarify whether this amendment supersedes the Commission staff guidance in the *Third Party Expense Letter.*[345] Unlike the *PAIB Letter* discussed above, the Commission is not directing the staff to withdraw the *Third Party Expense Letter* on the effective date of these amendments. The *Third Party Expense Letter* will still be relevant as staff guidance, notwithstanding that it contains a condition that has been codified into Rule 15c3–1 (*i.e.,* that an expense of the broker-dealer assumed by a third party will be considered a liability for net capital purposes unless the broker-dealer can demonstrate that the third party has adequate resources independent of the broker-dealer to pay the liability or expense).[346] In particular, the letter contains additional staff guidance not incorporated into the rule that will be relevant as staff guidance with respect to complying with the amendment to Rule 15c3–1 being adopted today. For example, the letter contains staff guidance with respect to the records a broker-dealer would be expected to make, keep current, and preserve under Rules 17a–3 and 17a–4 with respect to broker-dealer liabilities and expenses assumed by a third party, as well as requirements regarding written expense sharing agreements.[347] Broker-dealers can continue to rely on the guidance in the *Third Party Expense Letter* with respect to these matters in complying with today's amendment.

2. Requirement To Subtract From Net Worth Certain Non-Permanent Capital Contributions

In the proposing release, the Commission noted its concern that broker-dealers may be receiving capital contributions from investors that are subsequently withdrawn after a short period of time (often less than a year).[348] In some cases, the capital may be contributed under an agreement giving the investor the option to withdraw it at the investor's discretion. In the past, the Commission has emphasized that capital contributions to broker-dealers should not be temporary,[349] and the Commission staff has explained that a capital contribution should be treated as a liability if it is made with the understanding that the contribution can be withdrawn at the option of the investor.[350]

Consistent with these Commission and staff positions that capital is not temporary,[351] and given the importance of this issue and the Commission's concern that broker-dealers may not be properly treating short-term capital contributions as liabilities, the Commission proposed amending Rule 15c3–1 to add paragraph (c)(2)(i)(G) to further incorporate these positions into the rule.[352] The proposed change would require a broker-dealer to treat as a liability any capital that is contributed under an agreement giving the investor the option to withdraw it or that is contributed with the intent to withdraw the capital within one year. The Commission further proposed that capital withdrawn within one year would be presumptively subject to treatment as a liability (*i.e.,* it would be presumed to have been contributed with the intent to withdraw within one year).[353]

The Commission is adopting the final rule amendment with certain modifications. As adopted, the rule requires that a broker-dealer treat as a liability any capital that is contributed under an agreement giving the investor the option to withdraw it. The rule, as adopted, also requires that a broker-dealer treat as a liability any capital contribution that is intended to be withdrawn within one year of its contribution. In addition, the final rule provides that capital withdrawn within one year of contribution is deemed to have been intended to be withdrawn within one year unless the broker-dealer receives permission in writing for the withdrawal from its DEA.[354] The ability of a broker-dealer to seek permission in writing from its DEA to withdraw capital contributed within one year will provide a means for firms to seek to withdraw capital in limited circumstances after review by its DEA without having to reclassify the withdrawn capital as a liability for net capital purposes.[355]

In the final rule, the Commission has modified the proposed language by moving the qualifier that the DEA can approve a withdrawal so that it modifies this presumption. Specifically, as proposed, the rule provided that a contribution of capital had to be subtracted from net worth if it ''is

[342] *See Amendments to Financial Responsibility Rules,* 72 FR at 12872. The Commission specifically requested comment regarding the records by which a broker-dealer could demonstrate financial resources. It received no comments in response to this request.

[343] *See, e.g., Third Party Expense Letter.*

[344] *See Lowenstein Letter; SIFMA 2 Letter.*

[345] *See SIFMA 2 Letter.*

[346] *See Third Party Expense Letter,* at 2–3.

[347] *Id.*

[348] *See Amendments to Financial Responsibility Rules,* 72 FR at 12873.

[349] *See Net Capital Rule,* Exchange Act Release No. 28927 (Feb. 28, 1991), 56 FR 9124 (Mar. 5, 1991). *See also Study of Unsafe and Unsound Practices of Broker-Dealers, Report and Recommendations of the Securities and Exchange Commission,* H.R. Doc. No. 92–231 (1971), at 17, 42 (recommending improvement of adequacy and permanency of capital) (''During the 1967–1970 period under review, many broker-dealers, some of them large retail houses, were found to have inadequate and impermanent capital in relation to their business.'').

[350] Letter from Michael A. Macchiaroli, Associate Director, Division of Market Regulation, Commission, to Raymond J. Hennessy, Vice President, NYSE, and Susan DeMando, Vice President, NASD Regulation, Inc. (Feb. 23, 2000) (''*Temporary Capital Letter*'') (''It is the view of the Division that, for net capital purposes, if an individual investor contributes capital to a broker-dealer with an understanding that the contribution can be withdrawn at the option of the individual investor, the contribution may not be included in the firm's net capital computation and must be re-characterized as a liability. Any withdrawal of capital as to that investor within a period of one year, other than a withdrawal described in paragraph (e)(4)(iii) of Rule 15c3–1, shall be presumed to have been contemplated at the time of the contribution.'') (footnote omitted); *see also Net Capital Rule,* Exchange Act Release No. 28927 (Feb. 28, 1991), 56 FR 9124 (Mar. 5, 1991).

[351] *See Net Capital Rule,* Exchange Act Release No. 28927 (Feb. 28, 1991), 56 FR 9124 (Mar. 5, 1991).

[352] *See Amendments to Financial Responsibility Rules,* 74 FR at 12871–12872.

[353] *Id.*

[354] These requirements will not apply to withdrawals covered by paragraph (e)(4)(iii) of Rule 15c3–1, namely, withdrawals used to make tax payments or to pay reasonable compensation to partners. *See* 17 CFR 240.15c3–1(e)(4)(iii). These types of payments are ordinary business expenditures and do not raise the types of concerns the proposed rule is designed to address. One commenter suggested that the rule be amended to explicitly exclude any withdrawals that would fall under paragraph (e)(4)(iii) of Rule 15c3–1.

[355] *See* FINRA Rule 4110(c)(1) (providing, in part, that no equity capital of a member may be withdrawn for a period of one year from the date such equity capital is contributed, unless otherwise permitted by FINRA in writing).

intended to be withdrawn within a period of one year unless the withdrawal has been approved in writing by the Examining Authority for the broker or dealer.'' As adopted, the rule provides that ''[a]ny withdrawal of capital made within one year of its contribution is deemed to have been intended to be withdrawn within a period of one year, unless the withdrawal has been approved in writing by the Examining Authority for the broker or dealer.'' [356] The change is intended to eliminate a potential ambiguity in the proposal as to whether a withdrawal of capital within one year could ever be approved by the firm's DEA and, therefore, afford the intended relief from the deduction.[357]

The Commission received five comments regarding the amendment to paragraph (c)(2)(i)(G)(*2*) of Rule 15c3–1.[358] In addition to the general request for comment included in the proposing release, the Commission also requested specific comment on whether the time period within which withdrawn and intended-to-be-withdrawn contributions must be treated as liabilities should be longer than one year.[359] While the commenters agreed in principle that contributions of capital to broker-dealers should not be subject to withdrawal at will, they expressed concerns regarding the negative effect that overly restrictive limitations on withdrawals of capital could have on obtaining capital contributions and, therefore, on the financial health of broker-dealers. One commenter, a registered broker-dealer, stated that it believed that the amendment would raise its cost of capital to the point where it would be impossible to obtain capital from unrelated third parties at all.[360] Two commenters also expressed concerns about the potential burden posed by the amendment to broker-dealers in need of capital.[361] One suggested the addition of exceptions to the rule for *de minimis* withdrawals and dividends or distributions.[362] Another commenter suggested that the proposal should be amended to exclude a redemption right—a form of option—provided to the investor in connection with the investor's capital contribution to the broker-dealer, where (i) the redemption right may only be exercised by the investor commencing more than one year following the date of the capital contribution to the broker-dealer and (ii) the redemption right would not be mandatorily redeemable.[363]

Another commenter opposed the rule, stating that it contravenes pertinent legal and accounting standards and is unnecessary in view of existing capital withdrawal limitations and notification requirements.[364] This commenter stated that neither GAAP nor Rule 15c3–1 contain a requirement that capital must be permanent, and the word ''capital'' has no intrinsic meaning that requires it to be permanent.[365] This commenter stated that if any further limitations on capital withdrawals are adopted beyond the current provisions of the net capital rule, they should be designed to allow for the ability of broker-dealer holding companies to withdraw excess net capital at their option for legitimate purposes.[366]

The fifth commenter agreed that there should be no circumstance in which a broker-dealer accepted a capital contribution for net capital purposes that could be withdrawn at the option of the investor.[367] This commenter, however, also stated that the standard for withdrawals should be shortened from one year to nine or six months to increase the availability of funds from investors and owners, allowing more broker-dealers to raise capital and strengthen their financial stability.[368] The commenter requested that the Commission consider the needs of small firms that it said likely will require additional net capital over the next decade.[369]

In response to the commenters' concerns about firms' ability to obtain capital and that the amendment contravenes pertinent legal and accounting standards, the amended rule merely clarifies what constitutes a broker-dealer's permanent capital under Rule 15c3–1 and further emphasizes the requirement that capital contributions cannot be temporary.[370] Rule 15c3–1 imposes a capital standard that is distinct from the use of the term ''capital'' in other legal and accounting contexts, and the rule amendments under paragraph (c)(2)(i)(G) of Rule 15c3–1 are consistent with the Commission's and staff's views that capital under Rule 15c3–1 should not be temporary.[371]

[356] *See* paragraph (c)(2)(i)(G)(*2*) of Rule 15c3–1, as adopted.

[357] The phrase ''to the broker or dealer'' following ''one year of its contribution'' is not included in the final rule because it would be redundant, as the contributions covered in the amendment all involve contributions to the broker-dealer.

[358] *See Chicago Capital Management Letter; SIFMA 2 Letter; American Bar Association Letter; SIG Letter; NIBA 2 Letter.*

[359] *See Amendments to Financial Responsibility Rules,* 72 FR at 12871–12872.

[360] *See Chicago Capital Management Letter.*

[361] *See American Bar Association Letter; SIFMA 2 Letter.*

[362] *See SIFMA 2 Letter.*

[363] *See American Bar Association Letter.*

[364] *See SIG Letter.*

[365] *Id.*

[366] *Id.*

[367] *See NIBA 2 Letter.*

[368] *Id.*

[369] *Id.* The commenter also stated that rules that ''restrict small broker-dealers from raising capital as a result of uncertainty of investors or owner-operators related to the return of their capital in a reasonable time frame will create a disproportionate and impossible hurdle for small broker-dealers to overcome.'' *Id.*

[370] *See Net Capital Rule,* Exchange Act Release No. 28927 (Feb. 28, 1991) (''The Commission wishes to emphasize that the net capital maintained in a broker-dealer should be permanent capital and not merely a temporary infusion of funds from an affiliate or other sources. For example, there are instances where a broker-dealer receives funds from an affiliate in an amount that would enable the broker-dealer to engage in a transaction that it would otherwise be prohibited from doing because of minimum net capital requirements. If the funds are transferred back to the affiliate within a relatively short period of time after the transaction, the Commission questions whether the funds transferred into the broker-dealer entity could properly be characterized as capital of the firm. Instead, the transaction could be viewed as a loan by the affiliate to the broker-dealer, with the result that the broker-dealer would have to treat the transaction as a liability.''). *See also Net Capital Requirements for Brokers and Dealers,* Exchange Act Release No. 18417 (Jan. 13, 1982), 47 FR 3512 (Jan. 25, 1982) (describing subordination agreement requirements under Appendix D to Rule 15c3–1, including that, among other things, no prepayment may be made (except under the strictly defined limitations of paragraph (c)(5) of Appendix D) before the expiration of one year from the effective date of the subordination agreement, and noting this provision was designed to insure the adequacy as well as the permanence of capital in the industry.); *Temporary Capital Letter; Study of Unsafe and Unsound Practices of Broker-Dealers, Report and Recommendations of the Securities and Exchange Commission,* H.R. Doc. No. 92–231 (1971) (recommending improvement of adequacy and permanency of capital); and Letter from Nelson Kibler, Assistant Director, Division of Market Regulation to John Pinto, National Association of Securities Dealers, Inc. (Sept. 8, 1980).

[371] *See Study of Unsafe and Unsound Practices of Broker-Dealers, Report and Recommendations of the Securities and Exchange Commission,* H.R. Doc. No. 92–231 (1971), at p. 15 (''The unfortunate use of the term ''net capital'' in the financial responsibility rules of the Commission and the various exchanges resulted in a semantic confusion which too frequently has led to the mistaken belief that a broker-dealer's net capital is the equivalent of or has some relationship to the concept of ''capital'', as that term is commonly understood. ''Net Capital'' applies only to a hard core residue of net liquid assets designed to enable a broker-dealer to meet all rightful current demands of customers for their funds and securities.''). *See also Capital, Margin, and Segregation Requirements for Security-Based Swap Dealers and Major Security-Based Swap Participants and Capital Requirements for Broker-Dealers,* 77 FR at 70230 (''The net liquid assets test is imposed through the mechanics of how a broker-dealer is required to compute net capital pursuant to Rule 15c3–1. These requirements are set forth in paragraph (c)(2) of Rule 15c3–1, which defines the term *net capital.* The first step is to compute the broker-dealer's net worth under GAAP. Next, the broker-dealer must make certain adjustments to its net worth to calculate net capital. These adjustments are designed to leave the firm in a position where each dollar of unsubordinated liabilities is matched by more than a dollar of highly liquid assets. There are thirteen categories of net worth adjustments required by the rule.'') (footnotes omitted).

The Commission also considered the commenter's suggestion that there be exceptions for *de minimis* withdrawals, dividends, or distributions. As previously stated, however, the Commission has emphasized that capital contributions should not be temporary.[372] Moreover, paragraph (e) of Rule 15c3–1 already contains mechanisms to permit a broker-dealer to make capital withdrawals for specified purposes.[373] Finally, if a broker-dealer believes it has a basis to appropriately withdraw capital within one year of contribution because, for example, the withdrawal would be *de minimis,* the final rule provides a mechanism for the broker-dealer to seek permission in writing from its DEA to make such a withdrawal.[374]

With respect to a commenter's view that the standard for withdrawal should be less than one year (*e.g.,* six or nine months), the Commission continues to believe that one year is an appropriate amount of time that a broker-dealer must retain a contribution in order to classify it as capital and not a liability. This is the standard that the Commission staff and FINRA have applied for a number of years and there is no compelling reason to change it.[375] Because the final rule change is an incorporation of, among other things, existing Commission staff guidance into Rule 15c3–1, the requirement should not significantly alter current practice.

Moreover, with respect to commenters' concerns about the ability to obtain capital, the rule does not prohibit an investor from withdrawing capital at any time. It prohibits a broker-dealer from treating temporary cash infusions as capital for purposes of Rule 15c3–1. Finally, as stated above, the final rule provides a mechanism for a broker-dealer to apply to its DEA to make a withdrawal without triggering the deduction.[376] This provides a process for firms to affect withdrawals within one year where appropriate.

In summary, the Commission is adding paragraph (c)(2)(i)(G) to Rule 15c3–1 to require a broker-dealer to subtract from net worth any contribution of capital to the broker or dealer: ''(*1*) [u]nder an agreement that provides the investor with the option to withdraw the capital; or (*2*) [t]hat is intended to be withdrawn within a period of one year of contribution.'' [377] The final rule further provides that ''[a]ny withdrawal of capital made within one year of its contribution is deemed to have been intended to be withdrawn within a period of one year, unless the withdrawal has been approved in writing by the Examining Authority for the broker or dealer.'' [378]

3. Requirement To Deduct the Amount by Which a Fidelity Bond Deductible Exceeds SRO Limits

Under SRO rules, certain broker-dealers that do business with the public or that are required to become members of SIPC must comply with mandatory fidelity bonding requirements.[379] SRO rules typically permit a broker-dealer to have a deductible provision included in the bond; however, such rules provide that the deductible may not exceed certain amounts. With regard to firms that maintain deductible amounts over the maximum amount specified, several SRO rules provide that the broker-dealer must deduct this excess amount from its net worth when calculating net capital under Rule 15c3–1.[380] Other SROs require that any deductible amount elected by a broker-dealer that is greater than 10% of the coverage purchased by the broker-dealer must be deducted from the broker-dealer's net worth when calculating net capital under Rule 15c3–1.[381]

Rule 15c3–1, however, does not specifically reference the SRO deductible requirements as a charge to net worth. Therefore, a broker-dealer would not be required to account for the deduction required by an SRO rule in computing net capital under Rule 15c3–1 or in the net capital computation reflected on the broker-dealer's FOCUS report. To address this inconsistency, the Commission proposed to amend Rule 15c3–1 to add paragraph (c)(2)(xiv) to require a broker-dealer to deduct, with regard to fidelity bonding requirements, the amount required by the rules of the broker-dealer's DEA, *i.e.,* the amount in excess of the deductible prescribed in the applicable DEA's fidelity bond rule.[382] The Commission received one comment supporting the proposal and one opposing it.[383] The commenter opposing the amendment noted that amending Rule 15c3–1 to conform to FINRA Rule 4360 would create an increase in minimum net capital requirements for some broker-dealers.[384]

SRO rules prescribing fidelity bond deductibles, and capital charges for deductibles in excess of a certain amount, are designed to incentivize broker-dealers to carry fidelity bonds with a deductible low enough to help ensure customer protection. Moreover, in response to the comment that this amendment would increase minimum net capital requirements, the Commission notes that broker-dealers that are members of an SRO with such a fidelity bonding rule already must account for the deduction in complying with the net capital requirements of the SROs and nothing in the Commission's amendment to paragraph (c)(2)(xiv) of Rule 15c3–1 would alter this status quo. Rather, the proposed rule change would conform the capital calculation under paragraph (c)(2)(xiv) of Rule 15c3–1 to that required by the broker-dealer's SRO.

For these reasons, the Commission is adopting paragraph (c)(2)(xiv) to Rule 15c3–1 with technical revisions to the proposed rule text to make the text of

[372] *See Study of Unsafe and Unsound Practices of Broker-Dealers, Report and Recommendations of the Securities and Exchange Commission,* H.R. Doc. No. 92–231 (1971), at p. 15; *Capital, Margin, and Segregation Requirements for Security-Based Swap Dealers and Major Security-Based Swap Participants and Capital Requirements for Broker-Dealers,* 77 FR at 70230.

[373] *See* 17 CFR 240.15c3–1(e)(1)(iii)(B) and (e)(4)(iii). *See also Amendments to Financial Responsibility Rules,* 72 FR at 12872, n.79 (''These requirements would not apply to withdrawals covered by paragraph (e)(4)(iii) of Rule 15c3–1, namely, withdrawals used to make tax payments or pay reasonable compensation to partners. These types of payments are ordinary business expenditures and do not raise the types of concerns the proposed rule is designed to address.'').

[374] *See* paragraph (c)(2)(i)(G)(*2*) of Rule 15c3–1, as adopted.

[375] *See Temporary Capital Letter;* FINRA Rule 4110(c)(1) (''No equity capital of a member may be withdrawn for a period of one year from the date such equity capital is contributed, unless otherwise permitted by FINRA in writing.''). *See also* Exchange Act Release No. 60933 (Nov. 4, 2009), 74 FR 58334 (Nov. 12, 2009) (SR–FINRA–2008–067); *Net Capital Rule,* Exchange Act Release No. 28927 (Feb. 28, 1991) (emphasizing ''that the net capital maintained in a broker-dealer should be permanent capital and not merely a temporary infusion of funds from an affiliate or other sources'').

[376] The final rule does not distinguish between complete and partial withdrawals of capital and, consequently, the deduction could be triggered in either event. Moreover, a partial withdrawal would require a deduction of the full amount of the original contribution as it would indicate that the contribution was merely temporary in nature.

[377] *See* paragraph (c)(2)(i)(G) of Rule 15c3–1, as adopted.

[378] *Id.*

[379] *See, e.g.,* FINRA Rule 4360, CBOE Rule 9.22, and NASDAQ OMX PHLX Rule 705. SRO fidelity bonding requirements typically contain agreements covering areas such as: a ''Fidelity'' insuring clause to indemnify against loss of property through dishonest or fraudulent acts of employees; an ''On Premises'' agreement insuring against losses resulting from crimes such as burglary and theft and from misplacement of property of the insured; an ''In Transit'' clause indemnifying against losses occurring while property is in transit; a ''Forgery and Alteration'' agreement insuring against loss due to forgery or alteration of various kinds of negotiable instruments; and a ''Securities Loss'' clause protecting against losses incurred through forgery and alteration of securities. *Id.*

[380] *See, e.g.,* CBOE Rule 9.22.

[381] *See, e.g.,* FINRA Rule 4360.

[382] *See* 17 CFR 240.15c3–1(c)(12) (defining *examining authority* for purposes of Exchange Act Rule 15c3–1).

[383] *See SIFMA 2 Letter; NIBA 2 Letter.*

[384] *See NIBA 2 Letter.*

the final rule, as adopted, a more generic cross reference to SRO fidelity bond requirements. The technical changes are designed to increase the flexibility of the final rule so that revisions to SRO fidelity bond requirements pursuant to section 19(b) of the Exchange Act [385] will not require conforming amendments to paragraph (c)(2)(xiv) of Rule 15c3–1.[386] More specifically, the proposed rule text, as set forth in the proposing release, would have required the broker-dealer to deduct ''with respect to fidelity bond coverage, the excess of any deductible amount over the maximum deductible amount permitted by the Examining Authority for the broker or dealer.'' [387] The final rule, as adopted, provides that the broker-dealer must deduct ''the amount specified by rule of the Examining Authority for the broker or dealer with respect to a requirement to maintain fidelity bond coverage.'' [388] Thus, the final rule does not include the phrase ''maximum permissible deductible amounts.'' This phrase was borrowed from SRO fidelity bond rules. Because the construction of the SRO rules may change over time, the Commission is making the cross-reference to the SRO rules more general.[389]

4. Broker-Dealer Solvency Requirement

The Commission is adopting an amendment to paragraph (a) of Rule 15c3–1 to require a broker-dealer to cease conducting a securities business if certain insolvency events were to occur. Specifically, as adopted, amended paragraph (a) of Rule 15c3–1 provides that a broker-dealer must not be *insolvent* as that term is defined in new paragraph (c)(16) of the rule.[390] By making solvency a requirement of Rule 15c3–1, this amendment will require an insolvent [391] broker-dealer to cease conducting a securities business pursuant to section 15(c)(3) of the Exchange Act, which generally prohibits a broker-dealer from effecting any transaction in, or inducing or attempting to induce the purchase or sale of, any security in contravention of the Commission's financial responsibility rules (which include Rule 15c3–1).[392]

As proposed, paragraph (c)(16) of Rule 15c3–1 would have defined the term *insolvent* as, among other things, a broker-dealer's placement in a voluntary or involuntary bankruptcy or similar proceeding; the appointment of a trustee, receiver, or similar official; a general assignment by the broker-dealer for the benefit of its creditors; an admission of insolvency; or the inability to make computations necessary to establish compliance with Rule 15c3–1.[393] As discussed more specifically below, the Commission modified paragraph (c)(16) of Rule 15c3–1 in the final rule in response to concerns raised by commenters.

In the proposing release, the Commission solicited comment on whether there are other insolvency events that should be captured in the proposed definition.[394] One commenter noted that involuntary insolvency proceedings do not necessarily indicate that the broker-dealer is insolvent, as such proceedings can be frivolous, malicious, or otherwise lacking in merit.[395] The commenter also noted that industry standard contract forms generally provide a grace period for a party to such a proceeding to obtain a stay or dismissal before an event of default is deemed to occur.[396] In response to this comment, the Commission notes that the number of broker-dealer bankruptcy filings (voluntary or involuntary) is small, and therefore, the institution of a frivolous involuntary proceeding involving a broker-dealer likely is a very rare event. Thus, the Commission must consider the potential need for an automatic grace period to address the potential for a frivolous involuntary bankruptcy as well as the harm that could result from allowing a broker-dealer to continue to effect securities transactions for a period of time even though it is properly the subject of a bankruptcy proceeding. The Commission believes the more appropriate approach is to address potentially frivolous proceedings on a case-by-case basis. In the event that a case arises where there would be a need to fashion relief for a broker-dealer that was the subject of a frivolous or meritless involuntary petition, the Commission's existing authority permits it sufficient flexibility to fashion exemptions under appropriate circumstances.[397]

In addition to the comment discussed above, the Commission received four other comment letters that addressed these amendments.[398] One commenter objected to the amendments as unnecessary, citing the Rule 15c3–1 prohibition on broker-dealers effecting securities transactions if their net capital is below certain minimums and noting that a broker-dealer that was insolvent would ''by definition'' be below those minimums.[399] In response to this comment, the Commission notes that the purpose of the amendment is to address cases where a broker-dealer is subject to an insolvency event but takes the position that it is in compliance with the net capital rule. While such instances may be rare, an insolvent broker-dealer could seek the protection of the bankruptcy laws but continue to effect transactions with the public, potentially jeopardizing customers and other creditors of the broker-dealer, including counterparties.

Another commenter requested that the Commission modify the definition of *insolvent* to carve out market-wide disruptions that prevent the computation of net capital but are unrelated to the solvency of the broker-dealer.[400] In response to this suggestion, the Commission notes that if appropriate and necessary, such an event can be addressed through the Commission's exemptive authority, rather than by a specific exception in the rule.

One commenter, while supporting the amendment, objected to the incorporation of the definition of *insolvent* from section 101 of the Bankruptcy Code.[401] This commenter argued a bankruptcy-based standard for insolvency was appropriate for a notice requirement but that the proper standard for determining whether a broker-dealer should be prohibited from continuing to conduct a securities business is its amount of net capital. As noted above, allowing an insolvent

[385] 15 U.S.C. 78s(b).

[386] *See, e.g.,* FINRA Rule 4360.

[387] *See, e.g., Amendments to Financial Responsibility Rules,* 72 FR at 12872.

[388] *See* paragraph (c)(2)(xiv) of Rule 15c3–1, as adopted.

[389] *See, e.g.,* FINRA Rule 4360. *See also* Exchange Act Release No. 63961 (Feb. 24, 2011), 76 FR 11542 (Mar. 2, 2011).

[390] The final rule also has been modified by replacing the word ''shall'' with the word ''must.''

[391] The definition of *insolvent* is intended to be broad enough to encompass any type of insolvency proceeding or condition of insolvency; for example, the proposed definition incorporates concepts of insolvency in the U.S. Bankruptcy Code and SIPA. *See* 11 U.S.C. 101; 15 U.S.C. 78eee(b)(1).

[392] 15 U.S.C. 78o.

[393] *See Amendments to Financial Responsibility Rules,* 72 FR at 12872–12873. A broker-dealer's inability to make computations necessary to establish compliance with Rule 15c3–1 may also impact the broker-dealer's ability to make the computations necessary to establish compliance with Rule 15c3–3 and vice versa. *See, e.g.,* Rule 15c3–1(a)(1)(ii) (incorporating computations under Rule 15c3–3 into the minimum net capital requirement).

[394] *See Amendments to Financial Responsibility Rules,* 72 FR at 12873.

[395] *See SIFMA 2 Letter.*

[396] *Id.*

[397] *See* 15 U.S.C. 78mm(a). *See also* 17 CFR 240.15c3–1(b)(3).

[398] *See SIPC Letter; St. Bernard Financial Services Letter; American Bar Association Letter; Cornell Letter.*

[399] *See St. Bernard Financial Services Letter.*

[400] *See American Bar Association Letter.*

[401] *See SIFMA 2 Letter.*

broker-dealer to continue conducting a securities business during the period of its insolvency, notwithstanding its net capital position, could jeopardize customers and other market participants because a broker-dealer that has made an admission of insolvency, or is otherwise deemed insolvent or entitled to protection from creditors, does not possess the financial resources necessary to operate a securities business.[402] Continuing to operate in such circumstances poses a significant credit risk to counterparties and to the clearance and settlement system, and, in the event the firm subsequently is placed in a liquidation proceeding under SIPA, may impair the ability of the SIPA trustee to make customers of the broker-dealer whole and satisfy claims of other creditors out of the assets of the general estate.[403]

In addition, this commenter also was concerned that under the proposed amendment a firm would be prevented from effecting hedging or liquidating transactions intended to reduce the risk the firm poses to the financial markets and its customers. The commenter noted that such limitations also would be at odds with section 5(a)(2) of SIPA, which contemplates that a broker-dealer that is in, or approaching, financial difficulty may undertake to liquidate or reduce its business either voluntarily or pursuant to the direction of an SRO.[404] The final rule amendment is not intended to affect in any a broker-dealer's ability to act under section 5(a)(2) of SIPA.[405]

In addition, the Commission is amending the final rule to incorporate within the term *insolvency* the circumstance in which a broker-dealer is unable to make such computations as may be necessary to establish compliance with Rule 15c3–3.[406] In the proposing release, the Commission stated that the ''proposed definition of 'insolvent' is intended to be broad enough to encompass any type of insolvency proceeding or condition of insolvency,''[407] and noted that the proposed definition incorporates concepts of insolvency from the U.S. Bankruptcy Code and SIPA.[408] Consequently, consistent with the discussion in the proposing release, the modification in the final rule will more closely align the definition of *insolvent* under paragraph (c)(16) of Rule 15c3–1 with the grounds for the commencement of a proceeding under SIPA,[409] which includes the circumstance that a broker-dealer is unable to make computations necessary to establish compliance with the financial responsibility or hypothecation rules.[410] Rule 3a40–1 defines the term *financial responsibility rules* to include, among others, any rule adopted by the Commission pursuant to section 15(c)(3) of the Exchange Act—Rules 15c3–1 and 15c3–3 were adopted under section 15(c)(3). As a financial responsibility rule, the inability of a broker-dealer to make a computation necessary to establish compliance with Rule 15c3–3 constitutes a basis for commencing a SIPA proceeding. Consequently, this modification to the proposed definition of *insolvency* under paragraph (c)(16) of Rule 15c3–1 will more closely align the definition with SIPA.[411]

The Commission also is adopting an amendment to the first sentence of paragraph (b)(1) of Rule 17a–11 to require that a broker-dealer meeting the definition of *insolvent* must provide immediate notice to the Commission, the firm's DEA and, if applicable, the CFTC. One commenter specifically favored this amendment.[412] This notice will assist regulators in taking steps to protect the insolvent firm's customers, including, if appropriate, notifying SIPC of the need to commence a SIPA proceeding. The Commission is adopting the amendment to paragraph (b)(1) of Rule 17a–11, with one technical modification.[413]

5. Amendment To Rule Governing Orders Restricting Withdrawal of Capital From a Broker-Dealer

Paragraph (e) of Rule 15c3–1, which places certain conditions on a broker-dealer when withdrawing capital,[414] also allows the Commission to issue an order temporarily restricting a broker-dealer from withdrawing capital or making loans or advances to stockholders, insiders, and affiliates under certain circumstances.[415] The rule, however, limits such orders to withdrawals, advances, or loans that, when aggregated with all other withdrawals, advances, or loans on a net basis during a 30 calendar day period, exceed 30 percent of the firm's excess net capital.[416] When the Commission adopted this paragraph of Rule 15c3–1 more than 20 years ago, the Commission stated that it intended this section to be applied only where the continued viability of a broker-dealer appeared to be at stake.[417] In the ensuing years, the Commission has utilized this provision only one time.[418] The Commission has determined that the requirement is difficult to enforce, as it generally would not be clear when the 30% threshold had been reached, due to the inherent unreliability of a troubled broker-dealer's books and records. Consequently, the Commission proposed, and is adopting, a change to delete this provision and instead to allow the Commission to restrict all withdrawals, advances, and loans so long as the other conditions under the rule (all of which remain unchanged) are met.[419]

The Commission received three comment letters addressing this proposal.[420] One commenter supported the deletion of the 30% threshold, but believed its removal reflected the

[402] *See Amendments to Financial Responsibility Rules,* 72 FR at 12872.

[403] *Id.*

[404] *See SIFMA 2 Letter; SIPC Letter. See also* 15 U.S.C. 78eee(a)(5).

[405] *See*15 U.S.C. 78eee(a)(5). Further, the amendment is not intended to affect in any way a SIPA trustee's ability to liquidate a broker-dealer. Effectively, a SIPA trustee steps into the shoes of the debtor broker-dealer in order to liquidate the broker-dealer and protect its customers' interests.

[406] The final rule adds the phrase ''or with § 240.15c3–3'' to follow the phrase ''[i]s unable to make such computations as may be necessary to establish compliance with this section.'' *See* paragraph (c)(16)(iv) of Rule 15c3–1. *See also generally, SIPC Letter* (favoring an amendment requiring broker-dealers to cease doing business if *insolvent* as defined under proposed Rule 15c3-l(c)(16) and noting that the circumstances under which the broker would be required to cease doing business are consistent with the circumstances under which SIPC may seek to place a firm in liquidation).

[407] *See Amendments to Financial Responsibility Rules,* 72 FR at 12872.

[408] *Id.* at n.85.

[409] *See* 15 U.S.C. 78eee(b).

[410] *See* 15 U.S.C. 78eee(b)(l)(D). *See also* 17 CFR 240.3a40–1 (defining the term *financial responsibility rules* for purposes of SIPA to include Rule 15c3–3).

[411] The Commission also has made three technical modifications to the text of the *insolvency* definition. In response to a comment, the phrase ''broker-dealer'' was replaced with the phrase ''broker or dealer'' to be consistent with the use of the phrase in Rule 15c3–1. In addition, the phrase ''for purposes of this section'' was moved to the beginning of paragraph (c)(16) in order to clarify that the term *insolvency* is defined for purposes of Rule 15c3–1 in its entirety. Finally, the final rule does not include the phrase ''whether commenced voluntarily or involuntarily'' because the phrase would be redundant.

[412] *See SIPC Letter.*

[413] The Commission is deleting the phrase ''paragraph (c)(16) of'' and inserting ''(c)(16)'' immediately following the second ''15c3–1''.

[414] *See* 17 CFR 240.15c3–1(e).

[415] *See* 17 CFR 240.15c3–1(e)(3).

[416] *Id.*

[417] *Net Capital Rule,* Exchange Act Release No. 28927 (Feb. 28, 1991), 56 FR 9124, 9128 (Mar. 5, 1991).

[418] *Order Regarding Withdrawals, Unsecured Loans or Advances from Refco Securities, LLC and Refco Clearing, LLC,* Exchange Act Release No. 52606 (Oct. 13, 2005).

[419] The Commission also proposed revising the second sentence in paragraph (e)(3)(ii) to remove the text ''The hearing'' and in its place adding the text ''A hearing on an order temporarily prohibiting the withdrawal of capital.''

[420] *See NIBA 2 Letter; SIFMA 2 Letter; Raymond James 2 Letter.*

Commission's desire to regulate large firms with complex capitalization without considering the needs of smaller firms.[421] This commenter recommended the Commission set forth all conditions required for a firm to withdraw, repay, or redeem any amount that affects its overall capitalization.[422] Specifically, the commenter suggested the following non-exclusive list of conditions for consideration: (1) ''[r]egulatory minimum capital requirement related to all lines of business''; (2) ''[e]xcess mandated by that firms' accruals for that period''; (3) ''[e]xcess mandated by the firms' upcoming one-time non-recurring costs within that quarter''; (4) ''[e]xcess mandated by operating costs expected[,] but not related to accruals for that period''; (5) [c]osts related to increased personnel coverage or recruitment within that quarter''; and (6) ''[d]etermination of the Board of the firm that there is no reasonable expectation at the time of its approval of the capital withdrawal, repayment or redemption, that the firm would be required to, or advisable to, increase its net capital excess.''

The second commenter recommended several modifications to the amendment, including: (1) Clarifying that in addition to ordering complete restrictions on withdrawals, advances, and loans, the Commission may also issue orders imposing partial or conditional restrictions; (2) explicitly permitting certain types of withdrawals, advances, or loans, such as those in paragraphs (e)(4)(ii) and (iii) of Rule 15c3–1 (*e.g.,* required tax payments or payments to partners for reasonable compensation) even after the issuance of a temporary restrictive order; and (3) clarifying that the provision in paragraph (e)(3)(ii) of the rule allowing a broker-dealer to request and receive a hearing on an order temporarily restricting withdrawals also applies to orders temporarily restricting advances and loans (in addition to withdrawals).[423]

Finally, the third commenter noted that the proposed amendment would eliminate the 30% requirement limit and allow the Commission to restrict all withdrawals, advances, and loans under specific circumstances.[424] The commenter believes this action will impose an additional compliance burden on broker-dealers and will significantly limit the flexibility of broker-dealers in the event of a liquidity crisis.[425]

In response to these comments, the Commission notes that the 30% threshold pertains only to paragraph (e)(3)(i) of Rule 15c3–1, which relates to the Commission's authority to temporarily restrict withdrawals of net capital. The Commission cannot impose these restrictions without concluding under subparagraph (e)(3)(i) that ''such withdrawal, advance or loan may be detrimental to the financial integrity of the broker or dealer, or may unduly jeopardize the broker or dealer's ability to repay its customer claims or other liabilities which may cause a significant impact on the markets or expose the customers or creditors of the broker or dealer to loss without taking into account the application of the Securities Investor Protection Act of 1970.''[426] While paragraph (e)(3)(i) of Rule 15c3–1 would apply to all broker-dealers, the conditions under which the Commission may exercise its authority under the rule apply only to circumstances where the continued viability of the broker-dealer appears to be at stake.[427] As noted above, the Commission has only utilized this provision once.[428]

The Commission, however, agrees with the importance of maintaining flexibility in the context of ordering restrictions on withdrawals, advances, and loans. Therefore, the Commission is modifying the amendment, as adopted, to add language to paragraph (e)(3)(i) to state (following the phrase ''employee or affiliate'') that such orders will be issued, ''under such terms and conditions as the Commission deems necessary or appropriate in the public interest or consistent with the protection of investors. . . .''[429] With respect to the suggestion that the Commission explicitly permit certain types of withdrawals, advances, or loans even after the issuance of a temporary order, the Commission does not believe that it would be appropriate to permit—by codifying in the rule—a broker-dealer to take the actions described if the Commission has issued an order placing temporary restrictions on a broker-dealer's ability to withdraw net capital under paragraph (e)(3) of the rule. The order would be intended to protect the customers and creditors of the broker-dealer, and permitting the actions by rule could undermine those protections. Moreover, there is no need to explicitly permit certain types of withdrawals, advances or loans because if there were circumstances that merited the broker-dealer making such payments, the Commission order could be fashioned as appropriate to permit those payments.

With respect to the suggestion that the Commission clarify in paragraph (e)(3)(ii) of Rule 15c3–1 that a broker-dealer may request and receive a hearing on orders temporarily restricting advances and loans (in addition to withdrawals), under the existing rule, a broker-dealer may request a hearing if the Commission has issued an order temporarily restricting advances and loans by a broker-dealer, in addition to withdrawals, and the Commission is therefore adopting the amendment to paragraph (e)(3)(ii), as proposed.[430]

6. Adjusted Net Capital Requirements

i. Amendment to Appendix A of Rule 15c3–1

The Commission is adopting an amendment to Appendix A of Rule 15c3–1, which permits broker-dealers to employ theoretical option pricing models to calculate haircuts for listed options and related positions that hedge those options.[431] The amendment makes permanent a temporary amendment the Commission originally adopted in 1997.[432] The temporary amendment expired on September 1, 1997, unless it was otherwise extended by the Commission.[433] The Commission staff subsequently issued a no-action letter on January 13, 2000, which stated that the staff would not recommend enforcement action if broker-dealers continued to rely on the temporary amendment.[434]

[421] *See NIBA 2 Letter.* As noted above, the 30% threshold provision only applied in emergency situations and has only been used once before. As such, its deletion should only affect a limited number of broker-dealers.

[422] *Id.*

[423] *See SIFMA 2 Letter.*

[424] *See Raymond James 2 Letter.*

[425] *Id.*

[426] *See* paragraph (e)(3)(i) of Rule 15c3–1, as adopted.

[427] *Net Capital Rule,* Exchange Act Release No. 28927 (Feb. 28, 1991), 56 FR 9124, 9128 (Mar. 5, 1991).

[428] *Order Regarding Withdrawals, Unsecured Loans or Advances from Refco Securities, LLC and Refco Clearing, LLC,* Exchange Act Release No. 52606 (Oct. 13, 2005).

[429] *See* paragraph (e)(3)(i) of Rule 15c3–1, as adopted. *See also* 17 CFR 15c3–1(e). *See generally,* 15 U.S.C. 78mm(a)(1).

[430] 17 CFR 240.15c3–1(e)(3)(ii). The Commission also is adopting revisions to the second sentence of paragraph (e)(3)(ii), replacing the phrase ''The hearing'' with the phrase ''A hearing on an order temporarily prohibiting the withdrawal of capital.''

[431] 17 CFR 240.15c3–1a.

[432] *See Net Capital Rule,* Exchange Act Release No. 38248 (Feb. 6, 1997), 62 FR 6474 (Feb. 12, 1997).

[433] *See* 17 CFR 15c3–1a(b)(1)(iv)(B).

[434] Letter from Michael Macchiaroli, Associate Director, Division of Market Regulation, Commission, to Richard Lewandowski, Vice President, Regulatory Division, The Chicago Board Options Exchange, Inc. (Jan. 13, 2000) (stating that the Division of Market Regulation ''will not recommend . . . enforcement action if non-clearing option specialists and market-makers continue to rely on subparagraph (b)(1)(iv) of Appendix A to Rule 15c3–1 under the Exchange Act until such

The temporary amendment decreased the range of pricing inputs to the approved option pricing models, which effectively reduced the haircuts applied by the carrying firm with respect to non-clearing option specialist and market maker accounts.[435] The temporary amendment, which applied only to these types of accounts, was limited to major market foreign currencies and diversified indexes. Even during periods of substantial volatility, there have been no significant increases in the number of deficits in non-clearing option specialist and market-maker accounts, nor did the lower capital charges under paragraph (b)(1)(iv) result in excessive leverage. Consequently, this amendment appropriately aligns the net capital requirements of affected firms with the risks Rule 15c3–1 seeks to mitigate. The Commission received one comment letter regarding this aspect of the proposing release. The commenter concurred with the Commission's conclusions as to the effect of the temporary amendment and supported the proposal to make it permanent.[436] Accordingly, the Commission is amending paragraph (b)(1)(iv) of Appendix A to Rule 15c3–1, as proposed, to make the temporary amendment permanent.[437]

ii. Money Market Funds

a. Clarification

The Commission is adopting an amendment to paragraph (c)(2)(vi)(D)(*1*) of Rule 15c3–1 to clarify that a money market fund, for the purposes of paragraph (c)(2)(vi)(D)(*1*), is a fund described in Rule 2a–7 under the Investment Company Act of 1940 (''Rule 2a–7'').[438] The Commission did not receive any comments on this proposal and is adopting it, as proposed.

b. Proposed Haircut Reduction From 2% to 1%

The Commission proposed an amendment to reduce the ''haircut'' that broker-dealers apply under Rule 15c3–1 for money market funds.[439] In 1982, the Commission adopted a 2% haircut requirement for redeemable securities of money market funds.[440] In 1991, the Commission adopted certain amendments to Rule 2a–7 that strengthened the risk-limiting investment restrictions for money market funds.[441] Based on the enhancements to Rule 2a–7, the Commission proposed to amend paragraph (c)(2)(vi)(D)(*1*) of Rule 15c3–1 to reduce the haircut on such funds from 2% to 1% in order to better align the net capital charge with the risk associated with holding shares of a money market fund.[442] In addition to the general request for comments in the proposing release, the Commission also specifically requested comments regarding whether the haircut for certain types of money market funds should be reduced to 0% as suggested in a petition for rulemaking submitted to the Commission.[443]

The Commission received a total of 14 responses from 12 different commenters regarding this proposed amendment. All of the commenters supported a reduction in the haircut for money market funds and urged that the haircut be reduced below the proposed 1%, with the majority proposing a haircut of 0% for ''top-rated'' money market funds (*i.e.,* those with the highest ratings).[444] Commenters cited the safety record of money market funds, in particular AAA-rated money market funds, in support of imposing lower haircuts.[445] Several commenters argued that top-rated money market funds were more liquid and posed less credit and interest rate risk than other instruments and suggested haircuts of 1/8 of 1% or even 0%.[446] One commenter argued that since broker-dealers (like investors) view money market funds as cash equivalents, they would view a 1% haircut as a significant cost and would therefore avoid using money market funds.[447] Two commenters suggested that if the Commission determined it necessary to impose a haircut on some Rule 2a–7 money market funds, it should implement a bifurcated scheme under which money market funds that qualify for deposit into a broker-dealer's reserve account under Rule 15c3–3 would be subject to a 0% haircut,[448] with one arguing that such qualifying money market funds should in any case receive a haircut no greater than 1/8 of 1%.[449] Another commenter suggested that the proposed amendments to reduce the haircut for money market funds should be deferred until the results of the Commission's money market reforms are known.[450] Another commenter suggested a haircut of 5/8 of 1%, based on a combination of the 1/8 of 1% haircut applied to highly rated shorter-term (at least 30 but less than 91 days to maturity) commercial paper and municipal securities and an additional charge of 1/2 of 1% to account for any minimal risk associated with the nature or operation of mutual funds.[451] Finally, one commenter supported a 0% haircut for applied to money market funds that: (1) Do not hold investments in their affiliates or holding companies; and (2) are not affiliated with the bank in which the broker-dealer holds its cash reserves and operating funds.[452]

As discussed above in section II.E.6.ii. of this release, the Commission recently proposed substantial amendments to its money market fund rules.[453] In light of these proposed amendments,[454] the Commission is deferring consideration of a reduction of the haircut for money market funds in Rule 15c3–1 at this time. Therefore, the haircut that broker-dealers apply for money market funds will remain at 2% under paragraph

time as the Commission has determined whether it should be extended''). The letter did not grant any other relief.

[435] *See Net Capital Rule,* Exchange Act Release No. 38248 (Feb. 6, 1997), 62 FR 6474 (Feb. 12, 1997). Under Appendix A to Rule 15c3–1, a broker-dealer calculating net capital charges for its options portfolios shocks the products in each portfolio (grouped by underlying instrument) at ten equidistant points along a potential market move range. The market move ranges for major market foreign currencies, high-capitalization diversified indexes, and non-high-capitalization diversified indexes are, respectively: +(−) 6%, +(−) 10% and +(−) 15%. The temporary rule lowered these market move ranges to respectively: +(−) 4½%, + 6% (−) 8% and +(−) 10% in terms of calculating haircuts for positions of non-clearing options specialists and market makers. *Id.*

[436] *See SIFMA 2 Letter.*

[437] As a result, the Commission also is redesignating paragraphs (b)(1)(iv)(A), (b)(1)(iv)(A)(*1*), (b)(1)(iv)(A)(*2*), and (b)(1)(iv)(A)(*3*) as paragraphs (b)(1)(iv), (b)(1)(iv)(A), (b)(1)(iv)(B), and (b)(1)(iv)(C), respectively.

[438] *See* 17 CFR 270.2a–7.

[439] *See Amendments to Financial Responsibility Rules,* 72 FR at 12874.

[440] *Net Capital Requirements for Brokers and Dealers,* Exchange Act Release No. 18737 (May 13, 1982), 47 FR 21759 (May 20, 1982). *See* 17 CFR 240.15c3–1(c)(2)(vi)(D)(*1*).

[441] *Revisions to Rules Regulating Money Market Funds,* Investment Company Act Release No. 18005 (Feb. 20, 1991), 56 FR 8113 (Feb. 27, 1991).

[442] *See Amendments to Financial Responsibility Rules,* 72 FR at 12874.

[443] *See* Public Petitions for Rulemaking No. 4–478 (Apr. 3, 2003) (*available at http://www.sec.gov/rules/petitions/petn4–478.htm*), as amended (Apr. 4, 2005) (*available at http://www.sec.gov/rules/petitions/petn4–478a.pdf*), and No. 4–577 (Feb. 3, 2009) (*available at http://www.sec.gov/rules/petitions/2009/petn4–577.pdf*).

[444] *See Federated Letter; Federated 3 Letter; Curion Clearing Letter; FAF Advisors Letter; Brown Brothers Harriman Letter; SIFMA 2 Letter; ICI Letter; Barclays Letter; National Chamber Foundation Letter; Blackrock Letter; Deutsche Bank Securities Letter; UBS Letter; SIFMA 4 Letter; NIBA 2 Letter.*

[445] *See, e.g., Barclays Letter.*

[446] *See, e.g., FAF Advisors Letter.*

[447] *See Federated Letter.*

[448] *See Blackrock Letter; ICI Letter.*

[449] *See Blackrock Letter.*

[450] *See SIFMA 4 Letter.*

[451] *See SIFMA 2 Letter.*

[452] *See NIBA 2 Letter.*

[453] *See Money Market Fund Reform; Amendments to Form PF,* Release No. IC–30551 (June 5, 2013), 78 FR 36834 (June 19, 2013).

[454] *Id.*

(c)(2)(vi)(D)(*1*) of Rule 15c3–1. Deferring action will allow the Commission to assess the potential impact of any money market fund reforms it may adopt and whether any such impact would have consequences for the net liquid asset standard of Rule 15c3–1.

c. Aggregate Debit Items Charge

The Commission proposed amendments to Rule 15c3–1 that would have eliminated a reduction to aggregate debit items that certain broker-dealers must take when computing their reserve requirements under Rule 15c3–3.[455] Under paragraph (a)(1)(ii)(A) of Rule 15c3–1, a broker-dealer using the ''alternative standard'' [456] to compute its minimum net capital requirement must reduce aggregate debit items by 3% when computing its customer reserve requirement under Rule 15c3–3. Conversely, Note E(3) to the customer reserve formula (Rule 15c3–3a) requires a broker-dealer using the ''basic method'' of computing net capital under Rule 15c3–1 to reduce by 1% the total debits in Item 10 of the formula (*i.e.,* debit balances in customer cash and margin accounts).[457] Both of these provisions serve to increase the amount of funds a broker-dealer must deposit into its customer reserve account; however, the deduction applicable to alternative standard firms can result in an even larger reserve deposit requirement.

The Commission received four comment letters regarding these amendments and all were supportive.[458] However, recent market turmoil has highlighted the importance of maintaining adequate amounts of funds and qualified securities in the customer reserve account under Rule 15c3–3 to protect customers. Consequently, it would be imprudent to lower the debit reduction requirement for broker-dealers using the alternative standard at this time (especially given the fact that this standard is primarily used by firms with a substantial customer business). Therefore, the Commission has determined to defer consideration of action on this amendment at this time.

F. Technical Amendments

The Commission proposed a number of technical amendments to these rules, including changes to the definitions of *fully paid securities, margin securities,* and *bank* in Rule 15c3–3.[459] These proposed technical amendments were not designed to substantively change the meanings of these defined terms but, rather, to amend out-of-date citations and remove text that the Commission believed to be superfluous or redundant.

Two commenters [460] opposed the proposed technical amendments to the Rule 15c3–3 definition of *fully paid securities.* As proposed, the definition of *fully paid securities* would have included ''all securities carried for the account of a customer unless such securities are purchased in a transaction for which the customer has not made full payment.'' [461] The commenters contend that the amendments to the definition of *fully paid securities* would significantly expand the universe of fully paid securities because these securities generally are carried in a cash account, and under the proposed definition any security, in any account, including a margin account, could be considered a fully paid security (and subject to possession and control requirements) if it has been paid for in full. As such, the commenter noted that the term *fully paid securities,* as proposed, would require broker-dealers to determine whether securities in a margin account are fully paid (in which case they could not be hypothecated even if they are not excess margin securities). As a result, the commenter suggested that this definition should be limited to include only securities in a cash account that have been paid for in full. After careful consideration, and in response to the comment, the Commission has modified the text of paragraph (a)(3) to Rule 15c3–3 to more closely follow the original definition, while still adopting the updated references and terminology to reflect changes made to Regulation T since 1972. As adopted, the term *fully paid securities* includes ''all securities carried for the account of a customer in a cash account as defined in Regulation T (12 CFR 220.1 *et seq.*), as well as securities carried for the account of a customer in a margin account or any special account under Regulation T that have no loan value for margin purposes, and all margin equity securities in such account if they are fully paid. . . .'' [462] The definition also states that, ''the term ''fully paid securities'' does not apply to any securities purchased in transactions for which the customer has not made full payment.''

The Commission did not receive any comments on the proposed amendments to the definition of *margin securities* under paragraph (a)(4) of Rule 15c3–3. The Commission is adopting this definition as proposed. In addition, the Commission did not receive any comments to the proposed amendments to the definition of *bank* under paragraph (a)(7) of Rule 15c3–3. The Commission, however, has modified the language in this paragraph to make the paragraph gender neutral by replacing the phrase ''who maintains his principal place of business'' with the phrase ''that maintains its principal place of business.''

The Commission also has amended other provisions of Rule 15c3–3 to make the rule gender neutral. Finally, the Commission has replaced the word ''shall'' throughout the rule, as amended, with clearer words, such as ''will'' or ''must.'' This change will not change either the nature or substance of the affected rule provisions.

III. Responses to Specific Requests for Comment

In the proposing release, the Commission requested comment on certain specific matters, in addition to the proposed rule amendments.[463] These matters included: (1) A proposal to reduce the Rule 17a–11 notice requirement for broker-dealers that carry over $10 billion in debits; (2) whether to harmonize the net capital deductions required under paragraph (c)(2)(iv)(B) of Rule 15c3–1 for securities lending and borrowing transactions with the deductions required under paragraph (c)(2)(iv)(F) for securities repo transactions; and (3) solicitation of comment on how third-party liens against customer fully paid securities carried by a broker-dealer should be treated under the financial responsibility rules, including Rule 15c3–3, Rule 17a–3 and Rule 17a–4.

The Commission received seven comment letters that addressed the solicitation of comments for these matters.[464] With respect to the early warning level proposal, one commenter proposed modifying the Commission's

[455] *See Amendments to Financial Responsibility Rules,* 72 FR at 12867.

[456] Under the ''alternative standard,'' a broker-dealer's minimum net capital requirement is equal to 2% of the firm's aggregate debit items. 17 CFR 240.15c3–1(a)(1)(ii).

[457] Under the ''basic method,'' a broker-dealer cannot permit its aggregate indebtedness (generally total money liabilities) to exceed 1500% of its net capital. 17 CFR 15c3–1(a)(1)(i).

[458] *See Curian Clearing Letter; SIFMA 2 Letter; Deutsche Bank Securities Letter; Citigroup Letter.*

[459] 17 CFR 240.15c3–3(a)(3), (4), and (7), respectively.

[460] *See SIFMA 2 Letter; Angel Letter.*

[461] *See Amendments to Financial Responsibility Rules,* 72 FR at 12894.

[462] *See* paragraph (a)(3) of Rule 15c3–3, as adopted.

[463] *Id.* at 12874.

[464] *See SIFMA 2 Letter; SIFMA 4 Letter; First Clearing Letter; Citigroup Letter; American Bar Association Letter; Cornell Letter; Raymond James 2 Letter.*

early warning levels for very large ''alternative standard'' firms with more than $10 billion in debits.[465] The commenter recommended this approach because of the increase in debit items at large broker-dealers and the increased focus on effective risk management practices.[466] Another comment supported the amendment, suggesting that the notification could serve as an early warning if a firm is approaching insolvency.[467]

In addition, the Commission received three comments with respect to harmonizing the net capital deductions required under paragraph (c)(2)(iv)(B) of Rule 15c3–1 for securities lending and borrowing transactions with the deductions required under paragraph (c)(2)(iv)(F) for securities repo transactions.[468] These commenters stated that the Commission should consider the potential disruption to the marketplace that may arise in connection with any effort to harmonize capital charges.[469]

The Commission also received seven comments in response to the solicitation of comment on how third-party liens against customer fully paid securities carried by a broker-dealer should be treated under the financial responsibility rules, including Rule 15c3–3, Rule 17a–3 and Rule 17a–4.[470] Two commenters stated that the Commission should not require that a broker-dealer include third party liens as a credit in the reserve formula and stated that this is an area in which it would be productive to have a detailed discussion between Commission staff and the industry before any amendments are proposed.[471] Another commenter stated that each of the suggested approaches in the proposing release imposes burdens and requirements on broker-dealers that do not serve to address the concerns noted by the Commission.[472] Two commenters stated that the most effective way to avoid confusion regarding third party liens in a SIPC liquidation would be to segregate securities subject to a lien to a separate pledge account in the name of the pledgee.[473] Finally, one commenter argued that requiring broker-dealers to include the amount of liens as a credit item in the reserve formula was not necessary to achieve customer protection and would impose significant costs and burdens on the broker-dealers.[474]

The Commission will consider the comments received in developing any proposals should the Commission decide to take further action in any of these areas.

IV. Paperwork Reduction Act

Certain provisions of the amendments contain ''collection of information'' requirements within the meaning of the Paperwork Reduction Act of 1995 (''PRA'').[475] The Commission published a notice requesting comment on the collection of information requirements in the proposing release[476] and submitted the amendments to the Office of Management and Budget (''OMB'') for review in accordance with the PRA.[477] An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid control number. The amended rules—Rule 15c3–1, Rule 15c3–3, Rule 17a–3, Rule 17a–4 and Rule 17a–11—contain currently approved collections of information under, respectively, OMB control numbers 3235–0200, 3235–0078, 3235–0033, 3235–0279 and 3235–0085.

In response to comments received regarding the proposed amendments in the proposing release, the Commission has modified the language in the final rules being adopted, as discussed above. These comments and their impact on PRA estimates are discussed below. In addition, the initial burden estimates in the proposing release have been adjusted,[478] as discussed below, to reflect updated information used to make the current estimates, including updated FOCUS Report data.[479]

Finally, one commenter specifically stated that the estimates the Commission provided utilized only that number of broker-dealers in its estimates that the Commission ''justifiably considers to be affected by the proposals.''[480] The commenter, however, believes that most, if not all, broker-dealers will spend over 90 hours each analyzing the effects of the rules as implemented, will spend many more than 90 hours each in implementing procedures and modifying their written supervisory procedures to comply with the new rules, will spend in excess of 240 hours each in the monitoring of such rules, and will spend in excess of $15,000 each for outside counsel and auditor opinions or work product.[481] This commenter did not provide additional detail about the basis for its view that the Commission's estimates were too low. The Commission agrees with the commenter that broker-dealers directly affected by the rule amendments may be required to implement procedures or modify their written supervisory procedures in order to comply with the rule amendments. In cases where the rule amendments are requiring a broker-dealer to implement or document certain policies and procedures, these hour burdens are already included in the final hour estimates discussed below.[482] In addition, the Commission acknowledges that a broker-dealer may need to review its operations to determine whether or not it has any obligations under the rule amendments. Even if a broker-dealer is not directly affected by the rule amendments, such a review may result in an indirect effect on its operations. These indirect effects or costs, however, are more appropriately addressed in the Economic Analysis in section V. of this release because they relate to the overall impact of the amendments, rather than to the specific collections of information discussed below. Consequently, the Commission addresses the commenter's concerns that directly relate to the collections of information below, and the indirect burdens and costs in the Economic Analysis in section V. of this release.

A. Summary of the Collection of Information Requirements

The rule amendments contain recordkeeping and disclosure requirements that are subject to the PRA. In summary, the amendments may require a broker-dealer, under certain circumstances, to: (1) Disclose the principals and obtain certain agreements from the principals in a securities lending transaction where it performs settlement services if it is to be

[465] *See SIFMA 2 Letter.*

[466] *Id.*

[467] *See Cornell Letter.*

[468] *See SIFMA 2 Letter; Citigroup Letter; Raymond James 2 Letter.*

[469] *Id.*

[470] *See SIFMA 2 Letter; SIFMA 4 Letter; First Clearing Letter; Citigroup Letter; American Bar Association Letter; NIBA 2 Letter; Raymond James 2 Letter.*

[471] *See SIFMA 2 Letter; SIFMA 4 Letter; Citigroup Letter.*

[472] *See First Clearing Letter.*

[473] *See American Bar Association Letter; NIBA 2 Letter.*

[474] *See Raymond James 2 Letter.*

[475] 44 U.S.C. 3501, *et seq.*

[476] *See Amendments to Financial Responsibility Rules,* 72 FR at 12875.

[477] 44 U.S.C. 3507(d); 5 CFR 1320.11.

[478] *See Amendments to Financial Responsibility Rules,* 72 FR at 12875.

[479] The PRA estimates derived from FOCUS Reports filed by broker-dealers pursuant to Section 17 of the Exchange Act and Rule 17a–5 have been updated in this final release to reflect more recently available information, including FOCUS Report data as of December 31, 2011. The PRA estimates in the proposing release derived from FOCUS reports were from 2004 year end data. *See Amendments to Financial Responsibility Rules,* 72 FR at 12875.

[480] *See NIBA 2 Letter.*

[481] *Id.*

[482] *See, e.g.,* paragraph (j)(1) of Rule 15c3–3 and paragraph (a)(23) of Rule 17a–3, as adopted.

considered an agent (as opposed to a principal) for the purposes of the net capital rule [483]; (2) obtain permission in writing from its DEA to withdraw capital within one year of contribution [484]; (3) enter into a subordination agreement with an account holder in order to exclude such account holder from the definition of *PAB account* [485]; (4) provide written notice to PAB account holders that their securities may be used in the ordinary course of its securities business [486]; (5) perform a PAB reserve computation [487]; (6) obtain written notification from each bank with which it maintains a PAB reserve account that the bank was informed that all cash and/or qualified securities being held by the bank are being held for the exclusive benefit of brokers and dealers [488]; (7) enter into a written contract with a bank with which it maintains its PAB reserve accounts providing that the cash and/or qualified securities shall at no time be used directly or indirectly as security for a loan to the broker-dealer by the bank, and shall be subject to no right, charge, security interest, lien, or claim of any kind in favor of the bank or any person claiming through the bank [489]; (8) develop adequate procedures to ensure a customer for whom a free credit balance is carried is sent a written statement regarding the customer's free credit balances, including information regarding the amount due to the customer and that the funds are payable on demand, prior to using funds arising from free credit balances in the broker-dealer's operations [490]; (9) obtain the written affirmative consent of a new customer before including the customer's free credit balances in a Sweep Program, as well as provide certain disclosures and notices to all customers with regard to the broker-dealer's Sweep Program [491]; (10) make and maintain records documenting its credit, market, and liquidity risk management controls to assist the broker-dealer in analyzing the risks associated with its business activities [492]; (11) provide notice to the Commission and other regulatory authorities if the broker-dealer becomes insolvent [493]; and (12) provide notice to the Commission and other regulatory authorities if the broker-dealer's securities borrowed and loaned or securities repurchase/reverse repurchase activity reaches a certain threshold or, alternatively, report monthly its securities borrowed and loan or securities repurchase/reverse repurchase activity to its DEA in a form acceptable to its DEA.[494]

B. Use of Information

The Commission, its staff, and SROs will use the information collected under the amendments to Rule 15c3–1 and Rule 15c3–3 to determine whether the broker-dealer is in compliance with each rule and to help fulfill their oversight responsibilities. The collections of information would also help to ensure that broker-dealers are meeting their obligations under the rule amendments and have any required policies and procedures in place.

In particular, the record with respect to acting as agent in a securities loan transaction will assist examiners in verifying that the broker-dealer is properly accounting for securities loan deficits under Rule 15c3–1. The records with respect to obtaining DEA approval prior to withdrawing capital within one year of contribution under Rule 15c3–1 will assist examiners in determining if a broker-dealer is computing its net capital accurately with regard to the proper classification of its capital contributions, and will help to ensure the DEA only approves capital withdrawals which are appropriate in light of the firm's current financial condition at the time of the requested withdrawal. The amendments to Rule 15c3–1 also will facilitate the monitoring of the financial condition of broker-dealers by the Commission and its staff, as well as by SROs.

The records with respect to the PAB accounts will assist examiners in verifying that: (1) A carrying broker-dealer has properly excluded certain accounts from being treated as PAB accounts by entering into subordination agreements with particular account holders; (2) a carrying broker-dealer sent written notices to PAB accountholders to use their PAB securities; (3) the broker-dealer performed the PAB reserve computation; and (4) the bank holding the PAB reserve account agreed to do so free of lien by entering into a written contract with the broker-dealer.

The records with respect to customer's free credit balances will assist examiners in verifying that: (1) A carrying broker-dealer has obtained the written affirmative consent of a new customer before including a customer's free credit balances in a Sweep Program; (2) a carrying broker-dealer has provided the required disclosures and notices to all customers with regard to the broker-dealer's Sweep Program; and (3) the broker-dealer has maintained adequate procedures with regard to the use of a customer's free credit balances prior to using such customer's free credit balances in its operations. The amendments to Rule 15c3–3 will facilitate the process by which the Commission, its staff, and SROs monitor how broker-dealers are fulfilling the customer protection requirements of the rule. The written affirmative consent, disclosures and notices required to be provided to customers also will alert customers to the alternatives available to them with respect to their free credit balances.

The Commission, its staff, and SROs will use the information collected under the amendments to Rules 17a–3 and 17a–4 to determine whether the broker-dealer is adhering to its documented credit, market, and liquidity risk management controls, as well as to evaluate the effectiveness of these controls.

The Commission, its staff, and SROs will use the information collected under the amendments to Rule 17a–11 to identify a broker-dealer experiencing financial difficulty. This information will assist the Commission and other regulators in promptly taking appropriate steps to protect customers, creditors, and counterparties. In particular, a notice of insolvency will assist regulators in responding more quickly to protect customers of a failing institution. The notices and reports with respect to securities lending and repos will assist regulators in identifying broker-dealers that are active in these transactions or suddenly take on large positions and thereby assist in monitoring systemic risk.

C. Respondents

The final estimates of respondents below have been updated to reflect more recent information.[495] The amendment

[483] *See* paragraph (c)(2)(iv)(B) of Rule 15c3–1, as adopted.

[484] *See* paragraph (c)(2)(i)(G) to Rule 15c3–1, as adopted.

[485] *See* paragraph (a)(16) to Rule 15c3–3, as adopted.

[486] *See* paragraph (b)(5) to Rule 15c3–3, as adopted.

[487] *See* paragraph (e)(1) and (e)(3) of Rule 15c3–3, as adopted.

[488] *See* paragraph (f) of Rule 15c3–3, as adopted.

[489] *Id.*

[490] *See* paragraph (j)(1) to Rule 15c3–3, as adopted.

[491] *See* paragraph (j)(2) to Rule 15c3–3, as adopted.

[492] *See* paragraph (a)(23) to Rule 17a–3 and paragraph (e)(9) of Rule 17a–4, as adopted.

[493] *See* paragraph (b)(1) of Rule 17a–11, as adopted.

[494] *See* paragraph (c)(5) to Rule 17a–11, as adopted.

[495] The final estimates of respondents derived from FOCUS Reports filed by broker-dealers pursuant to Section 17 of the Exchange Act and Rule 17a–5 have been updated in this final release to reflect more recently available information, including FOCUS Report data as of December 31,

to Rule 15c3–1 requiring a broker-dealer to make disclosures to, and obtain certain agreements from, securities lending principals will apply only to those firms that participate in the settlement of securities lending transactions as agents. The Commission estimates that approximately 122 broker-dealers will be affected by this requirement.[496] This estimate has been updated from the estimate of 170 broker-dealers in the proposing release.[497] No comments were received on this estimate.

The amendment to Rule 15c3–1 with respect to a broker-dealer obtaining permission in writing from its DEA prior to withdrawing capital within one year of contribution under Rule 15c3–1 will apply to any broker-dealer who wishes to withdraw such capital. Because most broker-dealers already comply with existing interpretations regarding the treatment of temporary capital contributions and similar SRO requirements, or are familiar with such interpretations and requirements, this part of the amendment to Rule 15c3–1 regarding temporary capital contributions likely will impact only a small number of the approximately 4,709 broker-dealers registered with the Commission, as of December 31, 2011 (based on FOCUS Report data).[498] Therefore, the Commission estimates that approximately 90 broker-dealers will seek permission from their DEA in writing to withdraw capital within one year of its contribution under the amendment.[499]

The amendments to Rule 15c3–3 requiring a broker-dealer to perform a PAB reserve computation and to obtain certain agreements and notices related to its PAB accounts will affect only those firms that carry such accounts. Based on FOCUS Report data, as of December 31, 2011, the Commission estimates that approximately 61 broker-dealers will carry such accounts.[500] The amendment to Rule 15c3–3 requiring a broker-dealer to obtain the affirmative consent of a new customer before changing the terms under which the customer's free credit balances are maintained will apply only to firms that carry free credit balances for customers. Based on FOCUS Report data, as of December 31, 2011, the Commission estimates that approximately 189 broker-dealers carry free credit balances.[501]

The Commission estimates that the amendment to Rule 15c3–3 permitting a broker-dealer to exclude certain accounts from being treated as PAB accounts under Rule 15c3–3 by entering into subordination agreements with certain account holders will apply to all 61 broker-dealers that will carry such accounts. The Commission estimates that these 61 broker-dealers each will enter into an average of 11 subordination agreements.[502]

The amendments to Rules 17a–3 and 17a–4 requiring a broker-dealer to make and maintain records documenting the credit, market and liquidity risk management control for analyzing and managing risks will apply only to firms that have more than $1,000,000 in aggregate credit items, or $20,000,000 in capital. Thus, its impact will be limited to larger broker-dealers. Accordingly, the number of respondents will equal the number of broker-dealers meeting the thresholds set forth in the amendment. The Commission estimates that approximately 490 broker-dealers will meet at least one of these thresholds.[503]

One amendment to Rule 17a–11 will require a broker-dealer to provide the Commission with notice if it becomes subject to certain insolvency events. The Commission estimates that approximately two broker-dealers will become subject to one of these events in a given year.[504] Another amendment to Rule 17a–11 will require a broker-dealer to provide notice to the Commission if its securities borrowed or loaned, or its securities repurchase or reverse repurchase activity reaches a certain threshold or, alternatively, provide monthly reports to its DEA about such activities. This amendment will only affect a limited number of firms per year. The Commission estimates that approximately one broker-dealer[505] will provide notice and six broker-dealers[506] will opt to send the monthly reports in a given year.

D. Total Annual Reporting and Recordkeeping Burden

1. Securities Lending Agreements and Disclosures

The amendments to paragraph (c)(2)(iv)(B) of Rule 15c3–1 will require a broker-dealer to make disclosures to,

2011. The estimates of respondents in the proposing release derived from FOCUS reports were from 2004 year end data. *See Amendments to Financial Responsibility Rules,* 72 FR at 12876.

[496] This estimate is derived from FOCUS Reports.

[497] *See Amendments to Financial Responsibility Rules,* 72 FR at 12876.

[498] *Temporary Capital Letter; see also Net Capital Rule,* Exchange Act Release No. 28927 (Feb. 28, 1991), 56 FR 9124 (Mar. 5, 1991); and FINRA Rule 4110(c).

[499] The Commission received 900 broker-dealer capital withdrawal notices under paragraph (e) of Rule 15c3–1 in 2012. Because this amendment is consistent with prior Commission and staff positions that capital is not temporary, as well as current SRO requirements, it is likely that only a small number of these notices are capital withdrawals made within one year of contribution, and therefore, based on staff experience with the application of Rule 15c3–1, the Commission estimates that approximately 90 broker-dealers (10% of 900) will seek permission from their DEA in writing to withdraw capital under the amendment. *See Net Capital Rule,* Exchange Act Release No. 28927 (Feb. 28, 1991); *Temporary Capital Letter;* and FINRA Rule 4110.

[500] This estimate has been updated from our estimate of 75 broker-dealers in the proposing release. *See Amendments to Financial Responsibility Rules,* 72 FR at 12876. No comments were received on this estimate.

[501] In the proposing release, the Commission estimated approximately 256 broker-dealers carried free credit balances. *See Amendments to Financial Responsibility Rules,* 72 FR at 12876. No comments were received on this estimate.

[502] *See Order Granting Conditional Exemption Under the Securities Exchange Act of 1934 in Connection with Portfolio Margining of Swaps and Security-Based Swaps,* Exchange Act Release No. 68433 (Dec. 14, 2012), 77 FR 75211, 75222 n.69 (Dec. 19, 2012). (''FINRA CRD data indicate that the 17 largest broker-dealers (*i.e.,* those with total assets of $50 billion or more) reported a total of 188 affiliates that are themselves registered with the SEC (*i.e.,* they have their own CRD numbers), representing approximately 11 affiliates per broker-dealer.''). Carrying firms likely will enter into subordination agreements with affiliates, including foreign banks or foreign broker-dealers affiliated with the carrying broker-dealer to exclude such accounts from the rule. *See SIFMA 2 Letter.*

[503] This estimate has been updated from the proposing release estimate of 517 broker-dealers. *See Amendments to Financial Responsibility Rules,* 72 FR at 12876. No comments were received on this estimate.

[504] This estimate is based on the 2012 SIPC Annual Report, which indicates that over the last ten-year-period, the annual average of new customer protection proceedings was two. A copy of the 2012 Annual Report is *available at http://www.sipc.org/.* This estimate has been updated from our proposing release estimate of 6, which was based on the SIPC 2005 Annual Report. *See Amendments to Financial Responsibility Rules,* 72 FR at 12876. No comments were received on this estimate.

[505] This estimate is derived from information filed by broker-dealers in their FOCUS Reports. This estimate has been updated from the proposing release estimate of 11. *See Amendments to Financial Responsibility Rules,* 72 FR at 12876. No comments were received on this estimate. Based on FOCUS Report data, as of December 31, 2011, there were seven broker-dealers whose securities borrowed or securities loaned exceeded 80% of 25 times their tentative net capital, and there were six broker-dealers whose securities borrowed or securities loaned exceeded 25 times their tentative net capital. Therefore, the Commission assumes for purposes of the PRA that six broker-dealers would chose to file monthly reports in lieu of the notice requirements, and that one would file a notice.

[506] This estimate is derived from information filed by broker-dealers in their FOCUS Reports. Based on FOCUS Report data, as of December 31, 2011, there were six broker-dealers whose securities borrowed or securities loaned exceeded 25 times their tentative net capital. These firms likely will opt to file the monthly report under the proposed amendments to Rule 17a–11. This estimate has been updated from our proposing release estimate of 21 broker-dealers. *See Amendments to Financial Responsibility Rules,* 72 FR at 12876. No comments were received on this estimate. The estimated number of firms filing notices and monthly reports has decreased largely due to an overall decrease in the number of broker-dealers. *See also id.* at 12870 (discussing rationale for 2,500% threshold).

and obtain certain agreements from, securities lending principals in situations where the firm participates in the settlement of a securities lending transaction but wants to be deemed an agent for purposes of Rule 15c3–1.[507] The Commission has adopted the final rule substantially as proposed, and consequently, there were no changes to the final rule amendments that would affect the Commission's PRA estimates. In addition, the Commission did not receive any comments on the estimates in the proposing release,[508] and is therefore is retaining the amendment's PRA hour burden estimates without revision. The Commission, however, is updating the number of respondents to reflect more recently-available data from broker-dealer FOCUS Reports.

As discussed above in section II.C. of this release, the Commission, in recognition of standard stock loan agreements, designed the amendment to accommodate the continued use of these industry model agreements by incorporating their use into the rule's requirements. For the purpose of establishing a broker-dealer's status as agent or lender, these agreements may be sufficiently detailed to satisfy the new requirements. Thus, the standard agreement used by the vast majority of broker-dealers may contain the representations and disclosures required by the amendment. Nevertheless, based on staff experience with securities lending agreements and disclosure and the application of Rule 15c3–1, the Commission continues to believe that a small percentage of broker-dealers may need to modify their standard agreements. In the proposing release, the Commission estimated that 5% [509] of broker-dealers may need to modify their standard agreements. No comments were received on this estimate and the Commission believes 5% continues to be an appropriate estimate for the final rule amendments. Thus, the Commission estimates that 5% of the approximately 122 firms engaged in this business, or approximately 6 firms, will not have used the standard agreements.[510] The Commission estimates each of these firms will spend approximately 20 hours of employee resources updating their standard agreement template.[511] Therefore, the Commission estimates that the total one-time burden to broker-dealers as a result of this requirement will be approximately 120 hours.[512]

2. DEA Permission To Withdraw Capital within One Year of Contribution

The amendment to paragraph (c)(2)(i)(G)(*2*) of Rule 15c3–1 will require that a broker-dealer treat as a liability any capital contribution that is intended to be withdrawn within one year of its contribution.[513] The rule amendment also includes the presumption that capital withdrawn within one year of contribution is presumed to have been intended to be withdrawn within one year, unless the broker-dealer receives permission in writing for the withdrawal from its DEA. This amendment likely will impose annual recordkeeping burdens on broker-dealers making the request.

The Commission estimates that 90 broker-dealers will seek to obtain permission from their DEA in writing to withdraw capital within one year of its contribution, and that it will take a broker-dealer approximately one hour to prepare and submit the request to its DEA to withdraw capital.[514] Therefore, the Commission estimates that the total annual hour burden with respect to the rule amendment will be approximately 90 hours.[515]

3. Written Subordination Agreements under Rule 15c3–3

As discussed above in section II.A.2. of this release, in response to comments, the final rule amendment adopted by the Commission excludes from the definition of *PAB account* in paragraph (a)(16) of Rule 15c3–3, an account that ''has been subordinated to the claims of creditors of the carrying broker or dealer.'' [516] This modification to the final rule will result in one-time burdens under the collection of information for Rule 15c3–3.[517]

In light of comments received [518] and based on staff experience, the Commission understands most PAB account holders that enter into a subordinated loan agreement with a carrying broker-dealer in order to not be treated as PAB accounts under paragraph (a)(16) likely will be affiliates of the broker-dealer.[519] The Commission estimates that the 61 broker-dealers that carry PAB accounts will enter into an average of 11 subordination agreements as a result of the rule amendment.[520] The Commission estimates that it will take a carrying broker-dealer approximately 20 hours to develop a subordination agreement, based on the Commission's prior experience with the development of subordination agreements.[521] Therefore, the Commission estimates that the total one-time hour burden resulting from this requirement will be 13,420 hours.[522]

4. PAB Reserve Bank Account Recordkeeping Requirements

The amendments to Rules 15c3–3 and 15c3–3a require carrying broker-dealers to: (1) Perform a separate reserve computation for PAB accounts (in addition to the reserve computation currently required for Rule 15c3–3 customer accounts); (2) establish and fund a separate PAB reserve account; and (3) obtain and maintain physical possession or control of non-margin securities carried in PAB accounts unless the carrying broker-dealer has provided written notice to the PAB account holders that it will use those securities in the ordinary course of its securities business, and has provided opportunity for the PAB account holder to object to such use.

In the proposing release, the Commission proposed to require that the carrying broker-dealer obtain written permission from a PAB account holder before it could use the securities of the PAB account holder in the ordinary course of its securities business. The Commission estimated that, based on FOCUS Report data, there were approximately 2,533 existing PAB customers, and therefore, broker-dealers would have to amend approximately 2,533 existing PAB agreements.[523] The Commission further estimated that, on average, a firm would spend approximately 10 hours of employee

[507] 17 CFR 240.15c3–1(c)(2)(iv)(B).

[508] *See Amendments to Financial Responsibility Rules,* 72 FR at 12876.

[509] *Id.*

[510] This estimate is updated from the estimate of 9 firms (5% of 170 firms) in the proposing release. *Id.*

[511] Because these firms are already engaging in stock loan and repo activities, these functions likely will be performed by in-house employees, rather than outside counsel.

[512] 6 broker-dealers × 20 hours per firm = 120 hours. This is an update from the proposing release estimate of 9 broker-dealers × 20 hours = 180 hours. *Id.*

[513] 17 CFR 240.15c3–1(c)(2)(i)(G)(*2*).

[514] *See* section IV.C. of this release.

[515] 90 broker-dealers × 1 hour = 90 hours.

[516] 17 CFR 240.15c3–3(a)(16).

[517] The proposing release did not contain any proposals with regard to subordination agreements.

[518] *See SIFMA 2 Letter; SIFMA 4 Letter; Deutsche Bank Securities Letter.*

[519] *See Deutsche Bank Letter; SIFMA 2 Letter.*

[520] *See* section IV.C. of this release.

[521] *See Capital, Margin, and Segregation Requirements for Security-Based Swap Dealers and Major Security-Based Swap Participants and Capital Requirements for Broker-Dealers,* Exchange Act Release No. 68071, 77 FR at 70299. *See also Order Granting Conditional Exemption Under the Securities Exchange Act of 1934 in Connection with Portfolio Margining of Swaps and Security-Based Swaps,* Exchange Act Release No. 68433 (Dec. 14, 2012), 77 FR 75211 (Dec. 19, 2012).

[522] 61 broker-dealers × 11 accounts × 20 hours = 13,420 hours.

[523] *See Amendments to Financial Responsibility Rules,* 72 FR at 12877.

resources amending each agreement and that 75 firms would spend 20 hours amending their standard PAB agreement template, for a total of 26,830 hours.[524] The Commission did not receive any comments regarding these estimates in the proposing release.

In response to comments, as discussed above, the Commission determined not to adopt the requirement, as proposed. Instead, paragraph (b)(5) of Rule 15c3–3 requires the carrying broker-dealer to provide PAB account holders with written notice that the account holder's non-margin securities may be used in the ordinary course of its business.[525] Therefore, the Commission is revising the final one-time hour burden in light of the change in the rule to a notice requirement, which is expected to be less burdensome than the proposed customer consent provision while still providing customers with necessary information. The Commission estimates, based on FOCUS Report data, that approximately 61 broker-dealers carry PAB accounts.[526] The Commission further estimates, based on similar collections of information and the fact that these firms already carry PAB accounts, and on average, a firm will spend approximately 10 hours of employee resources drafting a standard notice template, for a total one-time burden of 610 hours.[527] In addition, based on FOCUS Report data, the Commission estimates that there are approximately 1,551 existing PAB customers and, therefore, broker-dealers will have to send approximately 1,551 written notices.[528] The Commission estimates, based on staff experience, that a firm will spend approximately 10 minutes per account sending out the required written notice, for a total one-time burden of 259 hours.[529]

The Commission estimates that a broker-dealer will incur postage costs sending out the required written notice to customers. These carrying broker-dealers likely will use the least cost method to comply with this requirement and may include this notification with other mailings sent to PAB account holders. The Commission, however, conservatively estimates that the postage cost of for each notification, using the current price of first class postage, will be approximately $.46 per document sent. Therefore, the staff estimates that the cost of sending the required written notification to PAB account holders will be approximately $713.[530]

Based on FOCUS Report data, the Commission also estimates that approximately 61 broker-dealers carry PAB accounts, and based upon differences between the *PAIB Letter* and the final rule, these 61 firms would have to amend their standard PAB agreement template. The Commission estimates a firm will spend, on average, approximately 20 hours of employee resources on this task, for a total of 1,220 hours.[531]

In light of the changes to the final rule amendments which require a broker-dealer to send a written notice, rather than obtain a customer's consent regarding the use of a PAB account holder's securities, the 61 broker-dealers carrying PAB accounts likely will engage outside counsel[532] to review the required notice,[533] as well as the standard PAB template agreement under the final rule amendments to Rule 15c3–3. As a result, the Commission estimates that these 61 broker-dealers will likely incur $2,000 in legal costs,[534] or $122,000[535] in aggregate initial burden to review and comment on these materials.

The requirements to perform a PAB reserve computation and obtain agreements and notices from banks holding PAB accounts will result in annual burdens based on the number of broker-dealers that hold PAB accounts and the number of times per year these broker-dealers open new PAB reserve accounts. Currently, to obtain the relief provided in the *PAIB Letter,* broker-dealers are required to obtain the agreements and notices from the banks.[536] The Commission understands that broker-dealers generally already obtain these agreements and notices. Therefore, the Commission estimates there will be no additional burden imposed by this requirement.[537] The Commission did not receive any comments on this estimate from the proposing release.

The amendment requiring a PAB reserve computation will produce a one-time burden. Based on FOCUS Report data, as of December 31, 2011, the Commission estimates that approximately 61 broker-dealers will perform a PAB reserve computation.[538] These firms already perform a reserve computation for domestic broker-dealer customers under the *PAIB Letter.* Nonetheless, the Commission estimates these firms will spend, on average, approximately 30 hours of employee resources per firm updating their systems to implement changes that will be necessitated by the amendment. Therefore, consistent with the hour estimates in the proposing release, the Commission estimates that the total one-time burden to broker-dealers arising from updating their systems to comply

[524] (2,533 PAB customers × 10 hours per customer) + (75 firms × 20 hours per firm) = 26,830. *Id.*

[525] 17 CFR 240.15c3–3(b)(5).

[526] This estimate is based on the number of broker-dealers carrying PAB accounts as of December 31, 2011. This is an update from the proposing release estimate of approximately 75 broker-dealers that carry PAB accounts. *See Amendments to Financial Responsibility Rules,* 72 FR at 12877.

[527] 61 firms × 10 hours = 610 hours. *See also Capital, Margin, and Segregation Requirements for Security-Based Swap Dealers and Major Security-Based Swap Participants and Capital Requirements for Broker-Dealers,* Exchange Act Release No. 68071, 77 FR at 70298 (estimating that the notice required to be sent by a security based swap dealer to a counterparty pursuant to section 3E(f) of the Exchange Act would take an outside counsel 10 hours to draft).

[528] The number of customers also is updated from the proposing release estimate of 2,533 customers. *See Amendments to Financial Responsibility Rules,* 72 FR at 12877.

[529] 1,551 PAB account holders × 10 minutes = 15,510 minutes/60 minutes = 258.5 hours (rounded to 259 hours). *See generally,* Exchange Act Release No. 68071, 77 FR at 70298 (estimating that the notice required to be sent by a security based swap dealer to a counterparty pursuant to section 3E(f) of the Exchange Act would take 10 minutes to send).

[530] 1,551 notices × $0.46 = $713.46.

[531] 61 firms × 20 hours = 1,220.

[532] *See NIBA 2 Letter.*

[533] 17 CFR 240.15c3–3(b)(5).

[534] 5 hours × $400 per hour = $2,000. The Commission estimates the review of the notice and standard PAB template would require 5 hours of outside counsel time, which is the same estimate used for outside counsel review in another recent release. Based on staff experience with the *PAIB Letter* and the application of Rule 15c3–3, the Commission estimates the outside counsel review related to the PAB amendments will take a comparable amount of time. *See Capital, Margin, and Segregation Requirements for Security-Based Swap Dealers and Major Security-Based Swap Participants and Capital Requirements for Broker-Dealers,* Exchange Act Release 68071, 77 FR at 70297, n.904. The Commission estimates that the outside counsel would cost $400 per hour, which is the same estimate used by the Commission in other recent releases. *See Capital, Margin, and Segregation Requirements for Security-Based Swap Dealers and Major Security-Based Swap Participants and Capital Requirements for Broker-Dealers,* Exchange Act Release 68071, 77 FR at 70297; *Further Definition of ''Swap,'' ''Security-Based Swap,'' and ''Security-Based Swap Agreement''; Mixed Swaps; Security-Based Swap Agreement Recordkeeping,* Exchange Act Release No. 67453 (July 18, 2012), 77 FR 48208 (Aug. 13, 2012).

[535] 61 firms × $2,000 legal cost = $122,000.

[536] *See PAIB Letter.*

[537] In addition, the hour burdens for broker-dealers to open new customer reserve bank account under Rule 15c3–3 are already included within the currently approved collection of information for Rule 15c3–3.

[538] This estimate is based on the number of broker-dealers which currently perform a PAB computation as of December 31, 2011. This is an update from the estimate in the proposing release of 75 broker-dealers.

with this requirement will be approximately 1,830 hours.[539]

The amendment requiring a PAB reserve computation also will produce an annual burden. Based on FOCUS Report data, the Commission estimates that of the 61 broker-dealers estimated to perform a PAB reserve computation, approximately 56 of the current PAB filers will perform the PAB reserve computation on a weekly basis, two broker-dealers will perform it on a monthly basis, and three broker-dealers will perform the PAB reserve computation on a daily basis.[540] The Commission further estimates that a broker-dealer will spend, on average, approximately 2.5 hours to complete the PAB reserve computation in order to make a record of such computation under Rule 15c3–3 as a result of the amendment.[541] Therefore, consistent with the hour burden estimates in the proposing release, the Commission estimates that the total annual burden to broker-dealers from this requirement will be approximately 9,215 hours.[542]

5. Adequate Procedures Required Under Paragraph (j)(1) of Rule 15c3–3

The Commission proposed importing requirements in Rule 15c3–2 into Rule 15c3–3 and eliminating Rule 15c3–2 as a stand-alone rule in the Code of Federal Regulations, and adopting new paragraph (j)(1) to Rule 15c3–3, which includes a condition that a broker-dealer must establish adequate procedures that will impose a paperwork burden if a broker-dealer wishes to accept or use any free credit balance for the account of any customer of the broker-dealer. The Commission is adopting this amendment substantially as proposed, which provides, ''[a] broker or dealer must not accept or use any free credit balance carried for the account of any customer of the broker or dealer unless such broker or dealer has established adequate procedures pursuant to which each customer for whom a free credit balance is carried will be given or sent, together with or as part of the customer's statement of account, whenever sent but not less frequently than once every three months, a written statement informing the customer of the amount due to the customer by the broker or dealer on the date of the statement, and that the funds are payable on demand of the customer.'' [543]

The requirement that broker-dealers establish adequate procedures with regard to free credit balances will result in one-time and annual hours burdens for broker-dealers subject to the requirements of new paragraph (j)(1) to Rule 15c3–3. Based on FOCUS Report data, the Commission estimates that 189 broker-dealers carry free credit balances. Most firms may already have such procedures in place with regard to the requirements of the rule, because these provisions are being imported from current Rule 15c3–2, which is being eliminated as a result of these amendments. Therefore, the Commission estimates that a broker-dealer will spend approximately 25 additional hours reviewing and updating its procedures to ensure it is in compliance with new paragraph (j)(1) to Rule 15c3–3 and approximately 10 additional hours per year reviewing and updating its procedures, for a total one-time and annual hour burden of 4,725 hours [544] and 1,890 hours,[545] respectively.[546]

6. Treatment of Free Credit Balances

New paragraph (j)(2) to Rule 15c3–3 will require a broker-dealer to obtain the written affirmative consent of a new customer before including a customer's free credit balances in a Sweep Program, as well as to provide certain disclosures and notices to all customers with regard to the broker-dealer's Sweep Program.

These requirements will result in one-time and annual burdens to broker-dealers subject to its provisions. However, these requirements will apply only to a firm that carries customer free credit balances and opts to have the ability to change how its customers' free credit balances are treated. The Commission did not receive comments regarding the hour burden estimates relating to the treatment of free credit balances in the proposing release.

In the proposing release, the Commission estimated that approximately 50 broker-dealers [547] would choose to provide new customers with the disclosures and notices required under the amendment in order to have the ability to change how their customers' free credit balances were treated. The Commission did not receive any comments on this estimate. The Commission, however, is revising this estimate for the final rule to include all 189 broker-dealers that carry free credit balances to reflect the fact that these firms may have to update their systems to comply with these new requirements. The Commission further estimates these firms will spend, on average, approximately 200 hours of employee resources per firm updating their current systems (including processes for generating customer account statements) to incorporate changes that will be necessitated by the amendment. Therefore, the Commission estimates that the total one-time burden to broker-dealers arising from this requirement will be approximately 37,800 hours.[548]

The Commission also estimates that these firms will consult with outside counsel in making these systems changes, particularly with respect to the language in the disclosures and notices under new paragraph (j)(2) to Rule 15c3–3. The Commission estimates that an outside counsel will spend, on average, approximately 50 hours assisting a broker-dealer in updating its systems [549] for a one-time aggregate burden to broker-dealers of 9,450 hours.[550] The Commission estimates that the average hourly cost for an outside counsel will be approximately

[539] 61 broker-dealers × 30 hours per firm = 1,830 hours. This is an update from the proposing release estimate of 75 firms × 30 hours per firm = 2,250 hours. *See Amendments to Financial Responsibility Rules,* 72 FR at 12877.

[540] These estimates are based on the number of broker-dealers performing a PAB reserve computation monthly, weekly, and daily, as of December 31, 2011. This is an update from the estimate in the proposing release, which provided that of the 75 broker-dealers estimated to perform a PAB computation, 71 broker-dealers would prefer PAB computations on a weekly basis and four broker-dealers would perform it on a monthly basis. *See Amendments to Financial Responsibility Rules,* 72 FR at 12877. No broker-dealers performed daily PAB computations as of the date of the proposing release. No comments were received on this estimate.

[541] This estimate is based on staff experience with the current estimate of 2.5 hours under the current collection of information for Rule 15c3–3 to make a record of each reserve computation. *See* 17 CFR 240.15c3–3(e)(3).

[542] (56 weekly filers × 52 weeks × 2.5 hours per computation) + (2 monthly filers × 12 months × 2.5 hours per computation) + (3 daily filers × 250 business days per year × 2.5 hours per computation) = 9,215 total hours. This is an update from the proposing release estimate of 9,350 hours. *See Amendments to Financial Responsibility Rules,* 72 FR at 12877, n.137.

[543] 17 CFR 240.15c3–3(j)(1).

[544] 189 broker-dealers × 25 hours = 4,725 hours. The 25 and 10 hour estimates are based on similar collections of information and the Commission's belief that many of these broker-dealers already have procedures in place and, therefore, most broker-dealers will only be revising and updating their current policies and procedures to ensure compliance with the rule. *See Removal of Certain References to Credit Ratings Under the Securities Exchange Act of 1934,* Exchange Act Release No. 64532 (Apr. 27, 2011), 76 FR 26550, 26568 (May 6, 2011).

[545] 189 broker-dealers × 10 hours = 1,890 hours.

[546] *See NIBA 2 Letter.*

[547] *See Amendments to Financial Responsibility Rules,* 72 FR at 12877.

[548] 189 broker-dealers × 200 hours per firm = 37,800.

[549] Because broker-dealers affected by these amendments are likely to already have existing sweep programs in place, a broker-dealer likely will need to update its existing systems, rather than be required to purchase additional hardware to comply with these rule amendments.

[550] 189 broker-dealers × 50 hours per firm = 9,450 hours.

$400 per hour.[551] For these reasons, consistent with its estimate in the proposing release, the Commission estimates that the average one-time cost to a broker-dealer will be approximately $20,000 [552] and the one-time cost to broker-dealers will be approximately $3,780,000.[553]

As for the annual hour burden, the Commission estimates, consistent with its estimate in the proposing release, these requirements will impact 5% [554] of the total broker-dealer customer accounts per year. Based on FOCUS Report data, the Commission estimates there are approximately 110,493,215 customer accounts and, consequently, 5% of the accounts (5,524,661 accounts per year) will be impacted.[555] Based on staff experience with similar requirements under the existing PRA collection for Rule 17a–3, the Commission further estimates that a broker-dealer will spend, on average, four minutes [556] of employee resources to process a written affirmative consent for new customers, as well as disclosures required under paragraph (j) to Rule 15c3–3. Therefore, the Commission estimates that the annual burden to broker-dealers arising from the requirement will be approximately 368,311 hours.[557]

7. Documentation of Risk Management Procedures

The amendments to Rules 17a–3 and 17a–4 will require certain large broker-dealers to make and keep current a record documenting credit, market, and liquidity risk management controls established and maintained by the broker-dealer to assist it in analyzing and managing the risks associated with its business activities. The amendment only will apply to broker-dealers that have more than (1) $1,000,000 in aggregate credit items as computed under the customer reserve formula of Rule 15c3–3, or (2) $20,000,000 in capital, including debt subordinated in accordance with Appendix D to Rule 15c3–1.

As proposed, the amendment would have required a broker-dealer to create a record documenting its ''internal risk management controls.'' [558] To address commenters' concerns that the proposed rule language was ambiguous and that the Commission should narrow the application of the rule, the Commission modified new paragraph (a)(23) to Rule 17a–3, as stated above, so that the final rule requires certain broker-dealers to document risk management controls established to manage market, credit, and liquidity risk, rather than all of its ''internal risk management controls.''

In the proposing release, the Commission estimated that based on FOCUS Report data, that there would be approximately 517 broker-dealers that would meet the applicability threshold of this amendment ($1,000,000 in credits or $20,000,000 in capital), and therefore would be subject to the proposed rule.[559] The Commission also estimated that this requirement would result in a one-time burden to broker-dealers of approximately 62,040 hours, based on the estimate that a broker-dealer would spend approximately 120 hours of employee resources augmenting its procedures to comply with the proposed rule.[560] The Commission did not receive any comments on this estimate in the proposing release.

In light of the change in the final rule text to require the documentation of controls established to manage market, credit, and liquidity risk, rather than all of its ''internal risk management controls,'' the Commission is reducing the final PRA estimate for Rule 17a–3 because the final rule narrows the scope of internal risk management controls the broker-dealer is required to document. Consequently, the change to the final rule should result in a reduction in the one-time hour burden estimate. The rule does not specify the type of controls a broker-dealer must establish to manage these risks. It simply requires the documentation of the procedures the broker-dealer has established. Broker-dealers that are part of holding companies may be subject to procedures that are used globally throughout the organization. As long as the broker-dealer maintains documented procedures of controls pertaining to the designated entity, the requirements of the rule would be met. The one-time hour burden to comply with the rule will vary depending on the size and complexity of a firm. In addition, some larger broker-dealers required to comply with Rule 15c3–4 (Internal Risk Management Control Systems for OTC Derivatives Dealers) already would be required to document their internal risk management control systems related to market, credit, and liquidity risk.[561]

Taking this into account, as well as based on staff experience monitoring compliance of risk management controls of broker-dealers, the Commission estimates that a broker-dealer will spend, on average, approximately 100 hours of employee resources to comply with this amendment to ensure its market, credit, and liquidity risk controls are documented. For the reasons discussed above, including narrowing the scope of the final rule, the estimate of 100 hours reflects a 20% reduction from the estimate in the proposing release of 120 hours. Based on FOCUS Report data, as of December 31, 2011, the Commission estimates there are approximately 490 broker-dealers that would be subject to the final rule amendment (because the firm has $1,000,000 in credits or $20,000,000 in capital). Therefore, the Commission estimates the total one-time burden to broker-dealers will be approximately 49,000 hours.[562]

In addition to the one-time hour burden discussed in the proposing release,[563] based on similar collections of information requiring the documentation of risk management controls,[564] large broker-dealers required to comply with the amendment as adopted likely will incur annual hour burdens.[565] Consequently, the Commission is incorporating annual hour burdens for this collection of information in the final rule amendments.[566] Therefore, the Commission estimates that a broker-

[551] Based on staff experience, the Commission used the estimate of $400 per hour for legal services provided by outside counsel, which is the same estimate used by the Commission in other recent releases. *See Capital, Margin, and Segregation Requirements for Security-Based Swap Dealers and Major Security-Based Swap Participants and Capital Requirements for Broker-Dealers,* Exchange Act Release 68071, 77 FR at 70297; *Further Definition of ''Swap,'' ''Security-Based Swap,'' and ''Security-Based Swap Agreement''; Mixed Swaps; Security-Based Swap Agreement Recordkeeping;* Final Rule, Exchange Act Release No. 67453 (July 18, 2012), 77 FR 48208 (Aug. 13, 2012).

[552] $400 per hour × 50 hours = $20,000.

[553] 189 broker-dealers × $20,000 = $3,780,000.

[554] *See Amendments to Financial Responsibility Rules,* 72 FR at 12877.

[555] These estimates have been updated from the proposing release estimates of 109,300,000 customer accounts and 5% of the customer account or 5,465,000 accounts. *Id.*

[556] *Id.*

[557] [5,524,661 accounts × 4 minutes/account]/60 minutes = 368,311 hours. This is an update from our proposing release estimate of 5,465,000 accounts × 4 minutes/account = 364,333 hours. *Id.* at 12878.

[558] *Id.* at 12899.

[559] *Id.* at 12878.

[560] 517 broker-dealers × 120 hours = 62,040 hours.

[561] *See* 17 CFR 240.15c3–4(a).

[562] 490 broker-dealers × 100 hours = 49,000 hours.

[563] *See Amendments to Financial Responsibility Rules,* 72 FR at 12878.

[564] *See Risk Management Controls for Brokers or Dealers with Market Access; Final Rule,* Exchange Act Release No. 63241 (Nov. 3, 2010), 75 FR 69792, 69815 (Nov. 15, 2013). *See also Capital, Margin, and Segregation Requirements for Security-Based Swap Dealers and Major Security-Based Swap Participants and Capital Requirements for Broker-Dealers,* Exchange Act Release 68071, 77 FR at 70295 and 70297.

[565] *See NIBA 2 Letter.*

[566] The proposing release did not contain annual hour burden estimates for this collection of information.

dealer would spend approximately 45 hours per year to ensure its compliance with the amendment to Rule 17a–3, for a total annual hour burden to the industry of 22,050 hours.[567]

Additionally, the proposing release did not specifically allocate the estimated hour burdens with respect to the amendments to Rule 17a–3 and 17a–4 between these two rules.[568] As discussed above, and based on staff experience with the application of Rule 17a–4, the Commission estimates that broker-dealers meeting the threshold requirements of paragraph (a)(23) of Rule 17a–3 will already have documented their established procedures and controls to manage the risks arising from their business. Consequently, the amendment to Rule 17a–4 to require a broker-dealer to preserve the records required pursuant to paragraph (a)(23) of Rule 17a–3 until three years after the termination of the use of the risk management controls documented therein should have a minimal impact on the current annual hour burden for Rule 17a–4 because the paperwork burden associated with this amendment derives from the substance of the amendments to paragraph (a)(23) of Rule 17a–3. Therefore, the Commission is retaining the current annual hour burden for Rule 17a–4 without change.

Because the final rule amendment requires a broker-dealer to document its liquidity, credit, and market risk management controls, if it has established such controls, these broker-dealers may incur one-time startup costs to hire outside counsel to review the documented controls to ensure the broker-dealer is meeting the requirements of the rule. Based on staff experience with similar reviews, the Commission estimates that these broker-dealers would incur $2,000 in legal costs,[569] or $980,000,[570] in the aggregate, initial one-time burden to review and comment on the documented risk management controls.[571]

8. Notice Requirements

The amendment to Rule 17a–11 requiring notice when a broker-dealer becomes subject to certain insolvency events will result in irregular filings from a small number of broker-dealers. As noted above, SIPC's 2012 annual report indicates that the average annual number of broker-dealers which have become subject to a liquidation proceeding under SIPA over the last ten years is two. Accordingly, the Commission estimates that approximately two insolvency notices will be sent per year and that a broker-dealer will spend, on average, approximately ten minutes of employee resources to prepare and send the notice.[572] The Commission did not receive any comments on its estimates from the proposing release. Therefore, the Commission estimates that the total annual burden to broker-dealers arising from this amendment will be approximately 20 minutes.[573]

The amendment to Rule 17a–11 requires broker-dealers engaged in securities lending or repurchase activities to either: (1) File a notice with the Commission and their DEA whenever the total money payable against all securities loaned, subject to a reverse repurchase agreement or the contract value of all securities borrowed or subject to a repurchase agreement, exceeds 2,500% of tentative net capital; or, alternatively, (2) report monthly their securities lending and repurchase activities to their DEA in a form acceptable to their DEA. The Commission did not receive any comments on these specific estimates in the proposing release and continues to believe they are appropriate. As such, the Commission is adopting this amendment with a minor modification that does not impact the collection of information.

In addition, based on FOCUS Report data, as of December 31, 2011, the Commission estimates that approximately one stock loan/borrow notice will be sent per year.[574] The Commission further estimates that a broker-dealer will spend, on average, approximately ten minutes of employee resources to prepare and send the notice. Therefore, the Commission estimates that the total annual burden to broker-dealers arising from this amendment will be approximately ten minutes.[575]

Based on FOCUS Report data, as of December 31, 2011, and staff experience, the Commission estimates that, annually, six broker-dealers will submit the monthly stock loan/borrow report.[576] Based on staff experience, the Commission estimates each firm will spend, on average, approximately 100 hours of employee resources updating its systems to generate the information required in the monthly report. Therefore, the Commission estimates that the total one-time burden to broker-dealers arising from this requirement will be approximately 600 hours.[577] With respect to the annual hour burden, the Commission estimates each firm will spend, on average, approximately one hour per month (or twelve hours per year) of employee resources to prepare and send the report or to prepare the information for the FOCUS report (as required by the firm's DEA, if applicable). Therefore, the Commission estimates the total annual burden arising from this amendment will be approximately 72 hours.[578]

[567] 490 broker-dealers × 45 hours = 22,050 hours. The 45 per hour annual estimate is based on a similar collection of information. *See Risk Management Controls for Brokers or Dealers with Market Access; Final Rule,* Exchange Act Release No. 63241 (Nov. 3, 2010), 75 FR 69792, 69815 (Nov. 15, 2010).

[568] *See Amendments to Financial Responsibility Rules,* 72 FR at 12878.

[569] The Commission staff estimates that the review of the documented controls would require 5 hours of outside counsel time at a cost of $400 per hour. *See also Capital, Margin, and Segregation Requirements for Security-Based Swap Dealers and Major Security-Based Swap Participants and Capital Requirements for Broker-Dealers,* Exchange Act Release 68071, 77 FR at 70297, n.904.

[570] 490 broker-dealers × $2,000 = $980,000.

[571] *See NIBA 2 Letter.*

[572] This is an update from the proposing release estimate of an average of six broker-dealers per year have become subject to a liquidation proceeding under SIPA, based on SIPC's 2005 annual report. The proposing release also contained a 10 minute estimate per broker-dealer (6 notices × 10 minutes per notice = 1 hour). *See Amendments to Financial Responsibility Rules,* 72 FR at 12878.

[573] 2 notices × 10 minutes per notice = 20 minutes.

[574] This estimate is an update of the proposing release estimate that twelve notices will be sent per year based on FOCUS data. *See Amendments to Financial Responsibility Rules,* 72 FR at 12878. As of December 31, 2011, there were seven broker-dealers whose securities borrowed or securities loaned exceeded 80% of 25 times their tentative net capital, and there were six broker-dealers whose securities borrowed or securities loaned exceeded 25 times their tentative net capital. The Commission assumes for purposes of the PRA that six broker-dealers would chose to file monthly reports in lieu of the notice requirements, and that one would file a notice.

[575] 1 notice × 10 minutes per notice = 10 minutes. This is an update of the proposing release estimate of 2 hours (12 notices × 10 minutes per notice). *See Amendments to Financial Responsibility Rules,* 72 FR at 12878. The Commission does not expect broker-dealers to incur postage costs as a result of this amendment because most broker-dealers file these notices via facsimile or email. Therefore, any incremental postages costs will likely be minimal.

[576] This is an update from the proposing release estimate that 21 broker-would submit a monthly report. *See Amendments to Financial Responsibility Rules,* 72 FR at 12878.

[577] 6 broker-dealers × 100 hours per firm = 600 hours. This is an update from our proposing release estimate of 2,100 hours (21 broker-dealers × 100 hours per firm). *See Amendments to Financial Responsibility Rules,* 72 FR at 12878.

[578] 6 broker-dealers × 12 hours per year = 72 hours. This is an update from the proposing release estimate of 252 hours (21 broker-dealers × 12 hours per year). *See Amendments to Financial Responsibility Rules,* 72 FR at 12878.

E. Collection of Information Is Mandatory

These recordkeeping and notice requirements are mandatory with the exception of: (1) The option for a broker-dealer to report monthly its securities lending activities to its DEA in lieu of filing the notice required under paragraph (c)(5) of Rule 17a–11; (2) the option for a broker-dealer to request written approval from its DEA in order to withdraw capital that has been contributed within one year under paragraph (c)(2)(i)(G)(*2*) of Rule 15c3–1; and (3) the option of a carrying broker-dealer to enter into a subordination agreement with an account holder in order to exclude such account holder's account from being treated as a PAB account under paragraph (a)(16) of Rule 15c3–3.

F. Confidentiality

Some of the information the Commission expects to receive may be confidential information. The information collected under the amendments to Rules 15c3–1, 15c3–3, 17a–3, and 17a–4 would be stored by the broker-dealers and made available to the Commission, Commission staff, and SROs, as required in connection with examinations, investigations, and enforcement proceedings. The information collected under the amendments to Rule 17a–11 would be generated from the internal records of the broker-dealers. It would be provided to the Commission, its staff, and SROs but not on a regular basis (except for the optional monthly reports).

To the extent that the Commission receives confidential information pursuant to these collections of information, the Commission is committed to protecting the confidentiality of such information to the extent permitted by law.[579]

Broker-dealers will send required written notices regarding use of a PAB account holder's securities to its customers, as required by Rule 15c3–3.[580] In addition, broker-dealers will send certain notices and disclosures to customers regarding the treatment of their free credit balances under new paragraph (j)(2) to Rule 15c3–3. To the extent these standard notices and disclosures are made available to the Commission, they may not be kept confidential.

G. Record Retention Period

One amendment to Rule 15c3–1 will require broker-dealers to make disclosures to principals and obtain agreements from principals with respect to securities lending transactions where the broker-dealer acts as agent. In addition, the amendment to Rule 15c3–3 to define the term *PAB account* will require carrying broker-dealers to enter into subordination agreements with certain account holders if they wish their account to be excluded from the definition. These records will have to be maintained for not less than three years under paragraph (b)(7) of Rule 17a–4.[581]

The amendments to Rule 15c3–3 require broker-dealers to provide PAB account holders with written notice that the securities may be used in the ordinary course of its business, obtain the written affirmative consent of a new customer before including a customer's free credit balances in a Sweep Program, and provide certain disclosures and notices to all customers with regard to the broker-dealer's Sweep Program. These agreements relate to the terms and conditions of the maintenance of the customer's account and, accordingly, fall within the record retention requirements of paragraph (c) of Rule 17a–4.[582] Under this paragraph, the records must be retained until six years after the closing of the customer's account. The amendments to Rule 15c3–3 also require broker-dealers to obtain notices and contracts from the banks holding their PAB reserve accounts. In order to comply with Rule 15c3–3, broker-dealers must have these notices and contracts in place and documented. These records will have to be maintained for not less than three years under the requirements of Rule 17a–4.[583]

The amendments to Rules 17a–3 and 17a–4 require broker-dealers to document credit, market, and liquidity risk management controls. The amendments to Rule 17a–4 include the establishment of a retention period for these records, which will be until three years after the termination of the use of the risk management controls documented therein under new paragraph (e)(9) of Rule 17a–4. The three-year retention period is designed to document former and current procedures and to provide sufficient opportunity to review the records during the broker-dealer's normal exam cycle.

The amendments to Rule 17a–11 will require broker-dealers to provide notice or report monthly to the Commission and other regulatory authorities under certain circumstances. These notices and reports will constitute communications relating to a broker-dealer's ''business as such'' and, therefore, will need to be retained for three years.[584]

V. Economic Analysis

A. Introduction

The Commission is sensitive to the costs and benefits of its rules. When engaging in rulemaking that requires the Commission to consider or determine whether an action is necessary or appropriate in the public interest, section 3(f) of the Exchange Act requires that the Commission consider, in addition to the protection of investors, whether the action will promote efficiency, competition, and capital formation.[585] In addition, section 23(a)(2) of the Exchange Act requires the Commission to consider the effects on competition of any rules the Commission adopts under the Exchange Act, and prohibits the Commission from adopting any rule that would impose a burden on competition not necessary or appropriate in furtherance of the purposes of the Exchange Act.[586]

In the proposing release,[587] the Commission solicited comment on the costs and benefits of the proposed amendments including whether these costs and benefits were accurate.[588] The

[579] *See, e.g.,* Exchange Act Section 24, 15 U.S.C. 78x (governing the public availability of information obtained by the Commission) and 5 U.S.C. 552 *et seq.* (Freedom of Information Act—''FOIA''). FOIA provides at least two pertinent exemptions under which the Commission has authority to withhold certain information. FOIA Exemption 4 provides an exemption for ''trade secrets and commercial or financial information obtained from a person and privileged or confidential.'' 5 U.S.C. 552(b)(4). FOIA Exemption 8 provides an exemption for matters that are ''contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions.'' 5 U.S.C. 552(b)(8).

[580] *See* 17 CFR 15c3–3(b)(5).

[581] 17 CFR 240.17a–4(b)(7).

[582] 17 CFR 240.17a–4(c).

[583] 17 CFR 240.17a–4.

[584] 17 CFR 240.17a–4(b)(4).

[585] 15 U.S.C. 78c(f).

[586] 15 U.S.C. 78w(a)(2).

[587] *See Amendments to Financial Responsibility Rules,* 72 FR at 12879; *see also Amendments to Financial Responsibility Rules for Broker-Dealers,* Exchange Act Release No. 66910 (May 3, 2012), 77 FR 27150 (May 9, 2012) (re-opening of comment period).

[588] For the purposes of this final economic analysis, the Commission is using salary data from the SIFMA Management & Professional Earnings in the Securities Industry 2012, which provides base salary and bonus information for middle-management and professional positions within the securities industry. The salary costs derived from the report and referenced in this cost/benefit section, are modified to account for an 1800-hour work year and multiplied by 5.35 to account for bonuses, firm size, employee benefits and overhead. Hereinafter, references to data derived from the report as modified in the manner described above will be cited as ''SIFMA 2012 Report as Modified.'' The proposing release used salary information for New York based employees derived from the *SIA*

Continued

Commission also requested that commenters identify and assess any costs and benefits not discussed in the proposing release. The Commission further encouraged commenters to provide specific data and analysis in support of their views.[589] The Commission also requested comment on whether the proposed amendments would place a burden on competition, and promote efficiency, competition, and capital formation.[590] In May 2012, the Commission re-opened the comment period to permit commenters additional opportunity to address these, and any other, issues raised by the proposed rule amendments.[591] The general comments received, as well as comments received relating to specific rule amendments, are discussed below.

In adopting the rule amendments, the Commission has been mindful of the associated costs and benefits. The discussion focuses on the Commission's reasons for adopting these amendments, the affected parties, the costs and benefits of the amendments compared to a baseline, and alternative courses of action. The discussion of the costs of the rule amendments includes a discussion of certain implementation burdens and related costs,[592] which may include assessment costs, personnel costs, and other costs (*e.g.,* technology costs).[593] The cost estimates and related data derived from FOCUS Reports discussed in the proposing release have also been updated in this final release to reflect more recently available data.[594]

Many of the benefits and costs discussed below are difficult to quantify, in particular when discussing enhancements in investor protection. For example, it is unknown how much the amendments to the financial responsibility rules will result in enhanced compliance with those rules. Therefore, much of the discussion is qualitative in nature but, where possible, the Commission has attempted to quantify the costs. However, the inability to quantify these costs and benefits does not mean that the costs and benefits of these rule amendments are any less significant.

As discussed throughout this release, in part in response to comments, the Commission has modified the proposed rules to reduce compliance burdens where consistent with investor protection. In addition, where commenters identified additional costs, the Commission has revised its economic analysis of the final rules to take these costs into account. Finally, the Commission has considered all comment letters received related to the impact of the proposed amendments on efficiency, competition, and capital formation, and responds to these comments in the sections below discussing individual rule amendments.

B. Economic Baseline

The regulatory changes adopted today amend requirements that apply to broker-dealers registered with the Commission. The discussion below includes the approximate numbers of broker-dealers that will be affected by today's amendments and a description of the economic baseline against which the costs and benefits, as well as the impact on efficiency, competition, and capital formation, of today's amendments are measured.

The broker-dealers registered with the Commission vary significantly in terms of their size, business activities, and the complexities of their operations. For example, carrying broker-dealers hold customer securities and funds.[595] Clearing broker-dealers clear transactions as members of security exchanges, the Depository Trust & Clearing Corporation and the Options Clearing Corporation.[596] Many clearing broker-dealers are carrying broker-dealers, but some clearing broker-dealers clear only their own transactions and do not hold customer securities and cash.

In addition, a broker-dealer that does not hold customer securities and/or cash is generally referred to as a ''non-carrying broker-dealer.'' Non-carrying broker-dealers include ''introducing brokers.''[597] These introducing broker-dealers accept customer orders and introduce their customers to carrying broker-dealers that hold the securities and cash of the customers of the introducing broker-dealers along with the securities and cash of their direct customers. A carrying broker-dealer generally receives and executes orders of the introducing broker-dealers' customers.[598] Carrying broker-dealers generally also prepare trade confirmations, settle trades, and organize book entries of the securities purchased and sold.[599] Introducing broker-dealers also may use carrying broker-dealers to clear the introducing firm's proprietary trades and carry the firm's securities. Another group of non-carrying broker-dealers effects transactions in securities like mutual funds on a subscription-way basis, where customers generally purchase the securities by providing the funds directly to the issuer.[600] Finally, some non-carrying broker-dealers act as finders by referring prospective purchasers of securities to issuers.[601]

Report on Management and Professional Earnings in the Securities Industry 2005. See Amendments to Financial Responsibility Rules, 72 FR at 12879, n.151.

[589] *Id.* at 12879.

[590] *Id.*

[591] *Amendments to Financial Responsibility Rules for Broker-Dealers,* Exchange Act Release No. 66910 (May 3, 2012), 77 FR 27150 (May 9, 2012).

[592] In the proposing release, the Commission estimated that the one-time and annual costs to broker-dealers would be $32,814,454 and $39,651,716, respectively. *See Amendments to Financial Responsibility Rules,* 72 FR at 12887.

[593] As discussed in section IV. of this release, the Commission has estimated certain indirect burdens and related costs of these implementation requirements.

[594] *See Amendments to Financial Responsibility Rules,* 72 FR at 12887. The FOCUS Report data from the proposing release was derived from 2004 year end numbers.

[595] Rule 15c3–1 specifies that a broker-dealer shall be deemed to carry customer accounts ''if, in connection with its activities as a broker or dealer, it receives checks, drafts, or other evidences of indebtedness made payable to itself or persons other than the requisite registered broker or dealer carrying the account of a customer, escrow agent, issuer, underwriter, sponsor, or other distributor of securities'' or ''if it does not promptly forward or promptly deliver all of the securities of customers or of other brokers or dealers received by the firm in connection with its activities as a broker or dealer.'' 17 CFR 240.15c3–1(a)(2)(i). Rule 15c3–3 defines the term *securities carried for the account of a customer* to mean ''securities received by or on behalf of a broker or dealer for the account of any customer and securities carried long by a broker or dealer for the account of any customer,'' as well as securities sold to, or bought for, a customer by a broker-dealer. 17 CFR 240.15c3–3(a)(2).

[596] *See Definitions of Terms and Exemptions Relating to the ''Broker'' Exceptions for Banks,* Exchange Act Release No. 56501 (Sept. 24, 2007), 72 FR 56514 (Oct. 3, 2007), at n.269.

[597] *Id.* at ¶ 1.15; *see also Net Capital Rule,* Exchange Act Release No. 31511 (Nov. 24, 1992), 57 FR 56973 (Dec. 2, 1992) (describing role of introducing broker-dealers).

[598] *Net Capital Rule,* Exchange Act Release No. 31511 (Nov. 24, 1992), 57 FR 56973 (Dec. 2, 1992).

[599] *See, e.g.,* FINRA Rule 4311 (Carrying Agreements). This FINRA rule governs the requirements applicable to FINRA members when entering into agreements for the carrying of any customer accounts in which securities transactions can be effected. Historically, the purpose of this rule has been to ensure that certain functions and responsibilities are clearly allocated to either the introducing or carrying firm, consistent with the requirements of the SRO's and Commission's financial responsibility and other rules and regulations, as applicable. *See also Notice of Filing of Amendment No. 1 and Order Granting Accelerated Approval of a Proposed Rule Change Adopting, as Modified by Amendment No. 1, Rules Governing Guarantees, Carrying Agreements, Security Counts and Supervision of General Ledger Accounts in the Consolidated FINRA Rulebook,* Exchange Act Release No. 63999 (Mar. 7, 2011), 76 FR 12380 (Mar. 7, 2011).

[600] *See Books and Records Requirement for Brokers and Dealers Under the Securities Exchange Act of 1934,* Exchange Act Release No. 44992 (Nov. 2, 2001) (''[T]he Commission recognizes that for some types of transactions, such as purchases of mutual funds or variable annuities, the customer may simply fill out an application or a subscription agreement that the broker-dealer then forwards directly to the issuer.'').

[601] *See* American Bar Association, *Report and Recommendations of the Task Force on Private*

While these amendments will impact investors and markets more generally, the broker-dealer industry is the primary industry directly affected by the rule amendments. In some cases, the amendments impose requirements on certain types of broker-dealers that engage in specific activities. For example, only carrying broker-dealers that carry free credit balances would be subject to the requirements regarding the treatment of free credit balances under paragraph (j) of Rule 15c3–3. All broker-dealers would be subject to the requirements to deduct from net worth certain liabilities or expenses assumed by third parties under Rule 15c3–1.

To establish a baseline for competition among broker-dealers, the Commission looked at the status of the broker-dealer industry detailed below. In terms of size, the following table provides the distribution of broker-dealers by total capital levels and the aggregate total capital within each capital bracket.

BROKER-DEALER CAPITAL AT CALENDAR YEAR END 2011 [602]

[$ millions]

Capital	Number of firms	Aggregate total capital
Less than $500,000	2,506	$347
Greater than or equal to $500,000 and less than $5 million	1,320	2,212
Greater than or equal to $5 million and less than $50 million	608	10,520
Greater than or equal to $50 million and less than $100 million	80	5,672
Greater than or equal to $100 million and less than $500 million	125	26,655
Greater than or equal to $500 million and less than $1 billion	28	19,248
Greater than or equal to $1 billion and less than $5 billion	27	61,284
Greater than or equal to $5 billion and less than $10 billion	6	41,175
Greater than or equal to $10 billion	9	175,585
Total	4,709	342,698

According to FOCUS Report data, as of December 31, 2011, there were approximately 4,709 broker-dealers registered with the Commission. Nine broker-dealers hold over half of broker-dealers' total capital. Further, based on FOCUS Report data, as of December 31, 2011, the Commission also estimates that there are approximately 287 broker-dealers that are clearing or carrying firms that do not claim exemptions pursuant to paragraph (k) of Rule 15c3–3. Based on FOCUS Report data, as of December 31, 2011, approximately 189 of these broker-dealers carry free credit balances, while 61 broker-dealers carry PAB accounts.

For the purposes of this economic analysis, the baseline is the current customer protection, net capital, books and records, and notification requirements for broker-dealers promulgated under the Exchange Act and existing interpretations thereunder, and how they affect broker-dealers.

As discussed above in section II.A.1. of this release, Rule 15c3–3—the customer protection rule—in effect mandates a separation of customer assets from broker-dealer assets through two fundamental requirements: (1) That a carrying broker-dealer must maintain physical possession or control over customers' fully paid and excess margin securities; and (2) that a carrying broker-dealer must maintain a reserve of cash or qualified securities [603] in an account at a bank that is at least equal in value to the net cash owed to customers, including cash obtained from the use of customer securities. These provisions are designed to require the broker-dealer to hold customer securities and cash in a manner that enables the prompt return of these assets in the event that the firm falls into financial difficulty or becomes insolvent. The goal of the rule is to place a broker-dealer in a position where it is able to wind down in an orderly self-liquidation without the need for financial assistance from SIPC through a formal proceeding under SIPA.[604]

As discussed above in section II.E. of this release, Rule 15c3–1—the net capital rule—requires broker-dealers to maintain a minimum level of net capital (meaning highly liquid capital) *at all times*.[605] The rule requires that a broker-dealer perform two calculations: (1) A computation of the minimum amount of net capital the broker-dealer must maintain; [606] and (2) a computation of the amount of net capital the broker-dealer is maintaining.[607] The minimum net capital requirement is the greater of a fixed-dollar amount specified in the rule and an amount determined by applying one of two financial ratios: the 15-to-1 aggregate indebtedness to net capital ratio or the 2% of aggregate debit items ratio.[608] In computing net capital, the broker-dealer must, among other things, make certain adjustments to net worth, such as deducting illiquid assets, taking other capital charges, and adding qualifying subordinated loans.[609] The amount remaining after these adjustments is defined as tentative net capital.[610] The final step in computing net capital is to take prescribed percentage deductions (''standardized haircuts'') from the mark-to-market value of the proprietary positions (*e.g.,* securities, money market instruments, and commodities) that are included in its tentative net capital.[611]

As discussed above in section II.D. of this release, Rule 17a–3 and 17a–4—the books and records rules—require broker-dealers to make and keep current certain records (*e.g.,* trade blotters, asset and liability ledgers, income ledgers, customer account ledgers, etc.), which must be maintained in a specific manner for required retention

Placement Broker-Dealers 23–24 (2005); *see also Net Capital Rule,* Exchange Act Release No. 31511 (Nov. 24, 1992), 57 FR 56973 (Dec. 2, 1992).

[602] The information in this chart is based on FOCUS Report data filed by broker-dealers in 2011. The information in the ''Aggregate Total Capital'' column is based on data reported on line 3530 of the FOCUS Report, which includes total capital and allowable subordinated liabilities.

[603] Rule 15c3–3 defines *qualified securities* as securities issued by the United States or guaranteed by the United States with respect to principal and interest. 17 CFR 240.15c3–3(a)(6).

[604] 15 U.S.C. 78aaa *et seq.*

[605] *See* 17 CFR 240.15c3–1.

[606] *See* 17 CFR 240.15c3–1(a).

[607] *See* 17 CFR 240.15c3–1(c)(2). The computation of net capital is based on the definition of *net capital* in paragraph (c)(2) of Rule 15c3–1. *Id.*

[608] *See* 17 CFR 240.15c3–1(a).

[609] *See* 17 CFR 240.15c3–1(c)(2)(i)–(xiii).

[610] *See* 17 CFR 240.15c3–1(c)(15).

[611] *See* 17 CFR 240.15c3–1(c)(2)(vi).

periods.[612] Finally, Rule 17a–11—the notification rule—requires a broker-dealer to notify the Commission and its DEA when certain events occur, such as if it fails to maintain certain levels of net capital.[613]

The specific requirements as well as the benefits and costs of each amendment and how broker-dealers will be affected are discussed in more detail in the sections below.

C. Discussion of General Comments Received

As stated above, in the proposing release, the Commission requested comment on estimates and views regarding the costs and benefits for particular types of market participants, as well as any other costs and benefits that may result from the adoption of the proposed rules.[614] In response to this specific request, the Commission received two comment letters.[615] The first commenter who was explicitly addressing the Commission's Initial Regulatory Flexibility Analysis stated that the Commission should pay ''explicit attention to regulatory trends in the rest of the world'' because doing so ''benefits not only small entities [the focus of the Initial Regulatory Flexibility Analysis] (by reducing their regulatory burden) but all entities, as larger entities can experience more consistent regulatory procedures around the world.'' [616] The commenter suggested that the Commission consider a ''Basel II type approach to net capital requirements.'' [617] The second commenter requested that the Commission publish an update to all statistics and costs referenced in the proposing release.[618] The commenter further requested that, once published, the Commission reopen the comment period so that comments could be provided based on ''current conditions and statistics.'' [619]

In response to the first commenter's request that the Commission should explicitly examine the alternatives used by regulators in other jurisdictions,[620] in adopting the final rule amendments today, as discussed throughout this section, the Commission considered reasonable alternatives, including alternatives in other jurisdictions, as well as the costs and benefits of the amendments. Moreover, the amendments relate to discrete areas of the broker-dealer financial responsibility rules (*i.e.,* they do not establish new financial responsibility standards such as would be the case if the Commission were to adopt a ''Basel II type approach to net capital requirements.''). Consequently, the commenter's suggestion is beyond the scope of this rulemaking.[621]

In response to the second commenter, the Commission is publishing updated costs and statistics in this release. The Commission, however, believes that it is unnecessary to reopen the comment period to obtain comment on the updated statistics for several reasons. First, in proposing the rule changes, the Commission included then current estimates in the proposing release. Second, as noted above, the Commission reopened the comment period in 2012.[622] The reopening of the comment period afforded commenters an additional opportunity to comment on the proposed rules (including estimated costs and benefits), given the economic events since the rule amendments were proposed, the regulatory developments, the comments received on the proposed amendments, the continuing public interest in the proposed amendments, and the passage of time.[623] The Commission received a total of 97 comment letters on the proposed amendments.[624] As discussed below, in many cases, the revised data included in this release reflects a decrease in overall costs because of the decline in the total number of broker-dealers (including the number of broker-dealers that will be affected by each of these rule amendments). As of the 2004 year end, the number of registered broker-dealers was 6,339. As of the 2011 year end, the number of registered broker-dealers was 4,709, reflecting a net decrease of 1,630 (or 26%) in the number of registered broker-dealers. Consequently, many of the aggregate costs included in the proposing release have declined due to the decrease in the number of registered broker-dealers.

Further, the costs incurred by a broker-dealer to comply with the rule amendments will generally depend, among other factors, on the size and complexity of its business activities. Because the size and complexity of broker-dealers varies significantly, their costs also could vary significantly. In some cases, the Commission provided in the proposing release, and is providing here, estimates of the average cost per broker-dealer, taking into consideration the variance in size and complexity of the business activities of broker-dealers. In other cases, the cost impact to broker-dealers will depend on whether the broker-dealer is conducting activities that are subject to the rule amendments. For example, the amendments to Rule 15c3–3 will apply, for the most part, only to broker-dealers that carry PAB accounts (*e.g.,* PAB account amendment), have a reserve deposit requirement (*e.g.,* reserve bank account amendments), or carry free credit balances (*e.g.,* free credit balance amendments). These amendments would have no direct cost impact on non-carrying broker-dealers, many of which are small broker-dealers. Moreover, given that some amendments are largely codifications of existing Commission and staff guidance (*e.g.,* amendments related to PAB accounts, third parties assuming broker-dealer liabilities, temporary capital contributions, and fidelity bond deductions), any economic effects, including costs and benefits, should be compared to the baseline of current practice. Broker-dealers that are already complying with these requirements would not be expected to incur substantial costs to comply with these amendments.

The second commenter also stated that broker-dealers are dealing with relatively static commission and fee schedules in comparison to what they might charge customers, and, as such, broker-dealers will be unable to pass on any cost increases resulting from these rule amendments directly to customers.[625] The commenter stated that these cost increases over a relatively short period of time threaten the viability of all small broker-dealers, irrespective of their business line types or classes.[626] The commenter noted that the estimates provided by the Commission utilized only the number of broker-dealers in its estimate that the Commission justifiably considered to be affected by the proposals.[627] In contrast, the commenter believes that most, if not all broker-dealers will spend over 90 hours each analyzing the effects of these

[612] 17 CFR 240.17a–3; 17 CFR 240.17a–4.

[613] 17 CFR 240.17a–11.

[614] *See Amendments to Financial Responsibility Rules,* 72 FR at 12879.

[615] *See Angel Letter; NIBA 2 Letter.*

[616] *See Angel Letter.*

[617] *Id.*

[618] *See NIBA 2 Letter.*

[619] *Id.*

[620] *See Angel Letter.*

[621] The commenter cited the *JP Morgan Letter* in support of the suggestion to ''consider regulatory trends in the rest of the world.'' *Id.* The *JP Morgan Letter* recommends that the Commission adopt a due diligence standard—citing a U.K. regulation—with respect to the amendments regarding customer reserve account cash deposits. *See JP Morgan Letter.* The Commission addresses this comment below in section V.D.1.i.b.(III) of this release.

[622] *Amendments to Financial Responsibility Rules for Broker-Dealers,* Exchange Act Release No. 66910 (May 3, 2012), 77 FR 27150 (May 9, 2012).

[623] *Id.*

[624] *See supra* note 6.

[625] *See NIBA 2 Letter.*

[626] *Id.*

[627] *Id.*

proposals and, if the rules are implemented, will spend much more than 90 hours each in implementing procedures to comply with the new rules. The commenter also believes that implementation will require broker-dealers to modify their written supervisory procedures and supervisory controls, and broker-dealers will spend in excess of 240 hours each in the monitoring of such rules on an ongoing basis. Consequently, the commenter believes that each broker-dealer will spend in excess of $15,000 for outside counsel and auditor opinions or work product.[628] This commenter did not provide additional detail about the basis for its view that the Commission's estimates were too low.

As stated above in section IV. of this release, the Commission agrees with the commenter that the broker-dealers directly affected by the rule amendments may be required to implement procedures or modify their written supervisory procedures to comply with the rule amendments. In cases where the rule amendments require a broker-dealer to directly implement or document certain policies and procedures, these hour burdens and costs already are incorporated into the PRA costs discussed above in section IV. of this release, and incorporated into the discussion below.[629] In response to the commenter, the Commission also acknowledges that a broker-dealer may need to review its operations to determine whether it has any obligations under the rule amendments. Even if the broker-dealer is not affected by the rule amendments, such a review may result in an indirect effect on its operations. These indirect costs are discussed in more detail below. In adopting these final rules, as discussed throughout the release, including this economic analysis, the Commission has sought to take into account the costs and benefits associated with each particular rule amendment. The Commission has also considered the indirect costs that a broker-dealer would incur to assess the impact of these final rule amendments.

The Commission estimates that a broker-dealer likely will hire outside counsel to assess the impact of the final rules on the broker-dealer's operations because all broker-dealers may be affected by the final rules, including non-carrying broker-dealers that may be affected by certain amendments, such as the Rule 15c3–1 amendments regarding third party liabilities or temporary capital contributions. Whether a broker-dealer determines to incur such assessment costs will depend on the nature and size of the broker-dealer's business and the range of activities the broker-dealer conducts. Therefore, while the Commission cannot estimate an aggregate assessment cost for all broker-dealers, the Commission estimates that these assessment costs would range approximately from $2,000 to $30,000[630] per broker-dealer.[631]

D. Economic Analysis of the Amendments and Alternatives

This section discusses costs and benefits of the rule amendments for the affected parties against the economic baseline identified above, both in terms of each of the specific changes from the baseline and in terms of the overall impact. In considering costs, benefits, and overall impact, this discussion addresses comments received, modifications made to the proposed amendments, and reasonable alternatives, where applicable.

This section also discusses the Commission's considerations on the burden on competition, and the promotion of efficiency, competition, and capital formation.[632] In significant part, the effects of the final rules on efficiency and capital formation are linked to the effects of these rules on competition. Competitive markets are generally expected to promote an efficient allocation of capital. Rules that promote, or do not unduly restrict, investor participation and competition in the broker-dealer industry can be accompanied by regulatory benefits that may reduce the risk of market failure and thus promote market efficiency and capital formation.

1. Amendments to the Customer Protection Rule

i. Economic Analysis

a. Proprietary Accounts of Broker-Dealers

(I). Summary of Amendments

Today's amendments to Rules 15c3–3 and 15c3–3a require carrying broker-dealers to: (1) Perform a separate reserve computation for PAB accounts (in addition to the customer reserve computation currently required under Rule 15c3–3);[633] (2) establish and fund a separate reserve account for the benefit of the PAB account holders;[634] and (3) obtain and maintain physical possession or control of securities carried for a PAB account, unless the carrying broker-dealer has provided written notice to the PAB account holder that the securities may be used in the ordinary course of its securities business, and has provided opportunity for the PAB account holder to object.[635] In addition to the amendments to Rules 15c3–3 and 15c3–3a, the Commission is adopting amendments to Rule 15c3–1 that will require a broker-dealer to deduct from net capital cash and securities held in a securities account at a carrying broker-dealer except where the account has been subordinated to the claims of creditors of the carrying broker-dealer.[636]

As discussed above in section II.A.2. of this release, there is a disparity between the customer reserve requirements in Rule 15c3–3 and the treatment of customers in a liquidation proceeding under SIPA.[637] Broker-dealers are not within the definition of *customer* for the purposes of Rule 15c3–3.[638] Accordingly, a carrying broker-dealer that carries PAB accounts is not required to treat these accounts as customer accounts for the purposes of Rule 15c3–3. However, the definition of *customer* in SIPA is broader than the

[628] *Id.*

[629] *See, e.g.,* paragraph (j)(1) of Rule 15c3–3 and paragraph (a)(23) of Rule 17a–3, as adopted.

[630] These costs estimates include hour estimates in the range of 5 hours to 75 hours for outside counsel assessment review. A small broker-dealer may hire outside counsel to review only 1 or 2 of the final rule amendments for approximately 5 hours × $400 per hour = $2,000. *See Business Conduct Standards for Security-Based Swap Dealers and Major Security-Based Swap Participants,* Exchange Act Release No. 64766, 76 FR 42396 (June 29, 2011), 76 FR 42396 (July 18, 2011) (applying the estimated cost of $400 for legal services by outside counsel). *See also Further Definition of ''Swap Dealer,'' ''Security-Based Swap Dealer,'' ''Major Swap Participant,'' ''Major Security-Based Swap Participant'' and ''Eligible Contract Participant'',* Exchange Act Release No. 66868 (Apr. 27, 2012), 77 FR 30596 (May 23, 2012) (noting that the review of the final rules by outside counsel for a large firm would generally cost more because the review would be more complex).

[631] As discussed above, and in section IV. of this release, broker-dealers directly affected by a specific rule amendment may be required to implement procedures or modify their written supervisory procedures in order to comply with the rule amendments. The hours and related costs are discussed in section IV. of this release, and are incorporated into the specific sections below discussing each rule amendment. Therefore, while the range of hours is less than 90 hours (as suggested by the commenter), the Commission has adjusted other specific hour and cost estimates (in sections IV. and V. of this release) in response to the commenter's concerns, and believes these adjusted estimates, in totality, for the reasons discussed above, adequately address the estimated costs as well as the commenter's concerns. *See NIBA 2 Letter.*

[632] In the proposing release, the Commission stated that its preliminary view was that the proposed amendments promote efficiency, competition, and capital formation and would not have any anti-competitive effects. *See Amendments to Financial Responsibility Rules,* 72 FR at 12887.

[633] 17 CFR 250.15c3–3(e)(3).

[634] 17 CFR 240.15c3–3(e)(1).

[635] 17 CFR 240.15c3–3(b)(5).

[636] 17 CFR 240.15c3–1(c)(2)(iv)(E).

[637] 15 U.S.C. 78aaa *et seq.*

[638] 17 CFR 240.15c3–3(a)(1).

definition in Rule 15c3–3 in that the SIPA definition does not exclude broker-dealers.[639]

SIPA customers are entitled to a number of protections if their broker-dealer fails and is liquidated in a SIPA proceeding, including the right to share *pro rata* with other SIPA customers in the customer property held by the broker-dealer and, if the fund of customer property is insufficient to make each SIPA customer whole, the entitlement to receive an advance from the SIPC fund of up to $500,000 (of which only $250,000 can be used to cover cash claims).[640] Broker-dealers that are SIPA customers have the right to share *pro rata* in customer property.[641] Consequently, when a carrying broker-dealer is liquidated in a SIPA proceeding, each customer (including a SIPA customer that is a broker-dealer) has a claim on the customer property. However, because the possession and control and customer reserve account provisions of Rule 15c3–3 do not apply to PAB account holders by virtue of the definition of *customer* in the rule, the carrying broker-dealer is not restricted from using the securities and cash in these accounts for its business purposes.

The treatment of PAB account holders as customers for the purposes of SIPA but not as customers for the purposes of Rule 15c3–3 increases the risk that, in the event that a carrying broker-dealer is liquidated under SIPA, the claims of all SIPA customers will exceed the amount of customer property available and, thereby, expose the SIPC fund and potentially SIPA customers to losses. In addition, if the customer property is insufficient to satisfy fully all SIPA customer claims, and losses are incurred, the broker-dealer SIPA customers could be potentially placed in financial distress causing adverse effects to the securities markets, in addition to the adverse effects resulting from the failure of the carrying broker-dealer.[642]

The amendments address the disparity between the customer reserve requirements in Rule 15c3–3 and the treatment of customers in a liquidation proceeding under SIPA by requiring broker-dealers to reserve for the amount that credits exceed debits with respect to broker-dealer accounts. The amendments create a process that protects customers and PAB account holders of a failed carrying broker-dealer, and are designed to provide such protection by mitigating the risk that there will be insufficient customer property to fully satisfy all customer claims in a SIPA liquidation. By requiring the protection of PAB account holders (who qualify as customers under SIPA), the amendments to Rule 15c3–3 also reduce the risk that advances from the SIPC fund would be necessary to protect customer claims.

The amendments to Rule 15c3–1 are intended to prevent broker-dealers from including in their net capital amount assets that may not be readily available to be returned to such broker-dealer account holders because the assets would not be subject to the PAB account provisions under Rules 15c3–3 and 15c3–3a. The amendments to Rule 15c3–1 also provide consistency with the exclusions from the definition of PAB account in paragraph (a)(16) of Rule 15c3–3.

Overall, the PAB-related amendments to Rules 15c3–3, 15c3–3a, and 15c3–1 should serve to reduce certain risks to investors and PAB account holders and, thereby, strengthen customer protection. The Commission requested comment on available metrics to quantify these benefits and any other benefits a commenter may identify. The Commission did not receive any comments in response to this request.

(II). Baseline and Incremental Economic Effects

Under the no-action relief set forth in the *PAIB Letter,*[643] discussed in section II.A.2 of this release, broker-dealers currently perform a reserve computation for domestic broker-dealer accounts and have obtained the necessary agreements and notices from the banks holding their PAIB reserve deposits. Therefore, as compared to the baseline of current Rule 15c3–1 and existing interpretations and guidance thereunder, including the no-action relief set forth in the *PAIB Letter,* the amendments will likely result only in small incremental benefits and costs because the final rule codifies many of the provisions of the *PAIB Letter.*[644]

Incorporation of certain aspects of the *PAIB Letter* into Rule 15c3–3 is intended to provide broker-dealers with more certainty with respect to the PAB requirements because these requirements will be expressly stated in a Commission rule. Moreover, the PAB final rule amendments will not impose a significant additional burden on broker-dealers presently utilizing the interpretive relief provided in the *PAIB Letter* since the provisions of the final rule amendments are substantially similar. Relative to the baseline, there will be economic differences to the extent that carrying broker-dealers are currently not following the *PAIB Letter,* as compliance with conditions of the *PAIB Letter* are voluntary, while the PAB amendments to Rule 15c3–3 will be mandatory for the carrying broker-dealers subject to its requirements. Consequently, to the extent that carrying broker-dealers are not currently complying with the *PAIB Letter,* and to the extent the amendments as adopted differ from the *PAIB Letter,* they may incur incremental costs, including possible costs of capital as firms reallocate capital to comply with the rule amendments.

(III). Alternatives

In adopting these amendments, the Commission considered alternatives suggested by commenters on specific provisions of the rule, and incorporated some of these alternative approaches into the final rule amendments.

Two commenters raised concerns about the proposed definition of the term *PAB account,* because by including proprietary accounts of foreign broker-dealers and foreign banks acting as broker-dealers within the definition, the definition would differ from provisions in the *PAIB Letter,* which excluded such accounts from a PAIB computation.[645] The first commenter suggested allowing broker-dealers to ''opt out'' of the rule.[646] The second commenter stated that foreign broker-dealers and foreign banks acting as broker-dealers should be allowed to subordinate their claims to customers and creditors of the broker-dealer to remove their accounts from PAB account treatment because under SIPA foreign broker-dealers and foreign banks acting as broker-dealers, under certain circumstances, will not be deemed customers and, therefore,

[639] *See* 15 U.S.C. 78*lll*(a).

[640] *See* 15 U.S.C. 78fff–2(c) and 15 U.S.C. 78fff–3(a), respectively. Under SIPA, the term *customer property* includes ''cash and securities . . . at any time received, acquired, or held by or for the account of the debtor from or for the securities accounts of a customer, and the proceeds of any such property transferred by the debtor, including property unlawfully converted.'' Therefore, customer property includes those securities positions that are held for customers and the cash that is owed to customers. 15 U.S.C. 78*lll*(4).

[641] *See* 15 U.S.C. 78fff–2(c). Broker-dealers, however, are not entitled to receive an advance from the SIPC fund. 15 U.S.C. 78fff–3(a).

[642] As noted above, while broker-dealers are customers for the purposes of SIPA, they are not entitled to the advances from the SIPC fund of up to $500,000 (limited to $250,000 for cash claims) allowed under SIPA to make up for potential shortfalls after the pro rata distribution of customer property. 15 U.S.C. 78fff–3(a).

[643] *See PAIB Letter.*

[644] *See* section II.B. of this release. The *PAIB Letter* is being withdrawn as of the effective date of these rule amendments.

[645] *See Dresdner Kleinwort Letter; Deutsche Bank Securities Letter.*

[646] *See Dresdner Kleinwort Letter.*

would not be entitled to a *pro rata* share of the estate of customer property in a SIPA liquidation.[647] More specifically, the commenter suggested that, to parallel the language in SIPA,[648] the Commission modify the definition of *PAB account* to exclude ''any foreign broker-dealer and foreign bank, to the extent that such entity has a claim for cash or securities that is subordinated to the claims of creditors of the carrying broker-dealer.'' This commenter also recommended that the subordinating broker-dealer would need to follow the requirements for non-conforming subordinated loans to remove an account from being treated as a PAB account.[649]

In response to commenters' concerns and suggested alternatives, the Commission is excluding from the *PAB account* definition accounts that have been subordinated to the claims of creditors of the carrying broker-dealer. Consequently, this provision will provide flexibility to carrying broker-dealers and their broker-dealer affiliates to structure their PAB account relationships in a manner that permits operational efficiencies (*i.e.,* the ability to exclude these accounts from the PAB reserve computation) while still promoting the goal of the amendments to have a consistent treatment of these accounts under Rule 15c3–3 and SIPA, and thereby protect accounts holders that are customers under SIPA. As discussed below, however, the requirement to enter into a subordination agreement with certain account holders to exclude them from the definition of *PAB account* may result in a one-time cost to broker-dealers.

In addition, in the proposing release, the Commission proposed to require that a carrying broker-dealer obtain written permission from a PAB account holder before it could use the securities of the PAB account holder in the ordinary course of its securities business. One commenter stated that this provision should be eliminated from the proposed amendments, arguing that it interferes unnecessarily in the contractual arrangements between broker-dealers, which are capable of understanding the terms of standard industry custodial relationships and that the *PAIB Letter* did not contain any such requirements. The Commission considered this alternative and believes that an appropriate level of protection for PAB account holders will be achieved by requiring the carrying broker-dealer to provide written notice to the PAB account holders that the firm may use their non-margin securities in the ordinary course of its securities business. The written notice requirement in the final rule will increase protection for PAB account holders from the status quo without imposing substantial burdens on existing account relationships. The revised rule will alert PAB account holders to the fact that the carrying broker-dealer may use their securities in its business for its own benefit, thereby reducing possible contractual ambiguity between the PAB account holder and the broker-dealer. The revised rule also will provide a PAB account holder the opportunity to seek to move the account to another broker-dealer or to negotiate different terms with regard to the use of its securities. Finally, this amendment will eliminate the need for, and the costs that would result from, carrying broker-dealers reworking existing contracts.

An alternative considered in adopting the PAB-related amendments to Rule 15c3–1 would have required a broker-dealer, when calculating net capital, to deduct from net worth cash and securities held in a securities account at another broker-dealer, if the other broker-dealer does not treat the account, and the assets in the account, in compliance with the applicable PAB requirements of the rule.[650] Although the proposing release stated that the Commission did not expect broker-dealers to audit or examine their carrying broker-dealers to determine whether such firms were in compliance with the proposed rule, commenters expressed concern that the proposed rule text suggested that broker-dealers in fact would have such an obligation.[651] There were also concerns expressed that a broker-dealer should not be deemed to have violated the net capital rule because its carrying firm fails to properly perform requirements solely applicable to the carrying firm and that Rule 15c3–1 should be modified to clarify that cash and securities held in a securities account at another broker-dealer are not subject to the deduction specified in paragraph (c)(2)(iv)(E) of Rule 15c3–1.[652] In response to these concerns, the Commission has modified the language in the Rule 15c3–1 to eliminate the proposed capital charge that would have resulted from a failure of a carrying broker-dealer to comply with the PAB requirements. Instead, the Commission has adopted amendments providing that a broker-dealer need not deduct cash and securities held in a securities account at another broker-dealer, with one exception. As discussed in section II.A.2. of this release, the exception generally parallels the exclusions from the definition of *PAB account* in Rule 15c3–3.

(IV). Compliance Cost Estimates

The Commission is mindful of the compliance costs associated with the final PAB rule amendments. In particular, the Commission recognizes that, though many requirements of the PAB rule amendments being adopted by the Commission today are incorporated from the *PAIB Letter,* there may be incremental imposed costs. For example, as discussed above in section II.A.2. of this release, because the possession and control and customer reserve account provisions of Rule 15c3–3 do not apply to PAB account holders by virtue of the definition of *customer* in the rule, the carrying broker-dealer is not restricted from using the securities and cash in those accounts for its own business purposes. Broker-dealers carrying PAB accounts will be required to comply with the final PAB rule amendments, in contrast to the provisions of the *PAIB Letter,* which are voluntary.[653] To the extent that carrying broker-dealers are not currently complying with the *PAIB Letter,* or to the extent the amendments as adopted differ from the PAIB Letter, they may incur incremental costs, including possible costs of capital as firms reallocate capital to comply with the rule amendments.

The requirement to enter into a subordination agreement with certain account holders to exclude them from the definition of *PAB account,*[654] the requirement to provide written notice to PAB account holders that their securities may be used in the ordinary course of the carrying broker-dealer's securities business,[655] the requirement

[647] *See Deutsche Bank Securities Letter.*

[648] *Id.* The definition of *customer* in SIPA excludes any person, to the extent that ''such person has a claim for cash or securities which by contract, agreement, or understanding, or by operation of law, is part of the capital of the debtor, or is subordinated to the claims of any or all creditors of the debtor, notwithstanding that some ground exists for declaring such contract, agreement, or understanding void or voidable in a suit between the claimant and the debtor.'' 15 U.S.C. 78*lll*(2)(C)(ii).

[649] *See Deutsche Bank Securities Letter.*

[650] *See* section II.A.2.v. of this release.

[651] *See SIFMA 2 Letter.*

[652] *Id.*

[653] *See PAIB Letter.*

[654] The internal hours for this requirement would likely be performed by an in-house Attorney at $379 per hour. Therefore the estimated internal cost would be calculated as follows: $379 per hour × 13,420 hours = $5,086,180. *See also* section IV.D.3. of this release.

[655] The internal hours required to draft the notice would likely be performed by an in-house Attorney

Continued

to amend the standard PAB agreement templates,[656] and the need to update systems to implement the necessary changes[657] may also impose one-time costs. In addition, a carrying broker-dealer will incur postage costs as a result of the requirement to send written notices to PAB account holders regarding the use of their non-margin securities, as well as outside counsel fees to review the notice and standard PAB agreement template.[658] Finally, the requirements to compute and establish a separate reserve for PAB accounts will result in annual costs to carrying broker-dealers to the extent that these requirements will lengthen the time needed to compute and establish the PAB reserve account under the *PAIB Letter.* The Commission estimates that these requirements would impose one-time and annual costs in the aggregate of approximately $6,434,840[659] and $2,709,210,[660] respectively.

As noted above, the Commission requested comment on the proposed cost estimates.[661] In particular, the Commission requested comment on whether there would be additional costs to broker-dealers as a consequence of these proposals. The Commission requested comment on whether these requirements would result in such costs and, if so, how to quantify the costs. The Commission also requested comment on whether these proposals would impose costs on other market participants, including broker-dealer customers. Commenters were also asked to identify the metrics and sources of any empirical data that support their cost estimates. The Commission did not receive any comments in response to these requests.

b. Banks Where Special Reserve Deposits May Be Held

(I). Summary of Amendments

As amended, paragraph (e) of Rule 15c3–3 requires carrying broker-dealers to deposit cash or qualified securities into their customer or PAB reserve account, which must be maintained at a ''bank.''[662] As adopted, the final rule excludes when determining whether a broker-dealer maintains the minimum deposits required under paragraph (e) of Rule 15c3–3: (1) Cash deposited with an affiliated bank; and (2) cash deposited at a ''non-affiliated bank to the extent that the amount of the deposit exceeds 15% of the bank's equity capital as reported by the bank in its most recent Call Report or any successor form the bank is required to file by its appropriate Federal banking agency (as defined by Section 3 of the Federal Deposit Insurance Act (12 U.S.C. 1813)).''

Under paragraph (f) of Rule 15c3–3, a broker-dealer is currently required to obtain a written contract from the bank wherein the bank agrees not to re-lend or hypothecate the qualified securities deposited into the reserve account.[663] This means that the bank cannot use the qualified securities in its business, which provides a measure of protection by requiring that the securities will be available to the broker-dealer if the bank falls into financial difficulty. Cash deposits, however, may be freely used in the course of the bank's commercial activities. Therefore, because they do not have that same type of protection, the amendments to Rule 15c3–3 enhance customer protection by prohibiting a carrying broker-dealer from holding customer cash deposits at its affiliated bank and establishing requirements designed to avoid the situation where a carrying broker-dealer's cash deposits constitute a substantial portion of the bank's deposits.

Customer cash deposits may be at risk if a carrying broker-dealer does not exercise due diligence when assessing the financial soundness of an affiliated bank with the same degree of impartiality and care as it would with an unaffiliated bank. The situation where a broker-dealer's cash constitutes a substantial portion of a bank's deposits also poses a risk that some or all of the cash deposits may not be readily available for quick withdrawal by the broker-dealer. Depending on the relative size of the deposit, a lost deposit that is large relative to the broker-dealer's capital could cause the firm to fail.[664] If the broker-dealer fails and the deposit is not recovered, the SIPC fund may not recover advances that it has made for the purpose of returning customer assets. To the extent that customer losses exceed the SIPA advance limits, customers may suffer permanent losses.

The amendment to Rule 15c3–3 should serve to reduce certain risks to investors in the event of a bank's failure and, thereby, enhance customer protection. The Commission requested comment on available metrics to quantify these benefits and any other benefits a commenter may identify. Commenters were also requested to identify sources of empirical data that could be used for the proposed metrics. The Commission did not receive any comments in response to these requests.

(II). Baseline and Incremental Economic Effects

The current baseline for the amendment to paragraph (e) of Rule 15c3–3 is the existing customer protection requirements under Rule 15c3–3 and interpretations of the rule. Under paragraph (e) of Rule 15c3–3, broker-dealers are currently required to deposit cash or qualified securities into the customer reserve account, which must be maintained at a ''bank.'' Under current interpretations, broker-dealers are limited in their reserve account cash deposits at parent or affiliated banks to 50% of the broker-dealer's excess net capital or 10% of the bank's equity capital.[665] Current interpretations also place similar restrictions on certain types of products at unaffiliated banks, including restrictions on concentration in money market deposit accounts and time deposits.[666]

As compared to the baseline, the Commission estimates that the incremental costs resulting from this amendment will be limited. Using

at $379 per hour. The estimated internal cost would be calculated as follows: $379 per hour × 610 hours = $231,190. The internal hours required to send out the notices would likely be performed by a Compliance Clerk at $63 per hour, resulting in an internal estimated cost calculated as follows: $63 per hour × 259 hours = $16,317. *See also* section IV.D.4. of this release.

[656] The internal hours would likely be performed by an in-house Attorney at $379 per hour, resulting in an internal estimated cost calculated as follows: $379 per hour × 1,220 hours = $462,380. *See also* section IV.D.4. of this release.

[657] The internal hours would likely be performed by a Senior Programmer at $282 per hour, resulting in the estimated internal cost calculated as follows: $282 per hour × 1,830 hours = $516,060. *See also* section IV.D.4. of this release.

[658] The estimated postage costs are calculated as follows: 1,551 notices × $0.46 = $713.46. To review and comment on the notice and PAB templates, the estimated outside counsel burden is $122,000, in aggregate. *See also* section IV.D.4. of this release.

[659] *See* section IV.D.3 and 4. of this release ($5,086,180 + $231,190 + $16,317 + $462,380 + $516,060 + $713.46 + $122,000 = $6,434,840.46).

[660] The internal hours would likely be performed by a Financial Reporting Manager at $294 per hour, resulting in the estimated internal cost calculated as follows: $294 per hour × 9,215 hours = $2,709,210. *See also* section IV.D.4. of this release.

[661] *See Amendments to Financial Responsibility Rules,* 72 FR at 12880. In the proposing release, the Commission estimated that the one-time and annual costs to broker-dealers resulting from these proposed amendments would be $603,000 and $2,599,399. *Id.*

[662] The term *qualified securities* is defined in paragraph (a)(6) of Rule 15c3–3 to mean securities issued by the United States or guaranteed by the United States with respect to principal and interest. 17 CFR 240.15c3–3(a)(6). The term *bank* is defined in paragraph (a)(7) of Rule 15c3–3 as a ''bank as defined in section 3(a)(6) of the Act and will also mean any building and loan, savings and loan or similar banking institution subject to the supervision by a Federal banking authority.'' *See* paragraph (a)(7) to Rule 15c3–3, as adopted.

[663] 17 CFR 240.15c3–3(f).

[664] *See Amendment to the Financial Responsibility Rules for Broker-Dealers,* 72 FR at 12880.

[665] FINRA Interpretation 15c3–3(e)(3)/051.

[666] *See* FINRA Interpretation 15c3–3(e)(1)/01 and /011.

FOCUS Report data, as of December 31, 2011, the Commission estimates that approximately 224 broker-dealers report reserve deposits.[667] A considerable proportion of these broker-dealers, including some of the largest firms, meet their deposit requirements using mostly qualified securities as opposed to cash and, therefore, will be marginally impacted by this amendment. For example, based on FOCUS Report data, as of December 31, 2011, for the 224 broker-dealers with reserve deposits, 79% of the total customer reserve requirement was met using qualified securities that could still be deposited at affiliated banks to meet customer reserve requirements, under the rule, as adopted. The remaining customer reserve requirement could be met by using qualified securities (as opposed to cash) and/or opening one or more accounts at unaffiliated banks, which would hold the cash within the limits permitted under the rule.

Relative to the current baseline, broker-dealers may incur two types of costs. The first type of cost relates to the costs of opening a new account at an unaffiliated bank for broker-dealers that currently hold cash in a reserve account at an affiliated bank. It is difficult to estimate the number of broker-dealers that hold cash reserve deposits at an affiliated bank because FOCUS Report data does not include the names of banks at which broker-dealers maintain their reserve accounts. Therefore, this data is not readily available to the Commission and commenters did not provide it. Based on an analysis of FOCUS Report data as of December 31, 2011, as well as available bank data,[668] the Commission, however, estimates that there are approximately 50 broker-dealers [669] that have an affiliated bank and cash in their customer reserve accounts.

The second type of cost relates to the costs of opening and maintaining multiple bank accounts if the cash deposit exceeds the 15% bank equity capital threshold as defined in the final rule, the likelihood of which the Commission expects to decrease because, with the relaxation of the bank equity capital threshold in the final rule, fewer broker-dealers will be required to open multiple accounts, relative to the current baseline. Broker-dealers, however, may replace these types of cost with the costs of converting cash into qualified securities to meet some or all of their reserve deposit requirements under Rule 15c3–3.

Moreover, in an attempt to reduce search costs, the potential exists that broker-dealers will select one or a few large unaffiliated banks or create networks on the basis of reciprocity between broker-dealers and banks. This could result in a potential concentration of reserve cash deposits at a few banks. If as a result of such concentration, the carrying broker-dealer's deposit constitutes a substantial portion of the bank's total deposits, the risk increases that the bank may not have the liquidity to quickly return the deposit to the broker-dealer. Finally, the affiliated banks that are currently holding and using broker-dealer reserve cash deposits in the course of their business may incur funding costs, resulting from the possible transfer of cash deposits in the reserve account by broker-dealers to unaffiliated banks. These incremental funding costs to the affiliated banks may potentially be offset by the benefit of receiving cash deposits from unaffiliated broker-dealers.

(III). Alternatives

In adopting the final rule, the Commission considered several alternative approaches suggested by commenters. For example, commenters urged the Commission not to adopt the proposed prohibition on broker-dealers maintaining cash in reserve accounts at banks that are affiliates, stating that affiliated banks should be treated the same as unaffiliated banks because both groups are subject to the same financial regulation. One commenter noted that if a broker-dealer must move their reserve accounts to an unaffiliated bank this may require the broker-dealer to enter into new or additional banking relationships to comply with the amendment, which would increase the costs and administrative burdens of those reserve account funds.[670]

Several commenters suggested that the Commission allow cash reserve deposits without percentage restrictions at unaffiliated banks that are well-capitalized or for which a broker-dealer has performed due diligence.[671] One of these commenters cited a U.K. regulation that requires a firm selecting a bank to hold customer deposits to undertake due diligence on the bank taking into consideration a number of factors including: (1) The capital of the bank; (2) the amount of client money placed, as a proportion of the bank's capital and deposits; (3) the credit rating of the bank (if available); and (4) to the extent the information is available, the level of risk in the investment and loan activities undertaken by the bank and its affiliated companies.[672]

One commenter suggested that the Commission consider higher percentages for cash deposits at large money-center banks.[673] This commenter also stated that the percentage thresholds would negatively impact small broker-dealers because they would cross the 50% of excess net capital threshold at lower deposit levels.[674] Another commenter suggested that the Commission reconsider the proposed limitation on the amount of reserve account cash deposits that may be held at any one bank because the limitation would result in significant costs for broker-dealers and could potentially adversely impact the customers of broker-dealers.[675]

In the final rule, the language excluding customer and PAB reserve cash deposits at affiliated banks from counting towards a broker-dealer's reserve requirement is being adopted as proposed. As discussed further below, relative to the proposed rule, in the final rule, the Commission eliminated the proposed language that would have excluded the amount of the deposit at an unaffiliated bank that exceeded 50% of a broker-dealer's excess net capital and based on the Commission's expert judgment, increased the bank equity capital threshold from 10% to 15%.[676]

In response to comments on the proposed rule (including comments suggesting a due diligence standard instead of an objective threshold), the Commission modified the final rule text in ways that are designed to substantially mitigate the costs identified by commenters. While the final rule amendment excludes the amount of any cash on deposit at an affiliated bank from being used to meet a broker-dealer's reserve requirement, the Commission eliminated the provision that would have excluded the amount of a deposit that exceeds 50% of a broker-dealer's excess net capital. This provision would have impacted small and mid-size broker-dealers when

[667] This estimate is based on FOCUS Report filings the 2011 year end. It is an update from the proposing release estimate of 216 broker-dealers. *See Amendments to Financial Responsibility Rules,* 72 FR at 12881.

[668] Data regarding a bank's equity capital as of the 2011 year end is publicly *available at http://www2.fdic.gov/sdi/.*

[669] This estimate is based on a review of broker-dealers and affiliated banks based on legal names, as well as customer reserve account data, from FOCUS Report data.

[670] *See Raymond James 2 Letter.*

[671] *See Raymond James Letter; JP Morgan Letter; The Clearing House Letter; ABASA Letter; PNC Letter; Deutsche Bank Securities Letter; E*Trade Letter; JP Morgan 2 Letter.*

[672] *See JP Morgan Letter.*

[673] *See SIFMA 2 Letter; see also NIBA Letter.*

[674] *See SIFMA 2 Letter.*

[675] *See Raymond James 2 Letter.*

[676] *See Amendments to Financial Responsibility Rules,* 72 FR at 12864.

they deposited cash into large commercial banks since the cash deposits of these firms would exceed the broker-dealer excess net capital threshold before exceeding the bank equity capital threshold.

The elimination of the broker-dealer excess net capital threshold, combined with the increase of the bank equity capital threshold from 10% to 15%, is intended to substantially mitigate the costs, burdens and inefficiencies that commenters believed would be imposed on small and mid-size broker-dealers if such firms had to open multiple bank accounts as a result of the proposed rule. The rule, as adopted, will allow small and mid-size broker-dealers to maintain reserve accounts at one bank if they so choose, provided that the bank equity capital threshold is not exceeded. In contrast to the proposed thresholds, the final rule amendments should reduce the costs associated with implementing the necessary changes to systems, operations, and contractual agreements related to a broker-dealer's reserve bank accounts.

Further, in response to comments, increasing the threshold from 10% to 15% of the bank's equity capital is intended to address concerns raised by large broker-dealers with large deposit requirements that the 10% threshold would have resulted in increased costs of having to spread out deposits over a number of banks. The decrease in the cost of opening and maintaining multiple accounts resulting from the increased threshold to 15% of the bank's equity capital may counterbalance the increase in the cost of transferring cash deposits to an unaffiliated bank. In summary, the rule, as adopted, with an increase to a 15% threshold will, in the Commission's expert judgment, substantially mitigate the cost concerns raised by commenters, while still providing adequate customer protection consistent with the goal of the rule to promote the broker-dealer's ability to have quick access to the deposit.

With respect to qualified securities, one commenter argued that if a broker-dealer elects to use qualified securities as opposed to cash to meet its reserve requirement, the broker-dealer will likely have a significant amount of additional operational and transactional costs.[677] In addition, this commenter stated that while large broker-dealers may be able to reallocate existing trading desk, operational, regulatory reporting, and treasury functions to assist in ongoing maintenance activities, small and mid-sized broker-dealers may be required to hire additional staff to manage and maintain a securities portfolio.[678] In response to the commenter, many large broker-dealers already hold large amounts of their reserve deposits in qualified securities. As the commenter noted, if a large broker-dealer needed to shift more of its reserve deposits into qualified securities as opposed to cash, then these firms would most likely reallocate existing functions to assist in ongoing maintenance activities, thus offsetting any costs associated with the shift of reserve deposits into qualified securities. Finally, with the elimination of the 50% excess net capital threshold in the rule as amended, most small and mid-sized firms likely would not have ongoing costs, because under the final rules, all firms will now only have to comply with the bank equity capital threshold, which as confirmed by comments, would be of concern primarily for the large firms. Therefore, under the final rule, broker-dealers should not incur significant operational or transactional costs in complying with the amendment.[679]

(IV). Compliance Cost Estimates

In the proposing release, in quantifying costs, the Commission estimated that, of the 216 firms with reserve deposit requirements, only 11 broker-dealers would need to open new bank accounts or substitute cash for qualified securities in an existing reserve account,[680] and that this would result in an estimated total one-time cost of approximately $2,630 per broker-dealer[681] and approximately $28,930 in the aggregate.[682] As noted above, the Commission requested comment on the proposed cost estimates. Commenters were asked to identify the metrics and sources of any empirical data that support their cost estimates. The Commission received seven comment letters in response to the proposed cost estimates.[683]

One commenter stated that the estimate is inaccurate and arbitrary, and does not take into account situations where a broker-dealer will need to establish numerous banking relationships.[684] Commenters also stated that the Commission failed to consider the ongoing costs of maintaining and monitoring multiple bank accounts.[685] One commenter believes that limiting Rule 15c3–3 deposits at a single bank to 50% of a broker-dealer's excess net capital will require a significant number of broker-dealers to open a number of additional cash and/or securities accounts and devote ongoing operational resources to the management of such accounts.[686] This commenter stated that at any one time, approximately 10% to 15% of broker-dealer customers could be impacted by the proposed rule change and many of those customers would be required to open accounts at multiple institutions.[687]

Commenters also stated that the proposed amendments would impose requirements whose costs are not adequately justified by their benefits and that the Commission substantially underestimated the costs.[688] One commenter noted that there are significant costs associated with implementing the necessary changes to systems, operations, and contractual agreements that the Commission did not appear to take into account.[689] Another commenter stated that the proposal also fails to quantify the inherent inefficiency of forcing broker-dealers to set up numerous bank accounts to satisfy the restrictive broker-dealer net capital and bank equity capital requirements.[690] Another commenter suggested that the Commission consider higher percentage limits for cash deposits held at very large money center banks, stating that a higher percentage limit would strike a better balance between the Commission's concerns regarding the safety of cash deposits and the substantial costs imposed on broker-dealers by overly restrictive deposit limitations.[691] Two commenters

[677] *See JP Morgan Letter.* The commenter noted that ''[c]ertain broker-dealers may be required to hire additional staff to manage and maintain a securities portfolio.'' *Id.* ''Managing a pool of qualified securities involves a myriad of tasks such as monitoring income collection, redemption processing, marking the securities to market, collateral substitutions and collateral segregation amongst other tasks.'' *Id.* The commenter did not quantify the costs of managing a pool of qualified securities or the costs of additional staff to manage the securities portfolio.

[678] *Id.*

[679] *See JP Morgan Letter.*

[680] The Commission estimated in the proposing release that it would take approximately 10 hours to implement these changes. *See Amendments to Financial Responsibility Rules,* 72 FR at 12881.

[681] *Id.*

[682] 11 broker-dealers × $2,630 = $28,930. *Id.* at 12881.

[683] *See Curian Clearing Letter; SIFMA 2 Letter; Clearing House Letter; ABASA Letter; Deutsche Bank Letter; E*Trade Letter; P Morgan Letter.*

[684] *See Curian Clearing Letter.*

[685] *See Curian Clearing Letter; SIFMA 2 Letter; ABASA Letter; The Clearing House Letter; E*Trade Letter; JP Morgan Letter.*

[686] *See JP Morgan Letter.*

[687] *Id.*

[688] *See SIFMA 2 Letter; ABASA Letter.*

[689] *See SIFMA 2 Letter.*

[690] *See ABASA Letter.*

[691] *See SIFMA 2 Letter.*

believed that the upfront and ongoing cost to each broker-dealer is far higher than the one-time estimate of $2,630 that the Commission estimated in the proposing release.[692] One commenter stated that conducting due diligence and opening new accounts and the ongoing monitoring and periodic re-evaluation of such additional accounts would require much more time than the 10 hours originally estimated by the Commission.[693] One commenter, referencing the *SIFMA 2 Letter,* stated that it agreed with SIFMA that the Commission significantly underestimated the cost of the proposal to smaller firms.[694] Finally, commenters did not provide the Commission with revised cost estimates or data related to these amendments.

In quantifying costs, the Commission is increasing its estimate of the number of broker-dealers that will likely incur the cost of opening a new account at an unaffiliated bank (or substituting cash for qualified securities in their reserve accounts) from the estimated 11 broker-dealers in the proposing release to 50 broker-dealers, as described above.[695] In addition, in response to the commenter's concern that conducting due diligence and opening new accounts would require much more time than the 10 hours originally estimated by the Commission,[696] the Commission also is increasing the one-time hour estimates discussed in the proposing release from 10 to 25 hours.[697] In response to the commenters pointing that the amendments would require ongoing monitoring of bank equity capital levels,[698] the Commission is including an annual cost estimate in this release (in addition to the estimated one-time costs) to account for incremental ongoing costs to monitor compliance with the rule.[699] The Commission further estimates that the average cost per firm to make these changes will be approximately $4,925 on a one-time basis and $12,675 on an annual basis.[700] For these reasons, the Commission estimates that the total cost to broker-dealers will be approximately $246,250 on a one-time basis and $633,750 on an annual basis.[701]

Finally, using FOCUS Report data and top decile bank equity capital data at year end 2011,[702] the Commission estimates that approximately 30 broker-dealers are no longer required to sustain the cost of maintaining multiple bank accounts, as a result of removing the 50% excess net capital threshold and increasing the bank equity capital threshold to 15%. This change to the final rule may result in potential cost savings to broker-dealers, which may have been required to maintain multiple bank accounts under the rule, as proposed.

c. Allocation of Customers' Fully Paid and Excess Margin Securities to Short Positions

The amendment to paragraph (d)(4) of Rule 15c3–3 requires broker-dealers to take prompt steps to obtain possession or control over fully paid and excess margin securities on the broker-dealer's books or records that allocate to a short position of the broker-dealer or a short position for another person, excluding positions covered by paragraph (m) of Rule 15c3–3, for more than 30 calendar days.[703] This amendment protects broker-dealer customers by helping to ensure that customer securities are available to be returned in the event of a broker-dealer failure. Therefore, in addition to broker-dealer customers, the amendment benefits the SIPC fund to the extent that it mitigates potential outlays from the fund to make advances to customers of a failed broker-dealer that cannot return all customer securities.

The Commission requested comment on available metrics to quantify these benefits and any other benefits a commenter may identify. In particular, the Commission requested comment on whether there would be additional costs to broker-dealers as a consequence of these proposals and whether these proposals would impose costs on other market participants, including broker-dealer customers. The Commission also requested that commenters identify sources of empirical data that could be used for the metrics they proposed. The Commission received one comment in response to these requests.[704] The commenter stated that the proposed amendments would ''greatly increase the cost of proprietary and customer short positions that were established and maintained in accordance with all applicable short sale regulations at the time entered.'' [705] However, this commenter did not quantify its cost estimates in terms of dollars, nor did it provide data to support its conclusion.

In response to this comment, modifications were made to the final rule that should mitigate the commenter's concern because the changes were designed to reduce operational burdens and to more closely align the final rule with current regulations related to short sales. More specifically, as discussed in section II.A.4., as adopted, final paragraph (d)(4) of Rule 15c3–3 contains a uniform 30 calendar day period and clarifies that the 30 calendar day period with respect to a syndicate short position established in connection with an offering does not begin to run until the underwriter's participation in the distribution is complete as determined pursuant to Rule 100(b) of Regulation M. In addition, the proposed amendment was designed to require that the aging process commence at the time a deficit in securities allocating to a short position arises. These modifications clarify the rule amendment, while continuing to strengthen customer protections under Rule 15c3–3.

Three commenters argued that the credit item added to the reserve formula computation when a customer's fully paid or excess margin securities are allocated to a short position provides the customer with adequate protection.[706] The Commission considered this alternative, as well as the cost concerns raised above, in adopting these final rule amendments. It has been a long-standing industry practice for carrying broker-dealers to use securities of PAB account holders in their business activities. In contrast, as stated above in section II.A.4. of this release, customers under Rule 15c3–3, which include the carrying broker-dealer's retail customers, have an expectation that the fully paid and excess margin securities reflected on their account statements are, in fact, in the possession or control of the carrying broker-dealer. However, as described above, this expectation may be

[692] *See JP Morgan Letter; E*Trade Letter.*

[693] *See SIFMA 2 Letter.*

[694] *See NIBA Letter.*

[695] The Commission estimates that the responsibility for the one-time opening a new reserve bank account or substituting qualified securities for cash in an existing account likely would be undertaken by a Senior Treasury/Cash Management Manager at $197 per hour. *See Amendments to Financial Responsibility Rules,* 72 FR at 12881.

[696] *See SIFMA 2 Letter.*

[697] *See Amendments to Financial Responsibility Rules,* 72 FR at 12881. The Commission estimates that the Senior Treasury/Cash Management Manager will spend approximately 25 hours performing these changes on a one-time basis.

[698] *See SIFMA 2 Letter.*

[699] The Commission estimates that the responsibility for the annual compliance review of these rule amendments likely would be split between a Senior Treasury/Cash Management Manager at $197 per hour and a Compliance Attorney at $310 per hour, and will likely take 50 hours per year.

[700] $197 per hour × 25 hours = $4,925; ($197 per hour × 25 hours) + ($310 × 25 hours) = $12,675.

[701] 50 broker-dealers × $4,925 = $246,250; 50 broker-dealers × $12,675 = $633,750.

[702] *See https://cdr.ffiec.gov/public/.*

[703] 17 CFR 240.15c3–3(d)(4).

[704] *See Raymond James 2 Letter.*

[705] *Id.*

[706] *See First Clearing Letter; Deutsche Bank Securities Letter; Citigroup Letter.*

frustrated where the securities are allocated to a short position carried by the broker-dealer, as the securities are not in the possession or control of the carrying broker-dealer. This gap in the existing rule, in effect, permits the broker-dealer to partially monetize the Rule 15c3–3 customer's securities. Also, under some circumstances (*e.g.,* a change in the market value of the securities), the amount the broker-dealer may have on deposit in the reserve account as a consequence of the credit item may be less than the value of the securities. Consequently, if the broker-dealer fails, sufficient funds may not be readily available to purchase the securities to return them to customers. The use of customer securities in this manner is contrary to the customer protection goals of Rule 15c3–3 and the expectations of a broker-dealer's customers.[707] Therefore, the Commission believes that any increased costs related to this final rule amendment are justified by the enhancements to the customer protection goals of Rule 15c3–3. For these reasons, and those discussed throughout this release, the Commission is adopting the amendment.

The Commission estimates this requirement will result in a one-time cost to firms that carry customer securities to update systems for complying with the possession or control requirements in Rule 15c3–3. Based on FOCUS Report data, as of December 31, 2011, the Commission estimates that approximately 287 broker-dealers carry customer accounts.[708] The Commission further estimates these firms will spend, on average, approximately 40 hours of employee resources per firm updating their systems to implement changes that will be necessitated by the amendment.[709] Therefore, the Commission estimates that the average cost per firm to make these changes will be approximately $11,280.[710] The Commission estimates that the total one-time cost to broker-dealers will be approximately $3,237,360.[711]

In addition to systems costs, broker-dealers may incur other costs to comply with the rule amendment because they may be required to change their existing practices. For example, the amendment could result in some broker-dealers borrowing securities to cover proprietary short positions rather than using customer securities, resulting in increased borrowing costs. However, under the current baseline, when broker-dealers use customer securities to cover short positions they are required to add a credit item in the Rule 15c3–3 reserve formula equal to the value of the securities. This credit item can result in higher reserve deposit requirements, which must be made using the broker-dealer's own capital. Thus, in response to commenters concerns regarding the costs of this amendments,[712] the increased costs associated with having to borrow securities to cover a short position likely will be offset by decreased costs associated with devoting capital to customer reserve requirements.

d. Importation of Rule 15c3–2 Requirements Into Rule 15c3–3

Today's amendment to Rules 15c3–2 and 15c3–3 imports requirements in Rule 15c3–2 [713] to Rule 15c3–3 and eliminates Rule 15c3–2 as a separate rule in the Code of Federal Regulations.[714] Rule 15c3–2 requires a broker-dealer holding free credit balances to provide its customers (defined as any person other than a broker-dealer) at least once every three months with a statement of the amount due the customer and a notice that the funds are not being segregated, but rather are being used in the broker-dealer's business and that the funds are payable on demand. The Commission believes it is appropriate to eliminate Rule 15c3–2 because it is largely irrelevant in light of the requirements of Rule 15c3–3 (which was adopted after Rule 15c3–2).

This amendment will benefit broker-dealers by streamlining and consolidating relevant provisions of Rule 15c3–2 into Rule 15c3–3, promoting efficiency in the rulemaking process while not modifying the legal requirements. These provisions include the requirements that broker-dealers inform customers of the amounts due to them and that such amounts are payable on demand, which have been moved to new paragraph (j)(1) of Rule 15c3–3.[715] Finally, the definition of *customer* for purposes of the imported Rule 15c3–2 requirements will be the definition of customer in Rule 15c3–3,[716] which is somewhat narrower than the definition in Rule 15c3–2. The application of the narrower definition of *customer* in Rule 15c3–3 should not increase related costs. Alternatively, it may result in decreased costs because the narrowing of the rule's scope may reduce the compliance burden on broker-dealers.

The Commission considered reasonable alternatives with regard to the proposed deletion of Rule 15c3–2 and the importation of certain requirements into paragraph (j)(1) of Rule 15c3–3. Not adopting the rule amendment and thus leaving Rule 15c3–2 in the Code of Federal Regulations was a considered alternative. The Commission, however, believes consolidating the relevant provisions in Rule 15c3–3 is a more appropriate alternative because it promotes efficiency in the rulemaking process, and streamlines the Commission's customer protection rules.

The amendments—because they only re-codify provisions of Rule 15c3–2 into Rule 15c3–3 [717]—should not be a new source of costs as compared to the baseline because these provisions are continuations of existing requirements. However, the re-codification and placement of these provisions into Rule 15c3–3 may cause broker-dealers to review and update their existing procedures from time-to-time and, therefore, could result in incremental costs.[718]

e. Treatment of Free Credit Balances

(I). Summary of Amendments

Today, the Commission is adopting the amendment to add new paragraph (j)(2) to Rule 15c3–3 that prohibits a broker-dealer from converting, investing, or transferring to another account or institution, free credit balances held in a customer's account except as provided in paragraphs (j)(2)(i) and (ii) of the rule. As adopted, the amendment defines a *Sweep Program* as

[707] *See* section II.A.1. of this release.

[708] This is an update of the proposing release estimate of 350 broker-dealers. *See Amendments to Financial Responsibility Rules,* 72 FR at 12881.

[709] For the purposes of this cost analysis, the Commission estimates that this work will be undertaken by a Senior Programmer at $282 per hour.

[710] $282 per hour × 40 hours = $11,280.

[711] 287 broker-dealers × $11,280 = $3,237,360. In the proposing release, the Commission estimated that the total one-time cost to broker-dealers would be $3,752,000. *See Amendments to Financial Responsibility Rules,* 72 FR at 12881.

[712] *See First Clearing Letter; Deutsche Bank Securities Letter; Citigroup Letter.*

[713] 17 CFR 240.15c3–2.

[714] *See Amendments to Financial Responsibility Rules,* 72 FR at 12867.

[715] The provisions in Rule 15c3–2 that are being re-codified in Rule 15c3–3, include the requirements that broker-dealers inform customers of the amounts due to them and that such amounts be payable on demand. In addition, Rule 15c3–2 contains an exemption for broker-dealers that are also banking institutions supervised by a Federal authority. This exemption will not be imported into Rule 15c3–3 because there are no broker-dealers that fit within this exemption.

[716] 17 CFR 240.15c3–3(a)(1).

[717] *See* paragraph (j)(1) of Rule 15c3–3.

[718] Based on the estimated hour burdens in section IV.D.5. of this release, there could be one-time internal costs of $1,464,750 and annual internal costs of $585,900, if the review and update is performed by a Compliance Attorney at $310 per hour.

''a service provided by a broker or dealer where it offers to its customer the option to automatically transfer free credit balances in the securities account of the customer to either a money market mutual fund product as described in § 270.2a–7 of this chapter or an account at a bank whose deposits are insured by the Federal Deposit Insurance Corporation.'' [719]

With regard to the treatment of free credit balances outside the context of a Sweep Program, paragraph (j)(2)(i) of Rule 15c3–3 permits a broker-dealer to invest or transfer to another account or institution free credit balances held in a customer's account only upon a specific order, authorization, or draft from the customer, and only in the manner, and under the terms and conditions, specified in the order, authorization, or draft.[720] Two commenters suggested that the proposal should be clarified to permit a broker-dealer to obtain a one-time consent to ongoing transfers of any free credit balances to a customer to another account, entity or product (outside of a Sweep Program). As discussed above, this scenario was covered by the proposed rule and is being adopted under paragraph (j)(2)(i) of Rule 15c3–3.

With regard to the treatment of free credit balances in the context of a Sweep Program, new paragraph (j)(2)(ii) of Rule 15c3–3 requires broker-dealers to meet conditions that vary depending on the date when a customer's account was opened. For accounts opened on or after the effective date of the rule, a broker-dealer must meet the conditions of (j)(2)(ii)(A) and (B) of the rule. For any account, the broker-dealer must meet the conditions in paragraphs (j)(2)(ii)(B) of the rule. Under paragraph (j)(2)(ii)(A), for accounts opened on or after the effective date of the rule, the amendment to Rule 15c3–3 requires a broker-dealer to obtain the written affirmative consent of a new customer to have free credit balances in the customer's securities account included in the Sweep Program. Under paragraph (j)(2)(ii)(B), a broker-dealer must comply with the remaining three conditions for any account: (1) Providing the customer with the disclosures and notices regarding the Sweep Program required by each SRO of which the broker-dealer is a member; (2) providing notice to the customer, as part of the customer's quarterly statement of account, that the balance in the bank deposit account or shares of the money market mutual funds in which the customer has a beneficial interest can be liquidated on the customer's order and the proceeds returned to the securities account or remitted to the customer; and (3) providing the customer written notice at least 30 calendar days before the broker-dealer makes certain changes to the Sweep Program and describes the options available to the customer if the customer does not accept the new terms and conditions or product.[721]

Free credit balances constitute money that a broker-dealer owes its customers. Customers may maintain these balances at the broker-dealer in anticipation of future stock purchases. Under current practices, customer account agreements set forth how the broker-dealer will invest these balances. For example, the broker-dealer may sweep them into a money market fund or, alternatively, pay an amount of interest on the funds. On occasion, broker-dealers may change the product to which a customer's free credit balances are swept—most frequently from a money market fund to an interest bearing bank account. Because of differences in these two types of products, there may be investment consequences when changing from one to the other.[722]

New paragraph (j)(2) to Rule 15c3–3 should serve to enhance customer protection by prohibiting a broker-dealer from transforming the credit risk faced by a customer through transfer of the broker-dealer's obligation to another entity without the required notice to, or approval from, the customer.

(II). Baseline and Incremental Economic Effects

In the absence of new paragraph (j)(2) of Rule 15c3–3, current practices represent the existing baseline. As compared to the baseline, new paragraph (j)(2) to Rule 15c3–3 will enhance customer protection by requiring broker-dealers to obtain the written affirmative consent of a new customer before including a customer's free credit balances in a Sweep Program, as well as to provide certain disclosures and notices to all customers with regard to the broker-dealer's Sweep Program. The Commission requested comment on available metrics to quantify these benefits and any other benefits a commenter may identify. The Commission did not receive any comments in response to this request.

Relative to the baseline, broker-dealers carrying free credit balances will incur incremental one-time and periodic costs (*e.g.,* systems changes, outside counsel, and notification costs) to comply with new paragraph (j)(2) of Rule 15c3–3. The Commission requested comment on whether there would be additional costs to broker-dealers as a consequence of the proposals. The Commission also requested comment on whether the proposals would impose costs on other market participants, including broker-dealer customers. Commenters were requested to identify sources of empirical data that could be used for the metrics they proposed. The Commission did not receive any comments in response to these requests.

(III). Alternatives

As stated above in section II.A.5.ii. of this release, the Commission is adopting new paragraph (j)(2) to Rule 15c3–3 with substantial modifications from the proposed rule in response to comments and to clarify certain portions of the rule.

Commenters generally agreed with the fundamental principle embodied in the proposal—that customer free credit balances should not be transferred from an obligation of the broker-dealer to an obligation of another entity without the customer's authorization.[723] Other commenters supported the proposed disclosures but suggested additional disclosures be made to customers including clarification with respect to other protections available to the customer.[724] Two commenters stated that the practice of sweep programs should be banned entirely or that the Commission should adopt a ''harder stance'' and require more than just disclosure.[725] One commenter responded to the Commission's request for comment as to the cost burdens that would result if the first condition (set forth in proposed paragraph (j)(2)(ii)(A)) to obtain a new customer's prior agreement were to be applied to existing customers. The commenter stated that such costs would be substantial because broker-dealers would be required to amend their agreements with all

[719] *See* paragraph (a)(17) of Rule 15c3–3.

[720] *See Amendments to Financial Responsibility Rules,* 72 FR at 12866.

[721] *See* new paragraph (j)(ii)(B)(*1*)–(*3*) of Rule 15c3–3, as adopted.

[722] Differences include the type of protection afforded the customer in the event of an insolvency, and the amount of interest or dividends earned on the product. *See Amendments to Financial Responsibility Rules,* 72 FR at 12866.

[723] *See SIFMA 2 Letter; First Clearing Letter; Pace Letter.*

[724] *See SIPC Letter.*

[725] *See Ellis Letter; Dworkin Letter.* One commenter stated that broker-dealers profit from ''excessive'' fees charged to customers who opt out of the sweep programs. *See Ellis Letter.* The second commenter suggested that the broker-dealer's ''customer has been effectively denied the opportunity to opt out of bank account sweeps by [the broker-dealer] preventing him or her from utilizing any other vehicle to park his or her free credit balances . . . .'' *See Dworkin Letter.*

existing customers.[726] One commenter stated that the amendments in the proposing release did not adequately address situations in which broker-dealers change customer account elections without first obtaining customer authorization.[727] Commenters also raised concerns about limitations on the types of products broker-dealers can use for sweep arrangements.[728]

The Commission considered alternatives, including whether to adopt the amendments and, in adopting the final rule, the Commission modified the language in the final rule in response to commenters and to clarify its application. In response to comments that the Commission should ban sweep programs or adopt a ''harder stance,'' the Commission notes that sweep programs provide a mechanism for excess cash in a customer's securities account to be held in a manner that allows the customer to earn interest on the funds but retain the flexibility to quickly access that cash to purchase securities or withdraw it.[729] In effect, transferring this excess cash to a bank account or money market fund is an alternative to retaining a credit balance in the customer's securities account. The final rule is intended to appropriately balance commenters' concerns while providing broker-dealers with flexibility in the operation of sweep programs.[730]

In addition, in response to the comments that the Commission should not limit the types of products broker-dealers can use for sweep accounts to money market funds and bank deposit products,[731] as discussed above in section II.A.5.ii. of this release, the Commission does not view sweep accounts as a mechanism for investing customers' excess cash in longer term or more volatile assets without specific consent from customers. Therefore, the Commission believes that it is not appropriate to modify the final rule amendments to expand the permitted products for Sweep Programs.

In response to commenters' concern regarding cost burdens resulting from the application of the affirmative consent requirement to existing accounts, the final rule retains the proposed requirement to require a broker-dealer to obtain a customer's prior affirmative consent for accounts opened on or after the effective date of the rule before transferring the customer's free credit balance to a product in the firm's Sweep Program, and makes explicit that the consent must be in writing. This will provide new customers with the opportunity to evaluate the broker-dealer's Sweep Program before consenting to the transfer of the customer's free credit balances into such program. In the proposing release, the Commission requested comment as to the cost burdens that would result if the condition to obtain a new customer's prior agreement were to be applied to existing customers. One commenter stated that such costs would be substantial because broker-dealers would be required to amend their agreements with existing customers. The Commission considered this alternative and agrees with the commenter that requiring a broker-dealer to amend its existing agreements with customers would be substantial. Therefore, to address the burden that would have been associated with having broker-dealers re-paper existing account documentation, the prior affirmative consent requirement will continue to apply only to accounts opened on or after the effective date of the rule.

However, as discussed above in section II.A.5.ii. of this release, all customers will be provided written notice at least 30 days before a broker-dealer changes certain terms and conditions or products of its Sweep Program. This notice must also contain a description of the options available to the customer if the customer does not accept the new terms and conditions or product. This is intended to benefit new and existing customers by giving them sufficient opportunity to make an informed decision and evaluate the effects of changes in the terms and conditions or product of the sweep program and the options available.

(IV). Compliance Cost Estimates

Broker-dealers will incur one-time and periodic costs to implement the changes necessitated by the amendment. These changes include providing customers with the disclosures and notices (including the description of the options available if a customer does not accept the new terms or conditions or product) in order to have the flexibility to change the treatment of customers' free credit balances. This would require that broker-dealers update their systems (including processes for generating customer account statements) to incorporate the necessary changes.[732] Additionally, broker-dealers may incur one-time costs of outside counsel in implementing these system changes, particularly with respect to the language in the disclosures and notices required by paragraph (j)(2) of the rule.

The Commission further estimates that broker-dealers will incur costs to process an affirmative consent for new customers.[733] Specifically, the Commission estimates that broker-dealers may incur aggregate one-time and annual costs of approximately $14.4 million[734] and $23.2 million,[735] respectively related to the changes necessitated by these rule amendments.[736]

f. ''Proprietary Accounts'' Under the Commodity Exchange Act

Some broker-dealers also are registered as futures commission merchants under the CEA. These firms carry both securities and commodities accounts for customers. The definition of *free credit balances* in paragraph (a)(8) of Rule 15c3–3 does not include funds carried in commodities accounts that are segregated in accordance with the requirements of the CEA.[737] However, regulations promulgated under the CEA exclude proprietary accounts from the CEA's segregation requirements.[738] This exclusion from the segregation requirements under the CEA has raised a question as to whether a broker-dealer must treat payables to customers in proprietary commodities accounts as ''free credit balances'' when

[726] *See SIFMA 2 Letter.*

[727] *See Waddell Letter.*

[728] *See SIFMA 2 Letter; First Clearing Letter; Raymond James 2 Letter.*

[729] *See Ellis Letter; Dworkin Letter.*

[730] *See Ellis Letter; Dworkin Letter; Waddell Letter.*

[731] *See SIFMA 2 Letter; First Clearing Letter; Raymond James 2 Letter.*

[732] The internal hours would likely be performed by a senior programmer. Therefore, the estimated internal costs for this hour burden would be calculated as follows: Senior Programmer at $282 per hours × 37,800 hours = $10,659,600. *See* section IV.D.6. of this release.

[733] The internal hours would likely be performed by a compliance clerk. Therefore, the estimated internal costs for this hour burden would be calculated as follows: Compliance Clerk at $63 per hour × 368,311 hours = $23,203,593. *See* section IV.D.6. of this release.

[734] *See* section IV.D.6. of this release. ($10,659,600 + $3,780,000 (outside counsel costs) = $14,439,600).

[735] *Id.* ($23,203,593).

[736] In the proposing release, the Commission estimated that broker-dealers would incur one-time costs of approximately $3.68 million ($2.68 million internal costs and $1.0 million for outside counsel) and annual costs of approximately $24.6 million. *See Amendments to Financial Responsibility Rules,* 72 FR at 12882.

[737] 17 CFR 240.15c3–3(a)(8).

[738] Rule 1.20 requires a futures commission merchant to segregate customer funds. *See* 17 CFR 1.20. Rule 1.3(k) defines the term *customer* for this purpose. *See* 17 CFR 1.3(k). The definition of *customer* excludes persons who own or hold a *proprietary account* as that term is defined in Rule 1.3(y). *See* 17 CFR 1.3(y). Generally, the definition of *proprietary account* refers to persons who have an ownership interest in the futures commission merchant. *Id.*

performing a customer reserve computation.[739] For these reasons, the specific amendment to the definition of the term *free credit balances* in paragraph (a)(8) of Rule 15c3–3 clarifies that funds held in a commodities account meeting the definition of a *proprietary account* under CEA regulations are not to be included as free credit balances in the customer reserve formula.

One commenter requested that the Commission clarify that the relevant definition of *proprietary account* for purposes of this amendment will be the definition contained in 17 CFR 1.3(y).[740] The Commission considered this alternative suggested by the commenter. While Rule 1.3(y) under the CEA currently contains the relevant definition of *proprietary account* for the purpose of the amendment, the definition could be codified in a different rule in the future. Consequently, the Commission is adopting the final rule amendment to paragraph (a)(8) of Rule 15c3–3, as proposed. Thus, the final rule does not include specific references to a specific rule. Rather, the amendment to paragraph (a)(8) to Rule 15c3–3, as adopted, more generally refers to a ''proprietary account as that term is defined in regulations under the Commodity Exchange Act.''

In addition, one commenter stated that, due to the changes to the swap markets mandated by Title VII of the Dodd-Frank Act, swap accounts (in addition to commodities accounts) are now subject to customer protection rules under the CEA. This commenter suggested that the Commission make it clear that funds in swap accounts also do not constitute free credit balances, whether those funds are required to be segregated by rules under the CEA (*e.g.,* cleared swap accounts or uncleared swap accounts that have opted for segregation) or excepted from segregation under the CEA (*e.g.,* cleared swaps proprietary accounts or uncleared swap accounts that have not opted for segregation). The commenter noted this treatment ''would be consistent with the treatment of funds in commodities accounts and with the regulation of swap accounts under the CEA.'' [741] The Commission agrees there may be additional accounts under the CEA, as amended by the Dodd-Frank Act that should explicitly be excluded from the definition of *free credit balances* under Rule 15c3–3. However, the amendments today are designed to clarify the specific question raised with respect to the treatment of funds in proprietary commodities accounts under the CEA and, consequently, the suggestions by this commenter are beyond the scope of this rulemaking.

The Commission considered reasonable alternatives in adopting the final rule amendment. These alternatives included adopting the proposed rule, with modifications suggested by commenters described above, as well as leaving the current rule in place without the amendments. The Commission believes that the adoption of the final rule is the more appropriate approach at this time because the final rule amendment will benefit broker-dealers that are registered as futures commission merchants by eliminating any ambiguity with respect to such accounts and avoiding situations where they unnecessarily increase reserve amounts.

The Commission does not anticipate that the amendments will result in any costs to broker-dealers and, as funds in certain commodities accounts are not protected under SIPA, will not expose the SIPC fund to increased liabilities. Because this amendment is intended to be a clarification of existing interpretations, broker-dealers are not expected to incur additional costs against the baseline of current Rule 15c3–3 and its existing interpretations. This clarification is designed to provide broker-dealers with more certainty as to the Commission's stated legal requirements.

ii. Consideration of Burden on Competition, and Promotion of Efficiency, Competition, and Capital Formation

The amendments to the customer protection rule (Rule 15c3–3) regarding PAB accounts,[742] cash deposits at special reserve bank accounts,[743] allocation of short positions,[744] the treatment of free credit balances,[745] and the clarification of the treatment of proprietary accounts under the CEA are designed to protect and preserve customer property held at broker-dealers.[746] These protections are primarily intended to reduce the risks borne by investors.

In particular, first, the final rule amendment on PAB accounts is intended to fill a gap in the definition of *customer* between Rule 15c3–3 and SIPA, reducing the risk that customers could face losses in the case of a liquidation of a carrying broker-dealer. The final rule codifies many of the provisions of the *PAIB Letter*. The Commission believes that it is prudent, and will provide greater regulatory clarity, to incorporate into Rule 15c3–3 specified provisions of the *PAIB Letter*. Further, the Commission understands that the relief in the *PAIB Letter* has been widely, if not universally, utilized by broker-dealers that carry customer accounts. Thus, the benefits associated with codifying specified provisions of the *PAIB Letter* will continue to provide SIPA customers with the protections currently provided by broker-dealers complying with the *PAIB Letter*. Setting forth these requirements in a Commission rule will benefit the securities markets by helping to diminish the risks and incidences of non-compliance.

Second, the final rule amendments regarding the banks where reserve deposits may be held are intended to protect customers' cash deposits by mitigating the risk that the funds in the customer reserve account will not be readily available to be withdrawn by the broker-dealer.

Third, the final rule amendments regarding the allocation of customers' fully paid and excess margin securities to a broker-dealer short position are designed to enhance the customer protection goals of Rule 15c3–3, which seek to ensure that broker-dealers do not use customer assets for proprietary activities.

Fourth, the final rule amendments regarding the importation of Rule 15c3–2 requirements into paragraph (j)(1) of Rule 15c3–3 and the elimination of Rule 15c3–2 streamline the regulatory requirements for broker-dealers. Also, the addition of new paragraph (j)(2) to Rule 15c3–3 is intended to protect a customer's free credit balances from being swept to products or programs without the appropriate approval, notice or disclosure.

Fifth, the final rule amendment establishing that the funds in certain commodities accounts need not be treated as free credit balances or other credit balances may enhance efficiency at the broker-dealers by freeing up cash that may have been required to be

[739] *See Part 241-Interpretive Releases Relating to the Securities Exchange Act of 1934 and General Rules and Regulations Thereunder,* Exchange Act Release No. 9922 (Jan. 2, 1973), 38 FR 1737 (Jan. 18, 1973) (interpreting the credit balance used in Item 1 of the Rule 15c3–3a formula ''to include the net balance due to customers in non-regulated commodities accounts reduced by any deposits of cash or securities with any clearing organization or clearing broker in connection with the open contracts in such accounts'').

[740] *See SIFMA 2 Letter.*

[741] *Id.*

[742] *See* section II.A.2. of this release.

[743] *See* section II.A.3. of this release.

[744] *See* section II.A.4. of this release.

[745] *See* section II.A.5.ii. of this release.

[746] *See* section II.A.6.i. of this release.

deposited into a broker-dealer's customer reserve account, and clarifying an ambiguity in Rule 15c3–3.

By strengthening requirements designed to protect customer assets, these amendments will mitigate potential exposure to the SIPC fund that is used to make advances to customers whose securities or cash are unable to be returned by a failed broker-dealer. To the extent that the amendments to Rule 15c3–3 achieve this goal, investors might be more willing to transact business in securities with broker-dealers. The possible positive effects on investor participation in the securities markets may promote capital formation as investor assets are able to be allocated more efficiently across the opportunity set.

As discussed above, the Commission recognizes that the amendments to Rule 15c3–3 adopted today may impose certain costs on broker-dealers that might place a burden on competition among broker-dealers. However, the Commission is of the opinion that these costs are justified by the significant benefits described in this economic analysis, as well as in the discussion of the rule amendments above. Amendments to Rule 15c3–3 should not place a burden on competition for non-carrying broker-dealers, which are generally small broker-dealers, because the amendments primarily affect broker-dealers that perform PAB and customer reserve computations, carry customer accounts, and carry free credit balances. In addition, for those carrying broker-dealers that already follow the *PAIB Letter,* any difference from the baseline with regard to cost burdens should be marginal. In sum, the costs of compliance resulting from the requirements in the amendments to Rule 15c3–3 should not impose a burden on competition not necessary or appropriate in furtherance of the purposes of the Exchange Act in light of the benefits discussed above.

2. Holding Futures Positions in a Securities Portfolio Margining Account

i. Economic Analysis

As discussed in section II.B. of this release, the Commission is adopting amendments to Rule 15c3–3 to accommodate futures positions in a securities account that is margined on a portfolio basis. The amendments revise the definition of free credit balances and other credit balances in paragraphs (a)(8) and (a)(9) of Rule 15c3–3, respectively, by expanding these definitions to include funds in a portfolio margin account relating to certain futures and futures options positions. Consequently, as part of free credit balances and other credit balances, these funds will be included as a credit item on the credit side of the customer reserve formula. The Commission is also adopting, as proposed, an amendment to Rule 15c3–3a Item 14 that permits a broker-dealer to include as a debit item, on the debit side of the customer reserve formula, the amount of customer margin required and on deposit at a derivatives clearing organization related to futures positions carried in a portfolio margin account.

The amendments are designed to provide greater protection to customers with portfolio margin accounts, through the reserve requirements of Rule 15c3–3 and SIPA, by requiring a broker-dealer to include all cash balances (including portfolio margin cash balances) of its customers' securities accounts in the computation of the customer reserve. The customer reserve computation under Rule 15c3–3 is designed to ensure that the funds a broker-dealer owes to customers are available to be returned to customers in the event the broker-dealer fails.

Subsequent to the Commission's proposals, the Dodd-Frank Act amended the definitions of *customer, customer property,* and *net equity* in section 16 of SIPA to take into account futures and options on futures held in a portfolio margin account carried as a securities account pursuant to a Commission-approved portfolio margining program.[747] As a result, persons who hold futures positions in a portfolio margining account carried as a securities account are now entitled to SIPA protection.

While the Dodd-Frank Act addressed the protection under SIPA of futures and futures options held in a securities portfolio margin account, the Commission's amendments to Rule 15c3–3 and 15c3–3a will still serve an important purpose. In particular, they complement the Dodd-Frank SIPA amendments, and will provide additional protections to customers by requiring broker-dealers to treat these futures positions in accordance with the segregation requirements in Rules 15c3–3 and 15c3–3a. Consequently, the Commission is adopting the amendments with modifications to address, in part, comments. As noted above, the requirements of Rule 15c3–3 and Rule 15c3–3a are designed to enable the prompt return of customer securities and cash in the event the broker-dealer falls into financial difficulty or becomes insolvent. The goal is to place a broker-dealer in a position where it is able to wind down in an orderly self-liquidation without the need for financial assistance from SIPC.

The Commission received six comments on the proposed amendments.[748] Three commenters generally supported the amendments.[749] One commenter supported the development of rules for portfolio margining and the Commission's effort to provide greater legal certainty regarding the SIPA treatment of futures positions in a portfolio margin account.[750] This commenter, however, in a subsequent comment letter, stated that this amendment is no longer necessary in light of the Dodd-Frank Act amendments, and recommended that the Commission withdraw it.[751] Another commenter stated that the Commission's proposal is premature in that the inclusion of futures in a portfolio margin account, which is a securities account, would conflict with the segregation provisions under the CEA[752] and that SIPC has not determined that protection should be extended to futures.[753] Commenting in 2007 before the adoption of the Dodd-Frank Act, SIPC stated that the proposed rules seek to extend SIPC protection to all positions in the portfolio margin account, irrespective of whether the positions are securities under SIPA or are on deposit in connection with a securities transaction.[754]

The Commission agrees, in part, with the commenter who stated that the Dodd-Frank Act SIPA amendments make the Commission's proposed amendments to Rules 15c3–3 and 15c3–3a unnecessary.[755] As noted above, the definitions of customer, customer property, and net equity in section 16 of SIPA were amended by the Dodd-Frank Act to take into account futures and options on futures held in a portfolio margin account carried as a securities account pursuant to a Commission-approved portfolio margining program.[756] Consequently, in a

[747] *See* Public Law 111–203 § 983.

[748] *See SIFMA 2 Letter; CME Letter; SIPC Letter; Citigroup Letter; American Bar Association Letter; SIFMA 4 Letter.*

[749] *See SIFMA 2 Letter; Citigroup Letter; American Bar Association Letter.*

[750] *See SIFMA 2 Letter.*

[751] *See SIFMA 4 Letter.*

[752] *See, e.g.,* 17 CFR 1.20–1.29.

[753] *See CME Letter; see also SIPC Letter* (expressing ''grave concerns'' about potential conflict between the proposed amendments and SIPA).

[754] *See SIPC Letter.* SIPC also urged the Commission to reconsider its adoption of the portfolio margin proposals, stating that if the changes are in order, the Commission should seek to have them made by legislative amendment and not rulemaking.

[755] *See SIFMA 4 Letter.*

[756] *See* Public Law 111–203 § 983.

proceeding under SIPA, futures and options on futures positions held in a portfolio margin account carried as a securities account would be included in determining a customer's net equity claim.[757] Therefore, the proposed amendment relating to the unrealized value of a futures option is not necessary to achieve the objective of providing SIPA protection for such positions. As a result, the Commission is modifying the final rule to delete the proposed language in paragraph (a)(8) of Rule 15c3–3 that would have treated the unrealized value of a futures option in a portfolio margin account on the filing date of a SIPA proceeding as a free credit balance for purposes of Rule 15c3–3.[758]

While the legislation provides additional certainty with respect to how futures in a portfolio margin account would be treated in a SIPA liquidation, the Commission's amendments will require that positions are subject to the protections of Rule 15c3–3, thus enhancing customer protection. Therefore, while the Commission has considered the suggested alternatives in developing the final rule amendments (including not adopting the amendments), the Commission has determined that adopting the portfolio margining amendments was a more appropriate approach in furtherance of enhancing customer protection.

The Commission requested comment on available metrics to quantify these benefits and any other benefits a commenter may identify, including the identification of sources of empirical data that could be used for such metrics. The Commission did not receive any comments in response to these requests.

Current SRO portfolio margin rules permit futures to be held in a securities portfolio margin account.[759] However, pending further regulatory action by the Commission and the CFTC, the ability to combine securities and futures products into a single portfolio margin account will be unavailable.[760] Therefore, under the current baseline of SRO portfolio margin rules, with the inclusion of only securities positions in the securities account, this amendment would have no effect as compared to the baseline until the Commission and CFTC take such further action with respect to portfolio margining.[761]

The requirements imposed by the portfolio margin amendments will be elective. The requirements will apply only to broker-dealers choosing to offer their customers portfolio margin accounts. The Commission estimates that approximately 35 broker-dealers will elect to offer their customers portfolio margin accounts that will include futures and futures options.[762] The amendment to the definition of *free credit balances* in Rule 15c3–3 will require broker-dealers to include in the reserve formula credit balances related to futures positions in a portfolio margin account. The amendment to Rule 15c3–3a Item 14 in the reserve formula will enable broker-dealers to include as a debit item the amount of customer margin required and on deposit at a derivatives clearing organization. Accordingly, these amendments will require changes to the systems broker-dealers use to compute and account for their reserve requirements. Consistent with the proposing release,[763] the Commission assumes that the responsibility for updating these systems will be undertaken by a Senior Programmer.[764] Therefore, the Commission estimates that the program and systems changes would result, on average, in a one-time cost of approximately $36,660 per broker-dealer.[765] Thus, the Commission estimates the total one-time cost to broker-dealers will be approximately $1,283,100.[766]

The Commission requested comment on the proposed cost estimates. In particular, the Commission requested comment on additional costs to broker-dealers that would arise from the proposals, such as system costs in addition to those discussed above (*e.g.,* costs associated with purchasing new software and updates to existing software). The Commission also requested comment on whether these proposals would impose costs on other market participants, including broker-dealer customers. Commenters were asked to identify the metrics and sources of any empirical data that supported their costs estimates. The Commission did not receive any comments in response to these requests.

ii. Consideration of Burden on Competition, and Promotion of Efficiency, Competition, and Capital Formation

The final rule amendments to Rule 15c3–3 to accommodate futures positions in a securities account margined on a portfolio basis[767] should complement the Congressional amendments and provide additional protections to portfolio margin customers through the strengthened reserve requirements of Rule 15c3–3. These additional protections may reduce the risk of loss of collateral to securities customers, promote participation in the securities markets, and enhance competition and price discovery. Moreover, these additional protections may make portfolio margining more attractive to investors. Portfolio margining may significantly reduce customer margin requirements by offsetting positions involving securities and futures products, which in turn reduces the costs of trading such products and enhances efficiency. Portfolio margining may also promote better price discovery across securities and futures products by allowing customers to offset a position assumed in one market with a product traded in

[757] Under the Dodd-Frank Act SIPA amendments, a customer's net equity now includes all positions in futures contracts and options on futures contracts held in a portfolio margining account carried as a securities account pursuant to a portfolio margining program approved by the Commission, including all property collateralizing such positions, to the extent that such property is not otherwise included herein. *See* 15 U.S.C. 78*lll*(11)(A)(ii). Further, the amendments provided that a claim for a commodity futures contract received, acquired, or held in a portfolio margining account pursuant to a portfolio margining program approved by the Commission or a claim for a security futures contract, shall be deemed to be a claim with respect to such contract as of the filing date, and such claim shall be treated as a claim for cash. *See* 15 U.S.C. 78*lll*(11).

[758] Specifically, the final rule does not include the proposed language: ", and, in the event the broker-dealer is the subject of a proceeding under SIPA, the market value as of the "filing date" as that term is defined in SIPA (15 U.S.C. 78*lll*(7)) of any long options on futures contracts."

[759] *See, e.g.,* FINRA Rule 4210.

[760] *See* Section 713 of the Dodd-Frank Act. Section 713 of the Dodd-Frank Act amends the Exchange Act and CEA to facilitate portfolio margining by allowing cash and securities to be held in a futures account and futures and options on futures and related collateral to be held in a securities account by a dually-registered broker-dealer and futures commission merchant pursuant to an approved portfolio margin program, subject to certain requirements, including regulatory action by the Commission and CFTC (pursuant to an exemption, or by rule or regulation). *See generally,* A Joint Report of the SEC and the CFTC on Harmonization of Regulation (Oct. 19, 2009).

[761] *See generally,* A Joint Report of the SEC and the CFTC on Harmonization of Regulation (Oct. 19, 2009).

[762] This estimate is based on OCUS Report data. This is an update from the estimate in the proposing release of 33 broker-dealers. *See Amendments to Financial Responsibility Rules,* 72 FR at 12883.

[763] *See Amendments to Financial Responsibility Rules,* 72 FR at 12883.

[764] The SIFMA 2012 Report as Modified indicates the average hourly cost of this position is approximately $282. Consistent with the proposing release, the Commission estimates the Senior Programmer will spend approximately 130 hours modifying software to conform it to the requirements of the amendments. *See Amendments to Financial Responsibility Rules,* 72 FR at 12883.

[765] 130 hours × $282 = $36,660. In the proposing release, the Commission estimated this cost would be $34,840. *See Amendments to Financial Responsibility Rules,* 72 FR at 12883.

[766] 35 broker-dealers × $36,660 = $1,283,100. In the proposing release, the Commission estimated this cost would be $1,149,720. *See Amendments to Financial Responsibility Rules,* 72 FR at 12883.

[767] *See* section II.B. of this release.

another market. The enhanced efficiencies as a result of increases in the use of portfolio margin accounts may facilitate capital formation through the availability of additional capital for customers as a result of reduced margin costs.

While today's amendments promote efficiency within the securities markets, the increased costs associated with the rule amendments may impose a burden on competition among broker-dealers. However, the Commission is of the opinion that these costs are justified by the significant benefits described in this economic analysis. In sum, the costs of compliance resulting from the requirements in the portfolio margining amendments to Rule 15c3–3 should not impose a burden on competition not necessary or appropriate in furtherance of the purposes of the Exchange Act in light of the benefits discussed above.

3. Amendments With Respect to Securities Lending and Borrowing and Repurchase/Reverse Repurchase Transactions

i. Economic Analysis

The Commission is adopting amendments to Rules 15c3–1 and 17a–11 to strengthen the financial responsibility of broker-dealers engaging in a securities lending business. First, the amendment to subparagraph (c)(2)(iv)(B) of Rule 15c3–1 clarifies that broker-dealers providing securities lending and borrowing settlement services are deemed, for purposes of the rule, to be acting as principals and are subject to applicable capital deductions. Under the amendment, these deductions could be avoided if a broker-dealer takes certain steps to disclaim principal liability. Second, the amendment to paragraph (c)(5) of Rule 17a–11 requires a broker-dealer to: (1) File a notice with the Commission and its DEA whenever the total money payable against all securities loaned, subject to a reverse repurchase agreement or the contract value of all securities borrowed or subject to a repurchase agreement exceeds 2,500% of tentative net capital; or, alternatively, (2) report monthly its securities lending and repurchase activities to its DEA in a form acceptable to its DEA.

Both amendments are intended to strengthen the financial responsibility of broker-dealers engaged in a securities lending or repurchase business. The first amendment to subparagraph (c)(2)(iv)(B) of Rule 15c3–1 will help eliminate the legal uncertainty among counterparties as to the role played by broker-dealers in such transactions and clarify the nature of the services that securities lending intermediaries provide their counterparties.

Thus, a broker-dealer will be considered a principal unless the broker-dealer has disclosed the identity of each party to the other, and the parties have agreed in writing that the obligations of the broker-dealer do not include a guarantee of performance by the other party and that in the event of default, neither party shall have the right of setoff against the obligations, if any, of the broker-dealer. In addition, this amendment will help avoid ambiguity regarding the applicability to a particular broker-dealer of the stock loan charges in the net capital rule.

In response to comments that standard legal documents currently used in securities lending transactions provide sufficient legal certainty with respect to the status of the parties,[768] the Commission considered whether to adopt the proposed approach or whether to rely on existing industry practice. The Commission considered the alternatives and believes that the rule as adopted appropriately balances the commenters' objections to the proposal with the Commission's concerns about stock lending practices, particularly with regard to the failure of MJK.[769] In recognition of standard stock loan agreement templates, the Commission designed the amendment to accommodate the continued use of these industry model agreements by incorporating their use into the rule's requirements.

The second amendment to paragraph (c)(5) of Rule 17a–11 will help identify broker-dealers with highly leveraged non-government securities lending and borrowing and repo activity.[770] This new provision requires that a broker-dealer notify the Commission whenever the total amount of money payable against all securities loaned or subject to a repurchase agreement, or the total contract value of all securities borrowed or subject to a reverse repurchase agreement exceeds 2,500% of tentative net capital; provided that, for purposes of this leverage threshold, transactions involving *government securities,* as defined in Section 3(a)(42) of the Exchange Act, are excluded from the calculation.[771] The notice provision is designed to alert regulators to a sudden increase in a broker-dealer's stock loan and repo positions, which could indicate that the broker-dealer is taking on new or additional risk that it may have limited experience or increased difficulty in managing. This amendment will assist securities regulators in monitoring such activities and responding to situations where a broker-dealer experiences financial difficulty due to a large securities lending or repo position. This may help prevent significant losses to the broker-dealer's customers and other broker-dealers, and reduce systemic financial risk.

As adopted, new paragraph (c)(5) of Rule 17a–11 also permits a broker-dealer to report monthly its stock loan and repo activity to its DEA in a form acceptable to its DEA in lieu of the notices required by paragraph (c)(5). This approach will provide each DEA with the flexibility to prescribe how the monthly reports are to be made and will accommodate a DEA that opts to use the FOCUS report as the reporting mechanism.[772] This provision will also accommodate large broker-dealers that are active in this business and regularly maintain stock loan and repo balances that exceed the threshold. The Commission expects that these broker-dealers have experience in managing the risks associated with these types of transactions and have established controls to address those risks. Consequently, notice under Rule 17a–11 from these broker-dealers will not be as useful to regulators. On the other hand, the monthly reports will provide securities regulators with information useful, for example, to develop trend analysis, if deemed appropriate. This analysis can be used to identify leverage levels that are outside the normal trend range and that may be indicative of a material change in the firm's business model (*e.g.,* taking on higher levels of leverage, branching into new products, or experiencing operational or financial difficulties).

The Commission requested comment on available metrics to quantify these benefits and any other benefits a commenter may identify. Commenters were requested to identify sources of empirical data that could be used for the metrics they propose. The Commission did not receive any comments in response to these requests.

The Commission expects that broker-dealers may incur costs related to the implementation of the rule

[768] *See* section II.C. of this release. *See also SIFMA 2 Letter; Citigroup Letter.*

[769] *See* section II.C. of this release.

[770] 17 CFR 240.17a–11(c)(5).

[771] 15 U.S.C. 78c(a)(42). *Government securities* generally present less market risk than other types of securities used in securities lending and repo transactions. Consequently, they are excluded from the scope of this rule.

[772] As proposed, the amendment to Rule 17a–11 would have provided that a broker-dealer that submitted a monthly report of its stock loan and repo activity to its DEA not be required to file the Rule 17a–11 notices required by paragraph (c)(5). *See Amendments to Financial Responsibility Rules,* 72 FR at 12870.

amendments. Using current Rule 15c3–1 and Rule 17a–11 as a baseline, the Commission expects that some broker-dealers may incur costs in connection with the implementation of these rule amendments.

With regard to the amendment to subparagraph (c)(2)(iv)(B) of Rule 15c3–1, the Commission understands that most existing standard securities lending master agreements in use today already contain language requiring agent lenders to disclose principals and for principals to agree not to hold the agents liable for a counterparty default. Thus, the standard agreement used by the vast majority of broker-dealers should contain the representations and disclosures required by the proposed amendment. However, a small percentage of broker-dealers may need to modify their standard agreements. The Commission estimates that the total one-time cost to broker-dealers for this change will be approximately $45,480.[773]

The Commission requested comment on the cost estimates. In particular, the Commission requested comment on additional costs to broker-dealers that would arise from the proposals, such as costs arising from making systems changes. The Commission also requested comment on whether these proposals would impose costs on other market participants, including broker-dealer customers. Commenters were also asked to identify the metrics and sources of any empirical data that support their costs estimates. The Commission did not receive any comments in response to these requests.

With regard to the amendment to Rule 17a–11, the Commission received several suggested alternatives from commenters which contributed to the modification of the final rule from the proposal. Three commenters addressed the proposed monthly notification requirement. They stated that the monthly report in lieu of the notification should be provided as part of the monthly FOCUS report many broker-dealers file with their DEA.[774] The Commission agrees that the FOCUS report may be an appropriate mechanism for reporting stock loan and repo positions in lieu of the proposed monthly notification requirement.[775] Consequently, the Commission modified the final rule amendment to delete the phrase ''submits a monthly report of'' and replace it with the phrase ''reports monthly.'' In addition, as adopted, in order to provide that the monthly report shall be sent to a broker-dealer's DEA, the Commission added the phrase ''to its designated examining authority in a form acceptable'' before ''to its designated examining authority.'' This approach, as adopted, is intended to provide each DEA with the flexibility to tailor the reporting requirements.

Based on FOCUS Report data, the Commission estimates that approximately one notice per year will be sent pursuant to this amendment.[776] Therefore, approximately one broker-dealer per year will incur costs to prepare and send the notice.[777] Consequently, the Commission estimates that the costs to broker-dealers associated with this requirement will be *de minimis.*

In addition, the Commission estimates that six broker-dealers will choose the option of reporting monthly[778] and will incur a one-time cost to update their systems to generate the information for the report.[779] The Commission also estimates that these broker-dealers will incur annual costs generating and filing the monthly reports or preparing the information to include in monthly FOCUS Reports (as applicable).[780] Therefore, the Commission estimates that the total one-time cost and annual costs to broker-dealers will be approximately $169,200[781] and $9,648[782] respectively. The Commission's total one-time and annual cost estimates have decreased from the proposing release primarily due to an overall decrease in the number of broker-dealers.

As noted above, the Commission requested comment on the proposed cost estimates. In particular, the Commission requested comment on additional costs to broker-dealers that would arise from the proposals. The Commission also requested comment on whether these proposals would impose costs on other market participants, including market participants active in the securities lending and repurchase markets. Commenters were asked to identify the metrics and sources of any empirical data that supported their cost estimates. The Commission did not receive any comments in response to these requests.

ii. Consideration of Burden on Competition, and Promotion of Efficiency, Competition, and Capital Formation

As described above, the amendment to subparagraph (c)(2)(iv)(B) of Rule 15c3–1 and new paragraph (c)(5) of Rule 17a–11 are designed to address two areas of concern that emerged from the Commission's experience with the failure of MJK.[783] First, broker-dealers with principal liability in a stock loan transaction may be deemed to be acting in an agency capacity and therefore not taking appropriate capital charges. Second, broker-dealers that historically have not been very active in stock loan activities may rapidly expand their balance sheets and increase leverage to a level that poses significant financial risk to the firm and counterparties. Either potential event could result in significant, adverse consequences for customers and counterparties of the broker-dealer. For the customers, the fact that the broker-dealer could avoid taking appropriate capital charges would imperil the broker-dealer's ability to self-liquidate, thereby impeding the ability of customers to be promptly paid in full. For the counterparties, the fact that the broker-dealer could rapidly escalate its leverage increases the likelihood that the broker-dealer could fail and its counterparties could

[773] In the proposing release, the Commission estimated that the total one-time cost to broker-dealers would be approximately $62,604. *See Amendments to Financial Responsibility Rules,* 72 FR at 12884. The internal hours would likely be performed by an in-house Attorney at $379 per hour, resulting in the estimated internal cost calculated as follows: 120 hours at $379 per hour = $45,480. *See* section IV.D.1. of this release.

[774] *See Abbey National Letter; Citigroup Letter; SIFMA 2 Letter.*

[775] Carrying broker-dealers are generally required to submit FOCUS reports on a monthly basis.

[776] This estimate is derived from FOCUS Report data, and adjusted based on staff experience. This estimate has been updated from the proposing release estimate of 11. No comments were received on this estimate.

[777] The internal hours would likely be performed by junior stock loan manager for 10 minutes at $134 per hour × 1 notice = $22.33. *See* section IV.D.8. of this release.

[778] This is an update from the proposing release estimate of 21 broker-dealers. *See Amendments to Financial Responsibility Rules,* 72 FR at 12884.

[779] The internal hours would likely be performed by a senior programmer. Therefore, the estimated internal costs for this hour burden would be calculated as follows: Senior Programmer for 100 hours at $282 per hour = $28,200. *See* section IV.D.8. of this release. This is an update from the proposing release estimate of $26,800. *See Amendments to Financial Responsibility Rules,* 72 FR at 12884.

[780] The internal hours would likely be performed by a junior stock loan manager. Therefore, the estimated internal costs for this hour burden would be calculated as follows: Junior Stock Loan Manager for 12 hours at $134 per hour = $1,608. *See* section IV.D.8. of this release. This is an update from the proposing release estimate of $2,496 per firm. *See Amendments to Financial Responsibility Rules,* 72 FR at 12884.

[781] 6 firms × $28,200 = $169,200. This is an update from the proposing release estimate of $562,800. *See Amendments to Financial Responsibility Rules,* 72 FR at 12884.

[782] 6 firms × $1,608 = $9,648. This is an update from the proposing release estimate of $52,416. *See Amendments to Financial Responsibility Rules,* 72 FR at 12884.

[783] *See* section II.C. of this release.

experience, losses of value associated with the rapid unwinding of positions with the failing broker-dealer.

Overall, the amendments to Rule 15c3–1 and Rule 17a–11 will help enhance the monitoring of securities lending or repurchase activities by securities regulators, thereby reducing the effect on customers and counterparties of the potential impact of a financial collapse of the broker-dealer.[784] This will strengthen the securities markets and make them more attractive to investors, thereby enhancing efficiency and capital formation. Moreover, the language in the final rule that provides each DEA with the flexibility to prescribe how the monthly reports are to be made may enhance efficiencies for broker-dealers by providing the ability for a DEA to tailor the reporting requirements. Finally, the costs of compliance with the amendments to Rules 15c3–1 and 17a–11 should not impose a burden on competition not necessary or appropriate in the furtherance of the purposes of the Exchange Act in light of the benefits discussed above.

4. Documentation of Risk Management Procedures

i. Economic Analysis

As discussed in section II.D. of this release, the Commission is adopting new paragraph (a)(23) to Rule 17a–3 to require certain broker-dealers to make and keep current a record documenting the credit, market, and liquidity risk management controls established and maintained by certain broker-dealers to assist them in analyzing and managing the risks associated with their business activities, including, for example, securities lending and repo transactions, OTC derivative transactions, proprietary trading, and margin lending.[785] The amendment will apply only to broker-dealers that have more than $1,000,000 in aggregate credit items as computed under the customer reserve formula of Rule 15c3–3, or $20,000,000 in capital including debt subordinated in accordance with Appendix D to Rule 15c3–1.

These amendments require large broker-dealers to document the controls they have implemented to address the risks they face as a result of their business activities. As proposed, the amendment would have required a broker-dealer to create a record documenting its ''internal risk management controls,'' rather than its market, credit, and liquidity risk controls. Commenters generally raised concerns with the proposed amendment stating, for example, that the proposed documentation of internal management controls over risks arising from the broker-dealer's business activities was overly broad and ambiguous.[786] The Commission considered the proposed approach and, as discussed above, in part in response to comments, the Commission narrowed the application of the amendment so that the final rule now requires the documentation of internal risk management controls established to manage market, credit, and liquidity risk.[787] The final rule benefits firms and their customers by mitigating the risk of losses associated with a firm's normal activities, while at the same time placing an increased recordkeeping burden on broker-dealers by requiring them to document certain risks in writing.

A well-documented system of internal controls designed to manage material risk exposures related to market, credit, and liquidity risk reflects the expectations of a firm's management as to how its business activities should be conducted in light of such exposures. Written risk management procedures enable management to better identify, analyze, and manage the risks inherent in the firm's business activities with a view to preventing material losses and to review whether the firm's activities are being conducted in a manner that is consistent with such procedures and controls. This will likely benefit market participants and reduce systemic financial risk.

In addition, by making the documented controls a required record under Rule 17a–3, a broker-dealer's regulator likely will have better access to them, as this benefit will only be realized to the extent that a broker-dealer has existing market, credit, and liquidity risk management controls in place because the rule does not specify the type of controls a broker-dealer must establish to manage these risks. It simply requires documentation of the procedures that the broker-dealer has established. The final rule amendment will require any such records of the market, credit, and liquidity risk management controls to be available to the broker-dealer's regulators so that they can review whether the broker-dealer is adhering to these controls.

The Commission requested comment on available metrics to quantify these benefits and any other benefits a commenter may identify. Commenters were requested to identify sources of empirical data that could be used for the metrics they proposed. The Commission did not receive any comments in response to these requests.

These amendments apply to a limited number of broker-dealers, namely, those firms with more than $1 million in customer credits or $20 million in capital and amend recordkeeping requirements in Rules 17a–3 and 17a–4. Therefore, against the existing baseline of these current rules, the Commission expects that the requirement will result in a one-time cost to some of these firms to the extent that they have established controls that have not been documented. However, since most firms are expected to be already compliant, the incremental costs are expected to be small. For example, broker-dealers that are approved to compute capital using internal models are already subject to Rule 15c3–4, which requires these firms to establish, document, and maintain a system of internal risk controls to assist them in managing the risks associated with its business activities, including market, credit, leverage, liquidity, legal, and operational risks.[788] These firms would most likely incur no or minimal costs to comply with the final rule. In addition, this rule amendment does not mandate any specific control, procedure, or policy be established; rather, the Commission is requiring that a control, procedure, or policy be documented if it is in place. For these reasons, the Commission estimates that the one-time hourly burden to meet the requirements of these rules will range from zero hours for some firms to hundreds of hours for other firms. Taking this into account, the Commission estimates that the total one-time cost to broker-dealers to document controls in compliance with this amendment will be approximately $13,783,700.[789] The Commission also estimates that the annual cost to broker-dealers to ensure compliance with the

[784] *Id.*

[785] 17 CFR 240.17a–3(a)(23).

[786] *See E*Trade Letter; Citigroup Letter.*

[787] *See* section II.D. of this release.

[788] 17 CFR 240.15c3–4; 17 CFR 240.15c3–1(a)(7)(iii). Based on staff experience monitoring broker-dealer risk management procedures, the internal hours would likely be coordinated by a broker-dealer's in-house attorney (19,600 hours), working with operation specialists (24,500 hours), and overseen by an associate general counsel (4,900 hours). Therefore, the estimated internal costs for this hour burden would be calculated as follows: [(Attorney for 19,600 hours at $379 per hour) + (Operations Specialist for 24,500 hours at $126 per hour) + (Associate General Counsel for 4,900 hours at $467) = $12,803,700. Broker-dealers are also expected to incur one-time outside counsel costs of $980,000 for a total one-time cost of $13,783,700. *See* section IV.D.7. of this release.

[789] *See* section IV.D.7. of this release. In the proposing release, the Commission estimated this cost would be approximately $14,201,990. *See Amendments to Financial Responsibility Rules,* 72 FR at 12885.

amendment to Rule 17a–3 will be approximately $8,356,950.[790]

As noted above, the Commission requested comment on the proposed cost estimates. In particular, the Commission requested comment on additional costs to broker-dealers that would arise from the proposals, such as costs arising from making changes to systems and costs associated with maintaining these records. The Commission also requested comment on whether the proposals would impose costs on other market participants, including broker-dealer customers. Commenters were also asked to identify the metrics and sources of any empirical data that support their cost estimates. The Commission did not receive any comments in response to these requests.

ii. Consideration of Burden on Competition, and Promotion of Efficiency, Competition, and Capital Formation

The amendments to Rules 17a–3 and 17a–4 require firms to document their market, credit, and liquidity risk management controls. The amendments will help strengthen broker-dealer internal controls. Documenting internal controls will encourage enhanced consideration of, and thus a firmer grasp upon, the risks attendant to a broker-dealer's business activities. This is designed to reduce the risks inherent to the business of operating as a broker-dealer. The final approach the Commission has taken with these rule amendments—encouraging effective internal controls while preserving flexibility—will enhance a broker-dealer's financial soundness and, consequently, may help to reduce the likelihood of broker-dealer failures with possible positive effects on investor participation, competition, and capital formation. The amendments may also increase efficiencies in broker-dealer examinations through the ready availability of records for examiners.

Finally, the Rule 17a–3 and 17a–4 amendments are not expected to place a burden on competition for small non-carrying broker-dealers because such firms would not be subject to these amendments.[791] As discussed above, there will be some incremental costs to compliance related to these amendments for carrying broker-dealers but the costs of compliance should not impose a burden on competition not necessary or appropriate in furtherance of the purposes of the Exchange Act and in light of the benefits discussed above.

5. Amendments to the Net Capital Rule

i. Economic Analysis

a. Requirement To Deduct From Net Worth Certain Liabilities or Expenses Assumed by Third Parties

(I). Summary of Amendments

The amendments to Rule 15c3–1 add a new paragraph (c)(2)(i)(F) requiring a broker-dealer to adjust its net worth when calculating net capital by including any liabilities that are assumed by a third party if the broker-dealer cannot demonstrate that the third party has the resources, independent of the broker-dealer's income and assets, to pay the liabilities. This amendment is intended to assist investors and regulators by requiring broker-dealers to provide a more accurate picture of their financial condition. This should help regulators react more quickly if a broker-dealer experiences financial difficulty and benefit customers of the troubled broker-dealer as well as its counterparties.

The purpose of the requirement in new paragraph (c)(2)(i)(F) of Rule 15c3–1 is to address the practices of a broker-dealer that raise concerns when a broker-dealer shifts liabilities to an entity with no revenue or assets independent of the broker-dealer to inappropriately increase its reported net capital, by excluding the liability from the calculation of net worth. The final rule is designed to prohibit a practice that could misrepresent a broker-dealer's actual financial condition, mislead the firm's customers, and hamper the ability of regulators to monitor the firm's financial condition.

The Commission requested comment on available metrics to quantify these benefits and any other benefits a commenter may identify. Commenters were requested to identify sources of empirical data that could be used for the metrics they proposed. The Commission did not receive any comments in response to these requests.

(II). Baseline and Incremental Economic Effects

As discussed in section II.E.1. of this release, the baseline of this rule amendment is current Rule 15c3–1 and existing guidance and interpretations. The Commission staff has provided guidance with respect to the treatment and recording of certain broker-dealer expenses and liabilities that is consistent with the rule amendment.[792] Consequently, as against the current baseline, the Commission does not expect significant incremental benefits and costs to the extent that they already comply with existing guidance and interpretations.[793]

While the amendments apply to all broker-dealers, they will impact only those few that shift liabilities to entities with no revenue or assets independent of the broker-dealer (*i.e.,* shell corporations) to boost the broker-dealer's reported net capital. Based on staff experience in supervising broker-dealer compliance with Rule 15c3–1, the vast majority of broker-dealers likely either do not seek to transfer responsibility for their liabilities to a third party or, if they do so, rely on a third party that has the financial resources—independent of the assets and revenue of the broker-dealer—to pay the obligations as they become due. Because of this, it is difficult to quantify the benefits and costs impact of this rule amendment.

The Commission conservatively estimates that the amendment may impact all broker-dealers that do not report any liabilities. FOCUS Report data, as of December 31, 2011, indicates that approximately 289 broker-dealers report having no liabilities. While this number is likely at the upper boundary of the total number of broker-dealers affected by this amendment, the number of broker-dealers reporting no liabilities likely represents a reasonable sample of broker-dealers on which to base the cost estimates.

Requiring these broker-dealers to book liabilities will decrease the amount of equity capital held by the firms and in some cases may require them to obtain additional capital. The majority of broker-dealers reporting no liabilities are introducing broker-dealers that have a $5,000 minimum net capital requirement, while the reported average of total liabilities is approximately $491,355 per broker-dealer. Therefore, conservatively estimating that each of the 289 broker-dealers will have to raise $491,355 in additional capital as result of the requirement, the total aggregate

[790] The internal hours would likely be performed by a broker-dealer's in-house attorney. Therefore, the estimated internal costs for this hour burden would be calculated as follows: Attorney at $379 per hour × 22,050 hours = $8,356,950. *See* section IV.D.7. of this release.

[791] The amendments only apply to broker-dealers that have more than $1,000,000 in aggregate credit items as computed under the customer reserve formula of Rule 15c3–3, or $20,000,000 in capital including debt subordinated in accordance with Appendix D to Rule 15c3–1.

[792] *See, e.g., Third Party Expense Letter; see also FINRA Notice to Members 03–6, Expense Sharing Agreements.*

[793] Under this amendment, some broker-dealers may request permission in writing from their DEA to withdraw capital within one year of contribution under the rule, resulting in annual costs to broker-dealers of approximately $144,150 (465 hours × $310 per hour for a Compliance Attorney). *See* section IV.D.2. of this release.

amount of additional capital that will need to be raised is $142 million.[794]

Further, relative to the proposing release, the Commission is revising the cost of capital from approximately 5%, which was determined based on historical interest rates published by the Federal Reserve, to 12% as the average cost of equity capital determined using the capital asset pricing model (''CAPM'').[795] Therefore, the Commission conservatively estimates that the total annual cost to broker-dealers will be approximately $17 million,[796] which is an increased estimate relative to the proposing release. For the broker-dealers to whom this increased estimate applies, the Commission expects that there would be greater costs imposed. However, the Commission expects that the benefits outlined above would also accrue to the customers of these broker-dealers.

The Commission requested comment on the proposed cost estimates. In particular, the Commission requested comment on additional costs to broker-dealers that would arise from the proposals. The Commission also requested comment on whether these proposals would impose costs on other market participants, including broker-dealer customers. Commenters were also asked to identify the metrics and sources of any empirical data that support their costs estimates. The Commission received five comments in response to this request for comment.[797]

One commenter noted that the Commission has provided no evidence that the public has been endangered or has been left financially unprotected as a result of the practice of having another entity book some or all of a member's liabilities.[798] This commenter asserted that the amendment will affect 14% of total member firms and that member firms may be shut down, sold or merged as an unintended consequence of the amendment.[799] The commenter questioned how many member firms will fail as a result of this proposal.[800]

Another commenter stated that the true costs of the amendment should be calculated and verified before a proposed amendment is offered and that the true costs of these amendments were given little time, research, and consideration.[801] This commenter also argued that the estimated 5% cost of capital has no basis and a firm would be fortunate to borrow funds for double the estimate of 5%.[802] This same commenter also stated that the proposal would require 702 debt-free introducing broker-dealers to needlessly take on debt of approximately $280,354.[803] Another commenter stated that it is unclear and unlikely how this amendment would achieve any of the desired results and may conversely impair a firm's ability to continue as a going concern.[804] None of the commenters provided the Commission with revised cost estimates.

One commenter stated that if small firms were required to raise over $300,000 in capital each, there would be the largest dissolution of small broker-dealers in the history of the regulated securities industry.[805] This commenter also stated that the Commission's estimate of a gross cost of capital of 7.5% (5% + 2.5%) is a totally unrealistic cost of capital for small broker-dealers and that these broker-dealers will categorically have costs significantly higher than 7.5%.[806] Finally, the commenter stated that, until the Commission convenes a small broker-dealer representative panel to assist it with establishing such costs, the Commission is speculating on such costs, and is therefore without adequate information to consider the effects of such costs and changes on small firms.[807]

(III). Alternatives

The Commission considered all comments received[808] and the alternative of not adopting the rule, and decided to adopt the amendments substantially as proposed. In response to the comment regarding the unrealistic cost of capital,[809] the Commission has increased the cost of capital to 12% as an average cost of equity capital for broker-dealers. As discussed in section II.E.1 of this release, the baseline of this amendment is current Rule 15c3–1 and existing guidance and interpretations. The Commission staff has provided guidance with respect to the treatment and recording of certain broker-dealer expenses and liabilities that is consistent with the rule amendment.[810] Existing broker-dealer recordkeeping rules require a broker-dealer to record its income and expenses.[811] For example, paragraph (a)(2) of Rule 17a–3 requires a broker-dealer to make and keep current ledgers (or other records) reflecting all assets and liabilities, income and expense and capital accounts.[812] Consequently, as against the current baseline, the above estimates are intended to be conservative. The Commission expects that broker-dealers will incur costs to comply with this amendment, including costs to obtain additional capital, only to the extent they are not currently complying with existing guidance and interpretations.

In response to comments,[813] the Commission does not expect broker-dealers to incur significant costs to comply with this amendment to the extent that they are appropriately recording their assets and liabilities under current Commission rules and interpretive guidance, because these items will already appear on a broker-dealer's balance sheet and be included in its net capital computation. Consequently, the rule amendment, as adopted, should not: (1) Cause firms to be classified as ''a going concern;''[814] (2) cause firms to fail, dissolve, or otherwise close;[815] (3) impose undue burdens; or (4) present serious implementation difficulties to firms (small or large) if they are appropriately recording their assets and liabilities under current Commission rules and interpretive guidance.[816] Further, as stated above, the estimates are intended to be conservative, and therefore, the Commission expects that the ''true''

[794] 289 broker-dealers × $491,355 = $142,001,595. This is an update from the proposing release estimate of 702 broker-dealers with aggregate liabilities of $280,354 per firm, resulting in an estimated amount of additional capital that would have to be raised in the amount of $196,808,508 (702 broker-dealers × $280,354 = $196,808,508). *See Amendments to Financial Responsibility Rules,* 72 FR at 12885, n.189 and accompanying text.

[795] The CAPM is a central model in modern financial theory and is widely used in applications, such as estimating the cost of capital for firms and evaluating the performance of managed portfolios. Based on conventional assumptions and historical stock price data available on Bloomberg, the Commission estimates a risk-free rate of 2.5% and an equity risk premium of 7.8%. Using, five-year, as well as two-year, monthly returns for a sample of listed broker-dealers, the Commission estimates an adjusted beta of approximately 1.25.

[796] $142,001,595 × 12.25% = $17,395,195. In the proposing release, the Commission estimated that this cost would be approximately $10 million. *See Amendments to Financial Responsibilities Rules.* 72 FR at 12995.

[797] *See Beer Letter; Beer 2 Letter; Lowenstein Letter; Levene Letter; NIBA 2 Letter.*

[798] *See Lowenstein Letter.*

[799] *Id.*

[800] *Id.*

[801] *See Beer 2 Letter.*

[802] *Id.*

[803] *See Beer Letter; Lowenstein Letter.*

[804] *See Levene Letter.*

[805] *See NIBA 2 Letter.*

[806] *Id.*

[807] *Id.*

[808] *See Beer Letter; Beer 2 Letter; Lowenstein Letter; Levene Letter; NIBA 2 Letter.*

[809] *See NIBA 2 Letter.*

[810] *See, e.g., Third Party Expense Letter; see also FINRA Notice to Members 03–6, Expense Sharing Agreements.*

[811] 17 CFR 240.17a–3; 17 CFR 240.17a–4.

[812] 17 CFR 240.17a–3(a)(2).

[813] *See Beer Letter; Beer 2 Letter; Lowenstein Letter; Levene Letter; NIBA 2 Letter.*

[814] *See Levene Letter.*

[815] *See NIBA 2 Letter.*

[816] *See, e.g., Third Party Expense Letter; see also FINRA Notice to Members 03–6, Expense Sharing Agreements.*

costs[817] that may be incurred by broker-dealers should be less than the maximum estimated. Therefore, the Commission does not believe a longer time period for compliance or the formation of a small broker-dealer advisory cost committee is necessary.[818]

b. Requirement To Subtract From Net Worth Certain Non-Permanent Capital Contributions

(I). Summary of Amendments

As discussed in section II.E.2. of this release, the amendment adds paragraph (c)(2)(i)(G) to Rule 15c3–1, requiring a broker-dealer to treat as a liability any capital that is contributed under an agreement giving the investor the option to withdraw it. The rule, as adopted, also requires that a broker-dealer treat as a liability any capital contribution that is withdrawn within a year of its contribution unless the broker-dealer receives permission in writing from its DEA.[819] The amendment to Rule 15c3–1 is intended to assist investors and regulators by requiring broker-dealers to provide a more accurate picture of their financial condition. This amendment will help regulators react more quickly if a broker-dealer experiences financial difficulty and benefits customers of a troubled broker-dealer as well as its counterparties.

The Commission requested comment on available metrics to quantify these benefits and any other benefits a commenter may identify. Commenters were requested to identify sources of empirical data that could be used for the metrics they proposed. The Commission did not receive any comments in response to these requests.

(II). Baseline and Incremental Economic Effects

As discussed in section II.E.2. of this release, the baseline of this rule amendment is current Rule 15c3–1 and existing guidance and interpretations. The Commission estimates that the amendments requiring broker-dealers to treat certain capital contributions as liabilities should not result in significant incremental benefits and costs, as compared to the baseline. Because of existing Commission and staff guidance regarding the permanency of capital,[820] broker-dealers typically do not enter into agreements permitting an owner to withdraw capital at any time. To the extent some firms may have engaged in this practice, they may need to raise capital to meet the rule requirement.

While the amendments apply to all broker-dealers, they will impact only the few broker-dealers that provide investors with the option to withdraw capital at any time or within one year. Because of existing Commission and staff interpretations related to temporary capital contributions,[821] most broker-dealers likely do not accept capital contributions under agreements permitting the investor to withdraw the capital at any time or within one year. Therefore, it is difficult to quantify the cost impact of this rule amendment.

Based on staff experience with the treatment of capital contributions and the application of Rule 15c3–1, the Commission estimates that no more than $100 million in capital at broker-dealers is subject to such agreements.[822] Further, with regard to the treatment of temporary capital contributions, in the proposing release, the Commission assumed an *incremental* cost of capital of 2.5%,[823] and estimated that the amendment would result in an annual cost of approximately $2.5 million.[824]

The Commission requested comment on the proposed cost estimates. In particular, the Commission requested comment on additional costs to broker-dealers that would arise from the proposals. The Commission also requested comment on whether these proposals would impose costs on other market participants, including broker-dealer customers. Commenters were also asked to identify the metrics and sources of any empirical data that support their costs estimates.

The Commission received three comments.[825] One commenter stated that the Commission's estimate that no more than $100 million of capital at broker-dealers is subject to agreements permitting an owner to withdraw capital at any time greatly underestimates the impact of the proposed rule.[826] The commenter stated that the Commission makes no case for deviating from the already established standards.[827] Another commenter believed that the proposal would raise its cost of capital to such an extent that it would be impossible for the firm to raise capital from unrelated third parties.[828]

One commenter stated that the Commission's estimate of a gross cost of capital of 7.5% (5% + 2.5%) is a totally unrealistic cost of capital for small broker-dealers and that these broker-dealers will categorically have costs significantly higher than 7.5%.[829] Finally, the commenter stated that, until the Commission convenes a small broker-dealer representative panel to assist it with establishing such costs, the Commission is ''speculating'' on such costs, and is therefore without adequate information to consider the effects of such costs and changes on small firms.[830]

In response to comments,[831] the Commission is revising this estimate in the final rule to an estimated cost of capital of approximately 12%, which is determined as the average cost of equity capital of broker-dealers using the CAPM. The overall estimated cost of capital is not incremental to the amendment discussed above regarding third party liabilities. The estimated cost of capital would be 12% for a broker-dealer seeking additional equity capital. Therefore, with regard to the treatment of temporary capital contributions, the Commission estimates the amendment will result in an annual cost of approximately $12.0 million,[832] which is an increased estimate relative to the proposing release. For the broker-dealers to whom this increased estimate applies, and who may not be complying with the rule amendments, the Commission expects that there would be greater costs imposed. However, the Commission expects that the benefits outlined above

[817] *See Beer 2 Letter.*

[818] *See NIBA 2 Letter.*

[819] One commenter suggested that the rule be amended to explicitly exclude any withdrawals that would fall under paragraph (e)(4)(iii) of Rule 15c3–1. *See American Bar Association Letter.* It is unnecessary to explicitly exclude any withdrawals that would fall under paragraph (e)(4)(iii) of Rule 15c3–1 because these requirements will not apply to withdrawals covered by paragraph (e)(4)(iii) of Rule 15c3–1, namely, withdrawals used to make tax payments or to pay reasonable compensation to partners. 17 CFR 240.15c3–1(e)(4)(iii). These types of payments are ordinary business expenditures and do not raise the types of concerns the proposed rule is designed to address. *See Amendments to Financial Responsibility Rules,* 74 FR at12872, n.79.

[820] *See Net Capital Rule,* Exchange Act Release No. 28927 (Feb. 28, 1991). *See also Net Capital Requirements for Brokers and Dealers* Exchange Act Release No. 18417 (Jan. 13, 1982), 47 FR 3512 (Jan. 25, 1982). *See also Temporary Capital Letter; Study of Unsafe and Unsound Practices of Broker-Dealers, Report and Recommendations of the Securities and Exchange Commission,* H.R. Doc. No. 92–231 (1971) (recommending improvement of adequacy and permanency of capital); and Letter from Nelson Kibler, Assistant Director, Division of Market Regulation to John Pinto, National Association of Securities Dealers, Inc. (Sept. 8, 1980).

[821] *See Net Capital Rule,* Exchange Act Release No. 28927 (Feb. 28, 1991), 56 FR 9124 (Mar. 5, 1991); and *Temporary Capital Letter.*

[822] *See Amendments to Financial Responsibility Rules,* 72 FR at 12885.

[823] *Id.* at 12886–12887.

[824] $100,000,000 × 2.5% = $2,500,000.

[825] *See Chicago Capital Management Letter; SIG Letter; NIBA 2 Letter.*

[826] *See SIG Letter.*

[827] *Id.*

[828] *See Chicago Capital Management Letter.*

[829] *See NIBA 2 Letter.*

[830] *Id.*

[831] *See NIBA 2 Letter.*

[832] $100,000,000 × 12.25% = $12,250,000.

would also accrue to the customers of these broker-dealers.[833]

(III). Alternatives

The Commission considered all comments discussed above and the alternative of not adopting the rule, and decided to adopt the amendments substantially as proposed. In response to commenters' concerns about the impact on capital and the $100 million estimate,[834] as discussed above, the final rule amendment is a codification of existing Commission staff guidance,[835] and thus should not represent a change for broker-dealers with respect to capital withdrawals. Moreover, with respect to commenters' concerns about obtaining capital,[836] the rule does not prohibit an investor from withdrawing capital at any time. Rather, it prohibits a broker-dealer from treating temporary cash infusions as capital for purposes of the net capital rule. Finally, the final rule amendment provides a mechanism for a broker-dealer to apply to its DEA to make a withdrawal within one year of the capital contribution without triggering the deduction under certain circumstances.

In the final rule, the Commission has increased the estimated cost of capital from 2.5% to 12%, in response to comments regarding the unrealistic cost of capital, and because the estimated cost of capital is not incremental to the estimated cost of capital to the amendment to Rule 15c3–1 regarding third party liabilities.[837] The estimated cost of capital would be 12% for a broker-dealer seeking a loan for any additional capital. In addition, based on staff experience with the treatment of capital contributions and for the reasons discussed above, the Commission continues to believe that the estimate of $100 million regarding the temporary capital contributions is reasonable.[838]

Further, the final rule amendments relating to temporary capital contributions have been revised to clarify that a withdrawal of capital made within one year of its contribution to the broker-dealer is deemed to have been intended to be withdrawn within one year, unless the withdrawal has been approved in writing by the broker-dealer's DEA.[839] The Commission made this change to eliminate a potential ambiguity as to whether a withdrawal of capital within one year could ever be approved by a broker-dealer's DEA. The final rule amendment clarifies the intent to provide a mechanism for broker-dealers to apply for approval to withdraw capital within one year and to be granted such approval where appropriate.

While owners of most broker-dealers have the option of withdrawing capital, most owners likely do not have agreements that provide the option of withdrawing capital at any time.[840] Paragraph (e) of Rule 15c3–1 contains mechanisms to permit a broker-dealer to make capital withdrawals for specified purposes.[841] If there is a specific need for a broker-dealer to seek permission to make a capital withdrawal within one year of contribution, the final rule already provides a mechanism for the broker-dealer to seek permission in writing from its DEA to make such a withdrawal.[842] Based on the discussion above, the Commission believes the final cost estimates are appropriate.[843]

c. Requirement To Deduct the Amount by Which a Fidelity Bond Exceeds SRO Limits

As discussed in section II.E.3. of this release, this amendment requires broker-dealers to deduct from net capital, with regard to fidelity bonding requirements prescribed by a broker-dealer's examining authority, the excess of any deductible amount over the amount permitted by SRO rules.

Under SRO rules, certain broker-dealers that do business with the public or are required to become SIPC members must comply with mandatory fidelity bonding requirements.[844] SRO rules typically permit a broker-dealer to have a deductible provision included in the bond; however, such rules provide that the deductible must not exceed certain amounts. With regard to firms that maintain deductible amounts over certain specified amounts, a number of SRO rules provide that the broker-dealer must deduct this specified amount from net worth when calculating net capital under Rule 15c3–1.[845]

Rule 15c3–1, however, does not specifically reference the SRO deductible requirements as a charge to net worth, meaning that a broker-dealer would not be required for the purposes of Commission rules to show the impact of the deduction in the net capital computation required by an SRO on the FOCUS Report.[846] To address the reporting inconsistency, the Commission is amending Rule 15c3–1 to add paragraph (c)(2)(xiv), which will require broker-dealers to deduct the amount specified by rule of the Examining Authority of the broker-dealer with respect to a requirement to maintain fidelity bond coverage. This rule amendment will provide consistency in broker-dealer reporting requirements.[847]

This amendment will also codify in a Commission rule capital charges that broker-dealers are currently required to take pursuant to the rules of various SROs. Consequently, any economic effects, including costs and benefits, should be compared to a baseline of current practices. The amendment should not impose additional costs on broker-dealers with respect to the purchasing or carrying of fidelity bond coverage. Nor will the amendment cause broker-dealers to incur additional costs in determining or reporting excess deductible amounts over the deductible permitted. Broker-dealers already make such determinations under SROs rules, and the manner in which such excesses are typically reported (*i.e.,* through periodic FOCUS Reports and other reports) would remain the same.

The Commission received one comment opposing the fidelity bond amendment, stating that FINRA Rule 4360 and the Commission's amendment would result in a *de facto* increase in minimum net capital requirements for some broker-dealers.[848] Any increase in net capital cited by the commenter

[833] $100,000,000 × 12.25% = $12,250,000.

[834] *See Chicago Capital Management Letter; SIG Letter; NIBA 2 Letter.*

[835] *See Temporary Capital Letter. See also* section II.E.2. of this release.

[836] *See Chicago Capital Management Letter; SIG Letter; NIBA 2 Letter.*

[837] *See NIBA 2 Letter.*

[838] *See SIG Letter.*

[839] *See* section II.E.2. of this release.

[840] *See SIG Letter.*

[841] *See* paragraphs (e)(1)(iii)(B) and (e)(4)(iii) of Rule 15c3–1. *See also Amendments to Financial Responsibility Rules,* 72 FR at 12872, n.79 (''These requirements would not apply to withdrawals covered by paragraph (e)(4)(iii) of Rule 15c3–1, namely, withdrawals used to make tax payments or pay reasonable compensation to partners. These types of payments are ordinary business expenditures and do not raise the types of concerns the proposed rule is designed to address.'')

[842] *See* paragraph (c)(2)(i)(G)(*2*) of Rule 15c3–1.

[843] *See NIBA 2 Letter.*

[844] *See, e.g.,* FINRA Rule 4360, CBOE Rule 9.22, and NASDAQ OMX PHLX Rule 705. SRO fidelity bonding requirements typically contain agreements covering the following areas: A ''Fidelity'' insuring clause to indemnify against loss of property through dishonest or fraudulent acts of employees; an ''On Premises'' agreement insuring against losses resulting from crimes such as burglary and theft and from misplacement of property of the insured; an ''In Transit'' clause indemnifying against losses occurring while property is in transit; a ''Forgery and Alteration'' agreement insuring against loss due to forgery or alteration of various kinds of negotiable instruments; and a ''Securities Loss'' clause protecting against losses incurred through forgery and alteration of securities. *Id.*

[845] *See, e.g.,* FINRA Rule 4360 and CBOE Rule 9.22.

[846] *See* 17 CFR 240.17a–5.

[847] Conversely, not adopting this rule amendment would have resulted in continued inconsistency among existing SRO rules and Rule 15c3–1.

[848] *See NIBA 2 Letter.*

would result from existing SRO rules.[849] Stated differently, broker-dealers that are members of an SRO with such a fidelity bonding rule must already account for the deduction in complying with the net capital requirements of SROs and nothing in the Commission's amendment to paragraph (c)(2)(xiv) of Rule 15c3–1 would alter this status quo. Consequently, while there is currently no deduction required under the baseline of current Rule 15c3–1 relating to fidelity bond deductibles, because SRO rules currently require this deduction, the adoption of this amendment under Rule 15c3–1 should not impose any additional costs on broker-dealers that they are not already incurring under existing SRO rules.

d. Broker-Dealer Solvency Requirement

As discussed in section II.E.4., the amendment to paragraph (a) of Rule 15c3–1 states that no broker-dealer shall be ''insolvent'' as that term is defined under paragraph (c)(16) of the rule. The companion amendment to paragraph (b)(1) of Rule 17a–11 requires insolvent broker-dealers to provide notice to regulatory authorities.

Allowing an insolvent broker-dealer to continue conducting a securities business during the period of its insolvency, notwithstanding its net capital position, could jeopardize customers and other market participants because a broker-dealer that has made an admission of insolvency, or is otherwise deemed insolvent or entitled to protection from creditors, does not possess the financial resources necessary to operate a securities business. Continuing to operate in such circumstances poses a significant credit risk to counterparties and to the clearance and settlement system, and, in the event the firm ends up in a liquidation proceeding under SIPA, may impair the ability of the SIPA trustee to make the customers of the broker-dealer whole and satisfy the claims of other creditors out of the assets of the general estate.[850]

Consequently, the amendment to Rule 15c3–1 benefits the securities markets, and indirectly, all other market participants, by removing risks associated with the continued operation of a financially unstable firm. For example, the amendment will limit the potential that an insolvent firm would take on new customers and place their assets at risk. Furthermore, the broker-dealer will not be able to enter into proprietary transactions with other broker-dealers and place them or clearing agencies at further risk of counterparty default. The broker-dealer's existing customers also will benefit from preservation of any remaining capital of the firm, which could be used to facilitate an orderly liquidation.

The amendment to Rule 17a-11 also benefits the securities markets in that it will provide regulators with the opportunity to more quickly take steps to protect customers and counterparties at the onset of the insolvency, including, if appropriate, notifying SIPC of the need to commence a SIPA liquidation.

The baseline for this proposed amendment is current Rules 15c3–1 and 17a–11, which currently do not contain requirements to cease conducting a securities business (or to notify the Commission) if certain insolvency events were to occur. The amendments generally will have no impact on broker-dealers when compared to the current baseline. Should a broker-dealer become subject to an insolvency proceeding, it will incur the cost of sending notice of that fact to the Commission and its DEA. The Commission estimated in the PRA that it will occur approximately two[851] times a year for all broker-dealers.[852] For these reasons, the Commission estimates that any costs arising from this amendment will be *de minimis.*

One commenter stated that involuntary bankruptcy proceedings do not necessarily indicate that the broker-dealer is insolvent, as such proceedings can be frivolous, malicious, or otherwise lacking in merit, and noted standard industry forms generally provide a grace period for a party to such a proceeding to obtain a stay or dismissal before an event of default is deemed to have occurred. The Commission considered this alternative approach and notes that if a firm believes that it is the subject of an unwarranted involuntary bankruptcy proceeding and that its case will not be dismissed within the 30 day timeframe, as is the case with existing net capital requirements, pursuant to Rule 15c3–1(b)(3), the Commission may, upon written application, exempt the broker-dealer from the requirement.

In addition, one commenter objected to the amendments as unnecessary, citing the Rule 15c3–1 prohibition on broker-dealers effecting securities transactions if their net capital is below certain minimums.[853] The commenter stated that the net capital of an insolvent broker-dealer would, by definition, be below those minimums.[854] The Commission considered the commenter's view and the alternative of not adopting the amendments. The purpose of the amendment is to address cases where the broker-dealer is subject to an insolvency event but maintains that it is in compliance with the net capital rule. Therefore, the Commission is adopting this amendment, because, while such instances may be rare, an insolvent broker-dealer could seek the protection of the bankruptcy laws but continue to effect transactions with the public, potentially jeopardizing customers and other creditors of the broker-dealer, including counterparties.

As noted above, the Commission requested comment on this cost estimate. In particular, the Commission requested comment on whether there would be costs to broker-dealers as a consequence of the proposal. The Commission also requested comment on whether this proposal would impose costs on other market participants, including broker-dealer customers. Commenters were asked to identify the metrics and sources of any empirical data that supported their costs estimates. The Commission did not receive any comments in response to these requests.

e. Amendment To Rule Governing Restrictions of Withdrawals of Capital

As discussed in section II.E.5. of this release, paragraph (e) of Rule 15c3–1, which places certain conditions on a broker-dealer when withdrawing capital,[855] also allows the Commission to issue an order temporarily restricting a broker-dealer from withdrawing capital or making loans or advances to stockholders, insiders, and affiliates

[849] For example, the Commission approved FINRA Rule 4360 through the SRO rule filing process. *See Order Approving Proposed Rule Change to Adopt FINRA Rule 4360 (Fidelity Bonds) in the Consolidated FINRA Rulebook,* Exchange Act Release No. 63961 (Feb. 24, 2011), 76 FR 11542 (Mar. 2, 2011). Pursuant to Section 19(b)(1) of the Exchange Act, each SRO must file with the Commission any proposed change in, addition to, or deletion from the rules of the exchange electronically on a Form 19b–4 through the Electronic Form 19b–4 Filing System, which is a secure Web site operated by the Commission. 15 U.S.C. 78s(b)(1) and 17 CFR 240.19b–4.

[850] *See Amendments to Financial Responsibility Rules,* 72 FR at 12872.

[851] This estimate is based on the 2012 SIPC Annual Report, which indicates that over the last ten year-period, the annual average of new customer protection proceedings was three. A copy of the 2012 Annual Report is *available at http://www.sipc.org/.*

[852] The internal hours would likely be performed by a compliance clerk. Therefore, the estimated internal costs for this hour burden would be calculated as follows: Compliance Clerk at $63 per hour × 20 minutes = $21.00. *See* section IV.D.8. of this release.

[853] *See St. Bernard Financial Services Letter.*

[854] *Id.*

[855] *See* 17 CFR 240.15c3–1(e).

under certain circumstances.[856] The rule, however, limits such orders to withdrawals, advances, or loans that, when aggregated with all other withdrawals, advances, or loans on a net basis during a 30 calendar day period, exceed 30% of the firm's excess net capital.[857]

The Commission has determined that the requirement is difficult to enforce, as it generally would not be clear when the 30% threshold had been reached, due to the inherent unreliability of a troubled broker-dealer's books and records. The Commission considered retaining the 30% threshold, but determined that a more appropriate approach would be to eliminate the 30% threshold requirement from the rule, rather than retain a provision that is difficult to enforce. Consequently, the Commission proposed, and is adopting, a change to delete this provision and instead to allow the Commission to restrict all withdrawals, advances, and loans so long as the other conditions under the rule (all of which remain unchanged) were met.

The amendment to paragraph (e) of Rule 15c3–1 benefits the securities markets by protecting customers and counterparties of a financially stressed broker-dealer. For example, by prohibiting unsecured loans to a stockholder or withdrawal of equity capital while the order is outstanding, the amendment will help to preserve the assets and liquidity of the broker-dealer and enable the Commission and its staff, as well as other regulators, to examine the broker-dealer's financial condition, net capital position, and the risk exposure to the customers and creditors of the broker-dealer.

The current rule permitting the Commission to restrict withdrawals of capital from a financially distressed broker-dealer was adopted in 1991.[858] This rule is the baseline for purposes of this economic analysis. When the Commission adopted this paragraph of Rule 15c3–1 more than twenty years ago, the Commission stated that it was intended to be an emergency provision, applicable only to the most exigent of circumstances where the continued viability of the broker-dealer appears to be at stake.[859] In the ensuing years, the Commission has only utilized this provision one time.[860] Based on this experience with the rule, and the fact that the rule is intended as an emergency provision only, as compared to the current baseline, the Commission estimates that the amendment will result in no or *de minimis* costs to broker-dealers.

As noted above, the Commission requested comment on this cost estimate. The Commission also requested comment on whether the proposal would impose costs on other market participants. Commenters were asked to identify the metrics and sources of any empirical data that support their cost estimates. One commenter supported the amendment but believed that the rule is intended to protect the capitalization of large firms while ignoring small firms, and proposed that the Commission state all the conditions that need to exist for a firm to withdraw, repay or redeem any amount that does not endanger the firm or its customers.[861] The commenter also stated that it opposes regulation that arbitrarily reduces the value of small broker-dealers and their competitive position relative to larger broker-dealers. A second commenter noted that the proposed amendment would impose additional compliance burdens on broker-dealers and would significantly limit broker-dealers' flexibility in the event of a liquidity crisis.[862]

In adopting the final rule, the Commission considered the alternatives and modifications suggested by commenters. In response to these comments, the Commission notes that the amendment would eliminate the 30% threshold from paragraph (e)(3)(i) of Rule 15c3–1, which relates to the Commission's authority to temporarily restrict withdrawals of net capital. It cannot impose these restrictions without concluding that ''such withdrawal, advance or loan may be detrimental to the financial integrity of the broker or dealer, or may unduly jeopardize the broker or dealer's ability to repay its customer claims or other liabilities which may cause a significant impact on the markets or expose the customers or creditors of the broker or dealer to loss without taking into account the application of the Securities Investor Protection Act of 1970.'' [863] While paragraph (e)(3)(i) of Rule 15c3–1 would apply to all broker-dealers, the stringent conditions under which the Commission may exert its authority under the rule to temporarily restrict a broker-dealer's withdrawals of net capital would apply to only the circumstances where the continued viability of the broker-dealer appears to be at stake.[864] The Commission, however, agrees with the importance of maintaining flexibility in the context of ordering restrictions on withdrawals, advances, and loans. Therefore, the Commission modified the amendment, as adopted, to add language to paragraph (e)(3)(i) to state (following the phrase ''employee or affiliate'') that such orders will be issued, ''under such terms and conditions as the Commission deems necessary or appropriate in the public interest or consistent with the protection of investors . . . .'' [865]

In summary, the Commission does not believe that the deletion of the 30% threshold will affect the competitiveness or unduly restrict the ongoing business operations of small broker-dealers as compared to larger firms. All broker-dealers remain subject to the other notice and withdrawal limitations on equity capital set forth in paragraphs (e)(1) and (e)(2) of Rule 15c3–1, which are not the subject of this rule amendment.

f. Amendment to Rule 15c3–1 Appendix A

As discussed in section II.E.6.i. of this release, the amendment to paragraph (b)(1)(vi) of Rule 15c3–1a will make permanent the reduced net capital requirements that apply to listed option positions in major market foreign currencies and high-capitalization and non-high-capitalization diversified indexes in non-clearing option specialist and market maker accounts. This change will benefit the broker-dealers that have been calculating charges under a temporary amendment the Commission originally adopted in 1997.[866] The temporary amendment expired on September 1, 1997, subject to extension.[867] The Commission staff subsequently issued a no-action letter on January 13, 2000, which stated that the staff would not recommend enforcement action if broker-dealers continued to rely on the temporary amendment.[868] The Commission

[856] *See* 17 CFR 240.15c3–1(e)(3).

[857] *Id.*

[858] *See Net Capital Rule,* Exchange Act Release No. 28927 (Feb. 28, 1991), 56 FR 9124 (Mar. 5, 1991).

[859] *Net Capital Rule,* Exchange Act Release No. 28927, 56 FR 9124, 9128.

[860] *Order Regarding Withdrawals, Unsecured Loans or Advances from Refco Securities, LLC and Refco Clearing, LLC,* Exchange Act Release No. 52606 (Oct. 13, 2005).

[861] *See NIBA 2 Letter.*

[862] *See Raymond James 2 Letter.*

[863] *See* 17 CFR 240.15c3–1(e)(3)(i).

[864] *Net Capital Rule,* Exchange Act Release No. 28927, 56 FR 9124, 9128.

[865] *See* paragraph (e) of Rule 17a–3, as adopted. *See generally,* 15 U.S.C. 78mm(a)(1).

[866] *See Net Capital Rule,* Exchange Act Release No. 38248 (Feb. 6, 1997), 62 FR 6474 (Feb. 12, 1997).

[867] *See* 17 CFR 15c3–1a(b)(1)(iv)(B).

[868] Letter from Michael Macchiaroli, Associate Director, Division of Market Regulation, Commission, to Richard Lewandowski, Vice President, Regulatory Division, The Chicago Board Options Exchange, Inc. (Jan. 13, 2000) (stating that the Division of Trading and Markets ''will not

considered whether to keep the amendment temporary but determined that making the temporary amendment permanent, as proposed, was the more appropriate alternative because it creates certainty for broker-dealers relying on the rule.

Because this amendment seeks to match capital requirements with actual risks, it should not have an adverse impact on the financial strength of broker-dealers. Moreover, because broker-dealers are already operating under the temporary relief, which is the current baseline, the amendment should not result in any costs for broker-dealers as compared to the current baseline.

The Commission requested comment on available metrics to quantify the benefits identified above and any other benefits the commenter may identify. In addition, the Commission requested comment on whether the proposal would result in any costs. Commenters were asked to identify the metrics and sources of any empirical data that support their cost estimates. The Commission did not receive any comments in response to these requests.

ii. Consideration of Burden on Competition, and Promotion of Efficiency, Competition, and Capital Formation

Rule 15c3–1 is designed to help ensure that a broker-dealer holds at all times liquid assets sufficient to pay its non-subordinated liabilities and retain a ''cushion'' of liquid assets used to pay customers without delay in the event that the broker-dealer fails. For example, a broker-dealer that inappropriately excludes certain liabilities when presenting its financial position [869] or includes non-permanent capital contributions in its financial statements [870] distorts the view of the firm's financial condition and undermines the rule. In either event, such practices jeopardize the broker-dealer's ability to self-liquidate and promptly pay customers.

The Commission's experience with the broker-dealer financial responsibility rules, underscored by the 2008 financial crisis, highlights the effects that the failure of a broker-dealer, particularly a large carrying broker-dealer, could have on customers and other market participants. Losses resulting from the disorderly winding down of a broker-dealer may often undermine the participation of investors in the U.S. capital markets, with possible negative effects on capital formation and market efficiency. Thus, it is imperative that broker-dealers operate in compliance with Rule 15c3–1 and that the Commission takes the necessary steps to help ensure that broker-dealers are prohibited from engaging in practices that obscure noncompliance.

The amendments to Rule 15c3–1 are designed to reduce the risk of a disorderly failure of a broker-dealer and lessen the potential that market participants may seek to rapidly withdraw assets and financing from broker-dealers during a time of market stress. These Rule 15c3–1 amendments may affect efficiency and capital formation through their positive impact on competition among broker-dealers. Specifically, markets that are competitive can, all other things equal, be expected to promote an efficient allocation of capital.[871]

The amendments to Rule 15c3–1—(1) Requiring a broker-dealer to account for certain liabilities or treat certain capital contributions as liabilities,[872] (2) requiring a broker-dealer to deduct certain fidelity bond deductibles,[873] (3) requiring an insolvent broker-dealer to cease conducting a securities business and provide notice under the amendment to Rule 17a–11,[874] (4) eliminating the qualification on Commission orders restricting withdrawals, advances, and unsecured loans to instances where recent withdrawals, advances or loans, in the aggregate, exceed 30% of the broker-dealer's excess net capital,[875] and (5) making permanent the reduced net capital requirements under Appendix A for market makers [876]—are consistent with promoting efficiency, competition, and capital formation in the market place.

First, a broker-dealer that fails to include liabilities that depend on the broker-dealer's assets and revenues and accepts temporary capital contributions is obscuring its true financial condition. This also interferes with the process by which regulators monitor the financial condition of broker-dealers and, thereby, impedes their ability to take proactive steps to minimize the harm resulting from a broker-dealer failure to customers, counterparties, and clearing agencies.

Second, requiring broker-dealers to take net capital charges for excess fidelity bond deductibles imposed under SRO rules will promote efficiency by providing consistency among Rule 15c3–1 and SRO rules. Because fidelity bond requirements provide a safeguard with regard to broker-dealer financial responsibility, the amendment will enhance competition through the operation of more financially sound firms.

Third, the continued operation of an insolvent broker-dealer or the withdrawal of capital from a broker-dealer that may jeopardize such broker-dealer's financial integrity poses financial risk to its customers, counterparties, and the registered clearing agencies. These risks increase costs and decrease efficiency of the marketplace.

Fourth, the elimination of the limitation on Commission orders restricting capital withdrawals under paragraph (e)(3) of Rule 15c3–1 from a financially troubled broker-dealer will provide greater protection to customers and counterparties of the firm and registered clearing agencies. While such orders are expected to be infrequent, when issued they should lower costs to these entities associated with having an outstanding obligation from the troubled broker-dealer, thereby promoting efficiency and facilitating capital formation.

One commenter expressed concern that the proposed amendments to Rule 15c3–1 would be particularly burdensome on small broker-dealers, negatively impacting capital formation for small issuers and increasing the cost of capital for small broker-dealers.[877] For example, the commenter stated that it believed that the proposed changes requiring a broker-dealer to subtract from net worth certain non-permanent capital contributions and to deduct from net worth certain liabilities or expenses assumed by third parties would negatively impact capital formation for small issuers and increase the cost of capital for small broker-dealers.[878]

While the Commission is cognizant that the Rule 15c3–1 amendments may impose burdens on broker-dealers, including non-carrying broker-dealers, the commenter is treating the amendments as entirely new additions to the net capital rule. Yet, as discussed

recommend . . . enforcement action if non-clearing option specialists and market-makers continue to rely on subparagraph (b)(1)(iv) of Appendix A to Rule 15c3–1 under the Exchange Act until such time as the Commission has determined whether it should be extended'').

[869] *See* section II.E.1. of this release.

[870] *See* section II.E.2. of this release.

[871] *See Capital, Margin, and Segregation Requirements for Security-Based Swap Dealers and Major Security-Based Swap Participants and Capital Requirements for Broker-Dealers,* Exchange Act Release No. 68071 (Oct. 18, 2012), 77 FR 70213, 70315 (Nov. 23, 2012).

[872] *See* sections II.E.1. and 2. of this release.

[873] *See* section II.E.3. of this release.

[874] *See* section II.E.4. of this release.

[875] *See* section II.E.5. of this release.

[876] *See* section II.E.6.i. of this release.

[877] *See NIBA 2 Letter.*

[878] *Id.*

in section II.E. of this release, the Commission has emphasized that capital contributions to broker-dealers should not be temporary. Further, the Commission staff has explained that a capital contribution should be treated as a liability if it is made with the understanding that such contribution can be withdrawn at the option of the investor.[879] Based on the Commission's experience with the application of Rule 15c3–1, the majority of broker-dealers operate consistent with past Commission and staff rules and guidance regarding the nature of capital and, thus, the Rule 15c3–1 amendments should not represent a substantial change for most broker-dealers. Therefore, the final rule should not negatively impact capital formation for small issuers, nor increase the cost of capital for small broker-dealers, to the extent that these firms already comply with current guidance and interpretations.[880] For those firms that will need to raise capital to comply with the amendments to Rule 15c3–1, the rule amendments potentially may negatively impact capital formation. However, the potential costs to some broker-dealers could be offset by the aggregate increase in capital formation related to heightened confidence in broker-dealer financial requirements.

Finally, the Commission recognizes that, as discussed above, the amendments to Rule 15c3–3 adopted today impose certain costs on broker-dealers that could affect competition among broker-dealers. However, the Commission is of the opinion that these costs are justified by the significant benefits described in this economic analysis. In sum, the costs of compliance resulting from the requirements in the amendments to Rule 15c3–3 should not impose a burden on competition not necessary or appropriate in furtherance of the purposes of the Exchange Act in light of the benefits discussed above.

VI. Final Regulatory Flexibility Analysis

The Commission proposed amendments to Rules 15c3–1, 15c3–1a, 15c3–2, 15c3–3, 15c3–3a, 17a–3, 17a–4, and 17a–11 under the Exchange Act. An Initial Regulatory Flexibility Analysis (''IRFA'') was included in the proposing release.[881] This Final Regulatory Flexibility Analysis (''FRFA'') has been prepared in accordance with the provisions of the RFA.[882]

The Commission requested comment with regard to matters discussed in the IRFA, including comments with respect to the number of small entities that may be affected by the proposed rule amendments.[883] The Commission also requested that commenters specify the costs of compliance with the proposed amendments, and suggest alternatives that would accomplish the goals of the amendments.[884] The Commission received one general comment on the IRFA.[885] In addition, the Commission received a number of comments regarding the impact on small entities with respect to specific aspects of the proposed rule amendments, including comments relating to amendments under Rule 15c3–3 with respect to where special reserve deposits may be held, and amendments under Rule 15c3–1 relating to the requirement to subtract from net worth certain liabilities or expenses assumed by third parties.[886] The general comment on the IRFA is discussed directly below. The specific comments are discussed in the applicable sections below.

A. General Issues Raised by Public Comments

The commenter stated that the Commission should pay ''explicit attention to regulatory trends in the rest of the world'' because doing so ''benefits not only small entities (by reducing their regulatory burden) but all entities, as larger entities can experience more consistent regulatory procedures around the world.'' [887] The commenter suggested that the Commission consider a ''Basel II type approach to net capital requirements.'' [888] In response to the commenter, the Commission notes that the amendments relate to discrete areas of the broker-dealer financial responsibility rules (*i.e.,* they do not establish new financial responsibility standards such as would be the case if the Commission were to adopt a ''Basel II type approach to net capital requirements.''). As noted above, the commenter's suggestion is beyond the scope of this rulemaking.[889]

B. Amendments to the Customer Protection Rule

1. Need for and Objectives of the Rule Amendments

The final rule amends certain provisions of Rule 15c3–3.[890] The amendment that requires broker-dealers to perform a PAB reserve computation is designed to address a disparity between Rule 15c3–3 and the SIPA, and to incorporate provisions of the *PAIB Letter* into Commission rules.[891] The amendment that will require broker-dealers to exclude cash deposited at an affiliated bank and cash deposited with an unaffiliated bank to the extent that the amount exceeds 15% of the bank's equity capital from being used to meet a broker-dealer's reserve requirements is designed to avoid the situation where a carrying broker-dealer's cash deposits constitute a substantial portion of the bank's deposits.[892] The amendment that will require broker-dealers to obtain possession and control of customers' fully paid and excess margin securities allocated to a short position is designed to address the fact that Rule 15c3–3 currently permits a broker-dealer to monetize customer securities, which is contrary to the customer protection goals of Rule 15c3–3, which seeks to ensure that broker-dealer's do not use customer assets for proprietary purposes.[893] The amendment that will require broker-dealers to provide certain notices and disclosures before changing the terms and conditions under which the broker-dealer treats customer free credit balances is intended to help ensure that the use of customer free credit balances accords with customer preferences.[894] The importation of certain provisions of Rule 15c3–2 into Rule 15c3–3 streamlines the customer protection rules and eliminates irrelevant provisions in Rule 15c3–2 due to Rule 15c3–3.[895] The amendments clarifying that funds in certain commodities accounts are not to be treated as free credit balances or other credit balances are intended to remove uncertainty with respect to their treatment under Rule 15c3–3.[896]

The amendments to Rule 15c3–3 are intended to strengthen the protections afforded to customer assets held at a

[879] *See* section II.E.2. of this release.

[880] *See NIBA 2 Letter.*

[881] *See Amendments to Financial Responsibility Rules,* 72 FR 12862.

[882] 5 U.S.C. 604(a).

[883] *See Amendments to Financial Responsibility Rules,* 72 FR at 12888.

[884] *Id.*

[885] *See Angel Letter.*

[886] These comments are discussed in the applicable section below.

[887] *See Angel Letter.*

[888] *Id.*

[889] The commenter cited the *JP Morgan Letter* in support of the suggestion to ''consider regulatory trends in the rest of the world.'' *Id.* The *JP Morgan Letter* recommends that the Commission adopt a due diligence standard—citing a U.K. regulation—with respect to the amendments regarding customer reserve account cash deposits. *See JP Morgan Letter.* The Commission addresses this comment above in section V.D.1.i.b.(III) of this release.

[890] 17 CFR 240.15c3–3.

[891] *See* section II.A.2. of this release.

[892] *See* section II.A.3. of this release.

[893] *See* section II.A.4. of this release.

[894] *See* section II.A.5. of this release.

[895] *Id.*

[896] *See* section II.A.6. of this release.

broker-dealer. The amendments are designed to minimize the risk that customer assets will be lost, tied-up in a liquidation proceeding, or held in a manner that is inconsistent with a customer's expectations.

2. Significant Issues Raised by Public Comment

The Commission received numerous comments with respect to the amendment under paragraph (e)(5) of Rule 15c3–3 that will require broker-dealers to exclude cash deposited at an affiliated bank and cash deposited with an unaffiliated bank to the extent that the amount exceeds 15% of the bank's equity capital from being used to meet a broker-dealer's reserve requirements.[897] As proposed, new paragraph (e)(5) of 15c3–3 would have provided that, in determining whether a broker-dealer maintains the minimum reserve deposits required (customer and PAB), the broker-dealer must exclude any cash deposited at an affiliated bank. In addition, the proposed amendment would have required a broker-dealer to also exclude cash deposited at an unaffiliated bank to the extent the cash deposited exceeds (1) 50% of the broker-dealer's excess net capital (based on the broker-dealer's most recently filed FOCUS Report),[898] or (2) 10% of the bank's equity capital (based on the bank's most recently filed Call Report or Thrift Financial Report).[899]

With respect to the proposed limits on the amounts that could be deposited in unaffiliated banks, some commenters argued that the percentages were too restrictive while other commenters suggested alternative approaches to the proposed percentage limitations.[900] One commenter stated that the percentage thresholds would negatively impact smaller broker-dealers because these firms would still be required under the proposed rule to maintain at least two reserve bank accounts at different banks.[901] This commenter noted that limiting Rule 15c3–3 deposits at a single bank to 50% of a broker-dealer's excess net capital could impact 10 to 15% of its broker-dealer customers in that many of these customers would be required to open accounts at multiple institutions.[902] This commenter suggested the Commission consider higher percentages for cash deposits at large money-centered banks, since the proposed percentage thresholds would negatively impact small broker-dealers because they would exceed the 50% of excess net capital threshold at lower deposit levels.[903] This commenter also noted that conducting due diligence and opening new accounts and the ongoing monitoring and periodic re-evaluation of such additional accounts would require much more time than the 10 hours originally estimated by the Commission.[904] A second commenter concurred with this cost assessment, stating that the Commission significantly underestimated the cost of the proposal to smaller firms.[905]

With respect to the use of qualified securities to meet reserve requirements, one commenter noted that broker-dealers will ''likely have a significant amount of additional operational and transactional costs.'' [906] The commenter believes that ''[w]hile larger broker-dealers may be able to reallocate existing trading desk, operational, regulatory reporting and treasury functions to assist in ongoing maintenance activities, midsized and smaller broker-dealers may be required to hire additional staff to manage and maintain a securities portfolio.'' [907]

In response to commenters concerns, the Commission has eliminated the provision that would have excluded the amount of a deposit that exceeds 50% of the broker-dealer's excess net capital. After review of the comment letters, the Commission believes that this provision likely would have disproportionately impacted small and mid-size broker-dealers when they deposited cash into large commercial banks since they would exceed the excess net capital threshold well before exceeding the bank equity capital threshold.[908] The bank equity capital threshold is the more important metric since it relates directly to the financial strength of the bank, which is the entity holding the account. In particular, if the carrying broker-dealer's deposit constitutes a substantial portion of the bank's total deposits, the bank may not have the liquidity to quickly return the deposit to the broker-dealer. The elimination of the excess net capital threshold should mitigate concerns expressed by small broker-dealers that they would need to open multiple bank accounts to make cash deposits or hire additional staff, if they sought to deposit qualified securities in a reserve account in order to avoid opening multiple accounts. This is because the excess net capital threshold likely would have impacted smaller broker-dealers, which—consistent with their size—maintain less net capital than larger firms.

Second, with respect to the bank equity capital threshold, in response to comments, the Commission has increased the trigger level from 10% to 15% of the bank's equity capital. The increase of the threshold to 15% is designed to address concerns raised by commenters that the proposed percentage tests were unduly restrictive in certain respects and should be modified, particularly with respect to large broker-dealers with large deposit requirements. Consequently, the increase from 10% to 15% is designed to mitigate commenters concerns that the 10% threshold would require broker-dealers to spread out deposits over an excessive number of banks, while still providing adequate protection against undue concentrations of deposits, particularly where smaller banks are concerned.

The elimination of the 50% of excess net capital threshold and increase of the bank capital threshold from 10% to 15% is designed to appropriately address concerns raised by commenters that they would have to substantially alter their current cash deposit practices in light of the goal of the rule to promote the broker-dealer's ability to have quick access to the deposit.

With the elimination of the broker-dealer excess net capital threshold, and the increase in the bank equity capital threshold, it is likely that very few broker-dealers (including small broker-dealers) would be required to maintain reserve accounts at multiple banks, unless they chose to do so for operational, business or other reasons. Therefore for the reasons discussed above, as adopted, paragraph (e)(5) of Rule 15c3–3, should not significantly impact a substantial number of small entities.

[897] *See* section II.A.3. of this release.

[898] Under Rule 17a–5 broker-dealers must file FOCUS Reports. 17 CFR 240.17a–5.

[899] *See Amendments to Financial Responsibility Rules,* 72 FR at 12864.

[900] *See Deutsche Bank Securities Letter; SIFMA 2 Letter; First Clearing Letter; ICI Letter; BlackRock Letter.*

[901] *See SIFMA 2 Letter* (''[T]he [percentage] tests could prevent a smaller firm from maintaining reserve account deposits at any single bank, even though those deposits are relatively small compared to the size of the bank—e.g., a broker-dealer with excess net capital of $500,000 could not maintain more than $250,000 in reserve account cash deposits at any one bank, regardless of the ratio between such bash deposits and the overall size or equity capital of the bank.'').

[902] *Id.*

[903] *Id.; see also SIFMA 4 Letter.*

[904] *See SIFMA 2 Letter.*

[905] *See NIBA 2 Letter.*

[906] *See JP Morgan Letter.*

[907] *Id.* The commenter noted that managing pools of qualified securities involves various tasks, such as ''monitoring income collection, redemption processing, marking the securities to market, collateral substitutions and collateral segregation amongst other tasks.'' *Id.*

[908] *See SIFMA 2 Letter; JP Morgan 2 Letter.*

3. Small Entities Subject to the Rule

Paragraph (c)(1) of Rule 0–10 [909] states that the term *small business* or *small organization,* when referring to a broker-dealer, means a broker or dealer that had total capital (net worth plus subordinated liabilities) of less than $500,000 on the date in the prior fiscal year as of which its audited financial statements were prepared pursuant to Rule 17a–5(d); [910] and is not affiliated with any person (other than a natural person) that is not a small business or small organization.

Based on FOCUS Report data, as of December 31, 2011, the Commission estimates there are approximately 5 broker-dealers that performed a customer reserve computation pursuant to Rule 15c3–3 and were ''small'' for the purposes Rule 0–10.

4. Reporting, Recordkeeping, and Other Compliance Requirements

The amendments (1) Require broker-dealers to perform a PAB reserve computation, (2) limit the amount that a broker-dealer may deposit in a reserve account at any individual bank in the form of cash, (3) require broker-dealers to obtain possession and control of customers' fully paid and excess margin securities allocated to a short position by borrowing equivalent securities or through other means within a specified period of time, and (4) require broker-dealers to obtain the written affirmative consent of a new customer before including a customer's free credit balances in a Sweep Program, as well as provide certain disclosures and notices to all customers with regard to the broker-dealer's Sweep Program.

5. Agency Action To Minimize Effect on Small Entities

The RFA directs the Commission to consider significant alternatives that would accomplish the stated objectives, while minimizing any significant adverse impact on small entities. In connection with adopting the final rules, the Commission considered, as alternatives, establishing different compliance or reporting requirements that take into account the resources available to smaller entities, exempting smaller entities from coverage of the disclosure requirements, and clarifying, consolidating, or simplifying disclosure for small entities.[911]

As discussed above, the impact on individual small broker-dealers, as well as all small broker-dealers, should be minimal, and thus the Commission is not establishing different compliance or reporting requirements or timetables; clarifying, consolidating, or simplifying compliance and reporting requirements under the rule for small entities; or exempting small entities from coverage of the rule, or any part thereof. The amendments impose performance standards and do not dictate for entities of any size any particular design standards (*e.g.,* technology) that must be employed to achieve the objectives of the amendments.

C. Holding Futures Positions in a Securities Portfolio Margining Account

1. Need for and Objectives of the Amendments

The amendments to Rule 15c3–3 and 15c3–3a are designed to accommodate futures positions in a securities account that is margined on a portfolio basis.[912] Under SRO portfolio margin rules, a broker-dealer can combine securities and futures positions in a portfolio margin securities account to compute margin requirements based on the net market risk of all positions in the account. The amendments to Rule 15c3–3 and 15c3–3a complement the amendments to SIPA in the Dodd-Frank Act, as well as provide additional protections to customers through the strengthened reserve requirements of Rule 15c3–3. In particular, the changes will apply the protections in Rules 15c3–3 and Rule 15c3–3a to all positions in a portfolio margin account.

These additional protections should make portfolio margining more attractive to investors. Portfolio margining can significantly reduce customer margin requirements for offsetting positions involving securities and futures products, which in turn reduces the costs of trading such products.

2. Significant Issues Raised by Public Comments

The Commission did not receive any specific comments with respect to this portion of the IRFA.

3. Small Entities Subject to the Rules

As discussed above in section V.D.2. of this release, based on FOCUS Report data, as of December 31, 2011, the Commission estimates that approximately 35 broker-dealers will elect to offer their customers portfolio margin accounts that will include futures and futures options. None of these broker-dealers are ''small'' for purposes of Rule 0–10.

4. Reporting, Recordkeeping, and Other Compliance Requirements

These amendments (1) revise the definition of *free credit balances* and *other credit balances* in Rule 15c3–3 to include funds in a portfolio margin account relating to certain futures and futures options positions, and (2) add a debit line item to the customer reserve formula in Rule 15c3–3a consisting of margin posted by a broker-dealer to a derivatives clearing organization.

5. Agency Action To Minimize Effect on Small Entities

As stated above, the Commission does not believe that any of the broker-dealers that will elect to offer portfolio margining are ''small'' for purposes of Rule 0–10. Further, the requirements imposed by the portfolio margin amendments will be elective. Therefore, the Commission does not believe it is necessary or appropriate to establish different compliance or reporting requirements or timetables; clarify, consolidate, or simplify compliance and reporting requirements under the rule for small entities; or exempting small entities from coverage of the rule, or any part thereof. The amendments also contain performance standards and do not dictate for entities of any size any particular design standards (*e.g.,* technology) that must be employed to achieve the objectives of the proposed amendments.

D. Securities Lending and Borrowing and Repurchase/Reverse Repurchase Transactions

1. Need for and Objectives of the Amendments

These rules amend subparagraph (c)(2)(iv)(B) of Rule 15c3–3 to clarify that broker-dealers providing securities lending and borrowing settlement services are deemed, for purposes of the rule, to be acting as principals and are subject to applicable capital deductions, unless the broker-dealer takes certain steps to disclaim principal liability.[913] In addition, the Commission is adopting paragraph (c)(5) to Rule 17a–11 to require that a broker-dealer notify the Commission whenever the total amount of money payable against all securities loaned or subject to a repurchase agreement exceeds 2,500 percent of tentative net capital.[914] The final rule also exempts a broker-dealer from this 17a–11 notice requirement if it reports monthly its securities lending and borrowing and repurchase and reverse

[909] 17 CFR 240.0–10(c)(1).

[910] 17 CFR 240.17a–5(d).

[911] 5 U.S.C. 604(a)(5).

[912] *See Amendments to Financial Responsibility Rules,* 72 FR at 12868–12870.

[913] *See* section II.C. of this release.

[914] *Id.*

repurchase activity to its DEA in a form acceptable to its DEA.

In 2001, MJK Clearing, a broker-dealer with a substantial number of customer accounts, failed when it could not meet its securities lending obligations. This failure has highlighted the risks associated with securities lending and repurchase and reverse repurchase agreements and the need to manage those risks. More specifically, two concerns arose from the failure of MJK, namely, (1) that broker-dealers with principal liability in a stock loan transaction may erroneously be considering themselves as acting in an agency capacity and, consequently, not taking appropriate capital charges; and (2) that broker-dealers that have historically not been very active in stock loan transactions may be rapidly expanding their balance sheets with such transactions, and thereby, increase leverage to a level that poses significant financial risk to the firm and its counterparties.

These amendments are intended to strengthen the documentation controls broker-dealers employ to manage their securities lending and borrowing and securities repurchase and reverse repurchase activities and to enhance regulatory monitoring. The intended result of the amendments is to avoid ambiguity regarding the applicability of the stock loan charges in the net capital rule to a particular broker-dealer. As the failure of MJK illustrated, disputes can arise over whether a broker-dealer is acting as a principal or agent in a stock loan transaction.[915]

The amendments to paragraph (c)(5) to Rule 17a–11 will help identify broker-dealers with highly leveraged non-government securities lending and borrowing and repo operations and make it easier for regulators to respond more quickly and protect customers in the event a firm is approaching insolvency.[916] This notice provision is designed to alert regulators to a sudden increase in a broker-dealer's stock loan and repo positions, which could indicate that the broker-dealer is taking on new risk that it may have limited experience in managing, as well as to help identify those broker-dealers highly active in securities lending and repos. Finally, the objective of the exemption from the notice provision of paragraph (c)(5) of Rule 17a–11 through monthly reporting is designed to accommodate large broker-dealers that are active in this business and regularly maintain stock loan and repo balances that exceed the threshold.

2. Significant Issues Raised by Public Comments

The Commission did not receive any specific comments with respect to this portion of the IRFA.

3. Small Entities Subject to the Rule

Based on FOCUS Report data, as of December 31, 2011, the Commission estimates that none of the broker-dealers that engage in securities lending and borrowing or securities repurchase and reverse repurchase activity are ''small'' for the purposes Rule 0–10. Therefore, the amendments should not affect ''small'' broker-dealers.

4. Reporting, Recordkeeping, and Other Compliance Requirements

These amendments require broker-dealers to (1) disclose the principals and obtain certain agreements from the principals in a transaction where they provide settlement services in order to be considered an agent (as opposed to a principal) for the purposes of the net capital rule, and (2) provide notice to the Commission and other regulatory authorities if the broker-dealer's securities lending or repo activity reaches a certain threshold or, alternatively, report monthly the broker-dealer's securities lending and repo activity to the broker-dealer's DEA, in a form acceptable to the DEA.

5. Agency Action To Minimize Effect on Small Entities

As noted above, the Commission estimates that this amendment will have no impact on small entities. Thus, the Commission does not believe it is necessary or appropriate to establish different compliance or reporting requirements or timetables, nor is it clarifying, consolidating, or simplifying compliance and reporting requirements under the rule for small entities; or exempt small entities from coverage of the rule, or any part thereof. The amendments also use performance standards and do not dictate for entities of any size any particular design standards (*e.g.,* technology) that must be employed to achieve the objectives of the proposed amendments.

E. Documentation of Risk Management Procedures

1. Need for and Objectives of the Amendments

Requiring certain large broker-dealers to document and preserve their internal credit, market, and liquidity risk management controls under paragraph (a)(23) to Rule 17a–3 and (e)(9) to Rule 17a–4 will assist firms in evaluating and adhering to their established internal risk management controls and regulators in reviewing such controls.[917]

These amendments are intended to strengthen the controls certain large broker-dealers employ to manage risk. These amendments are designed to lower systemic risk primarily in the securities markets by enhancing risk management through reinforcement of documentation practices and making it easier for regulators to access a broker-dealer's procedures and controls, to ensure a broker-dealer is adhering to such documented controls.

Additionally, by making the documented controls a required record under Rule 17a–3, a broker-dealer's regulator likely will have better access to them, as this benefit will only be realized to the extent a broker-dealer has existing market, credit and liquidity risk management controls in place because the rule does not specify the type of controls a broker-dealer must establish to manage these risks. It simply requires the documentation of the procedures the broker-dealer has established. The final rule amendment will require any such records of the market, credit, and liquidity risk management controls be available to the broker-dealer's regulators so they can review whether the broker-dealer is adhering to these controls.

2. Significant Issues Raised by Public Comments

The Commission did not receive any specific comments with respect to this portion of the IRFA.

3. Small Entities Subject to the Rule

These amendments apply to a limited number of broker-dealers, namely, those firms with more than $1 million in customer credits or $20 million in capital. Based on FOCUS Report data, as of December 31, 2011, the Commission estimates that none of the broker-dealers that will be subject to this amendment will be ''small'' for the purposes Rule 0–10.

4. Reporting, Recordkeeping, and Other Compliance Requirements

These amendments will require broker-dealers to document any credit, market, and liquidity risk management controls established and maintained by the broker-dealer to assist it in analyzing and managing the risks associated with its business activities. The Commission is not mandating any specific controls, procedures, or policies that must be established by a broker-dealer to manage

[915] *See, e.g., Nomura* v. *E*Trade,* 280 F.Supp.2d 184 (S.D.N.Y. 2003).

[916] 17 CFR 240.17a–11(c)(5).

[917] *See* section II.D. of this release.

market, credit, or liquidity risk. Rather, the Commission is requiring that a control, procedure, or policy be documented if it is in place.

5. Agency Action To Minimize Effect on Small Entities

As noted above, these amendments will have no impact on ''small'' broker-dealers. Thus, the Commission is not establishing different compliance or reporting requirements or timetables; clarifying, consolidating, or simplifying compliance and reporting requirements under the rule for small entities; nor exempting small entities from coverage of the rule, or any part thereof.

The amendments also use performance standards and do not dictate for entities of any size any particular design standards (*e.g.,* technology) that must be employed to achieve the objectives of the amendments.

F. Amendments to the Net Capital Rule

1. Need for and Objectives of the Amendments

The amendments to Rule 15c3–1 are designed to address several areas of concern regarding the financial responsibility requirements for broker-dealers. Some broker-dealers have excluded from their regulatory financial reports certain liabilities that have been shifted to third parties that lack the resources—independent of the assets and revenue of the broker-dealer—to pay the liabilities, or have utilized infusions of temporary capital. These practices may misrepresent the true financial condition of the broker-dealer and, thereby, impede the ability of regulators to take proactive steps to reduce the harm to customers, counterparties and clearing agencies that may result from the broker-dealer's failure. To address these issues, the Commission is adopting an amendment to Rule 15c3–1 to add a new paragraph (c)(2)(i)(F) requiring a broker-dealer to adjust its net worth when calculating net capital by including any liability or expense for which a third party has assumed the responsibility, unless the broker-dealer can demonstrate that the third party has adequate resources, independent of the broker-dealer to pay the liability or expense.[918] In addition, the Commission is adopting amendments to paragraph (c)(2)(i)(G)(*2*) of Rule 15c3–1, to require a broker-dealer to subtract from net worth any contribution of capital to the broker-dealer: (1) Under an agreement that provides the investor with the option to withdraw the capital; or (2) that is intended to be withdrawn within a period of one year of its contribution. Under the final rule, any withdrawal of capital made within one year of its contribution is deemed to have been intended to be withdrawn within a period of one year, unless the withdrawal has been approved in writing by the broker-dealer's DEA.[919]

Further, currently, broker-dealers are required to take net capital charges pursuant to SRO rules relating to fidelity bond deductibles, but Rule 15c3–1 does not explicitly incorporate such charges for purposes of computing net capital. To address this inconsistency, the Commission is adopting paragraph (c)(2)(xiv) to Rule 15c3–1.[920]

In addition, a number of broker-dealers have sought to obtain protection under the bankruptcy laws while still engaging in a securities business. Permitting an insolvent broker-dealer to continue to transact a securities business endangers its customers and counterparties and places securities clearing agencies at risk. To address this concern, the Commission is adopting an amendment to paragraph (a) of Rule 15c3–1 to require a broker-dealer to cease its securities business activities if certain insolvency events were to occur, as defined in new paragraph (c)(16) to Rule 15c3–1.[921]

Finally, an important goal of the Commission is to protect the financial integrity of the broker-dealer so that if the firm must liquidate it may do so in an orderly fashion. Allowing a capital withdrawal that may jeopardize the financial integrity of a broker-dealer exposes customers and creditors of the broker-dealer to unnecessary risk. Paragraph (e) of Rule 15c3–1, which places certain conditions on a broker-dealer when withdrawing capital,[922] allows the Commission to issue an order temporarily restricting a broker-dealer from withdrawing capital or making loans or advances to stockholders, insiders, and affiliates under certain circumstances.[923] The rule, however, limits such orders to withdrawals, advances, or loans that, when aggregated with all other withdrawals, advances, or loans on a net basis during a thirty calendar day period, exceed 30% of the firm's excess net capital. The Commission is amending paragraph (e) to remove the 30% of excess net capital limitation because the Commission has determined that the requirement is difficult to enforce, as it generally would not be clear when the 30% threshold had been reached, due to the inherent unreliability of a troubled broker-dealer's books and records.[924]

Finally, the Commission is making permanent a temporary amendment to Appendix A of Rule 15c3–1, which permits broker-dealers to employ theoretical option pricing models to calculate haircuts for listed options and related positions that hedge those options.[925] The temporary amendment decreased the range of pricing inputs to the approved option pricing models, which effectively reduced the haircuts applied by the carrying firm with respect to non-clearing option specialist and market maker accounts.[926] The amendment is intended to better align the capital requirements with the risks these requirements are designed to address.

2. Significant Issues Raised by Public Comments

The Commission received three comments in response to requests for comment related to the amendments to the net capital rule requiring broker-dealers to add back to its net worth certain liabilities assumed by third parties and treat certain temporary capital contributions as liabilities.[927]

One commenter noted that there should be no circumstance in which a broker-dealer accepted a capital contribution for net capital purposes that could be withdrawn at the option of the investor.[928] This commenter also noted that if small firms were required to raise over $300,000 in capital each, there will be the largest dissolution of small broker-dealers in the history of the regulated securities industry.[929] The commenter requested that the Commission state a reasonable time period for broker-dealers to raise capital

[918] *See* section II.E.1. of this release.

[919] *See* section II.E.2. of this release.

[920] *See* section II.E.4. of this release.

[921] *See* section II.E.5. of this release.

[922] *See* 17 CFR 240.15c3–1(e).

[923] *See* 17 CFR 240.15c3–1(e)(3).

[924] *See* section II.E.6. of this release.

[925] 17 CFR 240.15c3–1a; *See Net Capital Rule,* Exchange Act Release No. 38248 (Feb. 6, 1997), 62 FR 6474 (Feb. 12, 1997). *See also* Letter from Michael Macchiaroli, Associate Director, Division of Market Regulation, Commission, to Richard Lewandowski, Vice President, Regulatory Division, The Chicago Board Options Exchange, Inc. (Jan. 13, 2000) (stating that the Division of Market Regulation ''will not recommend . . . enforcement action if non-clearing option specialists and market-makers continue to rely on subparagraph (b)(1)(iv) of Appendix A to Rule 15c3–1 under the Exchange Act until such time as the Commission has determined whether it should be extended''). The letter did not grant any other relief.

[926] *See Net Capital Rule,* Exchange Act Release No. 38248 (Feb. 6, 1997), 62 FR 6474 (Feb. 12, 1997).

[927] *See Beer Letter; Levene Letter; NIBA 2 Letter.*

[928] *See NIBA 2 Letter.*

[929] *Id.*

to meet these new standards.[930] This commenter also stated that the Commission's estimate of a gross cost of capital of 7.5% (5% + 2.5%) is a totally unrealistic cost of capital for small broker-dealers and that these broker-dealers will categorically have costs significantly higher than 7.5%.[931]

Further, the commenter stated that, until the Commission convenes a small broker-dealer representative panel to assist it with establishing such costs, the Commission is ''speculating'' on such costs, and is therefore without adequate information to consider the effects of such costs and changes on small firms.[932] This commenter specifically requested the Commission consider the needs of small firms that will likely require additional net capital over the next decade.[933]

Additionally, this commenter believed that the rule is intended to protect the capitalization of large firms while ignoring small firms. The commenter also noted that it opposes regulation that arbitrarily reduces the value of small broker-dealers and their competitive position relative to larger broker-dealers.[934] Finally, the commenter expressed concern that the proposed amendments to Rule 15c3–1 would be particularly burdensome on small broker-dealers, negatively impacting capital formation for small issuers and increasing the cost of capital for small broker-dealers.[935]

Another commenter stated that this proposal will require the 702 mentioned debt-free introducing broker-dealers to needlessly take on debt of approximately $280,354.[936] Further, the commenter stated that, if the proposed is approved, it would force the majority of small firms out of business and ultimately deny investors the right and opportunity to deal with smaller, more personalized and debt-free member firms.[937] One commenter stated that it also must be considered that any implementation and enforcement of these proposed changes should not be made retroactive, because to subject firms to a new set of rules and guidelines will effectively penalize small firms that have been in full compliance with the rules and regulations.[938]

The Commission considered all comments discussed above and the potential impact on small broker-dealers.[939] The Commission continues to believe that the estimated cost of capital is not unrealistic for small broker-dealers. However, as discussed above in section V. of this release, in response to comments, the Commission increased the estimated cost of capital for these amendments is 12%.

Moreover, as discussed in section II.E.1 and 2. of this release, the baseline of these rules is current Rule 15c3–1 and existing guidance and interpretations. The Commission staff has provided guidance with respect to the treatment and recording of certain broker-dealer expenses and liabilities that is consistent with the rule amendment.[940] In addition, existing broker-dealer recordkeeping rules require that a broker-dealer record its income and expenses.[941] For example, paragraph (a)(2) of Rule 17a–3, requires a broker-dealer to make and keep current ledgers (or other records) reflecting all assets and liabilities, income and expense and capital accounts.[942] Therefore, the Commission does not expect small broker-dealers to incur significant costs or burdens to comply with the amendment regarding broker-dealers and payment of expenses by third parties.[943]

At the same time, the purpose of the requirement in new paragraph (c)(2)(i)(F) of Rule 15c3–1 is to address the practices of a broker-dealer that raise concerns when a broker-dealer shifts liabilities to an entity with no revenue or assets independent of the broker-dealer to inappropriately increase its reported net capital, by excluding the liability from the calculation of net worth. Therefore, the final rule, as discussed above in section II.E.1. of this release, is designed to prohibit a practice that could misrepresent a broker-dealer's actual financial condition, deceive the firm's customers, and hamper the ability of regulators to monitor the firm's financial condition.

Moreover, in response to comments,[944] the rule amendment, as adopted, should not impose burdens or present serious implementation difficulties to small broker-dealers[945] that are appropriately recording their assets and liabilities under current Commission rules and interpretive guidance.[946] These broker-dealers also should not be required to obtain loans to increase their capital as a result of the Rule 15c3–1 amendments. Therefore, the Commission does not believe a longer time period for compliance or the formation of a small broker-dealer advisory cost committee is necessary.[947]

In response to the commenters' concerns about the negative impact of the rule amendments on the capital of small broker-dealers,[948] as discussed above, the final rule amendment is a codification of existing Commission staff guidance,[949] and thus should not represent a change for small broker-dealers with respect to capital withdrawals. Moreover, with respect to commenters' concerns about obtaining capital,[950] the rule does not prohibit an investor from withdrawing capital at any time. Rather, it prohibits a broker-dealer from treating temporary cash infusions as capital for purposes of the net capital rule. Finally, the final rule amendments provide a mechanism for a broker-dealer to apply to its DEA to make a withdrawal within one year of the capital contribution without triggering the deduction under certain circumstances (*e.g., de minimis* withdrawals).

3. Small Entities Subject to the Rule

Based on FOCUS Report data, as of December 31, 2011, the Commission estimates that there are approximately 2,506 introducing and carrying broker-dealers that are ''small'' for the purposes Rule 0–10. The amendments relating to certain subtractions from net worth and the restrictions on the withdrawal of capital will apply to all ''small'' broker-dealers in that they will be subject to the requirements in the amendments. The amendment to Appendix A of Rule 15c3–1 likely should have no, or little, impact on ''small'' broker-dealers, because based on staff experience, most,

[930] *Id.*

[931] *Id.*

[932] *Id.*

[933] *Id.* The commenter stated that any rule that would ''restrict small broker-dealers from raising capital as a result of uncertainty of investors or owner-operators related to the return of their capital in a reasonable time frame will create a disproportionate and impossible hurdle for small broker-dealers to overcome.'' *See NIBA 2 Letter.*

[934] *See NIBA 2 Letter.*

[935] *Id.* The commenter noted that broker-dealers ''are dealing with a relatively static commission and fees matrix versus what they may charge customers.'' Consequently, the commenter believes ''broker-dealers will be unable to pass any of these costs increases directly to customers, irrespective of the type of customer or type of business that they are conducting with small broker-dealers, which further threatens the financial profit potential and return on equity of small broker-dealers.'' *Id.* The commenter further believes that the cost increases over a short period of time will threaten the viability of all small broker-dealers. *Id.*

[936] *See Beer Letter.*

[937] *Id.*

[938] *See Levene Letter.*

[939] *See Beer Letter; Levene Letter; NIBA 2 Letter.*

[940] *See, e.g., Third Party Expense Letter; see also FINRA Notice to Members 03–6, Expense Sharing Agreements.*

[941] 17 CFR 240.17a–3; 17 CFR 240.17a–4.

[942] 17 CFR 240.17a–3(a)(2).

[943] *See NIBA 2 Letter.*

[944] *Id.*

[945] *See Beer Letter; Levene Letter; NIBA 2 Letter.*

[946] *See, e.g., Third Party Expense Letter.*

[947] *See NIBA 2 Letter.*

[948] *See Beer Letter; Levene Letter; NIBA 2 Letter.*

[949] *See Temporary Capital Letter. See also* section II.E.2. of this release.

[950] *See Beer Letter; NIBA 2 Letter.*

if not all, of these firms do not carry non-clearing option specialist or market maker accounts.

4. Reporting, Recordkeeping, and Other Compliance Requirements

The amendments will require an ''insolvent'' broker-dealer to cease conducting a securities business and provide the securities regulators with notice of its insolvency. The amendments also will require broker-dealers to deduct from net worth certain liabilities and certain temporary capital contributions, as well as require broker-dealers to deduct from net capital, certain specified amounts as required by SRO fidelity bond rules. Finally, under the amendment to the rule on Commission orders restricting withdrawals of capital, a broker-dealer subject to an order will not be permitted to withdraw capital. Finally, the amendments will make permanent a temporary rule that reduced the haircut for non-clearing options specialist and market maker accounts under Appendix A to Rule 15c3–1.

5. Agency Action To Minimize Effect on Small Entities

As discussed in detail above, the Commission considered all comments received and adopted the amendment substantially as proposed.[951] The Commission understands the concerns relating to small broker-dealers raised by commenters [952] and reiterates that the rule is designed to address situations where there is no legitimate reason to book liabilities to a separate legal entity that otherwise would accrue to the broker-dealer. Moreover, the final rule is consistent with current staff interpretations regarding third-party expense sharing and thus should not represent a change for broker-dealers. The Commission also notes that the final rule is designed to prohibit a practice that could misrepresent a broker-dealer's actual financial condition, deceive the firm's customers, and hamper the ability of regulators to monitor the firm's financial condition. Moreover, the rule change, as adopted, should not impose undue burdens or present serious implementation difficulties for large or small broker-dealers. As the Commission explained in the proposing release, a broker-dealer can demonstrate the adequacy of the third party's financial resources by maintaining records such as the third party's most recent (*i.e.,* as of a date within the previous twelve months) audited financial statements, tax returns, or regulatory filings containing financial reports.[953] Given that the entity to which the broker-dealer is seeking to shift one or more liabilities typically is an affiliate, the staff's experience is that such records should be available to the broker-dealer. Further, because the proposed rule change is consistent with prior staff guidance regarding the need to be able to demonstrate the third party's financial adequacy, the broker-dealer seeking to shift a liability to a third party already would, under existing staff interpretations, expect to be ready to provide such evidence of the third party's financial resources. Taken together, these realities should mitigate the implementation and burden concerns raised by commenters as they relate to small broker-dealers.

One or more of these record types are generally readily available. The general availability of a satisfactory measure of financial resources should mitigate the implementation and burden concerns raised by the commenters.

As discussed above, given the minimal impact these amendments will have on small entities, the Commission is not establishing different compliance or reporting requirements or timetables; clarifying, consolidating, or simplifying compliance and reporting requirements under the rule for small entities; nor exempting small entities from coverage of the rule, or any part thereof.

The amendments use performance standards and do not dictate for entities of any size any particular design standards (*e.g.,* technology) that must be employed to achieve the objectives of the amendments.

VII. Statutory Authority

The Commission is adopting amendments to Rules 15c3–1, 15c3–3, 17a–3, 17a–4 and 17a–11 under the Exchange Act pursuant to the authority conferred by the Exchange Act, including Sections 15, 17, 23(a) and 36.[954]

Text of Final Rules

List of Subjects in 17 CFR Part 240

Brokers, Reporting and recordkeeping requirements, Securities.

In accordance with the foregoing, the Commission hereby amends Title 17, Chapter II of the Code of Federal Regulation as follows.

PART 240—GENERAL RULES AND REGULATIONS, SECURITIES EXCHANGE ACT OF 1934

■ 1. The general authority for Part 240 continues to read as follows:

Authority: 15 U.S.C. 77c, 77d, 77g, 77j, 77s, 77z–2, 77z–3, 77eee, 77ggg, 77nnn, 77sss, 77ttt, 78c, 78c–3, 78c–5, 78d, 78e, 78f, 78g, 78i, 78j, 78j–1, 78k, 78k–*1,* 78l, 78m, 78n, 78n–1, 78o, 78o–4, 78o–10, 78p, 78q, 78q–1, 78s, 78u–5, 78w, 78x, 78*ll,* 78mm, 80a–20, 80a–23, 80a–29, 80a–37, 80b–3, 80b–4, 80b–11, 7201 et. seq., and 8302; 7 U.S.C. 2(c)(2)(E); 12 U.S.C. 5221(e)(3); 18 U.S.C. 1350; and Pub. L. 111–203, 939A, 124 Stat. 1376, (2010), unless otherwise noted.

* * * * *

■ 2. Section 240.15c3–1 is amended by:
■ a. Revising the first sentence of paragraph (a) introductory text;
■ b. Removing from paragraph (a)(6)(iii)(A) the phrase ''paragraph (c)(2)(x)(A)(*1*) through (*9*) of this section'' and in its place adding the phrase ''Appendix A (§ 240.15c3–1a)'';
■ c. Revising the paragraph (c)(2)(i) heading;
■ d. Adding paragraphs (c)(2)(i)(F) and (G);
■ e. Revising paragraphs (c)(2)(iv)(B), (c)(2)(iv)(E), and (c)(2)(vi)(D)(*1*);
■ f. Adding paragraph (c)(2)(xiv);
■ g. Adding paragraph (c)(16) and an undesignated center heading;
■ h. Revising paragraph (e)(3)(i); and
■ i. Removing from the second sentence in paragraph (e)(3)(ii) the text ''The hearing'' and in its place adding the phrase ''A hearing on an order temporarily prohibiting the withdrawal of capital''.

The revisions and additions read as follows:

§ 240.15c3–1 Net capital requirements for brokers or dealers.

(a) Every broker or dealer must at all times have and maintain net capital no less than the greater of the highest minimum requirement applicable to its ratio requirement under paragraph (a)(1) of this section, or to any of its activities under paragraph (a)(2) of this section, and must otherwise not be ''insolvent'' as that term is defined in paragraph (c)(16) of this section. * * *

* * * * *

(c) * * *

(2) * * *

(i) *Adjustments to net worth related to unrealized profit or loss, deferred tax provisions, and certain liabilities.** * *

* * * * *

(F) Subtracting from net worth any liability or expense relating to the

[951] *See* section II.E.1. of this release.

[952] *See Beer Letter; Beer 2 Letter; Levene Letter; Lowenstein Letter; NIBA 2 Letter. See also* discussion in section II.E.1. of this release.

[953] *Amendments to Financial Responsibility Rules,* 72 FR at 12872. The Commission specifically requested comment regarding the records by which a broker-dealer could demonstrate financial resources. It received no comments in response to this request.

[954] 15 U.S.C. 78o, 78q, 78w and 78mm.

business of the broker or dealer for which a third party has assumed the responsibility, unless the broker or dealer can demonstrate that the third party has adequate resources independent of the broker or dealer to pay the liability or expense.

(G) Subtracting from net worth any contribution of capital to the broker or dealer:

(*1*) Under an agreement that provides the investor with the option to withdraw the capital; or

(*2*) That is intended to be withdrawn within a period of one year of contribution. Any withdrawal of capital made within one year of its contribution is deemed to have been intended to be withdrawn within a period of one year, unless the withdrawal has been approved in writing by the Examining Authority for the broker or dealer.

* * * * *

(iv) * * *

(B) All unsecured advances and loans; deficits in customers' and non-customers' unsecured and partly secured notes; deficits in omnibus credit accounts maintained in compliance with the requirements of 12 CFR 220.7(f) of Regulation T under the Act, or similar accounts carried on behalf of another broker or dealer, after application of calls for margin, marks to the market or other required deposits that are outstanding 5 business days or less; deficits in customers' and non-customers' unsecured and partly secured accounts after application of calls for margin, marks to market or other required deposits that are outstanding 5 business days or less, except deficits in cash accounts as defined in 12 CFR 220.8 of Regulation T under the Act for which not more than one extension respecting a specified securities transaction has been requested and granted, and deducting for securities carried in any of such accounts the percentages specified in paragraph (c)(2)(vi) of this section or Appendix A, § 240.15c3–1a; the market value of stock loaned in excess of the value of any collateral received therefor; receivables arising out of free shipments of securities (other than mutual fund redemptions) in excess of $5,000 per shipment and all free shipments (other than mutual fund redemptions) outstanding more than 7 business days, and mutual fund redemptions outstanding more than 16 business days; and any collateral deficiencies in secured demand notes as defined in Appendix D, § 240.15c3–1d; a broker or dealer that participates in a loan of securities by one party to another party will be deemed a principal for the purpose of the deductions required under this section, unless the broker or dealer has fully disclosed the identity of each party to the other and each party has expressly agreed in writing that the obligations of the broker or dealer do not include a guarantee of performance by the other party and that such party's remedies in the event of a default by the other party do not include a right of setoff against obligations, if any, of the broker or dealer.

* * * * *

(E) *Other Deductions.* All other unsecured receivables; all assets doubtful of collection less any reserves established therefor; the amount by which the market value of securities failed to receive outstanding longer than thirty (30) calendar days exceeds the contract value of such fails to receive; and the funds on deposit in a ''segregated trust account'' in accordance with 17 CFR 270.27d–1 under the Investment Company Act of 1940, but only to the extent that the amount on deposit in such segregated trust account exceeds the amount of liability reserves established and maintained for refunds of charges required by sections 27(d) and 27(f) of the Investment Company Act of 1940; *Provided,* That the following need not be deducted:

(*1*) Any amounts deposited in a Customer Reserve Bank Account or PAB Reserve Bank Account pursuant to § 240.15c3–3(e),

(*2*) Cash and securities held in a securities account at a carrying broker or dealer (except where the account has been subordinated to the claims of creditors of the carrying broker or dealer), and

(*3*) Clearing deposits.

* * * * *

(vi) * * *

(D)(*1*) In the case of redeemable securities of an investment company registered under the Investment Company Act of 1940, which assets consist of cash or money market instruments and which is described in § 270.2a–7 of this chapter, the deduction will be 2% of the market value of the greater of the long or short position.

* * * * *

(xiv) *Deduction from net worth for excess deductible amounts related to fidelity bond coverage.* Deducting the amount specified by rule of the Examining Authority for the broker or dealer with respect to a requirement to maintain fidelity bond coverage.

* * * * *

Insolvent

(16) For the purposes of this section, a broker or dealer is insolvent if the broker or dealer:

(i) Is the subject of any bankruptcy, equity receivership proceeding or any other proceeding to reorganize, conserve, or liquidate such broker or dealer or its property or is applying for the appointment or election of a receiver, trustee, or liquidator or similar official for such broker or dealer or its property;

(ii) Has made a general assignment for the benefit of creditors;

(iii) Is insolvent within the meaning of section 101 of title 11 of the United States Code, or is unable to meet its obligations as they mature, and has made an admission to such effect in writing or in any court or before any agency of the United States or any State; or

(iv) Is unable to make such computations as may be necessary to establish compliance with this section or with § 240.15c3–3.

* * * * *

(e) * * *

(3)(i) *Temporary restrictions on withdrawal of net capital.* The Commission may by order restrict, for a period of up to twenty business days, any withdrawal by the broker or dealer of equity capital or unsecured loan or advance to a stockholder, partner, sole proprietor, member, employee or affiliate under such terms and conditions as the Commission deems necessary or appropriate in the public interest or consistent with the protection of investors if the Commission, based on the information available, concludes that such withdrawal, advance or loan may be detrimental to the financial integrity of the broker or dealer, or may unduly jeopardize the broker or dealer's ability to repay its customer claims or other liabilities which may cause a significant impact on the markets or expose the customers or creditors of the broker or dealer to loss without taking into account the application of the Securities Investor Protection Act of 1970.

* * * * *

§ 240.15c3–1a [Amended]

■ 3. Section 240.15c3–1a is amended by:

■ a. Removing paragraph (b)(1)(iv)(B); and

■ b. Redesignating paragraphs (b)(1)(iv)(A) introductory text, (b)(1)(iv)(A)(*1*), (b)(1)(iv)(A)(*2*), and (b)(1)(iv)(A)(*3*) as paragraphs (b)(1)(iv) introductory text, (b)(1)(iv)(A),

(b)(1)(iv)(B), and (b)(1)(iv)(C) respectively.

§ 240.15c3–2 [Removed and Reserved]

■ 4. Section 240.15c3–2 is removed and reserved.

■ 5. Section 240.15c3–3 is amended by:
■ a. Removing from paragraph (a)(1) introductory text, third sentence, the citation ''220.19'' and in its place adding the citation ''220.12'';
■ b. In paragraph (a)(1)(iii), after the phrase ''(15 U.S.C. 78aaa *et seq.*)'' adding ''(SIPA)'';
■ c. Removing the ';'' at the end of paragraph (a)(1)(iv) and adding a period in its place;
■ d. Revising paragraphs (a)(3), (4), (7), (8), and (9);
■ e. Adding paragraphs (a)(16) and (17);
■ f. In paragraph (b)(2):
■ i. In the first sentence, removing the phrase ''his physical possession or under his control'' and in its place adding ''the broker's or dealer's physical possession or under its control'';
■ ii. In the second sentence, removing the word ''he'' and in its place adding ''it''; and
■ iii. In the second sentence, removing the word ''his'' and in its place adding ''its'';
■ g. Removing from paragraphs (b)(3)(iv) and (b)(4)(i)(C) the phrase ''the Securities Investor Protection Act of 1970'' and in its place adding ''SIPA'';
■ h. At the end of paragraph (b)(4)(i)(C) adding the word ''and,'';
■ i. In paragraph (b)(4)(v), removing the word ''his'' and adding in its place ''the person's'';
■ j. Adding paragraph (b)(5);
■ k. In paragraph (c)(2):
■ i. Removing ''a special omnibus'' and in its place adding ''an omnibus credit'';
■ ii. Removing the text ''section 4(b) of Regulation T under the Act (12 CFR 220.4(b))'' and in its place adding ''section 7(f) of Regulation T (12 CFR 220.7(f))''; and
■ iii. Removing the word ''he'' and in its place adding ''it'';
■ l. In paragraph (c)(3), removing the words ''him'' and ''he'' wherever they appear and in their place adding ''the broker or dealer'';
■ m. In the first sentence of paragraph (d) introductory text, removing the word ''his'' wherever it appears and in its place adding ''its'';
■ n. In paragraph (d)(2), removing the word ''his'' and in its place adding ''the broker's or dealer's'';
■ o. Removing the period at the end of paragraph (d)(3) and in its place adding ''; or'';
■ p. Redesignating paragraph (d)(4) as paragraph (d)(5);
■ q. Adding a new paragraph (d)(4);
■ r. Revising paragraphs (e) and (f);
■ s. Revising the first sentence of paragraph (g);
■ t. Removing from paragraph (i) the text ''his reserve bank account'' and in its place adding ''its Customer Reserve Bank Account, PAB Reserve Bank Account'';
■ u. Adding paragraph (j);
■ v. In paragraph (k)(1)(i), removing the phrase ''His dealer transactions'' and in its place adding ''The broker's or dealer's transactions as dealer'', and removing the word ''his'' the second and third time the word ''his'' appears and in its place adding ''its'';
■ w. In paragraph (k)(1)(ii), removing the word ''His'' and in its place adding ''The broker's or dealer's'';
■ x. In paragraph (k)(1)(iii), removing the word ''He'' and in its place adding ''The broker or dealer'' and removing the word ''his'' and in its place adding ''its'';
■ y. In paragraph (k)(2)(i), removing the word ''his'' and in its place adding ''its'' wherever it appears;
■ z. Revising paragraph (l)(2);
■ aa. Removing from the last sentence in paragraph (m) before the Note, the text ''a special omnibus'' and in its place adding ''an omnibus credit'' and removing the text ''section 4(b) of Regulation T [12 CFR 220.4(b)]'' and in its place adding ''section 7(f) of Regulation T (12 CFR 220.7(f))'';
■ bb. Redesignate the Note following paragraph (m) as ''Note to paragraph (m).'';
■ cc. Removing from the first sentence in paragraph (n) the phrase ''paragraphs (d)(2) and (3)'' and in its place adding ''paragraphs (d)(2) through (4)''; and
■ dd. Removing from paragraph (o)(2)(i)(A) the phrase ''the Securities Investor Protection Act of 1970 (15 U.S.C. 78aaa *et seq.*)'' and in its place adding ''SIPA'';

The revisions and additions read as follows:

§ 240.15c3–3 Customer protection—reserves and custody of securities.

(a) * * *

(3) The term *fully paid securities* means all securities carried for the account of a customer in a cash account as defined in Regulation T (12 CFR 220.1 *et seq.*), as well as securities carried for the account of a customer in a margin account or any special account under Regulation T that have no loan value for margin purposes, and all margin equity securities in such accounts if they are fully paid: *Provided, however,* that the term *fully paid securities* does not apply to any securities purchased in transactions for which the customer has not made full payment.

(4) The term *margin securities* means those securities carried for the account of a customer in a margin account as defined in section 4 of Regulation T (12 CFR 220.4), as well as securities carried in any other account (such accounts hereinafter referred to as ''margin accounts'') other than the securities referred to in paragraph (a)(3) of this section.

* * * * *

(7) The term *bank* means a bank as defined in section 3(a)(6) of the Act and will also mean any building and loan, savings and loan or similar banking institution subject to supervision by a Federal banking authority. With respect to a broker or dealer that maintains its principal place of business in Canada, the term ''bank'' also means a Canadian bank subject to supervision by a Canadian authority.

(8) The term *free credit balances* means liabilities of a broker or dealer to customers which are subject to immediate cash payment to customers on demand, whether resulting from sales of securities, dividends, interest, deposits or otherwise, excluding, however, funds in commodity accounts which are segregated in accordance with the Commodity Exchange Act or in a similar manner, or which are funds carried in a proprietary account as that term is defined in regulations under the Commodity Exchange Act. The term ''free credit balances'' also includes, if subject to immediate cash payment to customers on demand, funds carried in a securities account pursuant to a self-regulatory organization portfolio margining rule approved by the Commission under section 19(b) of the Act (15 U.S.C. 78s(b)) (''SRO portfolio margining rule''), including variation margin or initial margin, marks to market, and proceeds resulting from margin paid or released in connection with closing out, settling or exercising futures contracts and options thereon.

(9) The term *other credit balances* means cash liabilities of a broker or dealer to customers other than free credit balances and funds in commodity accounts which are segregated in accordance with the Commodity Exchange Act or in a similar manner, or funds carried in a proprietary account as that term is defined in regulations under the Commodity Exchange Act. The term ''other credit balances'' also includes funds that are cash liabilities of a broker or dealer to customers other than free credit balances and are carried in a securities account pursuant to an SRO portfolio margining rule, including

variation margin or initial margin, marks to market, and proceeds resulting from margin paid or released in connection with closing out, settling or exercising futures contracts and options thereon.

* * * * *

(16) The term *PAB account* means a proprietary securities account of a broker or dealer (which includes a foreign broker or dealer, or a foreign bank acting as a broker or dealer) other than a delivery-versus-payment account or a receipt-versus-payment account. The term does not include an account that has been subordinated to the claims of creditors of the carrying broker or dealer.

(17) The term *Sweep Program* means a service provided by a broker or dealer where it offers to its customer the option to automatically transfer free credit balances in the securities account of the customer to either a money market mutual fund product as described in § 270.2a–7 of this chapter or an account at a bank whose deposits are insured by the Federal Deposit Insurance Corporation.

(b) * * *

(5) A broker or dealer is required to obtain and thereafter maintain the physical possession or control of securities carried for a PAB account, unless the broker or dealer has provided written notice to the account holder that the securities may be used in the ordinary course of its securities business, and has provided an opportunity for the account holder to object.

* * * * *

(d) * * *

(4) Securities included on the broker's or dealer's books or records that allocate to a short position of the broker or dealer or a short position for another person, excluding positions covered by paragraph (m) of this section, for more than 30 calendar days, then the broker or dealer must, not later than the business day following the day on which the determination is made, take prompt steps to obtain physical possession or control of such securities. For the purposes of this paragraph (d)(4), the 30 day time period will not begin to run with respect to a syndicate short position established in connection with an offering of securities until the completion of the underwriter's participation in the distribution as determined pursuant to § 242.100(b) of Regulation M of this chapter (17 CFR 242.100 through 242.105); or

* * * * *

(e) *Special reserve bank accounts for the exclusive benefit of customers and PAB accounts.* (1) Every broker or dealer must maintain with a bank or banks at all times when deposits are required or hereinafter specified a ''Special Reserve Bank Account for the Exclusive Benefit of Customers'' (hereinafter referred to as the *Customer Reserve Bank Account*) and a ''Special Reserve Bank Account for Brokers and Dealers'' (hereinafter referred to as the *PAB Reserve Bank Account*), each of which will be separate from the other and from any other bank account of the broker or dealer. Such broker or dealer must at all times maintain in the Customer Reserve Bank Account and the PAB Reserve Bank Account, through deposits made therein, cash and/or qualified securities in amounts computed in accordance with the formula attached as Exhibit A (17 CFR 240.15c3–3a), as applied to customer and PAB accounts respectively.

(2) With respect to each computation required pursuant to paragraph (e)(1) of this section, a broker or dealer must not accept or use any of the amounts under items comprising Total Credits under the formula referred to in paragraph (e)(1) of this section except for the specified purposes indicated under items comprising Total Debits under the formula, and, to the extent Total Credits exceed Total Debits, at least the net amount thereof must be maintained in the Customer Reserve Bank Account and PAB Reserve Bank Account pursuant to paragraph (e)(1) of this section.

(3) *Reserve Bank Account computations.* (i) Computations necessary to determine the amount required to be deposited in the Customer Reserve Bank Account and PAB Reserve Bank Account as specified in paragraph (e)(1) of this section must be made weekly, as of the close of the last business day of the week, and the deposit so computed must be made no later than one hour after the opening of banking business on the second following business day; *provided, however,* a broker or dealer which has aggregate indebtedness not exceeding 800 percent of net capital (as defined in § 240.15c3–1) and which carries aggregate customer funds (as defined in paragraph (a)(10) of this section), as computed at the last required computation pursuant to this section, not exceeding $1,000,000, may in the alternative make the Customer Reserve Bank Account computation monthly, as of the close of the last business day of the month, and, in such event, must deposit not less than 105 percent of the amount so computed no later than one hour after the opening of banking business on the second following business day.

(ii) If a broker or dealer, computing on a monthly basis, has, at the time of any required computation, aggregate indebtedness in excess of 800 percent of net capital, such broker or dealer must thereafter compute weekly as aforesaid until four successive weekly Customer Reserve Bank Account computations are made, none of which were made at a time when its aggregate indebtedness exceeded 800 percent of its net capital.

(iii) A broker or dealer that does not carry the accounts of a ''customer'' as defined by this section or conduct a proprietary trading business may make the computation to be performed with respect to PAB accounts under paragraph (e)(1) of this section monthly rather than weekly. If a broker or dealer performing the computation with respect to PAB accounts under paragraph (e)(1) of this section on a monthly basis is, at the time of any required computation, required to deposit additional cash or qualified securities in the PAB Reserve Bank Account, the broker or dealer must thereafter perform the computation required with respect to PAB accounts under paragraph (e)(1) of this section weekly until four successive weekly computations are made, none of which is made at a time when the broker or dealer was required to deposit additional cash or qualified securities in the PAB Reserve Bank Account.

(iv) Computations in addition to the computations required in this paragraph (e)(3), may be made as of the close of any business day, and the deposits so computed must be made no later than one hour after the opening of banking business on the second following business day.

(v) The broker or dealer must make and maintain a record of each such computation made pursuant to this paragraph (e)(3) or otherwise and preserve each such record in accordance with § 240.17a–4.

(4) If the computation performed under paragraph (e)(3) of this section with respect to PAB accounts results in a deposit requirement, the requirement may be satisfied to the extent of any excess debit in the computation performed under paragraph (e)(3) of this section with respect to customer accounts of the same date. However, a deposit requirement resulting from the computation performed under paragraph (e)(3) of this section with respect to customer accounts cannot be satisfied with excess debits from the computation performed under paragraph (e)(3) of this section with respect to PAB accounts.

(5) In determining whether a broker or dealer maintains the minimum deposits required under this section, the broker or dealer must exclude the total amount of any cash deposited with an affiliated bank. The broker or dealer also must exclude cash deposited with a non-affiliated bank to the extent that the amount of the deposit exceeds 15% of the bank's equity capital as reported by the bank in its most recent Call Report or any successor form the bank is required to file by its appropriate Federal banking agency (as defined by section 3 of the Federal Deposit Insurance Act (12 U.S.C. 1813)).

(f) *Notification of banks.* A broker or dealer required to maintain a Customer Reserve Bank Account and PAB Reserve Bank Account prescribed by paragraph (e)(1) of this section or who maintains a Special Account referred to in paragraph (k) of this section must obtain and preserve in accordance with § 240.17a–4 a written notification from each bank with which it maintains a Customer Reserve Bank Account, a PAB Reserve Bank Account, or a Special Account that the bank was informed that all cash and/or qualified securities deposited therein are being held by the bank for the exclusive benefit of the customers and account holders of the broker or dealer in accordance with the regulations of the Commission, and are being kept separate from any other accounts maintained by the broker or dealer with the bank, and the broker or dealer must have a written contract with the bank which provides that the cash and/or qualified securities will at no time be used directly or indirectly as security for a loan to the broker or dealer by the bank and will not be subject to any right, charge, security interest, lien, or claim of any kind in favor of the bank or any person claiming through the bank.

(g) *Withdrawals from the reserve bank accounts.* A broker or dealer may make withdrawals from a Customer Reserve Bank Account and a PAB Reserve Bank Account if and to the extent that at the time of the withdrawal the amount remaining in the Customer Reserve Bank Account and PAB Reserve Bank Account is not less than the amount then required by paragraph (e) of this section. * * *

* * * * *

(j) *Treatment of free credit balances.* (1) A broker or dealer must not accept or use any free credit balance carried for the account of any customer of the broker or dealer unless such broker or dealer has established adequate procedures pursuant to which each customer for whom a free credit balance is carried will be given or sent, together with or as part of the customer's statement of account, whenever sent but not less frequently than once every three months, a written statement informing the customer of the amount due to the customer by the broker or dealer on the date of the statement, and that the funds are payable on demand of the customer.

(2) A broker or dealer must not convert, invest, or transfer to another account or institution, credit balances held in a customer's account except as provided in paragraphs (j)(2)(i) and (ii) of this section.

(i) A broker or dealer is permitted to invest or transfer to another account or institution, free credit balances in a customer's account only upon a specific order, authorization, or draft from the customer, and only in the manner, and under the terms and conditions, specified in the order, authorization, or draft.

(ii) A broker or dealer is permitted to transfer free credit balances held in a customer's securities account to a product in its Sweep Program or to transfer a customer's interest in one product in a Sweep Program to another product in a Sweep Program, *provided:*

(A) For an account opened on or after the effective date of this paragraph (j)(2)(ii), the customer gives prior written affirmative consent to having free credit balances in the customer's securities account included in the Sweep Program after being notified:

(*1*) Of the general terms and conditions of the products available through the Sweep Program; and

(*2*) That the broker or dealer may change the products available under the Sweep Program.

(B) For any account:

(*1*) The broker or dealer provides the customer with the disclosures and notices regarding the Sweep Program required by each self-regulatory organization of which the broker or dealer is a member;

(*2*) The broker or dealer provides notice to the customer, as part of the customer's quarterly statement of account, that the balance in the bank deposit account or shares of the money market mutual fund in which the customer has a beneficial interest can be liquidated on the customer's order and the proceeds returned to the securities account or remitted to the customer; and

(*3*)(*i*) The broker or dealer provides the customer with written notice at least 30 calendar days before:

(*A*) Making changes to the terms and conditions of the Sweep Program;

(*B*) Making changes to the terms and conditions of a product currently available through the Sweep Program;

(*C*) Changing, adding or deleting products available through the Sweep Program; or

(*D*) Changing the customer's investment through the Sweep Program from one product to another.

(*ii*) The notice must describe the new terms and conditions of the Sweep Program or product or the new product, and the options available to the customer if the customer does not accept the new terms and conditions or product.

* * * * *

(l) *Delivery of securities.* * * *

(2) Margin securities upon full payment by such customer to the broker or dealer of the customer's indebtedness to the broker or dealer; and, subject to the right of the broker or dealer under Regulation T (12 CFR 220) to retain collateral for its own protection beyond the requirements of Regulation T, excess margin securities not reasonably required to collateralize such customer's indebtedness to the broker or dealer.

* * * * *

■ 6. Section 240.15c3–3a is revised to read as follows:

§ 240.15c3–3a Exhibit A—Formula for determination of customer and PAB account reserve requirements of brokers and dealers under § 240.15c3–3.

	Credits	Debits
1. Free credit balances and other credit balances in customers' security accounts. (See Note A)	XXX	
2. Monies borrowed collateralized by securities carried for the accounts of customers (See Note B)	XXX	
3. Monies payable against customers' securities loaned (See Note C)	XXX	
4. Customers' securities failed to receive (See Note D)	XXX	
5. Credit balances in firm accounts which are attributable to principal sales to customers.	XXX	
6. Market value of stock dividends, stock splits and similar distributions receivable outstanding over 30 calendar days	XXX	
7. Market value of short security count differences over 30 calendar days old	XXX	

	Credits	Debits
8. Market value of short securities and credits (not to be offset by longs or by debits) in all suspense accounts over 30 calendar days	XXX	
9. Market value of securities which are in transfer in excess of 40 calendar days and have not been confirmed to be in transfer by the transfer agent or the issuer during the 40 days	XXX	
10. Debit balances in customers' cash and margin accounts excluding unsecured accounts and accounts doubtful of collection. (See Note E)		XXX
11. Securities borrowed to effectuate short sales by customers and securities borrowed to make delivery on customers' securities failed to deliver		XXX
12. Failed to deliver of customers' securities not older than 30 calendar days		XXX
13. Margin required and on deposit with the Options Clearing Corporation for all option contracts written or purchased in customer accounts. (See Note F)		XXX
14. Margin required and on deposit with a clearing agency registered with the Commission under section 17A of the Act (15 U.S.C. 78q–1) or a derivatives clearing organization registered with the Commodity Futures Trading Commission under section 5b of the Commodity Exchange Act (7 U.S.C. 7a–1) related to the following types of positions written, purchased or sold in customer accounts: (1) security futures products and (2) futures contracts (and options thereon) carried in a securities account pursuant to an SRO portfolio margining rule (See Note G)		XXX
Total credits		
Total debits		
15. Excess of total credits (sum of items 1–9) over total debits (sum of items 10–14) required to be on deposit in the "Reserve Bank Account" (§ 240.15c3–3(e)). If the computation is made monthly as permitted by this section, the deposit must be not less than 105% of the excess of total credits over total debits.		XXX

Notes Regarding the Customer Reserve Bank Account Computation

Note A. Item 1 must include all outstanding drafts payable to customers which have been applied against free credit balances or other credit balances and must also include checks drawn in excess of bank balances per the records of the broker or dealer.

Note B. Item 2 must include the amount of options-related or security futures product-related Letters of Credit obtained by a member of a registered clearing agency or a derivatives clearing organization which are collateralized by customers' securities, to the extent of the member's margin requirement at the registered clearing agency or derivatives clearing organization. Item 2 must also include the amount of Letters of Credit which are collateralized by customers' securities and related to other futures contracts (and options thereon) carried in a securities account pursuant to an SRO portfolio margining rule.

Note C. Item 3 must include in addition to monies payable against customers' securities loaned the amount by which the market value of securities loaned exceeds the collateral value received from the lending of such securities.

Note D. Item 4 must include in addition to customers' securities failed to receive the amount by which the market value of securities failed to receive and outstanding more than thirty (30) calendar days exceeds their contract value.

Note E. (1) Debit balances in margin accounts must be reduced by the amount by which a specific security (other than an exempted security) which is collateral for margin accounts exceeds in aggregate value 15 percent of the aggregate value of all securities which collateralize all margin accounts receivable; provided, however, the required reduction must not be in excess of the amounts of the debit balance required to be excluded because of this concentration rule. A specified security is deemed to be collateral for a margin account only to the extent it represents in value not more than 140 percent of the customer debit balance in a margin account.

(2) Debit balances in special omnibus accounts, maintained in compliance with the requirements of Section 7(f) of Regulation T (12 CFR 220.7(f)) or similar accounts carried on behalf of another broker or dealer, must be reduced by any deficits in such accounts (or if a credit, such credit must be increased) less any calls for margin, mark to the market, or other required deposits which are outstanding 5 business days or less.

(3) Debit balances in customers' cash and margin accounts included in the formula under Item 10 must be reduced by an amount equal to 1 percent of their aggregate value.

(4) Debit balances in cash and margin accounts of household members and other persons related to principals of a broker or dealer and debit balances in cash and margin accounts of affiliated persons of a broker or dealer must be excluded from the Reserve Formula, unless the broker or dealer can demonstrate that such debit balances are directly related to credit items in the formula.

(5) Debit balances in margin accounts (other than omnibus accounts) must be reduced by the amount by which any single customer's debit balance exceeds 25% (to the extent such amount is greater than $50,000) of the broker-dealer's tentative net capital (*i.e.,* net capital prior to securities haircuts) unless the broker or dealer can demonstrate that the debit balance is directly related to credit items in the Reserve Formula. Related accounts (*e.g.,* the separate accounts of an individual, accounts under common control or subject to cross guarantees) will be deemed to be a single customer's accounts for purposes of this provision.

If the registered national securities exchange or the registered national securities association having responsibility for examining the broker or dealer (''designated examining authority'') is satisfied, after taking into account the circumstances of the concentrated account including the quality, diversity, and marketability of the collateral securing the debit balances or margin accounts subject to this provision, that the concentration of debit balances is appropriate, then such designated examining authority may grant a partial or plenary exception from this provision. The debit balance may be included in the reserve formula computation for five business days from the day the request is made.

(6) Debit balances in joint accounts, custodian accounts, participation in hedge funds or limited partnerships or similar type accounts or arrangements that include both assets of a person or persons who would be excluded from the definition of customer (''noncustomer'') and assets of a person or persons who would be included in the definition of customer must be included in the Reserve Formula in the

following manner: If the percentage ownership of the non-customer is less than 5 percent then the entire debit balance shall be included in the formula; if such percentage ownership is between 5 percent and 50 percent then the portion of the debit balance attributable to the non-customer must be excluded from the formula unless the broker or dealer can demonstrate that the debit balance is directly related to credit items in the formula; or if such percentage ownership is greater than 50 percent, then the entire debit balance must be excluded from the formula unless the broker or dealer can demonstrate that the debit balance is directly related to credit items in the formula.

Note F. Item 13 must include the amount of margin required and on deposit with the Options Clearing Corporation to the extent such margin is represented by cash, proprietary qualified securities and letters of credit collateralized by customers' securities.

Note G. (a) Item 14 must include the amount of margin required and on deposit with a clearing agency registered with the Commission under section 17A of the Act (15 U.S.C. 78q–1) or a derivatives clearing organization registered with the Commodity Futures Trading Commission under section 5b of the Commodity Exchange Act (7 U.S.C. 7a–1) for customer accounts to the extent that the margin is represented by cash, proprietary qualified securities, and letters of credit collateralized by customers' securities.

(b) Item 14 will apply only if the broker or dealer has the margin related to security futures products, or futures (and options thereon) carried in a securities account pursuant to an approved SRO portfolio margining program on deposit with:

(1) A registered clearing agency or derivatives clearing organization that:

(i) Maintains the highest investment-grade rating from a nationally recognized statistical rating organization; or

(ii) Maintains security deposits from clearing members in connection with regulated options or futures transactions and assessment power over member firms that equal a combined total of at least $2 billion, at least $500 million of which must be in the form of security deposits. For the purposes of this Note G, the term ''security deposits'' refers to a general fund, other than margin deposits or their equivalent, that consists of cash or securities held by a registered clearing agency or derivative clearing organization; or

(iii) Maintains at least $3 billion in margin deposits; or

(iv) Does not meet the requirements of paragraphs (b)(1)(i) through (b)(1)(iii) of this Note G, if the Commission has determined, upon a written request for exemption by or for the benefit of the broker or dealer, that the broker or dealer may utilize such a registered clearing agency or derivatives clearing organization. The Commission may, in its sole discretion, grant such an exemption subject to such conditions as are appropriate under the circumstances, if the Commission determines that such conditional or unconditional exemption is necessary or appropriate in the public interest, and is consistent with the protection of investors; and

(2) A registered clearing agency or derivatives clearing organization that, if it holds funds or securities deposited as margin for security futures products or futures in a portfolio margin account in a bank, as defined in section 3(a)(6) of the Act (15 U.S.C. 78c(a)(6)), obtains and preserves written notification from the bank at which it holds such funds and securities or at which such funds and securities are held on its behalf. The written notification will state that all funds and/or securities deposited with the bank as margin (including customer security futures products and futures in a portfolio margin account), or held by the bank and pledged to such registered clearing agency or derivatives clearing agency as margin, are being held by the bank for the exclusive benefit of clearing members of the registered clearing agency or derivatives clearing organization (subject to the interest of such registered clearing agency or derivatives clearing organization therein), and are being kept separate from any other accounts maintained by the registered clearing agency or derivatives clearing organization with the bank. The written notification also will provide that such funds and/or securities will at no time be used directly or indirectly as security for a loan to the registered clearing agency or derivatives clearing organization by the bank, and will be subject to no right, charge, security interest, lien, or claim of any kind in favor of the bank or any person claiming through the bank. This provision, however, will not prohibit a registered clearing agency or derivatives clearing organization from pledging customer funds or securities as collateral to a bank for any purpose that the rules of the Commission or the registered clearing agency or derivatives clearing organization otherwise permit; and

(3) A registered clearing agency or derivatives clearing organization establishes, documents, and maintains:

(i) Safeguards in the handling, transfer, and delivery of cash and securities;

(ii) Fidelity bond coverage for its employees and agents who handle customer funds or securities. In the case of agents of a registered clearing agency or derivatives clearing organization, the agent may provide the fidelity bond coverage; and

(iii) Provisions for periodic examination by independent public accountants; and

(iv) A derivatives clearing organization that, if it is not otherwise registered with the Commission, has provided the Commission with a written undertaking, in a form acceptable to the Commission, executed by a duly authorized person at the derivatives clearing organization, to the effect that, with respect to the clearance and settlement of the customer security futures products and futures in a portfolio margin account of the broker or dealer, the derivatives clearing organization will permit the Commission to examine the books and records of the derivatives clearing organization for compliance with the requirements set forth in § 240.15c3–3a, Note G (b)(1) through (3).

(c) Item 14 will apply only if a broker or dealer determines, at least annually, that the registered clearing agency or derivatives clearing organization with which the broker or dealer has on deposit margin related to securities future products or futures in a portfolio margin account meets the conditions of this Note G.

Notes Regarding the PAB Reserve Bank Account Computation

Note 1. Broker-dealers should use the formula in Exhibit A for the purposes of computing the PAB reserve requirement, except that references to ''accounts,'' ''customer accounts, or ''customers'' will be treated as references to PAB accounts.

Note 2. Any credit (including a credit applied to reduce a debit) that is included in the computation required by § 240.15c3–3 with respect to customer accounts (the ''customer reserve computation'') may not be included as a credit in the computation required by § 240.15c3–3 with respect to PAB accounts (the ''PAB reserve computation'').

Note 3. Note E(1) to § 240.15c3–3a does not apply to the PAB reserve computation.

Note 4. Note E(3) to § 240.15c3–3a which reduces debit balances by 1% does not apply to the PAB reserve computation.

Note 5. Interest receivable, floor brokerage, and commissions receivable of another broker or dealer from the broker or dealer (excluding clearing deposits) that are otherwise allowable assets under § 240.15c3–1 need not be included in the PAB reserve computation, provided the amounts have been clearly identified as payables on the books of the broker or dealer. Commissions receivable and other receivables of another broker or dealer from the broker or dealer that are otherwise non-allowable assets under § 240.15c3–1 and clearing deposits of another broker or dealer may be included as ''credit balances'' for purposes of the PAB reserve computation, provided the commissions receivable and other receivables are subject to immediate cash payment to the other broker or dealer and the clearing deposit is subject to payment within 30 days.

Note 6. Credits included in the PAB reserve computation that result from the use of securities held for a PAB account (''PAB securities'') that are pledged to meet intra-day margin calls in a cross-margin account established between the Options Clearing Corporation and any regulated derivatives clearing organization may be reduced to the extent that the excess margin held by the other clearing corporation in the cross-margin relationship is used the following business day to replace the PAB securities that were previously pledged. In addition, balances resulting from a portfolio margin account that are segregated pursuant to Commodity Futures Trading Commission regulations need not be included in the PAB Reserve Bank Account computation.

Note 7. Deposits received prior to a transaction pending settlement which are $5 million or greater for any single transaction or $10 million in aggregate may be excluded as credits from the PAB reserve computation if such balances are placed and maintained in a separate PAB Reserve Bank Account by 12 p.m. Eastern Time on the following business day. Thereafter, the money representing any such deposits may be withdrawn to complete the related transactions without performing a new PAB reserve computation.

Note 8. A credit balance resulting from a PAB reserve computation may be reduced by the amount that items representing such credits are swept into money market funds or mutual funds of an investment company registered under the Investment Company Act of 1940 on or prior to 10 a.m. Eastern Time on the deposit date provided that the credits swept into any such fund are not subject to any right, charge, security interest, lien, or claim of any kind in favor of the investment company or the broker or dealer. Any credits that have been swept into money market funds or mutual funds must be maintained in the name of a particular broker or for the benefit of another broker.

Note 9. Clearing deposits required to be maintained at registered clearing agencies may be included as debits in the PAB reserve computation to the extent the percentage of the deposit, which is based upon the clearing agency's aggregate deposit requirements (*e.g.,* dollar trading volume), that relates to the proprietary business of other brokers and dealers can be identified.

Note 10. A broker or dealer that clears PAB accounts through an affiliate or third party clearing broker must include these PAB account balances and the omnibus PAB account balance in its PAB reserve computation.

■ 7. Section 240.17a–3 is amended by adding paragraph (a)(23) to read as follows:

§ 240.17a–3 Records to be made by certain exchange members, brokers and dealers.

(a) * * *

(23) A record documenting the credit, market, and liquidity risk management controls established and maintained by the broker or dealer to assist it in analyzing and managing the risks associated with its business activities, *Provided,* that the records required by this paragraph (a)(23) need only be made if the broker or dealer has more than:

(i) $1,000,000 in aggregate credit items as computed under § 240.15c3–3a; or

(ii) $20,000,000 in capital, which includes debt subordinated in accordance with § 240.15c3–1d.

* * * * *

■ 8. Section 240.17a–4 is amended by:

■ a. Removing from paragraph (b)(1) the citation ''§ 240.17a–3(f)'' and its place adding the citation ''§ 240.17a–3(g)'';

■ b. Removing from paragraph (b)(9) the citation ''§ 240.15c3–3(d)(4)'' and in its place adding the citation ''§ 240.15c3–3(d)(5)''; and

■ c. Adding paragraph (e)(9).

The addition reads as follows:

§ 240.17a–4 Records to be preserved by certain exchange members, brokers and dealers.

* * * * *

(e) * * *

(9) All records required pursuant to § 240.17a–3(a)(23) until three years after the termination of the use of the risk management controls documented therein.

* * * * *

■ 9. Section 240.17a–11 is amended by:

■ a. Revising the first sentence of paragraph (b)(1);

■ b. Removing from paragraph (c) introductory text ''or (c)(4)'' and in its place adding '', (c)(4) or (c)(5)''; and

■ c. Adding paragraph (c)(5).

The revision and addition read as follows:

§ 240.17a–11 Notification provisions for brokers and dealers

* * * * *

(b)(1) Every broker or dealer whose net capital declines below the minimum amount required pursuant to § 240.15c3–1, or is insolvent as that term is defined in § 240.15c3–1(c)(16), must give notice of such deficiency that same day in accordance with paragraph (g) of this section. * * *

* * * * *

(c) * * *

(5) If a computation made by a broker or dealer pursuant to § 240.15c3–1 shows that the total amount of money payable against all securities loaned or subject to a repurchase agreement or the total contract value of all securities borrowed or subject to a reverse repurchase agreement is in excess of 2500 percent of its tentative net capital; *provided,* however, that for purposes of this leverage test transactions involving government securities, as defined in section 3(a)(42) of the Act (15 U.S.C. 78c(a)(42)), must be excluded from the calculation; *provided* further, however, that a broker or dealer will not be required to send the notice required by this paragraph (c)(5) if it reports monthly its securities lending and borrowing and repurchase and reverse repurchase activity (including the total amount of money payable against securities loaned or subject to a repurchase agreement and the total contract value of securities borrowed or subject to a reverse repurchase agreement) to its designated examining authority in a form acceptable to its designated examining authority.

* * * * *

By the Commission.

Dated: July 30, 2013.

Elizabeth M. Murphy,

Secretary.

[FR Doc. 2013–18734 Filed 8–20–13; 8:45 am]

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Part III

Securities and Exchange Commission

17 CFR Parts 240 and 249

Broker-Dealer Reports; Final Rule

SECURITIES AND EXCHANGE COMMISSION

17 CFR Parts 240 and 249

[Release No. 34–70073; File No. S7–23–11]

RIN 3235–AK56

Broker-Dealer Reports

AGENCY: Securities and Exchange Commission.

ACTION: Final rule.

SUMMARY: The Securities and Exchange Commission (''Commission''), under the Securities Exchange Act of 1934 (''Exchange Act''), is amending certain broker-dealer annual reporting, audit, and notification requirements. The amendments include a requirement that broker-dealer audits be conducted in accordance with standards of the Public Company Accounting Oversight Board (''PCAOB'') in light of explicit oversight authority provided to the PCAOB by the Dodd-Frank Wall Street Reform and Consumer Protection Act (''Dodd-Frank Act'') to oversee these audits. The amendments further require a broker-dealer that clears transactions or carries customer accounts to agree to allow representatives of the Commission or the broker-dealer's designated examining authority (''DEA'') to review the documentation associated with certain reports of the broker-dealer's independent public accountant and to allow the accountant to discuss the findings relating to the reports of the accountant with those representatives when requested in connection with a regulatory examination of the broker-dealer. Finally, the amendments require a broker-dealer to file a new form with its DEA that elicits information about the broker-dealer's practices with respect to the custody of securities and funds of customers and non-customers.

DATES: This rule is effective June 1, 2014, except the amendment to § 240.17a–5(e)(5), which is effective October 21, 2013 and the amendments to § 240.17a–5(a) and (d)(6) and § 249.639, which are effective December 31, 2013.

FOR FURTHER INFORMATION CONTACT: Michael A. Macchiaroli, Associate Director, at (202) 551–5525; Thomas K. McGowan, Deputy Associate Director, at (202) 551–5521; Randall W. Roy, Assistant Director, at (202) 551–5522; Mark M. Attar, Branch Chief, at (202) 551–5889; Rose Russo Wells, Special Counsel, at (202) 551–5527; Sheila Dombal Swartz, Special Counsel, at (202) 551–5545; or Kimberly N. Chehardy, Attorney, at (202) 551–5791, Office of Financial Responsibility, Division of Trading and Markets; or Kevin Stout, Senior Associate Chief Accountant, at (202) 551–5930, Office of the Chief Accountant, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549–7010.

SUPPLEMENTARY INFORMATION: The Commission is adopting amendments to Rule 17a–5 (17 CFR 240.17a–5) and technical and conforming amendments to Rule 17a–11 (17 CFR 240.17a–11) and is adopting Form Custody (17 CFR 249. 639) under the Exchange Act.

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IX. Statutory Authority

I. Background

A. Overview

In 2009, the Commission began reviewing rules regarding the safekeeping of investor assets in connection with several cases the Commission brought alleging fraudulent conduct by investment advisers and broker-dealers, including, among other things, misappropriation or other misuse of customer securities and funds.[1] As part of the rule review effort, the Commission amended Rule 206(4)–2 under the Investment Advisers Act of 1940 (''Rule 206(4)–2''), which governs the custody of client securities and funds by investment advisers.[2] When adopting this amendment, the Commission stated that it represented ''a first step in the effort to enhance custody protections, with consideration of additional enhancements of the rules governing custody of customer assets by broker-dealers to follow.'' [3]

In June 2011, the Commission proposed rule amendments and a new form designed, among other things, to provide additional safeguards with respect to broker-dealer custody of customer securities and funds.[4] The proposed amendments would have amended certain annual reporting, audit, and notification requirements for broker-dealers.[5] The proposed amendments also would have required a broker-dealer that clears transactions or carries customer accounts (each, a ''clearing broker-dealer'') to agree to allow representatives of the Commission or the broker-dealer's DEA to review the documentation associated with certain reports of the broker-dealer's independent public accountant and to allow the accountant to discuss with representatives of the Commission or DEA the accountant's findings associated with those reports when requested in connection with an examination of the broker-dealer.[6] Further, the proposed amendments would have required a broker-dealer to file with its DEA on a quarterly basis a new form—Form Custody—that would have elicited information as to whether, and if so how, a broker-dealer maintains custody of securities and funds of customers and others.[7] The Commission also proposed requiring that a broker-dealer file its annual reports with the Securities Investor Protection Corporation (''SIPC'').[8]

The proposed amendments were designed to enhance the ability of the Commission to oversee broker-dealer custody practices and, among other things, to: (1) Increase the focus of broker-dealers that maintain custody of customer funds and securities (''carrying broker-dealers'') and their independent public accountants on compliance, and internal control over compliance, with certain financial and custodial requirements; (2) strengthen and clarify broker-dealer audit and reporting requirements in order to facilitate consistent compliance with these requirements; (3) facilitate the ability of the PCAOB to implement the explicit oversight authority over broker-dealer audits provided to the PCAOB by the Dodd-Frank Act; [9] (4) ensure that SIPC receives the necessary information to assess whether the liquidation fund it maintains is appropriately sized to the risks of a large broker-dealer failure; (5) enable Commission and DEA examiners to conduct risk-based examinations of carrying and clearing broker-dealers by

[1] *See, e.g., SEC* v. *Bernard L. Madoff, et al.,* Litigation Release No. 20889 (Feb. 9, 2009); *SEC* v. *Stanford International Bank, et al.,* Litigation Release No. 20901 (Feb. 17, 2009); *SEC* v. *Donald Anthony Walker Young, et al.,* Litigation Release No. 21006 (Apr. 20, 2009); *SEC* v. *Isaac I. Ovid, et al.,* Litigation Release No. 20998 (Apr. 14, 2009); *SEC* v. *The Nutmeg Group, LLC, et al.,* Litigation Release No. 20972 (Mar. 25, 2009); *SEC* v. *WG Trading Investors, L.P., et al.,* Litigation Release No. 20912 (Feb. 25, 2009).

[2] *See Custody of Funds or Securities of Clients by Investment Advisers,* Investment Advisers Act of 1940 (''Advisers Act'') Release No. 2968 (Dec. 30, 2009), 75 FR 1456 (Jan. 11, 2010). *See also* 17 CFR 275.206(4)–2.

[3] *See Custody of Funds or Securities of Clients by Investment Advisers,* 75 FR at 1456.

[4] *See Broker-Dealer Reports,* Exchange Act Release No. 64676 (June 15, 2011), 76 FR 37572 (June 27, 2011).

[5] *Id.* at 37575–37583.

[6] *Id.* at 37583–37584.

[7] *Id.* at 37584–37592.

[8] *Id.* at 37592–37594.

[9] Public Law 111–203, 124 Stat. 1376, H.R. 4173 (July 21, 2010).

assisting the examiners in selecting areas of focus for their examinations; and (6) provide the Commission and the DEAs with a comprehensive overview of a broker-dealer's custody practices.[10]

The Commission received 27 comment letters on the proposal.[11] The Commission has considered the comments and, as discussed in detail below, is adopting the amendments and the new form with modifications, in part in response to comments received. A number of commenters stated that the Commission should coordinate with the Commodity Futures Trading Commission (''CFTC'') to account for broker-dealers that also are registered as futures commission merchants (''FCMs'') in order to align the broker-dealer reporting and audit requirements with FCM reporting and audit requirements.[12] The Commission staff is in discussions with the CFTC staff concerning ways to align the reporting and audit requirements for dually-registered broker-dealer/FCMs with the goal of coordinating these requirements, including the requirements that the Commission is adopting today.

B. Rules Governing Broker-Dealer Financial and Custodial Responsibility

Rule 15c3–1,[13] Rule 15c3–3,[14] and Rule 17a–13,[15] under the Exchange Act and applicable DEA rules that require broker-dealers to periodically send account statements to customers (''Account Statement Rules'')[16] (collectively for the purposes of this release, ''the financial responsibility rules'') are central to today's amendments to the broker-dealer reporting, audit, and notification requirements. In light of the significance of the financial responsibility rules to today's amendments, the following section briefly summarizes the requirements of each rule in order to provide a foundation for the later discussion of the amendments.

1. The Broker-Dealer Net Capital Rule

Rule 15c3–1 requires broker-dealers to maintain a minimum level of net capital (consisting of highly liquid assets) at all times.[17] In computing net capital, a broker-dealer must, among other things, calculate net worth in accordance with U.S. generally accepted accounting principles (''GAAP'') and then make certain adjustments to net worth, such as deducting illiquid assets and taking other capital charges and adding qualifying subordinated loans.[18] The amount remaining after these deductions is defined as ''tentative net capital.''[19] The final step in computing net capital is to deduct certain percentages (''haircuts'') from the market value of the broker-dealer's proprietary positions to account for the market risk inherent in the positions[20] and to create a buffer of liquidity to protect against other risks associated with the broker-dealer's business.[21] The broker-dealer must cease conducting a securities business if the amount of net capital maintained by the firm falls below the minimum required amount.[22]

2. The Broker-Dealer Customer Protection Rule

Rule 15c3–3 imposes two key requirements on a carrying broker-dealer: first, the broker-dealer must maintain physical possession or control over customers' fully paid and excess margin securities;[23] and second, the firm must maintain a reserve of funds or qualified securities[24] in an account at one or more banks that is at least equal in value to the amount of net funds owed to customers.[25] These requirements are designed to protect customers by requiring broker-dealers to segregate customers' securities and

[10] The proposed amendments also were designed to avoid duplicative requirements for broker-dealers that are dually-registered as investment advisers in view of the internal control report requirement that was added by the amendment to Rule 206(4)–2. *See* discussion below in section VII.A. of this release identifying further motivations for the amendments.

[11] Comment letter of Naphtali M. Hamlet (June 22, 2011) (''*Hamlet Letter*''); comment letter of Robert R. Kelley (June 27, 2011) (''*Kelley Letter*''); comment letter of Chris Barnard (July 20, 2011) (''*Barnard Letter*''); comment letter of Suzanne Shatto (July 25, 2011) (''*Shatto Letter*''); comment letter of Suzanne H. Shatto (July 25, 2011) (''*Shatto Letter II*''); comment letter of Todd Genger (Aug. 2, 2011) (''*Genger Letter*''); comment letter of Suzanne Shatto (Aug. 14, 2011) (''*Shatto Letter III*''); comment letter of Deloitte & Touche LLP (Aug. 25, 2011) (''*Deloitte Letter*''); comment letter of the Securities Industry and Financial Markets Association (Aug. 25, 2011) (''*SIFMA Letter*''); comment letter of the Center for Audit Quality (Aug. 25, 2011) (''*CAQ Letter*''); comment letter of KPMG LLP (Aug. 25, 2011) (''*KPMG Letter*''); comment letter of PricewaterhouseCoopers, LLP (Aug. 25, 2011) (''*PWC Letter*''); comment letter of Citrin Cooperman & Co., LLP (Aug. 25, 2011) (''*Citrin Letter*''); comment letter of Grant Thornton LLP (Aug. 26, 2011) (''*Grant Thornton Letter*''); comment letter of James J. Angel (Aug. 26, 2011) (''*Angel Letter*''); comment letter of James J. Angel (Aug. 26, 2011) (''*Angel Letter II*''); comment letter of McGladrey & Pullen, LLP (Aug. 26, 2011) (''*McGladrey Letter*''); comment letter of the Certified Financial Planner Board of Standards, Inc. (Aug. 26, 2011) (''*CFP Letter*''); comment letter of Integrated Management Solutions USA LLC (Aug. 26, 2011) (''*IMS Letter*''); comment letter of the American Institute of Certified Public Accountants (Aug. 26, 2011) (''*AICPA Letter*''); comment letter of the Committee of Annuity Insurers (Aug. 26, 2011) (''*CAI Letter*''); comment letter of Ernst & Young LLP (Aug. 26, 2011) (''*E&Y Letter*''); comment letter of Van Kampen Funds Inc. and Invesco Distributors, Inc. (Aug. 26, 2011) (''*Van Kampen/Invesco Letter*''); comment letter of Suzanne H. Shatto (Sept. 13, 2011) (''*Shatto Letter IV*); comment letter N.M. Hamlet (Sept. 14, 2011) (''*Hamlet Letter II*''); comment letter of the Federal Regulation of Securities Committee, Business Law Section, American Bar Association (Sept. 15, 2011) (''*ABA Letter*''); and comment letter of the Committee of Annuity Insurers (Apr. 17, 2012) (''*CAI II Letter*''). The comment letters are available on the Commission's Web site at *http://www.sec.gov/comments/s7-23-11/s72311.shtml*. Comments are also available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street NE., Washington, DC (File No. S7–23–11).

[12] *See CAQ Letter; Deloitte Letter; E&Y Letter; Grant Thornton Letter; KPMG Letter; PWC Letter.*

[13] 17 CFR 240.15c3–1 (a rule prescribing net capital requirements for broker-dealers).

[14] 17 CFR 240.15c3–3 (a rule prescribing requirements regarding the holding of customer securities and funds by broker-dealers).

[15] 17 CFR 240.17a–13 (a rule requiring broker-dealers to perform quarterly securities counts).

[16] *See, e.g.,* Rule 9.12 of the Chicago Board Options Exchange (''CBOE''); NASD Rule 2340 of the Financial Industry Regulatory Authoirty (''FINRA'').

[17] *See* 17 CFR 240.15c3–1. The rule requires that a broker-dealer perform two calculations: (1) A computation of the minimum amount of net capital the broker-dealer must maintain; and (2) a computation of the amount of net capital the broker-dealer is maintaining. *See* 17 CFR 240.15c3–1(a) and (c)(2). The computation of net capital is based on the definition of the term ''net capital'' in paragraph (c)(2) of Rule 15c3–1. *Id.* Generally, a broker-dealer's minimum net capital requirement is the greater of a fixed-dollar amount specified in the rule and an amount determined by applying one of two financial ratios. *See* 17 CFR 240.15c3–1(a).

[18] *See* 17 CFR 240.15c3–1(c)(2)(i)–(xiii).

[19] *See* 17 CFR 240.15c3–1(c)(15).

[20] *See* 17 CFR 240.15c3–1(c)(2)(vi).

[21] *See, e.g., Uniform Net Capital Rule,* Exchange Act Release No. 13635 (June 16, 1977), 42 FR 31778 (June 23, 1977).

[22] *See* 15 U.S.C. 78o(c)(3)(A).

[23] *See* 17 CFR 240.15c3–3(d). *Control* means the broker-dealer must hold these securities free of lien in one of several locations specified in the rule (*e.g.,* at a bank or clearing agency). *See* 17 CFR 240.15c3–3(c). The broker-dealer must make a daily determination from its books and records (as of the preceding day) of the quantity of fully paid and excess margin securities not in its possession or control. *See* 17 CFR 240.15c3–3(d). If the amount in the broker-dealer's possession or control is less than the amount indicated as being held for customers on the broker-dealer's books and records, the broker-dealer generally must initiate steps to retrieve customer securities from non-control locations or otherwise obtain possession of them or place them in control locations. *Id.* The terms *fully paid securities, margin securities,* and *excess margin securities* are defined in Rule 15c3–3. *See* 17 CFR 240.15c3–3(a)(3), (a)(4), and (a)(5), respectively.

[24] The term *qualified security* is defined in Rule 15c3–3 to mean a security issued by the U.S. or a security in respect of which the principal and interest are guaranteed by the U.S. *See* 17 CFR 240.15c3–3(a)(6).

[25] *See* 17 CFR 240.15c3–3(e). The amount of the net funds owed to customers (''customer reserve requirement'') is computed by adding customer credit items (*e.g.,* cash in securities accounts) and subtracting from that amount customer debit items (*e.g.,* margin loans) pursuant to a formula in Exhibit A to Rule 15c3–3. *See* 17 CFR 240.15c3–3a. Carrying broker-dealers are required to compute the customer reserve requirement on a weekly basis, except where customer credit balances do not exceed $1 million (in which case the computation can be performed monthly, although the broker-dealer must maintain 105% of the required deposit amount and may not exceed a specified aggregate indebtedness limit). *See* 17 CFR 240.15c3–3(e)(3).

funds from the broker-dealer's proprietary business activities. If the broker-dealer fails financially, customers' securities and funds should be readily available to be returned to customers. In addition, if the failed broker-dealer is liquidated in a proceeding under the Securities Investor Protection Act of 1970 (''SIPA''), as amended, the customers' securities and funds should be isolated and readily identifiable as ''customer property'' and, consequently, available to be distributed to customers ahead of other creditors.[26]

Provisions of Rule 15c3–3 exempt a broker-dealer from the requirements of Rule 15c3–3 under certain circumstances.[27] Generally, a broker-dealer is exempt from Rule 15c3–3 if it does not hold customer securities or funds, or, if it does receive customer securities or funds, it promptly delivers the securities or promptly transmits the funds to appropriate persons.[28]

3. The Broker-Dealer Quarterly Securities Count Rule

Rule 17a–13 generally requires a broker-dealer that maintains custody of securities (proprietary, customer, or both), on a quarterly basis, to physically examine and count the securities it holds, account for the securities that are subject to its control or direction but are not in its physical possession (*e.g.,* securities held at a control location), verify the locations of securities under certain circumstances, and compare the results of the count and verification with its records.[29] In accordance with a schedule, the broker-dealer must take an operational capital charge under Rule 15c3–1 for short securities differences (which include securities positions reflected on the broker-dealer's securities record that are not susceptible to either count or confirmation) that are unresolved after discovery.[30] The differences also must be recorded in the broker-dealer's books and records.[31]

4. The Broker-Dealer Account Statement Rules

The Account Statement Rules of DEAs require member broker-dealers to send, at least once every calendar quarter, a statement of account containing a description of any securities positions, money balances, or account activity to each customer whose account had a security position, money balance, or account activity during the period since the last such statement was sent to the customer.[32] The Account Statement Rules provide a key safeguard for customers by requiring that they receive information concerning securities positions and other assets held in their accounts on a regular basis, which they can use to identify discrepancies and monitor the performance of their accounts.

II. Final Amendments to Broker-Dealer Reporting, Audit, Notification, and Other Requirements

A. Overview of New Requirements

The Commission is adopting amendments to the reporting, audit, and notification requirements in Rule 17a–5, and additional amendments to other provisions of the rule, including technical changes. The Commission also is adopting amendments to the notification requirements in Rule 17a–11, and certain other technical amendments to that rule.

Under the amendments to the reporting and audit requirements, broker-dealers must, among other things, file with the Commission annual reports consisting of a financial report and either a compliance report or an exemption report that are prepared by the broker-dealer, as well as certain reports that are prepared by an independent public accountant covering the financial report and the compliance report or the exemption report.[33] The filing of a compliance or exemption report and the related report of the independent public accountant are new requirements. The financial report must contain the same types of financial statements that were required to be filed under Rule 17a–5 prior to these amendments (a statement of financial condition, a statement of income, a statement of cash flows, and certain other financial statements).[34] In addition, the financial report must contain, as applicable, the supporting schedules that were required to be filed under Rule 17a–5 prior to these amendments (a computation of net capital under Rule 15c3–1, a computation of the reserve requirements under Rule 15c3–3, and information relating to the possession or control requirements under Rule 15c3–3).[35]

A broker-dealer that did not claim that it was exempt from Rule 15c3–3 throughout the most recent fiscal year must file the compliance report, and a broker-dealer that did claim it was exempt from Rule 15c3–3 throughout the most recent fiscal year (generally, a ''non-carrying broker-dealer'') must file the exemption report.[36] Broker-dealers must make certain statements and provide certain information relating to the financial responsibility rules in these reports.[37]

In addition to preparing and filing the financial report and the compliance report or exemption report, a broker-dealer must engage a PCAOB-registered independent public accountant to prepare a report based on an examination of the broker-dealer's financial report in accordance with PCAOB standards.[38] A carrying broker-dealer also must engage the PCAOB-registered independent public accountant to prepare a report based on an examination of certain statements in the broker-dealer's compliance report.[39] A non-carrying broker-dealer must engage the PCAOB-registered independent public accountant to prepare a report based on a review of certain statements in the broker-dealer's exemption report.[40] In each case, the examination or review must be conducted in accordance with PCAOB standards. The broker-dealer must file these reports with the Commission along with the financial report and the compliance report or exemption report prepared by the broker-dealer.[41]

The annual reports also must be filed with SIPC if the broker-dealer is a member of SIPC.[42] In addition, broker-dealers must generally file with SIPC a supplemental report on the status of the membership of the broker-dealer in SIPC.[43] The supplemental report must include a report of the independent public accountant that covers the SIPC annual general assessment reconciliation or exclusion from membership forms based on certain

[26] *See* 15 U.S.C. 78aaa *et seq.*

[27] *See* 17 CFR 240.15c3–3(k).

[28] *Id.*

[29] *See* 17 CFR 240.17a–13(b).

[30] *See* 17 CFR 240.15c3–1(c)(2)(v).

[31] *See* 17 CFR 240.17a–3(a)(4)(vi).

[32] *See, e.g.,* CBOE Rule 9.12; NASD Rule 2340.

[33] *See* paragraph (d) of Rule 17a–5.

[34] *See* paragraph (d)(2)(i) of Rule 17a–5. The requirements for the financial report are discussed below in more detail in section II.B.2. of this release.

[35] *See* paragraph (d)(2)(ii) of Rule 17a–5.

[36] *See* paragraphs (d)(1)(i)(B)(*1*) and (*2*) of Rule 17a–5.

[37] *See* paragraphs (d)(3) and (4) of Rule 17a–5. The requirements for the compliance report and the exemption report are discussed below in more detail in section II.B.3. and section II.B.4. of this release, respectively.

[38] *See* paragraphs (f)(1) and (g)(1) of Rule 17a–5.

[39] *See* paragraphs (f)(1) and (g)(2)(i) of Rule 17a–5.

[40] *See* paragraphs (f)(1) and (g)(2)(ii) of Rule 17a–5.

[41] *See* paragraph (d)(1)(i)(C) of Rule 17a–5. The requirements for the engagement of the independent public accountant are discussed below in more detail in section II.D.3. of this release.

[42] *See* paragraph (d)(6) of Rule 17a–5. This requirement is discussed below in more detail in section II.B.6. of this release.

[43] *See* paragraph (e)(4) of Rule 17a–5. This requirement is discussed below in more detail in section II.C.4. of this release.

procedures specified in the rule. In the future, SIPC may determine the format of this report by rule, subject to Commission approval.[44]

Finally, the PCAOB-registered independent public accountant must immediately notify the broker-dealer if the accountant determines during the course of preparing the accountant's reports that the broker-dealer is not in compliance with the financial responsibility rules or if the accountant determines that any material weakness exists in the broker-dealer's internal control over compliance with the financial responsibility rules.[45] The broker-dealer, in turn, must file a notification with the Commission and its DEA under Rule 15c3–1, Rule 15c3–3, or Rule 17a–11 if the independent public accountant's notice concerns an instance of non-compliance that would trigger notification under those rules.[46] Under the amendments to Rule 17a–11, a broker-dealer also must file a notification with the Commission and its DEA if the broker-dealer discovers or is notified by the independent public accountant of the existence of any material weakness (as defined in the amendments) in the broker-dealer's internal control over compliance with the financial responsibility rules.[47]

Each of these amendments is discussed in more detail in the following sections of this release.

B. Annual Reports To Be Filed—Paragraph (d) of Rule 17a–5

Prior to today's amendments, paragraph (d) of Rule 17a–5 generally required a broker-dealer to annually file the financial statements and supporting schedules discussed below in section II.B.2. of this release and a report prepared by the broker-dealer's independent public accountant covering the financial statements and supporting schedules.[48] The Commission proposed amendments that would, among other things, restructure paragraph (d) and—as part of the proposed revisions to the attestation engagement provisions—add the requirement that a broker-dealer file either a compliance report or an exemption report, as applicable, and a report prepared by the broker-dealer's independent public accountant based on an examination of the compliance report or a review of the exemption report.[49] As discussed in sections II.B.1. through II.B.6. of this release, the Commission is adopting the proposed amendments to paragraph (d) with modifications.[50]

1. Requirement To File Reports—Paragraph (d)(1) of Rule 17a–5

i. Proposed Amendments

The Commission proposed to amend paragraph (d)(1) of Rule 17a–5 [51] to require that a broker-dealer file a financial report containing financial statements and supporting schedules and either a compliance report or an exemption report, as applicable.[52] The proposal provided that a broker-dealer must file a compliance report ''unless the [broker-dealer] is exempt from the provisions of [Rule 15c3–3]'' in which case the broker-dealer would be required to file an exemption report.[53] The proposed amendments also would have required a broker-dealer generally to file reports prepared by an independent public accountant covering the financial report and compliance report or exemption report, as applicable, unless the broker-dealer was exempt from the requirement to file the reports or from the requirement to engage an independent public accountant with respect to the reports.[54] To accommodate these changes, the Commission also proposed to reorganize the provisions of paragraph (d)(1) of Rule 17a–5, and to make other technical amendments.[55]

The proposed amendments with respect to the compliance report and exemption report set forth different requirements for carrying broker-dealers as compared with broker-dealers that do not hold customer securities and funds.[56] In order to provide clarity with respect to this distinction, the proposed amendments referenced Rule 15c3–3, which applies to carrying broker-dealers and contains provisions under which a broker-dealer is exempt from the requirements in the rule. The goal was to establish a clear way of determining whether a broker-dealer would need to file a compliance report or an exemption report. However, not all broker-dealers that are subject to Rule 15c3–3 regularly hold customer securities or funds. This prompted the Commission to inquire in the proposing release as to whether there are broker-dealers that would not qualify to file the proposed exemption report because they are not exempt from Rule 15c3–3, but that should be allowed to file a more limited report than the proposed compliance report based on the limited scope of their business.[57]

ii. Comments Received

The Commission received several comments on its proposed amendments to paragraph (d)(1) of Rule 17a–5.[58] Some commenters asked whether the provision that would require the broker-dealer to file an exemption report instead of a compliance report related to a period end date or to a period of time.[59] Further, as discussed in more detail in sections II.B.4. and II.D.3. of this release, commenters raised questions and concerns about how instances of exceptions to meeting the exemption provisions of paragraph (k) of Rule 15c3–3 would be treated under the proposed reporting requirements.[60] One commenter also stated that ''limited purpose'' carrying broker-dealers should not be required to file a compliance report, and broker-dealers with certain business model characteristics should not be required to file the compliance report.[61] Similarly, another commenter stated that broker-dealers engaging

[44] *Id.* Currently, Rule 17a–5 prescribes the format of the report. *See* 17 CFR 240.17a–5.

[45] *See* paragraph (h) of Rule 17a–5. As discussed below, material weakness is defined for purposes of the compliance report and, therefore, the notification of a material weakness only can occur in the context of the audit of a broker-dealer that files a compliance report.

[46] *Id.* Notifications under Rule 17a–11 also must be filed with the CFTC if the broker-dealer is registered as a FCM with the CFTC. *See* 17 CFR 240.17a–11(g).

[47] *See* paragraph (e) of Rule 17a–11. These notification provisions are discussed below in more detail in section II.F. of this release.

[48] *See* 17 CFR 240.17a–5(d)(1)(i). Certain types of broker-dealers were exempt from the requirement to file the reports or to file reports that had been audited by an independent public accountant. *See* 17 CFR 240.17a–5(d)(1)(ii)–(iii).

[49] *See Broker-Dealer Reports,* 76 FR at 37575–37581.

[50] Before today's amendments, paragraph (d) of Rule 17a–5 was titled ''Annual filing of audited financial statements.'' In the proposing release, the Commission proposed to change the title to ''Annual reports'' to reflect that, under the proposed amendments to paragraph (d), broker-dealers would be required to prepare and file two reports with the Commission—a financial report and a compliance report or an exemption report. *See Broker-Dealer Reports,* 76 FR at 37575. The Commission received no comments on this proposal and is adopting the new title as proposed. *See* paragraph (d) of Rule 17a–5. In addition, the Commission is making a technical amendment to paragraph (d) of Rule 17a–5 to replace the term ''fiscal or calendar year'' with the term ''fiscal year.'' The Commission is adopting this technical amendment because the term ''fiscal year'' includes instances in which December 31st, *i.e.,* the calendar year end, is the broker-dealer's fiscal year end.

[51] *See* 17 CFR 240.17a–5(d)(1).

[52] *See Broker-Dealer Reports,* 76 FR at 37575.

[53] *Id.*

[54] *Id.*

[55] *Id.* at 37575–37578, 37603–37604.

[56] *Id.* at 37575–37578, 37580–37581 (discussing the compliance report and exemption report, respectively).

[57] *Id.* at 37581.

[58] *See, e.g., CAI Letter; CAI II Letter; CAQ Letter; Citrin Letter; Deloitte Letter; Grant Thornton Letter; KPMG Letter; McGladrey Letter.*

[59] *See CAQ Letter; Deloitte Letter; Grant Thornton Letter; KPMG Letter.*

[60] *See CAI Letter; SIFMA Letter.*

[61] *See CAI Letter; CAI II Letter.*

exclusively in proprietary trading or investment banking may not technically be exempt from Rule 15c3–3 but nonetheless should not have to file the compliance report as they do not have ''customers.'' [62] Finally, one commenter stated that the Commission should clarify who must sign the compliance reports and exemption reports and the liability that attaches in the event of a misstatement or omission in the reports.[63]

iii. The Final Rule

After considering these comments, the Commission is adopting the proposed amendments with certain modifications.[64] Under the final rule, all broker-dealers generally must prepare and file a financial report and either the compliance report or the exemption report.[65] A broker-dealer that did not claim an exemption from Rule 15c3–3 at any time during the most recent fiscal year or claimed an exemption for only part of the fiscal year must prepare and file the compliance report.[66] A broker-dealer must prepare and file the exemption report if the firm *did claim* that it was exempt from Rule 15c3–3 throughout the most recent fiscal year.[67] Broker-dealers also must file reports prepared by a PCAOB-registered independent public accountant covering the financial report and the compliance report or exemption report, as applicable.[68]

The final rule is modified from the proposal in three key ways. First, the final rule provides that the broker-dealer must file the exemption report if it did ''claim that it was exempt'' from Rule 15c3–3 [69] throughout the most recent fiscal year.[70] This modification from the proposal—which provided that a broker-dealer ''shall'' file the exemption report if the broker-dealer ''is exempt from the provisions of [Rule 15c3–3]''—is designed to provide greater clarity as to whether a broker-dealer must file the exemption report (as opposed to the compliance report), particularly when the broker-dealer had exceptions to meeting the exemption provisions in paragraph (k) of Rule 15c3–3 during the fiscal year.[71] Specifically, if the broker-dealer claimed an exemption from Rule 15c3–3 in its *Financial and Operational Combined Uniform Single Reports* (''FOCUS Reports'') throughout the fiscal year,[72] it must file the exemption report even it had exceptions to the exemption provisions.[73] Consequently, the applicability of the exemption report under the final rule is based on an objective and easily ascertainable factor: whether the broker-dealer claimed an exemption from Rule 15c3–3 throughout the most recent fiscal year.[74]

As noted above, several commenters argued that broker-dealers that engage in limited custodial activities and, therefore, are not exempt from Rule 15c3–3, should not be required to file a compliance report.[75] Specifically, one of these commenters suggested that a ''new'' category of ''limited purpose'' broker-dealer with certain business model characteristics should be addressed in the rule and that this ''new'' category of broker-dealer should not be required to file the compliance report.[76] The Commission has considered these comments but has determined not to provide for a broader exception from the requirement to file a compliance report for broker-dealers with limited custodial activities. The objectives of the compliance report and related examination of the compliance report are intended, among other things, to ''increase the focus of independent public accountants on the custody practices of broker-dealers'' and to ''help identify broker-dealers that have weak controls for safeguarding investor assets.'' [77] Therefore, broker-dealers that hold customer assets—even if their custodial activities are limited—generally should be subject to the requirement to file the compliance report and related accountant's report.[78]

[62] *See McGladrey Letter.*

[63] *See CAI Letter.*

[64] *See* paragraph (d)(1) of Rule 17a–5. Paragraph (d)(1)(iii) of Rule 17a–5 (now re-designated as paragraph (d)(1)(iv)) contains an exemption from filing an annual report if the broker-dealer is a member of a national securities exchange and has transacted business in securities solely with or for other members of a national securities exchange, and has not carried any margin account, credit balance or security for any person who is defined as a ''customer'' in paragraph (c)(4) of Rule 17a–5. *See* paragraph (d)(1)(iv) of Rule 17a–5. The Commission also proposed to move the exemptions from having to file financial statements under paragraph (d) of Rule 17a–5 from paragraphs (d)(1)(ii) and (d)(1)(iii) of Rule 17a–5 to paragraphs (d)(1)(iii) and (d)(1)(iv), respectively. The Commission received no comments on these amendments and is adopting them as proposed. *See* paragraphs (d)(1)(iii) and (d)(1)(iv) of Rule 17a–5. For clarity, the amendments to paragraph (d)(1)(i) of Rule 17a–5 include a reference to the exemptions from the requirement for a broker-dealer to file the annual reports so that the paragraph now states ''[e]xcept as provided in paragraphs (d)(1)(iii) and (d)(1)(iv) of this section, every broker or dealer registered under section 15 of the Act must file annually . . . .'' *See* paragraph (d)(1)(i) of Rule 17a–5. As proposed, the final rule provided that the reports must be filed annually ''on a calendar or fiscal year basis.'' The final rule deletes the phrase ''on a calendar or fiscal year basis'' as the rule provides elsewhere that the annual reports must be filed on a fiscal year basis. *Id.* In addition, the Commission proposed to move the requirement that reports under paragraph (d) of Rule 17a–5 be as of the same fixed or determinable date each year, unless a change is approved in writing by the broker-dealer's DEA, from paragraph (d)(1)(i) of Rule 17a–5 to paragraph (d)(1)(ii). The Commission received no comments on this proposed amendment and is adopting it substantially as proposed. *See* paragraph (d)(1)(ii) of Rule 17a–5. The final rule also includes a technical modification from the proposal to require that the reports required to be filed under paragraph (d) must be as of the same ''fiscal year end each year,'' rather than as of the same ''fixed or determinable date each year.'' *See* paragraph (d)(1)(ii) of Rule 17a–5. This change, by having the rule refer to the broker-dealer's ''fiscal year,'' eliminates outdated language and conforms the language in paragraph (d) of Rule 17a–5 to language in paragraph (n) of Rule 17a–5. *See* 17 CFR 240.17a–5(n). The final rule also adds a clarifying cross-reference to the provision in Rule 17a–5 pursuant to which a broker-dealer requests a change of its fiscal year end. *See* paragraph (d)(1)(i) of Rule 17a–5. Furthermore, the final rule requires that a copy of the written approval by the broker-dealer's DEA of a change in the broker-dealer's fiscal year be sent to the Commission's principal office in Washington, DC, in addition to the regional office of the Commission for the region in which the broker-dealer has its principal place of business. *Id.* This change is consistent with paragraph (n) of Rule 17a–5, which requires that when a broker-dealer changes its fiscal year, it must file a notice with the Commission's principal office in Washington, DC as well as the regional office of the Commission for the region in which the broker-dealer has its principal place of business. *See* 17 CFR 240.17a–5(n).

[65] *See* paragraph (d)(1)(i) of Rule 17a–5. The financial report, compliance report, and exemption report are discussed below in more detail in sections II.B.2., II.B.3., and II.B.4., respectively, of this release.

[66] *See* paragraph (d)(1)(i)(B)(*1*) of Rule 17a–5.

[67] *See* paragraph (d)(1)(i)(B)(*2*) of Rule 17a–5.

[68] *See* paragraph (d)(1)(i)(C) of Rule 17a–5. The proposed requirements and final rule with respect to the attestation engagement for the independent public accountant are discussed below in section II.D. of this release.

[69] *See* paragraph (d)(1)(i)(B)(2) of Rule 17a–5. A broker-dealer claiming an exemption from Rule 15c3–3 is required to indicate the basis for the exemption on the periodic reports it files with securities regulators. *See, e.g.,* Item 24 of Part IIa of the Financial and Operational Combined Uniform Single Report. *See* 17 CFR 249.617.

[70] As discussed below in more detail in section II.B.4. of this release, the provisions of paragraph (k) of Rule 15c3–3 prescribe ''exemptions'' from the requirements of Rule 15c3–3. *See* 17 CFR 240.15c3–3(k)(1), (k)(2)(i), (k)(2)(ii), and (k)(3).

[71] *See CAI Letter; SIFMA Letter.*

[72] The FOCUS Reports are: Form X–17A–5 Schedule I; Form X–17A–5 Part II; Form X–17A–5 Part IIa; Form X–17A–5 Part IIb; and Form X–17A–5 Part III.

[73] As discussed in detail below in section II.B.4. of this release, a broker-dealer that has exceptions to meeting the exemption provisions in paragraph (k) of Rule 15c3–3 must identify them in the exemption report.

[74] *See* discussion in section II.B.4. of this release. There may be circumstances in which a broker-dealer has not held customer securities or funds during the fiscal year, but does not fit into one of the exemptive provisions listed under Item 24 of Part IIa. Even though there is not a box to check on the FOCUS Report, these broker-dealers should file an exemption report and related accountant's report.

[75] *See, e.g., CAI Letter; CAI II Letter; McGladrey Letter.*

[76] *See CAI II Letter.*

[77] *See Broker-Dealer Reports,* 76 FR at 37599.

[78] Broker-dealers with extremely limited custodial activities (*e.g.,* holding customer checks made out to a third party for limited periods of

Continued

The level of effort required by carrying broker-dealers to prepare a compliance report will depend on the nature and extent of their activities. For example, the controls of a carrying broker-dealer that engages in limited custodial activities could be less complex than the controls of a carrying broker-dealer that engages in more extensive custodial activities.[79] Therefore, this requirement is intended to be scalable so that a carrying broker-dealer with limited custodial activities generally should have to expend less effort to support its statements in the compliance report, particularly with respect to the statements relating to Rules 15c3–3 and 17a–13.

The second key modification is that the final rule provides that the requirement to file the exemption report applies if the broker-dealer did claim that it was exempt from Rule 15c3–3 ''throughout the most recent fiscal year.'' [80] Thus, a broker-dealer that did not claim an exemption from Rule 15c3–3 at any time during the most recent fiscal year or claimed an exemption for only part of the fiscal year must file the compliance report.[81]

The third key modification is that the final rule specifies the individual who must execute the compliance reports and exemption reports.[82] As noted above, one commenter stated that the Commission should make clear who should sign the compliance reports and exemption reports and what liability attaches in the event of a misstatement or omission.[83] The commenter suggested a reasonableness standard, and stated that the Commission should make clear that the reports do not create a new private right of action.[84] In response to this comment, the final rule provides that the compliance report and the exemption report must be executed by the person who makes the oath or affirmation under paragraph (e)(2) of Rule 17a–5.[85] As discussed below in more detail in section II.C.2. of this release, paragraph (e)(2) of Rule 17a–5 requires an oath or affirmation to be attached to the financial report and provides that the oath or affirmation must be made by certain types of persons depending on the corporate form of the broker-dealer (*e.g.,* a duly authorized officer if the broker-dealer is a corporation).[86] The requirement to file these new reports with the Commission is not intended to establish a new private cause of action.

2. The Financial Report—Paragraph (d)(2) of Rule 17a–5

Before today's amendments, paragraph (d)(2) of Rule 17a–5 required that the annual audited report of a broker-dealer contain certain financial statements in a format consistent with Form X–17A–5 Part II or Form X–17A–5 Part IIa, as applicable, including a statement of financial condition, an income statement, a statement of cash flows, a statement of changes in owners' equity, and a statement of changes in liabilities subordinated to claims of general creditors.[87] Paragraph (d)(3) of Rule 17a–5 required that the annual audited report contain supporting schedules, including a computation of net capital under Rule 15c3–1, a computation for determining reserve requirements under Rule 15c3–3, and information relating to the possession and control requirements of Rule 15c3–3.[88] Paragraph (d)(4) of Rule 17a–5 required a reconciliation between the net capital and reserve computations in the audited report and those in the most recent Form X–17A–5 Part II or Form X–17A–5 Part IIa, if there were material differences between the annual audited report and the form.[89]

The Commission proposed combining the provisions in paragraphs (d)(2) through (d)(4) of Rule 17a–5 in revised paragraph (d)(2) without substantive modification to those provisions.[90] In addition, the Commission proposed that revised paragraph (d)(2) be titled ''Financial report'' to reflect that the information required in this report would be financial in nature and to differentiate it from the proposed compliance reports and exemption reports. The Commission did not receive comments concerning the amendments to paragraph (d)(2) of Rule 17a–5 and is adopting them substantially as proposed.[91]

3. The Compliance Report—Paragraph (d)(3) of Rule 17a–5

i. The Proposed Amendments

As proposed, the requirements for the contents of the compliance report were prescribed in paragraph (d)(3) of Rule 17a–5.[92] Under the proposal, a carrying broker-dealer would need to include in the compliance report a specific statement, certain assertions, and descriptions.[93] The independent public accountant would examine the assertions in the compliance report in preparing the report of the accountant.[94]

time) could seek exemptive relief under section 36 of the Exchange Act (15 U.S.C. 77mm) from the requirement to file the compliance report and report of the independent public accountant covering the compliance report.

[79] As discussed below in section II.D. of this release, the PCAOB has proposed attestation standards for an independent public accountant's examination of the compliance report and the review of the exemption report. The proposed examination standard provides procedural requirements for independent public accountants that are ''designed to be scalable based on the broker's or dealer's size and complexity.'' *See Proposed Standards for Attestation Engagements Related to Broker and Dealer Compliance or Exemption Reports Required by the U.S. Securities and Exchange Commission and Related Amendments to PCAOB Standards,* PCAOB Release No. 2011–004, PCAOB Rulemaking Docket Matter No. 035 (July 12, 2011) at 8 (''*PCAOB Proposing Release*'').

[80] *See* paragraphs (d)(1)(i)(B)(*1*)–(*2*) of Rule 17a–5.

[81] There will be cases where a broker-dealer changes its business model to convert from a carrying broker-dealer to a non-carrying broker-dealer during the fiscal year. In this case, the broker-dealer could seek exemptive relief under section 36 of the Exchange Act (15 U.S.C. 78mm) from the requirement to file the compliance report and to instead file the exemption report. In analyzing such a request, the period of time the broker-dealer operated as a carrying broker-dealer would be a relevant consideration.

[82] *See* paragraphs (d)(1)(i)(B)(*1*)–(*2*) of Rule 17a–5.

[83] *See CAI Letter.* The filings discussed above constitute a ''report'' for purposes of 15 U.S.C. 78ff(a) and other applicable provisions of the Exchange Act. As a consequence, it would be unlawful for a broker-dealer to willfully make or cause to be made, a false or misleading statement of a material fact or omit to state a material fact in the filings.

[84] *Id.*

[85] *See* paragraphs (d)(1)(i)(B)(*1*)–(*2*) of Rule 17a–5.

[86] *See* paragraph (e)(2) of Rule 17a–5.

[87] *See* 17 CFR 240.17a–5(d)(2). As noted above, Form X–17A–5 Part II and Form X–17A–5 Part IIa are among the FOCUS Reports that broker-dealers complete and file with the Commission or their DEA on a periodic basis. *See* 17 CFR 240.17a–5(a) and 17 CFR 249.617. These two forms require broker-dealers to file monthly or quarterly financial information with the Commission or their DEA, including information about the broker-dealer's: (1) Assets and liabilities; ownership equity; net capital computation under Rule 15c3–1; minimum net capital requirement under Rule 15c3–1; income (loss); computation of the customer reserve requirement under Rule 15c3–3 in the case of Form X–17A–5 Part II; the possession and control requirements under Rule 15c3–3 in the case of Form X–17A–5 Part II; and changes in ownership equity.

[88] *See* 17 CFR 240.17a–5(d)(3).

[89] *See* 17 CFR 240.17a–5(d)(4).

[90] *See Broker-Dealer Reports,* 76 FR at 37575.

[91] *See* paragraph (d)(2) of Rule 17a–5. The Commission has made plain English changes to the language of the paragraph (*e.g.,* replacing the term ''shall'' with ''must''). The Commission also, consistent with current practice, has clarified that the financial statements must be prepared in accordance with U.S. GAAP to distinguish from other accounting frameworks. *See* paragraph (d)(2) of Rule 17a–5. In addition, the Commission has replaced the words ''notes to the consolidated statement of financial condition'' with ''notes to the financial statements.'' This change in terminology is designed to conform the language in Rule 17a–5 to current accounting practice. Under GAAP, notes to a complete set of financial statements must cover all the financial statements, and not just one of the statements, such as the consolidated statement of financial condition.

[92] *See Broker-Dealer Reports,* 76 FR at 37575–37578.

[93] *Id.*

[94] *Id.* The independent public accountant would not have been required to examine the proposed

Specifically, as proposed, the carrying broker-dealer would be required to include in the compliance report a statement as to whether the firm has established and maintained a system of internal control to provide the broker-dealer with reasonable assurance that any instances of material non-compliance with the financial responsibility rules will be prevented or detected on a timely basis.[95] In addition, the compliance report would need to include the following three assertions: (1) Whether the broker-dealer was in compliance in all material respects with the financial responsibility rules as of its fiscal year end; (2) whether the information used to assert compliance with the financial responsibility rules was derived from the books and records of the broker-dealer; and (3) whether internal control over compliance with the financial responsibility rules was effective during the most recent fiscal year such that there were no instances of material weakness.[96] Finally, the carrying broker-dealer would need to include in the compliance report a description of each identified instance of material non-compliance and each identified material weakness in internal control over compliance with the financial responsibility rules.[97] The independent public accountant would examine the assertions in preparing the report of the accountant.[98] The independent public accountant would not examine the statement regarding the establishment of the system of internal control.

Under the proposal, the broker-dealer would not be able to assert compliance with the financial responsibility rules as of its most recent fiscal year end if it identified one or more instances of material non-compliance.[99] Similarly, the broker-dealer would not be able to assert that its internal control over compliance with the financial responsibility rules during the fiscal year was effective if one or more material weaknesses existed with respect to internal control over compliance.[100]

An instance of *material non-compliance* was proposed to be defined as a failure by the broker-dealer to comply with any of the requirements of the financial responsibility rules in all material respects.[101] When determining whether an instance of non-compliance is material, the Commission stated that the broker-dealer should consider all relevant factors including but not limited to: (1) The nature of the compliance requirements, which may or may not be quantifiable in monetary terms; (2) the nature and frequency of non-compliance identified; and (3) qualitative considerations.[102] The Commission also stated that some deficiencies would necessarily be instances of material non-compliance, including failing to maintain the required minimum amount of net capital under Rule 15c3–1 or failing to maintain the minimum deposit requirement in a special reserve bank account for the exclusive benefit of customers under Rule 15c3–3.[103]

The term *material weakness* was proposed to be defined as a deficiency, or a combination of deficiencies, in internal control over compliance with the financial responsibility rules, such that there is a reasonable possibility that material non-compliance with the financial responsibility rules will not be prevented or detected on a timely basis.[104] The proposed definition of material weakness was modeled on the definition of material weakness in a Commission rule—Rule 1–02(a)(4) of Regulation S–X [105]—and in auditing literature governing financial reporting.[106] In the proposing release, the Commission stated that a deficiency in internal control over compliance would exist when the design or operation of a control does not allow the broker-dealer, in the normal course of performing its assigned functions, to prevent or detect non-compliance with the financial responsibility rules on a timely basis.[107] The Commission also stated that, for purposes of the proposed definition of the term *material weakness,* there is a reasonable possibility of an event occurring if it is probable or reasonably possible.[108] The Commission further stated that an event is probable if the future event or events are likely to occur and that an event is reasonably possible if the chance of the future event or events occurring is more than remote, but less than likely.[109]

ii. Comments Received

The Commission received a number of comments on the proposed compliance report. Generally, the comments focused on the intended scope of the compliance report and the assertions to be included. Specifically, many commenters raised concerns about what would constitute ''material non-compliance.'' [110] Several of these commenters urged the Commission to provide guidance with additional specific examples or quantitative and qualitative factors to be considered when determining whether non-compliance was material.[111] One commenter proposed alternate definitions for material non-compliance and material weakness and provided examples of non-compliance that should not be regarded as material.[112]

Commenters also addressed the time period covered by the assertion relating to effectiveness of internal control. In particular, some commenters stated that the proposed assertion that internal control was effective should be as of a point in time, as opposed to ''during the fiscal year.'' [113] One commenter stated that broker-dealers that must file the internal control report required under

''statement'' and descriptions in the compliance report.

[95] *See Broker-Dealer Reports,* 76 FR at 37575–37576.

[96] *Id.*

[97] *Id.*

[98] *Id.* GAAS and PCAOB standards for attestation engagements provide that accountants ordinarily should obtain written assertions in an examination or review engagement. *See, e.g.,* PCAOB Interim Attestation Standard, *AT Section 101* at ¶ .09. Accordingly, the Commission proposed that the independent public accountant's report cover only the three assertions in the compliance report.

[99] *See Broker-Dealer Reports,* 76 FR at 37576–37577.

[100] *Id.* at 37577.

[101] *Id.*

[102] *Id.*

[103] *Id.*

[104] *Id.*

[105] *See* 17 CFR 210.1–02(a)(4); 17 CFR 240.12b–2.

[106] *See* PCAOB Auditing Standard, *AS No. 5* app. A at ¶ A7; American Institute of Certified Public Accountants (''AICPA''), *AU Section 325* at ¶ .06.

[107] *See Broker-Dealer Reports,* 76 FR at 37577.

[108] *Id. See also Commission Guidance Regarding Management's Report on Internal Control Over Financial Reporting Under Section 13(a) or 15(d) of the Securities Exchange Act of 1934,* Securities Act of 1933 Release No. 8810 (June 20, 2007), 72 FR 35324, 35332 n.47 and corresponding text (June 27, 2007).

[109] *Broker-Dealer Reports,* 76 FR at 37577. The Commission has stated in other contexts that there is a reasonable possibility of an event occurring if it is ''probable'' or ''reasonably possible.'' *See Amendments to Rules Regarding Management's Report on Internal Control Over Financial Reporting,* Exchange Act Release No. 55928 (June 20, 2007), 72 FR 35310 (June 27, 2007). *See also* 17 CFR 240.12b-2; 17 CFR 210.1–02. Commission guidance provides that an event is ''probable'' if the future event or events are likely to occur, and that an event is ''reasonably possible'' if the chance of the future event or events occurring is more than remote, but less than likely. *See Commission Guidance Regarding Management's Report on Internal Control Over Financial Reporting Under Section 13(a) or 15(d) of the Securities Exchange Act of 1934,* 72 FR at 35332 n.47 and corresponding text.

[110] *See ABA Letter; CAI Letter; CAQ Letter; Deloitte Letter; E&Y Letter; Grant Thornton Letter; KPMG Letter; McGladrey Letter; PWC Letter; SIFMA Letter; Van Kampen/Invesco Letter.*

[111] *See ABA Letter; CAQ Letter; E&Y Letter; KPMG Letter; McGladrey Letter; PWC Letter.*

[112] *See SIFMA Letter.*

[113] *See Deloitte Letter; E&Y Letter; Grant Thornton Letter; KPMG Letter.*

Rule 206(4)–2 should be able to elect to make the assertion pertain to the entire fiscal year in order to satisfy reporting requirements under the IA Custody Rule.[114] Others stated that broker-dealers should have the opportunity to remediate any material weaknesses in internal control that were identified during the period and, if corrective action was taken, not be required to include them in the compliance report.[115]

Regarding the proposed assertion that the broker-dealer was in compliance with the financial responsibility rules, one commenter stated that broker-dealers may need to interpret certain requirements and in other cases broker-dealers may be relying on informal interpretations obtained through dialogue with the Commission or its DEA.[116] This commenter recommended that in those circumstances the Commission require broker-dealers to formally document such interpretations and obtain evidence of agreements reached with the Commission or the DEA.

Some commenters stated that the Commission should provide additional guidance about the control objectives that would need to be met to achieve effective internal control over compliance with the financial responsibility rules.[117] Several commenters urged the Commission to clarify the interaction between material weaknesses in internal control over financial reporting and material weaknesses in internal control over compliance with the financial responsibility rules.[118] One commenter stated that the compliance report was over-inclusive and burdensome, and suggested that the final rule focus instead on ''issues most vital to the financial condition of the broker-dealer and its compliance and internal control over compliance.'' [119]

Some commenters had questions and comments about the proposed assertion that information used to assert compliance with the financial responsibility rules was derived from the books and records of the broker-dealer. Three commenters asked whether ''books and records'' means records maintained under Rule 17a–3.[120]

iii. The Final Rule

The Commission is adopting the proposed amendments to Rule 17a–5 requiring a carrying broker-dealer to prepare and file a compliance report, with modifications, some of which are in response to comments.[121] Generally, as adopted, the broker-dealer's compliance report will include five specific statements, and two descriptions, if applicable.

Specifically, paragraph (d)(3) of Rule 17a–5 requires that the compliance report contain statements as to whether: (1) The broker-dealer has established and maintained Internal Control Over Compliance (which, as discussed below, is a defined term in the final rule); (2) the Internal Control Over Compliance of the broker-dealer was effective during the most recent fiscal year; (3) the Internal Control Over Compliance of the broker-dealer was effective as of the end of the most recent fiscal year; (4) the broker-dealer was in compliance with Rule 15c3–1 and paragraph (e) of Rule 15c3–3 as of the end of the most recent fiscal year; and (5) the information the broker-dealer used to state whether it was in compliance with Rule 15c3–1 and paragraph (e) of Rule 15c3–3 was derived from the books and records of the broker-dealer. Further, if applicable, the compliance report must contain a description of: (1) Each identified material weakness in the Internal Control Over Compliance during the most recent fiscal year, including those that were identified as of the end of the fiscal year; and (2) any instance of non-compliance with Rule 15c3–1 or paragraph (e) of Rule 15c3–3 as of the end of the most recent fiscal year.

The final rule does not use the term assertion—the assertions contained in the proposal are now referred to as statements.[122] The consistent use of the term statements is designed to simplify the structure of the rule rather than to substantively change the nature of the matters stated in the compliance report or which of the statements are to be examined by the independent public accountant.

In the final rule, the first statement in the compliance report is whether the broker-dealer has established and maintained Internal Control Over Compliance.[123] The rule defines *Internal Control Over Compliance* to mean internal controls that have the objective of providing the broker-dealer with reasonable assurance that non-compliance with the financial responsibility rules will be prevented or detected on a timely basis.[124] In order to clarify the application of the rule, the proposal has been modified so that part of the statement contained in the proposed compliance report, as to the broker-dealer's system of internal control, has been incorporated in the definition of *Internal Control Over Compliance* in the final rule.[125] Under the final rule, a broker-dealer cannot state that it has established and maintained Internal Control Over Compliance if the internal controls do not provide the broker-dealer with reasonable assurance that non-compliance with the financial responsibility rules will be prevented or detected on a timely basis.

The final rule also provides that a broker-dealer is not permitted to conclude that its Internal Control Over Compliance was effective if there were one or more material weaknesses in its Internal Control Over Compliance.[126] A *material weakness* is defined as a deficiency, or a combination of deficiencies, in the broker-dealer's Internal Control Over Compliance such that there is a reasonable possibility [127] that non-compliance with Rule 15c3–1 or paragraph (e) of Rule 15c3–3 will not be prevented or detected on a timely basis, or that non-compliance to a material extent with Rule 15c3–3, except for paragraph (e), Rule 17a–13 or any Account Statement Rule will not be prevented or detected on a timely

[114] *See E&Y Letter.* This commenter also stated that a point-in-time assessment would be consistent with the requirement for issuers subject to internal control reporting under section 404 of the Sarbanes-Oxley Act. Further, for carrying broker-dealers that are not subject to Rule 206(4)–2, this commenter stated that the incremental benefits of having the assertion pertain to the entire year rather than the year end assessment does not justify the cost. *Id.*

[115] *See CAQ Letter; Deloitte Letter; McGladrey Letter.*

[116] *See E&Y Letter.*

[117] *See Angel Letter; Deloitte Letter.*

[118] *See Deloitte Letter; KPMG Letter; PWC Letter.*

[119] *See CAI Letter.*

[120] *See CAQ Letter; Deloitte Letter; E&Y Letter.*

[121] *See* paragraph (d)(3) of Rule 17a–5.

[122] *See* paragraphs (d)(3)(i)(A)(*1*)–(*5*) of Rule 17a–5.

[123] *See* paragraph (d)(3)(i)(A)(*1*) of Rule 17a–5.

[124] *See* paragraph (d)(3)(ii) of Rule 17a–5.

[125] *Id.*

[126] *See* paragraph (d)(3)(iii) of Rule 17a–5. *See also* 17 CFR 229.308(a)(3) (providing that ''[m]anagement is not permitted to conclude that the registrant's internal control over financial reporting is effective if there are one or more material weaknesses in the registrant's internal control over financial reporting.'').

[127] As noted above, the Commission has stated in other contexts that there is a reasonable possibility of an event occurring if it is ''probable'' or ''reasonably possible.'' *See Amendments to Rules Regarding Management's Report on Internal Control Over Financial Reporting,* 72 FR 35310. *See also* 17 CFR 240.12b–2; 17 CFR 210.1–02. Commission guidance provides that an event is ''probable'' if the future event or events are likely to occur, and that an event is ''reasonably possible'' if the chance of the future event or events occurring is more than remote, but less than likely. *See Commission Guidance Regarding Management's Report on Internal Control Over Financial Reporting Under Section 13(a) or 15(d) of the Securities Exchange Act of 1934,* 72 FR at 35332 n.47 and corresponding text.

basis.[128] A deficiency in Internal Control Over Compliance exists when the design or operation of a control does not allow the management or employees of the broker-dealer to prevent or detect on a timely basis non-compliance with the financial responsibility rules in the normal course of performing their assigned functions.

The final amendments reflect several other key changes from the proposal. For example, one commenter stated that the compliance report was overinclusive and burdensome, and therefore suggested that the final rule focus on ''issues most vital to the financial condition of the broker-dealer and its compliance and internal control over compliance.'' [129] The final rule requires a statement as to whether the broker-dealer was in compliance with Rule 15c3–1 and paragraph (e) of Rule 15c3–3 as of the end of the most recent fiscal year and, if applicable, a description of any instances of non-compliance with these rules as of the fiscal year end. This is a modification from the proposed assertion that the broker-dealer is in compliance with the financial responsibility rules in all *material* respects and proposed description of any material non-compliance with the financial responsibility rules. Thus, the final rule reflects two changes from the proposal: (1) Elimination of the concepts of ''material non-compliance'' and ''compliance in all material respects'' for the purposes of reporting in the compliance report; and (2) a narrowing of these statements and requirements from compliance with all of the financial responsibility rules to compliance with Rule 15c3–1 and paragraph (e) of Rule 15c3–3. In this way, the final rule more narrowly focuses on the core requirements of the financial responsibility rules, as suggested by the commenter.

The ''material non-compliance'' and ''compliance in all material respects'' concepts were designed to limit the types of instances of non-compliance that would prevent a carrying broker-dealer from stating that it was in compliance with the financial responsibility rules. In order to retain a limiting principle, the final rule focuses on provisions that trigger notification requirements when they are not complied with, namely, Rule 15c3–1 and the customer reserve requirement in paragraph (e) of Rule 15c3–3.[130] Any instance of non-compliance with these requirements as of the fiscal year end must be addressed in the compliance report. As stated in the proposing release, failing to maintain the required minimum amount of net capital under Rule 15c3–1 or failing to maintain the minimum deposit requirement in a special reserve bank account under paragraph (e) of Rule 15c3–3 would have been instances of material non-compliance under the proposed rule.[131] Accordingly, under the proposal, a broker-dealer would have been required to describe all instances of non-compliance with Rule 15c3–1 and paragraph (e) of Rule 15c3–3. Under the proposal, a broker-dealer also would have been required to describe instances of material non-compliance with Rule 17a–13 and the Account Statement Rules. The final rule is narrower in that a broker-dealer is only required to describe instances of non-compliance with Rule 15c3–1 and paragraph (e) of Rule 15c3–3.

Consistent with these changes, the final rule requires a statement as to whether the carrying broker-dealer has established and maintained *Internal Control Over Compliance,* which is defined as internal controls that have the objective of providing the broker-dealer with reasonable assurance that non-compliance with the financial responsibility rules will be prevented or detected on a timely basis.[132] The definition of *Internal Control Over Compliance* modifies the proposed statement that the carrying broker-dealer has established and maintained a system of internal control to provide the firm with reasonable assurance that any instances of material non-compliance with the financial responsibility rules will be prevented or detected on a timely basis.[133] Thus, the definition eliminates the concept of material non-compliance. Similarly, the proposed assertion as to whether the information used to assert compliance with the financial responsibility rules was derived from the books and records of the carrying broker-dealer has been modified to a statement as to whether the information used to state whether the carrying broker-dealer was in compliance with Rule 15c3–1 and paragraph (e) of Rule 15c3–3 was derived from the broker-dealer's books and records.[134]

The definition of *material weakness* similarly has been modified from the proposal. Under the final rule, a *material weakness* would include deficiencies in internal control relating to ''non-compliance'' with Rule 15c3–1 or paragraph (e) of Rule 15c3–3, and ''non-compliance to a material extent'' with Rule 15c3–3, except for paragraph (e), Rule 17a–13, and the Account Statement Rules.[135] This modification of the definition of *material weakness* is based on the practical difficulties in creating a system of control that will eliminate a reasonable possibility of the occurrence of any instances of non-compliance with certain requirements of the financial responsibility rules. For example, the inadvertent failure to send one account statement out of thousands of such statements would not constitute non-compliance to a material extent with the Account Statement Rules though it would be an instance of non-compliance.

Further, and consistent with current auditing standards, the definition of ''deficiency in internal control'' in the final rule has been modified to include the phrase ''the management or employees of the broker or dealer'' in place of the phrase ''the broker or dealer.'' [136]

The final rule—substantially as proposed—requires the carrying broker-dealer to state whether its Internal Control Over Compliance was effective during the most recent fiscal year.[137] Some commenters suggested that a broker-dealer that has remediated a material weakness be permitted to provide an assertion about whether a material weakness still exists at the end of the year, instead of having to state whether internal control was effective during the most recent fiscal year.[138] In light of the importance of a broker-dealer being in continual compliance

[128] *See* paragraph (d)(3)(iii) of Rule 17a–5. *See also* 17 CFR 240.12b–2; 17 CFR 210.1–02(a)(4) (providing that a ''[m]aterial weakness means a deficiency, or a combination of deficiencies, in internal controls over financial reporting . . . such that there is a reasonable possibility that a material misstatement of the registrant's annual or interim financial statements will not be prevented or detected on a timely basis.'').

[129] *See CAI Letter.*

[130] *See* 17 CFR 240.15c3–1(a)(6)(iv)(B), (a)(6)(v), (a)(7)(ii), (a)(7)(iii), (c)(2)(x)(B)(*1*), (c)(2)(x)(F)(*3*) (notification requirements with respect to Rule 15c3–1); 17 CFR 240.17a–11(b)–(c) (notification requirements with respect to Rule 15c3–1); 17 CFR 240.15c3–3(i) (notification requirement in the event of a failure to make a required deposit to the reserve account).

[131] *See Broker-Dealer Reports,* 76 FR at 37577.

[132] *See* paragraphs (d)(3)(i)(A)(*1*) and (d)(3)(ii) of Rule 17a–5. As indicated above, the independent public accountant is not required to examine this statement. *See* paragraph (g)(2)(i) of Rule 17a–5.

[133] *See* paragraphs (d)(3)(i)(A)(*1*) and (d)(3)(ii) of Rule 17a–5.

[134] *See* paragraph (d)(3)(i)(A)(*5*) of Rule 17a–5.

[135] *See* paragraph (d)(3)(iii) of Rule 17a–5.

[136] *Id. See also* PCAOB Auditing Standard, *AS No. 5* app. A, at ¶ A3 (providing that ''[a] deficiency in internal control over financial reporting exists when the design or operation of a control does not allow *management or employees,* in the normal course of performing their assigned functions, to prevent or detect misstatements on a timely basis.'').

[137] *See* paragraph (d)(3)(i)(A)(*2*) of Rule 17a–5.

[138] *See CAQ Letter; E&Y Letter; KPMG Letter; PWC Letter.*

with the financial responsibility rules, the Commission believes it is appropriate for the broker-dealer's statement to address effectiveness of its Internal Control Over Compliance throughout the fiscal year. Consequently, the final rule requires the statement to cover the entire fiscal year as opposed to the date that is the end of the fiscal year as suggested by commenters.

However, in response to comments suggesting that the broker-dealer be permitted to report the remediation or whether a material weakness still exists at the end of the year,[139] the final rule also requires the carrying broker-dealer to state whether its Internal Control Over Compliance was effective as of the end of the most recent fiscal year.[140] Thus, if there was a material weakness in the Internal Control Over Compliance of the broker-dealer during the year that has been addressed such that the broker-dealer no longer considers there to be a material weakness at fiscal year end, the compliance report would reflect both the identification of the material weakness and that its Internal Control Over Compliance was effective as of the end of the most recent fiscal year, thereby indicating that the material weakness had been addressed as of the fiscal year end.

Consistent with these changes, the final rule provides that the carrying broker-dealer cannot conclude that its Internal Control Over Compliance was effective during the most recent fiscal year if there were one or more material weaknesses in Internal Control Over Compliance of the broker-dealer during the fiscal year.[141] The final rule adds a similar provision relating to the effectiveness of a broker-dealer's Internal Control Over Compliance at the end of the most recent fiscal year [142] to respond to comments [143] and to align with the additional statement discussed above as to whether the broker-dealer's Internal Control Over Compliance was effective as of the end of the fiscal year.[144]

The final rule also retains the proposed requirement that the carrying broker-dealer provide a description of each identified material weakness in the broker-dealer's Internal Control Over Compliance, but, in conformity with other modifications to the proposal, the final rule requires that the material weaknesses include those identified during the most recent fiscal year as well as those that were identified as of the end of the fiscal year.[145] This change should not add a significant burden because broker-dealers should know whether any material weaknesses identified before year end have been remediated.

As noted above, one commenter recommended that the Commission require broker-dealers to document oral guidance obtained through dialogue with Commission or DEA staff.[146] While such a requirement was not proposed and is not being adopted in the final rule, it may be appropriate and prudent for a broker-dealer to maintain documentation in its books and records of the matters discussed with the Commission or DEA staff, the broker-dealer's own views and conclusion on those matters, and any guidance received by the broker-dealer.

Also as noted above, two commenters asked the Commission to provide additional guidance about the control objectives that should be met to achieve effective internal control over compliance with the financial responsibility rules.[147] As stated in the proposing release, the control objectives identified in the Commission's guidance on Rule 206(4)–2 are more general than the specific operational requirements in the financial responsibility rules.[148] In particular, broker-dealers are subject to operational requirements with respect to handling and accounting for customer assets.[149] Given the specificity of the financial responsibility rules, the Commission does not believe that additional guidance about the control objectives is necessary.

As noted above, several commenters sought assurances that the independent public accountant's examination of the compliance report would not cover the effectiveness of internal control over financial reporting.[150] The final rule does not require that the broker-dealer include a statement regarding the effectiveness of its internal control over financial reporting, nor does it require that the independent public accountant attest to the effectiveness of internal control over financial reporting. The requirement in the final rule is for the broker-dealer to state whether its Internal Control Over Compliance was effective during the most recent fiscal year and at the end of the fiscal year and for the accountant to express an opinion based on an examination of those statements.

A broker-dealer's Internal Control Over Compliance is intended to focus, for example, on a broker-dealer's oversight of custody arrangements and protection of customer assets. In contrast, internal control over financial reporting is focused on the reliability of financial reporting and the preparation of financial statements in accordance with GAAP. As stated in the proposing release, the Commission did not propose that effectiveness of internal control over financial reporting be included as one of the assertions made by the broker-dealer in the compliance report. The Commission intends that the compliance report should focus on oversight of net capital, custody arrangements, and protection of customer assets, and therefore, should be focused on compliance with the financial responsibility rules.

Further, the examination of the compliance report would pertain solely to certain statements in the compliance report and not to the broker-dealer's process for arriving at the statements. The report of the independent public accountant, based on the examination of the compliance report, requires the accountant to perform its own independent examination of the related internal controls. Consequently, it is not necessary for the independent public accountant to provide an opinion with regard to the process that the broker-dealer used to arrive at its conclusions.

As noted above, commenters sought clarification of the meaning of ''books and records'' as used in the compliance report statement. The reference in paragraph (d)(3)(i)(A)(*5*) of Rule 17a–5 to books and records refers to the books and records a broker-dealer is required to make and maintain under Commission rules (*e.g.,* Rule 17a–3 and Rule 17a–4).[151]

4. The Exemption Report—Paragraph (d)(4) of Rule 17a–5

i. Proposed Amendments

The Commission proposed that the exemption report must contain an assertion by the broker-dealer that it is exempt from Rule 15c3–3 because it meets conditions set forth in paragraph (k) of Rule 15c3–3 and ''should identify

[139] *See CAQ Letter; Deloitte Letter; E&Y Letter; McGladrey Letter.*

[140] *See* paragraph (d)(3)(i)(A)(*3*) of Rule 17a–5.

[141] *See* paragraph (d)(3)(iii) of Rule 17a–5. *See also* 17 CFR 229.308(a)(3) (providing that ''[m]anagement is not permitted to conclude that the registrant's internal control over financial reporting is effective if there are one or more material weaknesses in the registrant's internal control over financial reporting.'').

[142] *See* paragraph (d)(3)(iii) of Rule 17a–5.

[143] *See CAQ Letter; Deloitte Letter; E&Y Letter; McGladrey Letter.*

[144] *See* paragraph (d)(3)(i)(A)(*3*) of Rule 17a–5.

[145] *See* paragraph (d)(3)(i)(B) of Rule 17a–5.

[146] *See E&Y Letter.*

[147] *See Angel Letter; Deloitte Letter.*

[148] *See Broker-Dealer Reports,* 76 FR at 37580.

[149] *Id.*

[150] *See Deloitte Letter; KPMG Letter; PWC Letter.*

[151] *See* 17 CFR 240.17a–3; 17 CFR 240.17a–4.

the specific conditions.'' [152] As discussed below in section II.D.3. of this release, under the proposal, the independent public accountant, as part of the engagement, would have been required to prepare a report based on a review of the exemption report in accordance with PCAOB standards.[153]

ii. Comments Received

The Commission received several comments regarding the exemption report.[154] Some commenters stated that the Commission should clarify whether the assertion would cover the entire fiscal year or be as of a fixed date.[155] One commenter stated that the assertion should be as of a fixed date.[156] With respect to the independent public accountant's review of the exemption report, one commenter provided the example of a bank or clerical error that results in a broker-dealer that operates under an exemption to Rule 15c3–3 finding itself in possession of customer assets overnight once during the fiscal year.[157] This commenter stated that such a situation should not ''warrant the 'material modification' of a broker-dealer's Exemption Report.'' [158] Similarly, another commenter noted that ''to consider a single instance of a broker-dealer failing to promptly forward a customer's securities as an instance that would necessitate a material modification creates an unworkable standard.'' [159]

One commenter stated that the exemption report relates only to Rule 15c3–3 and asked how the Commission intended to assess, for a firm that claims an exemption from Rule 15c3–3, compliance with Rule 15c3–1 and the adequacy of the firm's internal control over compliance with that rule.[160] Another commenter asked whether the exemption report should be replaced with a box to check on the FOCUS Report, as the amount of paperwork involved for small firms ''seems rather excessive.'' [161]

iii. The Final Rule

The Commission is adopting, with modifications discussed below, the requirements regarding the exemption report.[162] The modifications are designed to address commenters' concerns that the proposed exemption report assertion would create an unworkable standard given the possibility that a broker-dealer might have instances of exceptions to meeting the exemption provisions in paragraph (k) of Rule 15c3–3 and that the proposed requirements with respect to the exemption report did not explicitly provide how exceptions should be treated. In response to these concerns, the final rule provides that exemption reports must contain the following statements made to the best knowledge and belief of the broker-dealer: (1) A statement that identifies the provisions in paragraph (k) of Rule 15c3–3 under which the broker-dealer claimed an exemption from Rule 15c3–3; (2) a statement the broker-dealer met the identified exemption provisions in paragraph (k) of Rule 15c3–3 throughout the most recent fiscal year without exception or that it met the identified exemption provisions in paragraph (k) of Rule 15c3–3 throughout the most recent fiscal year except as described in the exemption report; and (3) if applicable, a statement that identifies each exception during the most recent fiscal year in meeting the identified provisions in paragraph (k) of Rule 15c3–3 and that briefly describes the nature of each exception and the approximate date(s) on which the exception existed.[163]

In response to comments seeking clarity as to whether the assertion in the exemption report should cover a fixed date or the fiscal year,[164] the final rule explicitly provides that the statement and certain information in the exemption report must cover the most recent fiscal year.[165] This corresponds to the provisions of paragraph (d)(1)(i)(B) of Rule 17a–5 governing when a broker-dealer must file the exemption report instead of the compliance report. In particular, a broker-dealer that claimed an exemption from Rule 15c3–3 throughout the most recent fiscal year must file the exemption report.[166]

In addition, as proposed, the exemption report was required to contain an assertion that the broker-dealer ''is exempt from the provisions'' of Rule 15c3–3 ''because it meets conditions set forth in'' paragraph (k) of Rule 15c3–3 and ''should identify the specific conditions.'' [167] Thus, the exemption report would have required the broker-dealer to state definitively that ''it is exempt'' from Rule 15c3–3 because it ''meets the conditions set forth in'' in paragraph (k).[168] As noted above, commenters raised questions and concerns about how certain exceptions would be handled under the proposed exemption report requirements. The final rule addresses these comments in a number of ways.

First, it provides that the statements in the exemption report must be made to the ''best knowledge and belief of the broker or dealer.'' [169] This modification is designed to address situations where the broker-dealer is unaware of an instance or instances in which it had an exception to meeting the exemption provisions in paragraph (k) of Rule 15c3–3 during the most recent fiscal year. As discussed below, the broker-dealer must state in the report that it met the exemption provisions throughout the year without exceptions or with exceptions that must be identified.[170]

Second, the final rule provides that the broker-dealer first must identify in the exemption report the ''provisions'' in paragraph (k) of Rule 15c3–3 under which it ''claimed'' an exemption from Rule 15c3–3.[171] As discussed above in section II.B.1. of this release, the final rule has been modified to provide that a broker-dealer must file the exemption report if it did ''claim that it was exempt'' from Rule 15c3–3 throughout

[152] *See Broker-Dealer Reports,* 76 FR at 37580–37581.

[153] *Id.* at 37578–37579. PCAOB standards for attestation engagements provide that accountants ordinarily should obtain written assertions in an examination or review engagement.

[154] *See CAQ Letter; Deloitte Letter; Grant Thornton Letter; KPMG Letter.* Some of the comments relating to the exemption report and the response to the comments are discussed above in section II.B.1. of this release.

[155] *See CAQ Letter; Deloitte Letter; Grant Thornton Letter; KPMG Letter.*

[156] *See KPMG Letter.*

[157] *See SIFMA Letter.*

[158] *Id.*

[159] *See CAI Letter.*

[160] *See McGladrey Letter.*

[161] *See Angel Letter.*

[162] *See* paragraph (d)(4) of Rule 17a–5.

[163] *Id.*

[164] *See CAQ Letter; Deloitte Letter; Grant Thornton Letter; KPMG Letter.*

[165] *See* paragraph (d)(4)(ii) of Rule 17a–5.

[166] *See* paragraph (d)(1)(i)(B) of Rule 17a–5.

[167] *See Broker-Dealer Reports,* 76 FR at 37604.

[168] *Id.*

[169] *See* paragraph (d)(4) of Rule 17a-5.

[170] As discussed above in section II.B.3. of this release, a carrying broker-dealer must state in the compliance report whether it was in compliance with Rule 15c3–1 and paragraph (e) of Rule 15c3–3 as of the end of the most recent fiscal year. *See* paragraph (d)(3)(i)(A)(*4*) of Rule 17a-5. In response to comments and in light of the nature of the statements required in the exemption report, the Commission added the best knowledge and belief standard to the exemption report requirement.

[171] *See* paragraph (d)(4)(i) of Rule 17a-5. As proposed, paragraph (d)(4) of Rule 17a-5 provided that the exemption report ''shall contain a statement by the broker or dealer that it is exempt from the provisions of [Rule 15c3–3] because it meets the conditions set forth in [paragraph (k) of Rule 15c3–3] and *should* identify the specific conditions.'' *See Broker-Dealer Reports,* 76 FR 37604 (emphasis added). The Commission intended that the broker-dealer be required to identify the provisions of paragraph (k) of Rule 15c3–3 under which the broker-dealer was claiming the exemption. To make clear that this requirement and the other requirements of the exemption report are mandatory, the final rule uses the word ''must'' in relation to each element of the exemption report. *See* paragraph (d)(4) of Rule 17a-5.

the most recent fiscal year.[172] This change is designed to remove any ambiguity as to when a broker-dealer must file the exemption report as opposed to the compliance report, particularly in situations where the broker-dealer had exceptions to meeting the exemption provisions in paragraph (k) of Rule 15c3–3. Consistent with this change, the final rule requires the broker-dealer to identify in the exemption report the provisions in paragraph (k) under which it ''claimed the exemption.''[173]

Further, as proposed, the broker-dealer would have been required to identify the exemption ''conditions'' in paragraph (k) of Rule 15c3–3.[174] The use of the word ''provisions'' in the final rule is designed to eliminate a potential ambiguity as to whether the exemption provisions in paragraphs (k)(2) and (3) of Rule 15c3–3 applied to the exemption report. In particular, paragraph (k) of Rule 15c3–3 prescribes ''exemptions'' from the requirements of Rule 15c3–3.[175] Paragraph (k)(1) provides that the requirements of Rule 15c3–3 do not apply to a broker-dealer that meets all of the ''conditions'' set forth in the paragraph.[176] Paragraph (k)(2) identifies two sets of conditions (without using the word ''conditions'') either of which exempts a broker-dealer from the requirements of Rule 15c3–3.[177] Paragraph (k)(3) provides that the Commission may exempt a broker-dealer from the provisions of Rule 15c3–3, either unconditionally or on specified terms and conditions, if the Commission finds that the broker-dealer has established safeguards for the protection of funds and securities of customers comparable with those provided for by Rule 15c3–3 and that it is not necessary in the public interest or for the protection of investors to subject the particular broker-dealer to the provisions of Rule 15c3–3.[178] The Commission intended that a broker-dealer file an exemption report if it is exempt from Rule 15c3–3 under the provisions in either paragraph (k)(1), (k)(2)(i), (k)(2)(ii), or (k)(3) of Rule 15c3–3. To make this clear, the final rule refers to the ''provisions'' of paragraph (k) of Rule 15c3–3.[179] Consequently, a broker-dealer filing the exemption report must identify the provisions in paragraph (k) that it relied on to claim an exemption from Rule 15c3–3.[180]

The third modification designed to address commenters' questions and concerns about how to handle exceptions to meeting the exemption provisions in paragraph (k) of Rule 15c3–3 relates to the proposed assertion that the broker-dealer ''is exempt from the provisions'' of Rule 15c3–3 ''because it meets conditions set forth in'' paragraph (k). The final rule provides that the exemption report must contain a statement that the broker-dealer met the identified exemption provisions in paragraph (k) of Rule 15c3–3 throughout the most recent fiscal year without exception or that it met the identified exemption provisions in paragraph (k) of Rule 15c3–3 throughout the most recent fiscal year except as described in the exemption report.[181] This modification from requiring the broker-dealer to state an absolute (*i.e.,* that it is exempt from Rule 15c3–3) allows the broker-dealer to account for instances in which it had exceptions to meeting the exemption provisions in paragraph (k) of Rule 15c3–3 directly in the exemption report (rather than having to file the compliance report). Specifically, if to the broker-dealer's best knowledge and belief, it had no exceptions during the most recent fiscal year to the identified exemption provisions in paragraph (k) of Rule 15c3–3, it must state in the exemption report that it met the identified exemption provisions in paragraph (k) without exception. Alternatively, a broker-dealer that had exceptions must state that it met the identified exemption provisions except as described in the exemption report.

If the broker-dealer states that it had exceptions (*e.g.,* exceptions identified during the year, such as through routine monitoring of its compliance processes as part of the execution of its internal controls, internal or external audits, or regulatory examinations), the final rule requires the firm to identify, to its best knowledge and belief, each exception and briefly describe the nature of the exception and the approximate date(s) on which the exception existed.[182] The Commission expects that non-carrying broker-dealers generally track exceptions as part of monitoring compliance with the exemption provisions in paragraph (k) of Rule 15c3–3.[183] Further, a non-carrying broker-dealer's adherence to the exemption provisions in paragraph (k) of Rule 15c3–3 generally is a focus of Commission examiners when they conduct financial responsibility examinations on this class of firm. For example, examiners will review whether a non-carrying broker-dealer promptly forwards checks in accordance with provisions in paragraph (k) of Rule 15c3–3. The Commission also notes that the 2011 AICPA Broker Dealer Audit Guide states: ''In auditing the financial statements of a broker-dealer claiming exemption from SEC Rule 15c3–3, the auditor should determine whether and to what extent the broker-dealer complied with the specific exemption during the audit period as well as the quality of the broker-dealer's controls and procedures to ensure ongoing compliance.''[184] In addition, under the PCAOB's proposed standards, the independent public accountant should inquire of individuals at the broker-dealer who have relevant knowledge of controls relevant to the broker-dealer's compliance with the exemption provisions and who are responsible for monitoring compliance with the exemption provisions whether they are aware of any deficiencies in controls over compliance or instances of non-compliance with the exemption conditions.[185] Moreover, in the independent public accountant's report, ''[i]f the broker's or dealer's statement is not fairly stated, in all material respects,

[172] *See* paragraph (d)(1)(i)(B)(*2*) of Rule 17a-5. A broker-dealer claiming an exemption from Rule 15c3–3 is required to indicate the basis for the exemption on the periodic reports it files with securities regulators. *See, e.g.,* Item 24 of Part IIa of the FOCUS Reports. *See* 17 CFR 249.617.

[173] *See* paragraph (d)(4)(i) of Rule 17a-5.

[174] *See* paragraph (d)(4)(ii) of Rule 17a-5. The proposed rule provided that the broker-dealer must assert that it is exempt from the provisions of Rule 15c3–3 because it meets ''conditions'' set forth in paragraph (k) *and* should identify the specific ''conditions.'' *See Broker-Dealer Reports,* 76 FR at 37580–37581.

[175] *See* 17 CFR 240.15c3–3(k)(1), (k)(2)(i), (k)(2)(ii), and (k)(3).

[176] *See* 17 CFR 240.15c3–3(k)(1)(i)–(iv).

[177] *See* 17 CFR 240.15c3–3(k)(2)(i)–(ii).

[178] *See* 17 CFR 240.15c3–3(k)(3).

[179] This modification is consistent with Item 24 of Part IIa of the FOCUS Report, which is titled ''EXEMPTIVE PROVISION UNDER RULE 15c3–3'' and requires a broker-dealer that claims to be exempt from the requirements of Rule 15c3–3 to identify the provision in Rule 15c3–3—paragraph (k)(1), paragraph (k)(2)(i), paragraph (k)(2)(ii), or paragraph (k)(3)—under which it is claiming to be exempt. *See* 17 CFR 249.617.

[180] This change also is intended to make clear that the broker-dealer can identify the provisions of paragraph (k) of Rule 15c3–3 that the broker-dealer is relying on to claim the exemption by simply identifying in the exemption report the subparagraph in paragraph (k) (*i.e.,* (k)(1), (k)(2)(i), (k)(2)(ii), or (k)(3)) that contains the particular conditions the broker-dealer is relying on to claim the exemption rather than repeating the conditions themselves in the exemption report. For example, it would be sufficient for a broker-dealer relying on the exemption provisions in paragraph (k)(2)(ii) of Rule 15c3–3 to identify the provisions in the exemption report under which in claimed an exemption by referring to ''paragraph (k)(2)(ii) of Rule 15c3–3'' or ''17 CFR 240.15c3–3(k)(2)(ii).''

[181] *See* paragraph (d)(4)(ii) of Rule 17a-5.

[182] *See* paragraph (d)(4)(iii) of Rule 15c3–3.

[183] *See, e.g., Net Capital Rule,* Exchange Act Release No. 31511 (Nov. 24, 1992), 57 FR 56973 (Dec. 2, 1992), at 56981 n.25 (stating that non-carrying broker-dealers must develop procedures to ensure that they do not receive customer securities or checks made payable to themselves).

[184] *See AICPA Broker-Dealer Audit Guide* at ¶ 3.35.

[185] *See PCAOB Proposing Release* app. 2 at ¶ 10.

because of an instance or certain instances of non-compliance with the exemption conditions, the auditor must modify the review report to describe those instances of non-compliance and state that the broker or dealer is not in compliance with the specified exemption conditions.'' [186]

Under the final rule, a non-carrying broker-dealer must identify in the exemption report and describe each exception during the most recent fiscal year in meeting the identified exemption provisions in paragraph (k) of Rule 15c3–3. The description must include the approximate date(s) on which the exception existed. Without such reporting, the Commission and the broker-dealer's DEA would have no information to assess the nature, extent, and significance of the exceptions.

As noted above, one commenter asked whether the exemption report should be replaced with a box to check on the FOCUS Report, as the amount of paperwork involved for small firms ''seems rather excessive.'' [187] The Commission does not believe this is an appropriate alternative. First, as indicated above, a broker-dealer claiming an exemption from Rule 15c3–3 already is required to indicate the basis for the exemption on its FOCUS Report.[188] Second, the exemption report requires the broker-dealer to make certain statements that the independent public accountant must review. Thus, the exemption report will provide a standardized statement across all broker-dealers claiming an exemption from Rule 15c3–3 for the independent public accountant to review. Third, the exemption report will provide the Commission and the broker-dealer's DEA with more information than currently is reported by non-carrying broker-dealers in the FOCUS Report. Specifically, it requires the broker-dealer to, among other things, state either that it met the identified exemption provisions in paragraph (k) throughout the most recent fiscal year without exception or that it met the identified exemption provisions throughout the most recent fiscal year except as described in the report. This will provide the Commission and the broker-dealer's DEA with information as to whether a broker-dealer is meeting the exemption provisions of paragraph (k) of Rule 15c3–3 (not simply that the broker-dealer is claiming the exemption as is reported in the FOCUS Report). Fourth, requiring that the exemption report be filed with the Commission should increase broker-dealers' focus on the statements being made, facilitating consistent compliance with the exemption provisions in Rule 15c3–3, and therefore, providing better protection of customer assets. Fifth, the requirement to prepare and file the exemption report should not result in excessive paperwork, as stated by one commenter.[189]

As noted above, one commenter pointed out that the exemption report relates solely to Rule 15c3–3 and asked how the adequacy of a non-carrying broker-dealer's internal controls over compliance with Rule 15c3–1 would be assessed.[190] Under the final amendments, a broker-dealer's financial report will continue to include a supporting schedule containing a net capital computation under Rule 15c3–1, which will be covered by the independent public accountant's examination of the financial report. Moreover, the PCAOB has proposed standards for auditing supplemental information accompanying audited financial statements.[191]

5. Time for Filing Annual Reports—Paragraph (d)(5) of Rule 17a–5

Prior to today's amendments, paragraph (d)(5) of Rule 17a–5 required that the annual audit report be filed not more than 60 days after the date of the financial statements.[192] The Commission proposed amending paragraph (d)(5) to replace the term *annual audit report* with *annual reports.*[193] This change was designed to reflect the fact that, under the proposal, broker-dealers must file a financial report, a compliance report or exemption report, and reports prepared by an independent public accountant covering these reports. While the Commission did not receive comments on this proposed change, one commenter stated that the existing requirement in Rule 17a–5 that the annual audit report be filed 60 days after the date of the financial statements should be lengthened to 90 days.[194] In support of this recommendation, the commenter cited CFTC Rule 1.10, which allows an FCM up to 90 days to file annual audit reports.[195]

The Commission is adopting, with modifications, the proposed amendment to paragraph (d)(5) of Rule 17a–5.[196] The modifications add the term ''calendar'' to make explicit that the time for filing the annual reports is 60 calendar days after the fiscal year end (as opposed to business days). The modifications replace the words ''date of the financial statements'' with the words ''end of the fiscal year of the broker or dealer'' to provide consistency in the language of Rule 17a–5.[197] The final rule does not change the time limit for filing the annual reports to 90 days after the end of the fiscal year. The 60-day time frame is a long standing requirement and it provides the Commission and other regulators with relatively current information to, among other things, monitor the financial condition of broker-dealers. Further, broker-dealers may seek an extension of time to file the annual reports from their DEAs.[198]

6. Filing of Annual Reports With SIPC—Paragraph (d)(6) of Rule 17a–5

Prior to today's amendments, paragraph (d)(6) of Rule 17a–5 provided that the ''annual audit report'' must be filed at the regional office of the Commission for the region in which the broker-dealer has its principal place of business, the Commission's principal office in Washington, DC, and the principal office of the DEA of the broker-dealer.[199] Copies were required to be provided to all self-regulatory organizations (''SROs'') of which the broker-dealer is a member.

i. The Proposed Amendments

The Commission proposed two amendments to this provision. First, the Commission proposed that an SRO that is not a broker-dealer's DEA could by rule waive the requirement that broker-dealers file annual reports with it because many SROs do not believe that it is necessary to receive copies of broker-dealer annual reports if they are not the broker-dealer's DEA.[200] The

[186] *Id.* at ¶ 20.

[187] *See Angel Letter.*

[188] *See* Item 24 of Part IIa of the FOCUS Report.

[189] *See Angel Letter.* The commenter did not explain why the exemption report would result in excessive paperwork. *Id. See also* discussion below in section VI.D.1.iii. of this release for the estimated paperwork hour burden associated with this requirement.

[190] *See McGladery Letter.* The material inadequacy report—which applied to carrying and non-carrying broker-dealers—covered Rule 15c3–1. *See* 17 CFR 240.17a–5(g).

[191] *See Proposed Auditing Standard, Auditing Supplemental Information Accompanying Audited Financial Statements and Related Amendments to PCAOB Standards,* PCAOB Release No. 2011–05, PCAOB Rulemaking Docket Matter No. 036 (July 12, 2011) (''*PCAOB Proposed Auditing Standard for Supplemental Information*'').

[192] *See* 17 CFR 240.17a–5(d)(5).

[193] *See Broker-Dealer Reports,* 76 FR at 37604.

[194] *See IMS Letter.*

[195] *See* 17 CFR 1.10(b)(ii). Rule 1.10 also provides that if the FCM is registered with the Commission as a broker-dealer, the FCM must file the report not later than the time permitted for filing an annual audit report under Rule 17a–5.

[196] *See* paragraph (d)(5) of Rule 17a–5.

[197] *Id. See also* paragraph (n) of Rule 17a–5.

[198] *See* paragraph (m) of Rule 17a–5.

[199] *See* 17 CFR 240.17a–5(d)(6).

[200] *See Broker-Dealer Reports,* 76 FR at 37592.

Commission received no comments on this proposal and is adopting it as proposed.[201]

Second, the Commission proposed amending this provision to require a broker-dealer to file its annual reports with SIPC.[202] SIPC, a nonprofit, nongovernmental membership corporation established by SIPA, is responsible for providing financial protection to customers of failed broker-dealers. SIPA also provided for the establishment of a fund (''SIPC Fund'') to pay for SIPC's operations and activities. SIPC uses the fund to make advances to satisfy customer claims for securities and cash that cannot be readily returned to the customer. SIPA limits the amount of the advance to $500,000 per customer, of which $250,000 can be used to satisfy the cash portion of a customer's claim. The SIPC Fund also covers the administrative expenses of liquidation proceedings for failed broker-dealers when the general estate of the failed firm is insufficient; these include costs incurred by a trustee, trustee's counsel, and other advisors. SIPC finances the SIPC Fund through annual assessments, set by SIPC, on all member firms, plus interest generated from its permitted investments. Generally, all broker-dealers registered with the Commission under section 15(b) of the Exchange Act[203] are required to be members of SIPC.[204] Before today's amendments, broker-dealers were required to file only limited information with SIPC. Specifically: (1) Information elicited on Form SIPC–6, the ''General Assessment Payment Form;'' (2) information elicited on Form SIPC–7, the ''Annual General Assessment Reconciliation;'' and (3) for periods in which the SIPC assessment is not a minimum assessment, a comparison by the independent public accountant of the amounts reflected in the annual report the broker-dealer filed with the Commission with amounts reported on Form SIPC–7.

The Commission explained in the proposing release that the proposed requirement for broker-dealers to file their annual reports with SIPC could allow SIPC to better monitor industry trends and enhance its knowledge of particular firms.[205] The Commission also explained that the requirement that broker-dealers file copies of their annual reports with SIPC was designed to address cases where the SIPC Fund has been used to pay the administrative expenses of the liquidation of a failed broker-dealer and SIPC sought to recover the money advanced when the estate had insufficient assets.[206] In some of these cases, SIPC has sought to recover money damages from the broker-dealer's auditing firm based on an alleged failure to comply with auditing standards. At least one court, however, has held under New York law that SIPC could not maintain such a claim because it was not a recipient of the annual audit filing and could not have relied on it.[207]

ii. Comments Received

The Commission received seven comments on the proposal that broker-dealers be required to file their annual reports with SIPC.[208] Six commenters generally opposed the requirement.[209] One commenter indicated that it is appropriate for broker-dealers to file their annual reports with SIPC if SIPC uses the reports to reconcile the annual reports with the Form SIPC–7 or otherwise places reliance on them.[210] Three of the commenters stated that the Commission failed to adequately articulate the policy considerations driving the proposed change and also failed to discuss the possible costs of increased litigation risk to accountants.[211] Some of the commenters argued that this change would contradict limitations on SIPC's authority to bring claims against accountants under SIPA and the securities laws imposed by the U.S. Supreme Court.[212]

After the proposal, a task force established by SIPC to undertake a comprehensive review of SIPA and SIPC's operations and policies and to propose reforms to modernize SIPA and SIPC recommended to the SIPC Board that SIPC members be required to file audit reports with SIPC concurrently with their filing with the SEC, a position consistent with the proposal. In a report presented to the SIPC Board of Directors in February 2012,[213] the task force stated that including SIPC as a designated recipient of the audit report ''would further the goal of investor protection by providing another layer of review of the report by an organization directly affected by its contents.'' [214] In addition, the task force stated that ''including SIPC as a recipient would help to address the persistent concern that any signs of 'financial weakness, as by non-compliance with net capital requirements or otherwise, [be] watched very carefully and followed up' in order to augment the financial responsibility requirements SIPA was intended to enhance, and to provide greater investor protection.'' [215]

iii. The Final Rule

The Commission is adopting the amendment requiring broker-dealers to file their annual reports with SIPC substantially as proposed.[216] SIPC plays an important role in the securities markets and the SIPC Fund can help reduce losses to investors from the failure of their broker-dealer. SIPC has a legitimate interest in receiving the annual reports of its broker-dealer members to assist it with its maintenance of the SIPC Fund and to monitor trends in the broker-dealer industry. SIPC presently obtains revenue information from broker-dealers, through Form SIPC–7, to determine how best to structure broker-dealer assessments to maintain the SIPC Fund at an appropriate level. However, the information collected in the form is limited and may not assist SIPC in assessing whether the SIPC Fund is appropriately sized to the risks of a large broker-dealer failure. The annual audited reports contain much more detailed information about the assets, liabilities, income, net capital, and Rule

[201] *See* paragraph (d)(6) of Rule 17a–5.

[202] *See Broker-Dealer Reports,* 76 FR at 37592.

[203] *See* 15 U.S.C. 78o(b).

[204] *See* 15 U.S.C. 78ccc(a)(2). However, broker-dealers engaged exclusively in the distribution of mutual fund shares, the sale of variable annuities, the insurance business, the furnishing of investment advice to investment companies or insurance company separate accounts, or whose principal business is conducted outside the U.S. are not required to be members of SIPC. *See* 15 U.S.C. 78ccc(a)(2)(A)(i)–(iii).

[205] *See Broker-Dealer Reports,* 76 FR at 37592.

[206] *Id. See also* SIPC, *2010 Annual Report,* at 18, *available at http://www.sipc.org/pdf/2010%20Annual%20Report.pdf.*

[207] *See SIPC* v. *BDO Seidman, LLP,* 746 NE.2d 1042 (N.Y. 2001).

[208] *See CAQ Letter; Deloitte Letter; E&Y Letter; Grant Thornton Letter; KPMG Letter; McGladrey Letter; PWC Letter.*

[209] *See CAQ Letter; Deloitte Letter; E&Y Letter; Grant Thornton Letter; KPMG Letter; PWC Letter.*

[210] *See McGladrey Letter.* Form SIPC–7 is discussed in more detail below in section II.C.4. of this release.

[211] *See CAQ Letter; Deloitte Letter; KPMG Letter.*

[212] *See CAQ Letter; Deloitte Letter; E&Y Letter; KPMG Letter; PWC Letter.*

[213] *See Report and Recommendations of the SIPC Modernization Task Force* (Feb. 2012), *available at http://www.sipc.org/pdf/Final%Report%202012.pdf.* The Task Force was comprised of volunteers, and included investor advocates, regulatory specialists, and academic experts, including the trustee for the liquidation of Lehman Brothers Inc. and MF Global Inc.

[214] *See Report and Recommendations of the SIPC Modernization Task Force,* at 19.

[215] *Id.* (quoting the SEC, *Study of Unsafe and Unsound Practices of Broker-Dealers,* H.R. Doc. No. 92–231, at 152 (1971)).

[216] *See* paragraph (d)(6) of Rule 17a–5. The Commission clarified that the broker-dealer must file the annual reports with SIPC only ''if the broker or dealer is a member of SIPC.'' The Commission believes that SIPC has an interest in receiving annual reports only from broker-dealers that are SIPC members, because only these broker-dealers may pose a risk to the SIPC Fund.

15c3–3 customer reserve requirements of broker-dealers, and also include, for carrying broker-dealers, a compliance report containing information about the broker-dealer's compliance with, and controls over compliance with, the broker-dealer financial responsibility rules. The annual reports also generally include the independent public accountant's reports covering the financial report and compliance report or exemption report, as applicable, prepared by the broker-dealer. This information will assist SIPC in monitoring the financial strength of broker-dealers and, therefore, in assessing the adequacy of the SIPC Fund.[217]

In addition, by receiving the annual reports, SIPC may be able to overcome a legal hurdle to pursuing claims against a broker-dealer's accountant where the accountant's failure to adhere to professional standards in auditing a broker-dealer caused a loss to the SIPC Fund. Although this amendment is intended to remove one potential legal hurdle to SIPC actions against accountants, the other elements of any relevant cause of action would be unaffected. The Commission does not intend by this amendment to take a position on the circumstances under which SIPC may have a viable cause of action against an independent public accountant.[218]

Several commenters stated that the Commission did not address the potential costs and benefits of requiring broker-dealers to file copies of their annual reports with SIPC, including potential accounting litigation costs.[219] As discussed below in section VII. of this release, the Commission recognizes that there may be increased litigation costs (or reserves for potential litigation costs) as a result of the amendment and that to the extent that there are such costs, some of them may be passed on to broker-dealers in the form of increased audit fees. But, while this amendment may facilitate the ability of SIPC to bring actions against accountants for malpractice or material misrepresentation under state law by removing one potential legal hurdle to such actions, it will not necessarily result in a significant increase in such actions. Generally, SIPC initiates a small number of proceedings each year, and most of these proceedings have not involved a claim against a broker-dealer's accountant. Specifically, SIPC was established in 1971. In the period from 1971–2011, SIPC initiated 324 proceedings under SIPA to liquidate a failed broker-dealer.[220] This results in an average of approximately 8 SIPA proceedings per year, though 109 of the 324 proceedings were initiated in the period from 1971–1974, which was the immediate aftermath of the financial crisis of 1968–1970.[221] According to SIPC staff, SIPC has brought 9 lawsuits against accountants since 1971, which is one lawsuit for every 36 SIPA proceedings.[222] Accordingly, the likelihood of a lawsuit against an accountant is small and the Commission anticipates that the overall costs related to litigation as a result of the filing requirement should not be significant. The Commission believes that any such costs are justified by the benefits of enhanced customer protection and the associated ability of SIPC to better assess the financial condition of broker-dealers and the adequacy of the SIPC Fund.

C. The Nature and Form of the Annual Reports

1. Exemptions From Audit Requirement—Paragraph (e)(1) of Rule 17a–5

Prior to today's amendments, paragraph (e)(1)(i) of Rule 17a–5 provided, among other things, that the audit of the broker-dealer's financial statements needed to be performed by an accountant that is independent as defined in paragraph (f) of Rule 17a–5.[223] Paragraph (e)(1)(i) also contained provisions under which certain broker-dealers were not required to engage an accountant to audit their financial statements.[224]

The Commission proposed amending paragraph (e)(1)(i) of Rule 17a–5 to remove the words ''An audit shall be conducted by a public accountant who shall be in fact independent as defined in paragraph (f)(3) of this section herein, and he shall give an opinion covering the statements filed pursuant to paragraph (d).'' This amendment would consolidate the requirements with respect to the qualifications of the accountant in paragraph (f) of Rule 17a–5, and paragraph (e)(1)(i) of Rule 17a–5 would address only exemptions from the requirement to engage an independent public accountant to audit the annual reports prepared by the broker-dealer.[225] The Commission received no comments on this proposal, and is adopting it with modifications.[226] The modifications: (1) Modernize certain terms in the rule in a manner consistent with the Commission's ''plain English'' initiative; and (2) cite to the reports required under ''Rule 17a–5(d)(1)(i)(C)'' to provide a more precise cross reference than the former citation to reports required under ''Rule 17a–5(d).'' [227]

[217] *See McGladrey Letter.*

[218] Several commenters argue that requiring the annual report to be filed with SIPC would contradict limitations the Supreme Court has imposed on SIPC's authority to bring claims against accountants. The decisions cited by these commenters, however, do not speak to the precise issue the amended rule is intended, among other things, to address—the New York Court of Appeals' decision held that SIPC could not state a cause of action for either fraudulent or negligent misrepresentation against an auditing firm because it was not a recipient of the annual audit report. *See SIPC* v. *BDO Seidman, LLP,* 746 NE.2d 1042 (N.Y. 2001); aff'd, 245 F.3d 174 (2d Cir. 2001). Rather, in *Holmes* v. *Securities Investor Protection Corporation,* the Supreme Court found that the statutory provision relied on by SIPC, 15 U.S.C. 78eee(d), did not, either alone or with the Racketeer Influenced and Corrupt Organizations Act, confer standing. 503 U.S. 258, 275 (1992). And, in *Touche Ross & Co.* v. *Redington,* the Supreme Court determined that customers of securities brokerage firms do not have an implied cause of action for damages under section 17(a) of the Exchange Act against accountants who audit the financial reports filed by such firms; thus, SIPC could not assert this implied cause of action on behalf of these customers. 442 U.S. 560, 567 (1979). As already noted, the Commission does not intend by this amendment to take a position on the circumstances under which SIPC may have a viable cause of action against an independent public accountant.

[219] *See, e.g., CAQ Letter; Deloitte Letter; KPMG Letter.*

[220] *See* SIPC, *Annual Report 2011,* at 6.

[221] *Id. See also* Commission, *Study of Unsafe and Unsound Practices of Brokers and Dealers: Report and Recommendations of the Securities and Exchange Commission* (December 1971) (discussing the financial crisis of 1968–1970). Since its inception through 2001, SIPC initiated 299 proceedings under SIPA.

[222] *See Redington* v. *Touche Ross & Co.,* 592 F.2d 617 (2d Cir. 1978); *In re Bell & Beckwith,* 77 B.R. 606 (Bkrtcy. N.D. Ohio, 1987); *Mishkin* v. *Peat, Marwick, Mitchell & Co.,* 658 F.Supp. 271 (S.D.N.Y. 1987); *SIPC* v. *BDO Seidman, LLP,* 49 F.Supp.2d 644 (S.D.N.Y. 1999); *In re Donahue Securities Inc.,* 2004 WL 3152763 (Bkrtcy S.D. Ohio, 2004); *In re SIPC* v. *R.D. Kushnir & Co,* 274 B.R. 768 (Bkrtcy. N.D. Ill., 2002); *In re Sunpoint Securities, Inc.,* 377 B.R. 513 (Bkrtcy. E.D. Tex., 2007); Compliant at 5–6, *Gilbert* v. *Ohab,* Bkrtcy. M.D. Fl. (May 2010) (No. 6:08-ap-00145–KSJ); Complaint at 2, *Shively* v. *Mortland,* Bkrtcy. D. Co. (Feb. 2004) (No. 03–BK–1102–HRT).

[223] *See* 17 CFR 240.17a–5(e)(1)(i).

[224] *Id.*

[225] *See Broker-Dealer Reports,* 76 FR at 37593–37594. The proposed and final amendments to paragraph (f) of Rule 17a–5 are discussed below in section II.E. of this release.

[226] *See* paragraph (e)(1)(i) of Rule 17a–5.

[227] *Id.* Prior to today's amendments, paragraph (e)(1)(ii) of Rule 17a–5 provided that ''[a] broker or dealer who files a report which is not covered by an accountant's opinion shall include in the oath or affirmation required by paragraph (e)(2) of this section a statement of the facts and circumstances relied upon as a basis for exemption from the requirement that financial statements and schedules filed pursuant to paragraph (d) of this section be covered by the opinion of an accountant.'' *See* 17 CFR 240.17a–5(e)(1)(ii). The Commission did not propose amendments to this subparagraph. However, to be consistent with today's amendments, the Commission is making technical

Continued

2. Affirmation—Paragraph (e)(2) of Rule 17a–5

Prior to today's amendments, paragraph (e)(2) of Rule 17a–5 provided that an oath or affirmation must be attached to the annual audit report that, to the best knowledge and belief of the person making the oath or affirmation, the financial statements and schedules are true and correct and, among other things, that the oath or affirmation must be made by the proprietor if a sole proprietorship, by a general partner, if a partnership, or by a duly authorized officer, if a corporation.[228] The Commission proposed amending the first sentence of paragraph (e)(2) of Rule 17a–5 by adding the word ''financial'' before the word ''report.''[229] The Commission is adopting this amendment as proposed.

One commenter stated that currently paragraph (e)(2) of Rule 17a–5 does not specifically cover limited liability companies, and its reference to partnerships assumes that a general partner is a natural person.[230] The commenter argued that it should be updated to conform to generally accepted business laws.

In response to this comment, the Commission is adopting amendments to paragraph (e)(2) of Rule 17a–5 that modify the proposed amendments.[231] In particular, the Commission is adding that if the broker-dealer is a limited liability company or limited liability partnership, the oath or affirmation must be made by the chief executive officer, chief financial officer, manager, managing member, or any of those members vested with management authority for the limited liability company or limited liability partnership.[232]

3. Confidentiality of Annual Reports—Paragraph (e)(3) of Rule 17a–5

Prior to today's amendments, paragraph (e)(3) of Rule 17a–5 provided that the financial statements filed under paragraph (d) are public, except that if the Statement of Financial Condition is bound separately from the balance of the annual audited financial statements filed under paragraph (d)(1), the balance of the annual audited financial statements will be deemed confidential.[233] As noted in the proposing release, the wording of this provision has led to confusion.[234] In particular, Commission staff has received inquiries on how broker-dealers can indicate that they are requesting confidential treatment for the portion of the financial statements intended to be kept confidential to the extent permitted by law and, on occasion, financial statements broker-dealers intended to be confidential are inadvertently made public.[235] This could happen, for example, if a broker-dealer fails to bind the balance sheet separately from the other portion of the financial statements when it files the financial statements with the Commission.[236]

Consequently, the Commission proposed amending paragraph (e)(3) of Rule 17a–5 to provide that the annual reports filed pursuant to paragraph (d) are public, except that if the Statement of Financial Condition is bound separately from the annual report filed pursuant to ''paragraph (d)(2) of Rule 17a–5,'' and each page of the balance of the annual report is stamped ''confidential,'' the balance of the annual report shall be deemed confidential.[237] The proposed rule text inadvertently referenced only the financial report. It was intended that the financial report, compliance report, exemption report, and related accountant reports would be treated the same under paragraph (e)(3) of Rule 17a–5. Consequently, the Commission is modifying the proposed amendment. Specifically, paragraph (e)(3) of Rule 17a–5, as adopted, provides that if the Statement of Financial Condition is bound separately from the balance of the ''annual reports filed under paragraph (d) of this section,'' and each page of the balance of the annual reports is stamped ''confidential,'' then the balance of the annual reports will be deemed confidential to the extent permitted by law.[238] Consequently, if the compliance reports and exemption reports and the related reports of the independent public accountant are submitted in accordance with the procedures specified in paragraph (e)(3) of Rule 17a–5, these reports will be deemed confidential to the extent permitted by law.[239]

Prior to today's amendments, paragraph (e)(3) of Rule 17a–5 also provided that the broker-dealer's reports, including the confidential portions, will be available, for example, for official use by any official or employee of the U.S. and an official or employee of any national securities exchange and registered national securities association of which the broker-dealer is a member and ''by any other person to whom the Commission authorizes disclosure of such information as being in the public interest.''[240] The Commission proposed amending this list of permitted recipients to include the PCAOB.[241] The Commission did not receive comments on this proposal and is adopting it essentially as proposed with a minor wording edit for clarity.[242]

4. Supplemental Report on SIPC Membership—Paragraph (e)(4) of Rule 17a–5

As discussed above in section II.B.6. of this release, SIPC maintains the SIPC Fund to be used in liquidations of broker-dealers under SIPA. The SIPC Fund is established and maintained through assessments on broker-dealers that are required to be members of

amendments to paragraph (e)(1)(ii) of Rule 17a–5 so that it now provides that ''[a] broker or dealer that files annual reports under paragraph (d) of this section that are not covered by reports prepared by an independent public accountant must include in the oath or affirmation required by paragraph (e)(2) of this section a statement of the facts and circumstances relied upon as a basis for exemption from the requirement that the annual reports filed under paragraph (d) of this section be covered by reports prepared by an independent public accountant.'' *See* paragraph (e)(1)(ii) of Rule 17a–5.

[228] *See* 17 CFR 240.17a–5(e)(2).

[229] *See Broker-Dealer Reports,* 76 FR at 37603.

[230] *See IMS Letter.*

[231] *See* paragraph (e)(2) of Rule 17a–5.

[232] *See IMS Letter.*

[233] *See* 17 CFR 240.17a–5(e)(3).

[234] *See Broker-Dealer Reports,* 76 FR at 37592–37593.

[235] The public portions of broker-dealer annual audited reports are available on the Commission's Web site. These reports may be accessed via the *Search for Company Filings* link under *Filings & Forms* on the Commission's home page.

[236] The Commission staff has previously posted guidance on the Commission Web site on how to request confidential treatment for the financial statements other than the statement of financial condition. *See http://www.sec.gov/divisions/marketreg/bdnotices.htm.*

[237] *See Broker-Dealer Reports,* 76 FR at 37592–37593.

[238] *See* paragraph (e)(3) of Rule 17a–5.

[239] *See* 5 U.S.C. 552 *et seq.* (Freedom of Information Act—''FOIA''). FOIA provides at least two potentially pertinent exemptions under which the Commission has authority to withhold certain information. FOIA Exemption 4 provides an exemption for ''trade secrets and commercial or financial information obtained from a person and privileged or confidential.'' 5 U.S.C. 552(b)(4). FOIA Exemption 8 provides an exemption for matters that are ''contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions.'' 5 U.S.C. 552(b)(8). However, as discussed below, under paragraph (c)(2)(iv) of Rule 17a–5, if there are material weaknesses, the accountant's report on the compliance report must be made available for customers' inspection and, consequently, it would not be deemed confidential. In addition, paragraph (c)(2)(i) of Rule 17a–5 (which is not being amended today) requires a broker-dealer to furnish to its customers annually a balance sheet with appropriate notes prepared in accordance with GAAP and which must be audited if the broker-dealer is required to file audited financial statements with the Commission. *See* 17 CFR 240.17a–5(c)(2)(i).

[240] *See* 17 CFR 240.17a–5(e)(3).

[241] *See Broker-Dealer Reports,* 76 FR at 37592–37593.

[242] *See* paragraph (e)(3) of Rule 17a–5.

SIPC.[243] In order to assist in the collection of assessments from member broker-dealers, SIPC has promulgated two forms that broker-dealers must file with SIPC, as applicable: Form SIPC–3 and Form SIPC–7. Form SIPC–3 is required when a broker-dealer is claiming an exemption from SIPC membership (*i.e.,* when the broker-dealer does not have to pay an assessment). In this case, the broker-dealer must file Form SIPC–3 each year certifying that the broker-dealer remained qualified for the exemption during the prior year. Form SIPC–7 elicits information from a broker-dealer that is a SIPC member about the broker-dealer's sources of revenue attributable to its securities business. Every broker-dealer that is a member of SIPC must file this form annually.

Prior to today's amendments, paragraph (e)(4) of Rule 17a–5 provided that a broker-dealer must file with its annual report a supplemental report on the status of the membership of the broker-dealer in SIPC, which was required to be ''covered by an opinion of the independent public accountant'' if the annual report of the broker-dealer was required to be audited.[244] Among other things, the supplemental report needed to cover the SIPC annual general assessment reconciliation or exclusion from membership forms (*i.e.,* Form SIPC–7 or Form SIPC–3).[245] Paragraph (e)(4)(iii) of Rule 17a–5 used the terms ''review'' and ''opinion'' in describing the accountant's report that must cover the supplement report.[246] In addition, it required that the review by the accountant include certain minimum procedures.[247]

Under this provision, the supplemental report did not need to be filed if the SIPC Fund assessments were the minimum assessment provided for under SIPA.[248] Between 1996 and 2009, the annual assessment for SIPC members remained at the $150 minimum assessment level provided for under SIPA.[249] In 2009, SIPC raised the assessment above the minimum, which triggered the requirement in paragraph (e)(4) of Rule 17a–5 to file a supplemental report with the Commission, the broker-dealer's DEA, and SIPC.[250]

The Commission stated in the proposing release that, because Forms SIPC–3 and SIPC–7 are used solely by SIPC for purposes of levying its assessments, the supplemental report required pursuant to paragraph (e)(4) of Rule 17a–5 relating to these forms would be more appropriately filed exclusively with SIPC and that SIPC (rather than the Commission) should prescribe by rule the form of the supplemental report.[251] The Commission stated that it would continue to have a role in establishing the requirements for a supplemental report because the Commission must approve SIPC rules.[252]

For these reasons, the Commission proposed to amend paragraph (e)(4) of Rule 17a–5 to require that broker-dealers file with SIPC a report on the SIPC annual general assessment reconciliation or exclusion from membership forms that contains such information and is in such format as determined by SIPC by rule and approved by the Commission.[253] However, because there would be an interim period before a rule determined by SIPC became effective, the Commission proposed amendments to paragraph (e)(4) under which broker-dealers would continue to file a supplemental report with the Commission, the broker-dealer's DEA, and SIPC until SIPC adopts a rule pursuant to paragraph (e)(4)(i) of Rule 17a–5 and the rule is approved by the Commission.[254] Consequently, a broker-dealer would be required to file the SIPC supplemental reports with SIPC using the existing formats for the reports until the earlier of the Commission approving a rule adopted by SIPC or two years. If after two years, a rule promulgated by SIPC has not been approved by the Commission, broker-dealers would no longer be required to file these reports.

Further, to facilitate this change, the Commission proposed to update the rule text to conform it to existing professional standards and industry practices.[255] Specifically, the Commission proposed amending paragraph (e)(4) of Rule 17a–5 to eliminate the ambiguity that stems from the differing auditing terms used in that rule by removing all references to ''review'' and ''opinion.''[256] In their place, the Commission proposed that the supplemental report include an independent public accountant's report based on the performance of the procedures listed in paragraph (e)(4)(iii) of Rule 17a–5, which the Commission did not propose to change.[257]

The Commission received two comments relating to the proposed amendments to paragraph (e)(4) of Rule 17a–5, both of which supported the proposed change.[258] One commenter indicated that the proposed amendment would decrease the burden on broker-dealers associated with filing the supplemental report with the Commission and the broker-dealer's DEA.[259] In addition, the other commenter indicated that until the supplemental reports are filed exclusively with SIPC, they should be subject to confidential treatment.[260]

The Commission is adopting the amendments to paragraph (e)(4) of Rule 17a–5 as proposed.[261] With respect to the comment about the Commission keeping the supplemental report confidential, a broker-dealer can request confidential treatment for the report.[262] If such a request is made, the Commission anticipates that it will accord the supplemental report confidential treatment to the extent permitted by law.[263]

[243] Broker-dealers engaged exclusively in the distribution of mutual fund shares, the sale of variable annuities, the insurance business, the furnishing of investment advice to investment companies or insurance company separate accounts, or whose principal business is conducted outside the U.S. are not required to be members of SIPC. *See* 15 U.S.C. 78ccc(a)(2)(A)(i)–(iii).

[244] *See* 17 CFR 240.17a–5(e)(4).

[245] *Id.*

[246] *See* 17 CFR 240.17a–5(e)(4)(iii).

[247] *See* 17 CFR 240.17a–5(e)(4)(iii)(A)–(F).

[248] *See* 17 CFR 240.17a–5(e)(4); 15 U.S.C. 78ddd(d)(1)(c).

[249] *See* SIPC, *SIPC to Reinstitute Assessments of Member Firms' Operating Revenues* (Mar. 2, 2009) (news release).

[250] *Id.*

[251] *See Broker-Dealer Reports,* 76 FR at 37582.

[252] *Id.*

[253] *Id.*

[254] *Id.*

[255] *Id.*

[256] *Id.*

[257] *See Broker-Dealer Reports,* 76 FR at 37582. The Commission proposed one modification to the procedures listed in former paragraph (e)(4)(iii); namely, amending the procedure described in paragraph (e)(4)(iii)(F), which is now renumbered (e)(4)(ii)(6), to change the reference from ''Form SIPC–7'' to ''Form SIPC–3'' because the reference to Form SIPC–7 is inaccurate. *Id.*

[258] *See CAI Letter; McGladrey Letter.*

[259] *See CAI Letter.*

[260] *See McGladrey Letter.*

[261] *See* paragraph (e)(4) of Rule 17a–5.

[262] *See* 17 CFR 200.83. Information about how to request confidential treatment of information submitted to the Commission is *available at http://www.sec.gov/foia/howfo2.htm#privacy.*

[263] *See, e.g.,* Exchange Act section 24, 15 U.S.C. 78x (governing the public availability of information obtained by the Commission) and 5 U.S.C. 552 *et seq.* (Freedom of Information Act—''FOIA''). FOIA provides at least two pertinent exemptions under which the Commission has authority to withhold certain information. FOIA Exemption 4 provides an exemption for ''trade secrets and commercial or financial information obtained from a person and privileged or confidential.'' 5 U.S.C. 552(b)(4). FOIA Exemption 8 provides an exemption for matters that are ''contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions.'' 5 U.S.C. 552(b)(8).

D. Engagement of the Accountant

As part of today's amendments to the broker-dealer annual reporting requirements in Rule 17a–5, the Commission is amending certain requirements relating to a broker-dealer's engagement of an independent public accountant. Specifically, the Commission is requiring that a broker-dealer engage an independent public accountant to prepare reports based on an examination of the broker-dealer's financial report and either an examination of certain statements in the broker-dealer's compliance report or a review of certain statements in the broker-dealer's exemption report. The examinations and reviews must be made in accordance with the standards of the PCAOB, consistent with the explicit authority granted to the PCAOB by the Dodd-Frank Act to establish (subject to Commission approval) auditing and attestation standards with respect to broker-dealer audits.[264] Among other things, the amendments replace provisions that required the filing of a ''material inadequacy'' report and are intended to update terminology in the rule to make the rule's requirements clear and to provide for a more consistent approach to engaging broker-dealer independent public accountants.

This section addresses statutory requirements for broker-dealer annual reports and the Commission's authority with regard to these reports, describes the engagement of accountant requirements in Rule 17a–5 prior to today's amendments, summarizes the Commission's proposed amendments and comments received, and discusses the final rule amendments.

1. Statutory Requirements and Commission Authority

Section 17(e)(1)(A) of the Exchange Act requires a broker-dealer to file annually with the Commission a ''certified'' balance sheet and income statement as well as ''such other financial statements (which shall, as the Commission specifies, be certified) and information concerning its financial condition as the Commission, by rule, may prescribe as necessary or appropriate in the public interest or for the protection of investors.'' [265] Section 17(e)(2) of the Exchange Act provides the Commission with authority, by rule, to prescribe the form and content of the financial statements and the accounting principles and standards used in their preparation as it deems necessary or appropriate in the public interest or for the protection of investors.[266] In addition, section 17(a) of the Exchange Act more generally requires registered broker-dealers to make and disseminate such reports as the Commission, by rule, may prescribe as necessary or appropriate in the public interest, for the protection of investors.[267] The Commission adopted Rule 17a–5, in part, under these provisions.[268]

Prior to the enactment of the Sarbanes-Oxley Act of 2002 (''Sarbanes-Oxley Act''),[269] section 17(e)(1)(A) required that the annual financial statements a broker-dealer must file with the Commission be certified by ''an independent public accountant.'' The Sarbanes-Oxley Act established the PCAOB [270] and amended section 17(e)(1)(A) by replacing the words ''certified by an independent public accountant'' with the words ''certified by a registered public accounting firm.'' [271] Title I of the Sarbanes-Oxley Act prescribed specific PCAOB registration, standards-setting, inspection, investigation, disciplinary, foreign application, oversight, and funding programs in connection with audits of issuers.[272] However, as originally enacted, the Sarbanes-Oxley Act did not expressly prescribe similar programs in connection with audits of broker-dealers that are not issuers.

The Dodd-Frank Act, enacted in July 2010, amended the Sarbanes-Oxley Act to provide the PCAOB with explicit authority to, among other things, establish (subject to Commission approval) auditing and related attestation, quality control, ethics, and independence standards for registered public accounting firms with respect to their preparation of audit reports to be included in broker-dealer filings with the Commission, and the authority to conduct and require an inspection program of registered public accounting firms that audit broker-dealers.[273] The Dodd-Frank Act addressed inspection authority by adding section 104(a)(2)(A) to the Sarbanes-Oxley Act, which provides that the PCAOB ''may, by rule, conduct and require a program of inspection* * *of registered public accounting firms that provide one or more audit reports for a broker or dealer'' and that the PCAOB, in establishing a program for inspection, ''may allow for differentiation among classes of brokers or dealers, as appropriate.'' [274]

The Dodd-Frank Act also added section 104(a)(2)(D) to the Sarbanes-Oxley Act, which provides that a public accounting firm is not required to register with the PCAOB if the public accounting firm is exempt from an inspection program established by the PCAOB.[275] The Dodd-Frank Act made a conforming amendment to section 17(e)(1)(A) of the Exchange Act to replace the words ''certified by a registered public accounting firm'' with the words ''certified by an independent public accounting firm, or by a registered public accounting firm if the firm is required to be registered under the Sarbanes-Oxley Act of 2002.'' [276]

Before today's amendments, paragraph (g)(1) of Rule 17a–5 required that audits of broker-dealer reports filed with the Commission under Rule 17a–5 be made in accordance with generally accepted auditing standards (''GAAS''), which are established by the Auditing Standards Board of the American Institute of Certified Public Accountants (''AICPA''). In light of the authority granted to the PCAOB by the Dodd-Frank Act to establish standards governing audit reports to be included in broker-dealer filings with the Commission, the Commission issued transitional interpretive guidance to clarify that references in Commission rules, staff guidance, and in the federal securities laws to GAAS or to specific standards under GAAS, as they relate to non-issuer brokers or dealers, should continue to be understood to mean auditing standards generally accepted in the U.S., in addition to any applicable rules of the Commission.[277] The

[264] *See* Public Law 111–203 § 982.

[265] *See* 15 U.S.C. 78q(e)(1)(A).

[266] *See* 15 U.S.C. 78q(e)(2).

[267] *See* 15 U.S.C. 78q(a).

[268] *See Broker-Dealer Reports,* Exchange Act Release No. 11935 (Dec. 17, 1975), 40 FR 59706 (Dec. 30, 1975).

[269] Public Law 107–204, 116 Stat. 745 (2002).

[270] Public Law 107–204 § 101.

[271] *See* Public Law 107–204 § 205(c)(2). The term *Registered Public Accounting Firm* is defined in section 2(a)(12) as ''a public accounting firm registered with the [PCAOB] in accordance with this Act.'' *See* Public Law 107–204 § 2(a)(12).

[272] Section 2(a)(7) of the Sarbanes-Oxley Act defines the term *issuer* as ''an issuer as defined in section 3 of the [Exchange Act], the securities of which are registered under section 12 of [the Exchange Act], or that files or has filed a registration statement that has not yet become effective under the Securities Act of 1933…, and that it has not withdrawn'' (U.S.C. citations omitted). *See* Public Law 107–204 § 2(a)(7).

[273] *See* Public Law 111–203 § 982.

[274] *See* Public Law 111–203 § 982(e)(1).

[275] *Id.*

[276] *See* Public Law 111–203 § 982(e)(2). As discussed below, today's amendments to the qualifications of the independent public accountant provisions require, consistent with amended section 17(e)(1)(A), that the accountant be qualified, independent, and registered with the PCAOB ''if required by the Sarbanes-Oxley Act of 2002.'' *See* paragraph (f)(1) of Rule 17a–5.

[277] *See Commission Guidance Regarding Auditing, Attestation, and Related Professional Practice Standards Related to Brokers and Dealers,* Exchange Act Release No. 62991 (Sept. 24, 2010), 75 FR 60616, 60617 (Oct. 1, 2010).

guidance also stated that the Commission intended to revisit the interpretation in connection with a rulemaking project to update the audit and related attestation requirements under the federal securities laws for broker-dealers.[278] As discussed below, the Commission is now adopting amendments to Rule 17a–5 to require that audits and attestations of broker-dealer reports filed under Rule 17a–5 be made in accordance with standards of the PCAOB—the rule as amended does not contain references to GAAS.

Since the Commission proposed these amendments, the PCAOB has taken a number of actions to implement the explicit authority over broker-dealer audits provided to it by the Dodd-Frank Act. For example, on August 18, 2011, the Commission approved two PCAOB rule changes: a temporary PCAOB rule that established an interim program of inspection of audits of broker-dealers,[279] and a PCAOB rule change providing that funds to cover the PCAOB's annual budget be allocated among issuers, brokers, and dealers.[280] In addition, as discussed below, subsequent to the Commission's proposal to amend Rule 17a–5, the PCAOB proposed attestation standards to establish requirements for examining broker-dealer compliance reports and reviewing broker-dealer exemption reports ''to align its attestation standards more closely with the auditor's responsibilities under [the proposed amendments to Rule 17a–5].'' [281] The PCAOB concurrently proposed an auditing standard for supplemental information accompanying audited financial statements that would supersede the current standard.[282] The auditing standard would apply to supporting schedules broker-dealers must file under Rule 17a–5, including schedules regarding the computation of net capital and the customer reserve requirement and information related to the broker-dealer's possession or control of customer assets.[283] The PCAOB also proposed amendments ''to tailor certain of its rules to the audits and [independent public accountants] of broker-dealers.'' [284]

2. Engagement of Accountant Requirements Prior to Today's Amendments

Rule 17a–5 requires that a broker-dealer prepare and file certain financial statements and supporting schedules in addition to the balance sheet and income statement required under section 17(e)(1)(A) of the Exchange Act.[285] Before today's amendments, the financial statements and supporting schedules were generally required to be audited in accordance with GAAS by an independent public accountant registered with the PCAOB.[286]

In addition to filing a report of the independent public accountant covering the financial statements and supporting schedules, paragraph (j) of Rule 17a–5 required the broker-dealer to file with the annual audit a supplemental report prepared by the accountant (''material inadequacy report'') that either: (1) Indicated that the accountant did not find any material inadequacies; or (2) described any material inadequacies in internal control the accountant found during the course of the audit of the financial statements and supporting schedules and any corrective action taken or proposed by the broker-dealer.[287]

For purposes of preparing the material inadequacy report, paragraph (g)(1) of Rule 17a–5 required that the audit include a ''review'' of the broker-dealer's accounting system, internal accounting control, and procedures for safeguarding securities.[288] Further, the accountant was required to review the practices and procedures of the broker-dealer in: (1) Making the periodic computations of aggregate indebtedness and net capital under paragraph (a)(11) of Exchange Act Rule 17a–3 and the reserve required by paragraph (e) of Rule 15c3–3; [289] (2) making the quarterly securities examinations, counts, verifications, and comparisons and the recordation of differences required by Rule 17a–13; [290] (3) complying with the requirement for prompt payment for securities under Regulation T of the Board of Governors of the Federal Reserve System (''Regulation T''); [291] and (4) obtaining and maintaining physical possession or control of all fully paid and excess margin securities of customers as required by Rule 15c3–3.[292] The scope of the independent public accountant's procedures was required to be sufficient to provide ''reasonable assurance'' that any material inadequacies existing at the date of the examination in the broker-dealer's accounting system, internal accounting control, and procedures for safeguarding securities as well as in the practices and procedures described in items (1) through (4) above would be disclosed.[293]

The *AICPA Broker-Dealer Audit Guide* provided that the material inadequacy report should address what the independent public accountant concluded in its ''study'' of the adequacy of the broker-dealer's

[278] *Id.*

[279] *See Public Company Accounting Oversight Board; Order Approving Proposed Temporary Rule for an Interim Program of Inspection Related to Audits of Brokers and Dealers,* Exchange Act Release No. 65163 (Aug. 18, 2011), 76 FR 52996 (Aug. 24, 2011).

[280] *See Public Company Accounting Oversight Board; Order Approving Proposed Board Funding Rules for Allocation of the Board's Accounting Support Fee Among Issuers, Brokers, and Dealers, and Other Amendments to the Board's Funding Rules,* Exchange Act Release No. 65162 (Aug. 18, 2011), 76 FR 52997 (Aug. 24, 2011).

[281] *See PCAOB Proposing Release* at 5.

[282] *See PCAOB Proposed Auditing Standard for Supplemental Information.*

[283] *Id.* at 3.

[284] *See Proposed Amendments to Conform the Board's Rules and Forms to the Dodd-Frank Act and Make Certain Updates and Clarifications,* PCAOB Release No. 2012–002, PCAOB Rulemaking Docket Matter No. 039 (Feb. 28, 2012).

[285] *See* 17 CFR 240.17a–5(d).

[286] *See* 17 CFR 240.17a–5(g). An engagement to perform an audit (or examination) of financial statements is designed to provide reasonable assurance about whether the financial statements are free of material misstatement. *See, e.g.,* PCAOB Interim Auditing Standard, *AU Section 110* at ¶ .02. The term *audit* is defined in section 110(1) of the Sarbanes-Oxley Act, as amended by the Dodd-Frank Act, to mean ''an examination of the financial statements, reports, documents, procedures, controls, or notices of an issuer, broker, or dealer by an independent public accountant in accordance with the rules of the [PCAOB] or the Commission, for the purpose of expressing an opinion on the financial statements or providing an audit report.''

[287] *See* 17 CFR 240.17a–5(j). Prior to today's amendments, paragraph (g)(3) of Rule 17a–5 describes a material inadequacy in a broker-dealer's accounting system, internal accounting controls, procedures for safeguarding securities, and practices and procedures to include any condition which has contributed substantially to or, if appropriate corrective action is not taken, could reasonably be expected to: (1) Inhibit a broker-dealer from promptly completing securities transactions or promptly discharging its responsibilities to customers, other broker-dealers or creditors; (2) result in material financial loss; (3) result in material misstatements of the broker-dealer's financial statements; or (4) result in violations of the Commission's recordkeeping or financial responsibility rules to an extent that could reasonably be expected to result in the conditions described in (1) through (3) above. *See* 17 CFR 240.17a–5(g)(3). In addition to the material inadequacy report, a broker-dealer was required to file during certain periods a supplemental report covered by an opinion of the independent public accountant on the status of the broker-dealer's membership in SIPC. *See* 17 CFR 240.17a–5(e)(4). The Commission is amending this requirement as discussed above in section II.C.4. of this release. Further, a broker-dealer that computes net capital under the alternative model-based standard in Appendix E to Rule 15c3–1 (17 CFR 240.15c3–1e) is required to file a supplemental report of an independent public accountant indicating the results of the accountant's review of the internal risk management control system established and documented by the broker-dealer in accordance with Rule 15c3–4 (17 CFR 240.15c3–4). *See* 17 CFR 240.17a–5(k). The Commission is not amending this requirement today.

[288] *See* 17 CFR 240.17a–5(g)(1).

[289] *See* 17 CFR 240.17a–5(g)(1)(i).

[290] *See* 17 CFR 240.17a–5(g)(1)(ii).

[291] *See* 17 CFR 240.17a–5(g)(1)(iii). *See also* 12 CFR 220 *et seq.* (Regulation T).

[292] *See* 17 CFR 240.17a–5(g)(1)(iv).

[293] *See* 17 CFR 240.17a–5(g)(1).

practices and procedures in complying with the financial responsibility rules in relation to the definition of material inadequacy as stated in paragraph (g)(3) of Rule 17a–5.[294] The issuance of a study is relatively unique to broker-dealer audits, however, and while auditing standards at one time referred to the performance of a study, current auditing standards no longer contain such references.

Additional engagement of accountant requirements prior to today's amendments were set forth in paragraphs (g) and (i) of Rule 17a–5. Paragraph (g)(2) of Rule 17a–5 provided that, if the broker-dealer was exempt from Rule 15c3–3, the independent public accountant must ascertain that the conditions of the exemption were being complied with as of the examination date and that no facts came to the independent public accountant's attention to indicate that the exemption had not been complied with during the period since the last examination.[295]

Paragraph (i) of Rule 17a–5, before today's amendments, was titled, ''Accountant's reports—general provisions.'' [296] Paragraph (i)(1) of Rule 17a–5 provided that the accountant's report must be dated, signed manually, indicate the city and state where issued, and identify the financial statements and schedules covered by the report.[297] Paragraph (i)(2) of Rule 17a–5 provided that the accountant's report must state whether the audit was made in accordance with generally accepted auditing standards; state whether the accountant reviewed the procedures followed for safeguarding securities; and designate any auditing procedures deemed necessary by the accountant under the circumstances of the particular case which have been omitted, and the reason for their omission.[298] Further, the rule provided that ''[n]othing in this section shall be construed to imply authority for the omission of any procedure which independent accountants would ordinarily employ in the course of an audit made for the purpose of expressing the opinions required under [Rule 17a–5].'' [299]

Prior to today's amendments, paragraph (i)(3) of Rule 17a–5 provided that the accountant's report must state clearly the opinion of the accountant: (i) with respect to the financial statements and schedules covered by the report and the accounting principles and practices; and (ii) as to the consistency of the application of the accounting principles, or as to any changes in such principles that have a material effect on the financial statements.[300] Paragraph (i)(4) provided that any matters to which the accountant took exception must be clearly identified, the exception specifically and clearly stated, and, to the extent practicable, the effect of each such exception on the related financial statements given.[301] Paragraph (i)(5) of Rule 17a–5 provided that the terms *audit* (*or examination*), *accountant's report,* and *certified* have the meanings given in Rule 1–02 of Regulation S–X (17 CFR 210.1–02).[302]

3. Amended Engagement of Accountant Requirements

i. Proposed Amendments

The Commission proposed to substantially amend paragraph (g) and remove paragraph (j) of Rule 17a–5, in part, to update the engagement of the accountant requirements to address outdated or inconsistent terminology in the rule.[303] The proposed amendments to paragraph (g) and removal of paragraph (j) of Rule 17a–5 would have eliminated the requirement for the accountant to prepare and the broker-dealer to file a material inadequacy report.[304] In its place, the independent public accountant would have been required to prepare, and the broker-dealer would have been required to file, in addition to a report covering the financial report, a report covering either the broker-dealer's compliance report or exemption report, as applicable.[305] Specifically, the Commission proposed to amend paragraph (g) of Rule 17a–5 to be titled ''Engagement of independent public accountant'' and to require a broker-dealer required to file annual reports under paragraph (d) of Rule 17a–5 to engage an independent public accountant, unless the broker-dealer is subject to the exclusions in paragraphs (d)(1) and (e)(1)(i) of Rule 17a–5. The independent public accountant, as part of the engagement, would have been required to undertake to: (1) Prepare a report based on an examination of the broker-dealer's financial report in accordance with standards of the PCAOB; and (2) prepare a report based on an ''examination'' of the assertions of the broker-dealer in the compliance report in accordance with standards of the PCAOB [306] or to prepare a report based on a ''review'' of the broker-dealer's exemption report in accordance with standards of the PCAOB.[307] This provision would have retained the requirement that the financial statements and supporting schedules be audited by the independent public accountant, so that the accountant would have continued to be required to obtain ''reasonable assurance'' about whether they were free of material misstatement, but would have changed

[294] The material inadequacy report is addressed in the AICPA's *Audit & Accounting Guide: Brokers and Dealers in Securities* (Sept. 1, 2011 ed.) (''*AICPA Broker-Dealer Audit Guide*''), which provides that the report should: (1) Address what auditors concluded in their study of the adequacy of the broker-dealer's practices and procedures in complying with the Commission's financial responsibility rules in relation to the definition of a material inadequacy in Rule 17a–5; and (2) disclose material weaknesses in internal control over financial reporting (including procedures for safeguarding securities) that are revealed through auditing procedures designed and conducted for the purpose of expressing an opinion on the financial statements. *See AICPA Broker-Dealer Audit Guide* at ¶ 3.77. The *AICPA Broker-Dealer Audit Guide* further provides that if conditions believed to be material weaknesses are found to exist or have existed during the year, the report should disclose the nature of the weaknesses and the corrective action taken or proposed to be taken by the broker-dealer. *See AICPA Broker-Dealer Audit Guide* at ¶ 3.80. The *AICPA Broker-Dealer Audit Guide* also provides sample reports ''on internal control required by SEC Rule 17a–5(g)(1).'' *See AICPA Broker-Dealer Audit Guide* apps. C, D, and F.

[295] *See* 17 CFR 240.17a–5(g)(2).

[296] *See* 17 CFR 240.17a–5(i).

[297] *See* 17 CFR 240.17a–5(i)(1).

[298] *See* 17 CFR 240.17a–5(i)(2).

[299] *Id.*

[300] *See* 17 CFR 240.17a–5(i)(3).

[301] *See* 17 CFR 240.17a–5(i)(4).

[302] *See* 17 CFR 240.17a–5(i)(5).

[303] *See Broker-Dealer Reports,* 76 FR at 37578–37579. In addition, the Commission proposed changing the title of paragraph (g) from *Audit objectives* to *Engagement of the independent public accountant. Id.* at 37606.

[304] *Id.* at 37578–37579.

[305] *Id.*

[306] An attest engagement designed to provide a high level of assurance is referred to as an ''examination.'' *See, e.g.,* PCAOB Interim Attestation Standard, *AT Section 101* at ¶ .54. For this type of engagement, the accountant's conclusion will be expressed in the form of an opinion. For example, the accountant's conclusion based on an examination of an assertion could state that in the accountant's opinion, [the assertion] is fairly stated in all material respects. *See, e.g.,* PCAOB Interim Attestation Standard, *AT Section 101* at ¶ .84. The proposed rule provided that the examination and related report would apply to the broker-dealer's ''assertions'' in the compliance report (and therefore would not apply to other items in the proposed compliance report; namely, a statement as to whether the broker-dealer has established a system of internal control and a description of instances of material non-compliance, and material weaknesses over compliance with, the financial responsibility rules).

[307] An attest engagement designed to provide a moderate level of assurance is referred to as a ''review.'' *See, e.g.,* PCAOB Interim Attestation Standard, *AT Section 101* at ¶¶ .55, .89. For this type of engagement, the accountant's conclusion will be expressed, not in the form of an opinion, but in the form of ''negative assurance.'' *See, e.g.,* PCAOB Interim Attestation Standard, *AT Section 101* at ¶ .68. For example, the accountant's conclusion based on a review of an assertion could state that no information came to the accountant's attention that indicates that the assertion is not fairly stated in all material respects. *See, e.g.,* PCAOB Interim Attestation Standard, *AT Section 101* at ¶ .88.

the audit standards from GAAS to standards of the PCAOB.[308]

The Commission proposed making conforming amendments to paragraph (i) of Rule 17a–5, substituting the words ''examinations'' and ''reviews'' for the word ''audits,'' substituting the words ''standards of the PCAOB'' for ''generally accepted auditing standards,'' substituting ''annual reports'' for ''financial statements,'' and changing the title to ''Reports prepared by the independent public accountant.'' The Commission also proposed deleting paragraph (i)(5) of Rule 17a–5, which provided that the terms ''audit,'' ''examination,'' ''accountant's report,'' and ''certified'' have the meanings given in Rule 1–02 of Regulation S–X. As proposed, paragraph (i)(1) of Rule 17a–5 would have provided that the independent public accountant's reports must: be dated; be signed manually; indicate the city and state where issued; and identify without detailed enumeration the items covered by the reports. Paragraph (i)(2) of Rule 17a–5 would have provided that the accountant's report must state whether the examination or review was made in accordance with standards of the PCAOB and must designate any examination, and, if applicable, review procedures deemed necessary by the independent public accountant under the circumstances of the particular case that have been omitted, and the reason for their omission. Further, the rule would have provided that ''[n]othing in this section shall be construed to imply authority for the omission of any procedure that independent public accountants would ordinarily employ in the course of an examination or review made for the purpose of expressing the opinions or statement required under [Rule 17a–5].'' Paragraph (i)(3) of Rule 17a–5 would have provided that the independent public accountant's reports must state clearly the opinion of the independent public accountant: (i) with respect to the financial report and the accounting principles and practices reflected therein and the compliance report; and (ii) with respect to the financial report, as to the consistency of the application of the accounting principles, or as to any changes in such principles that have a material effect on the financial statements. Paragraph (i)(4) of Rule 17a–5 would have provided that any matters to which the independent public accountant takes exception must be clearly identified, the exception thereto specifically and clearly stated, and, to the extent practicable, the effect of each such exception on any related items contained in the annual reports.

As stated above, after the Commission proposed the amendments to Rule 17a–5, the PCAOB issued proposed standards that ''would establish requirements for examining the assertions in a broker's or dealer's compliance report and reviewing a broker's or dealer's assertion in the exemption report.'' [309] The PCAOB stated that the proposed standards were ''tailored to the requirements'' in Rule 17a–5 as proposed to be amended by the Commission.[310]

ii. Comments

The Commission received several comments regarding the proposed revisions to the independent accountant engagement requirements in Rule 17a–5.[311] One commenter stated that GAAS should be used for audits of non-carrying broker-dealers; or, in the alternative, that the Commission should delay the effective date for the requirement that the audit be conducted in accordance with PCAOB standards for smaller broker-dealers until one year after the approval of the amendments.[312] A second commenter stated that PCAOB standards should apply only for broker-dealers ''permanently subject to PCAOB inspection'' and that the Commission should not require that audits of broker-dealers be performed in accordance with PCAOB standards for non-issuer broker-dealers until the PCAOB determines which non-issuer broker-dealers will be subject to its permanent inspection program.[313]

One commenter noted that the proposing release states that broker-dealers will be required to file a report by the accountant that ''addresses'' the assertions in the compliance report,[314] and stated that the Commission should provide more guidance on what an accountant must address, as ''nowhere in the Release or in the proposed rules is there guidance as to what 'addresses' means or entails.'' [315] This commenter further stated that the Commission ''presumably'' will rely on PCAOB rules, and suggested that final rules regarding the accountant's obligations with respect to its examination of the compliance report should be deferred until after a comment period of at least 60 days after the PCAOB rules are finalized or the Commission amends its proposal to include specifics as to what ''address'' means and what type of review is required by the accountant.[316] The commenter also stated that the requirement should not be effective unless the *AICPA Broker-Dealer Audit Guide* is revised and updated.[317] One commenter asked what was expected of the auditor with respect to the books and records assertion and stated that a separate opinion on this assertion may entail more detailed procedures as to the source of the information.[318]

Another commenter stated that a review engagement should not be employed for the exemption report because inquiry and observation would not provide sufficient evidence regarding a broker-dealer's assertion that it is exempt from the requirements of Rule 15c3–3 and stated that, under the PCAOB's interim attestation standards, an auditor should not accept an engagement to perform a ''review'' level of service related to an entity's compliance with specified requirements or an assertion with regard to that compliance.[319] As an alternative, this commenter suggested an ''agreed-upon procedures'' approach addressing the results of procedures specified by the Commission or the performance of an examination engagement if suitable criteria were developed.[320] Another commenter stated that the benefit of receiving an audit report covering the exemption report would not justify the cost.[321] Similarly, a commenter stated that the exemption report should be replaced with a box to check on the FOCUS Report as the auditor attestation provided no added benefit.[322]

Several commenters urged the Commission to clarify the interaction between material weaknesses in internal control over financial reporting and material weaknesses in internal control over compliance with the financial responsibility rules.[323] One commenter stated that due to the reliance placed on the financial books and records to

[308] *See Broker-Dealer Reports,* 76 FR at 37606. As stated above, an engagement to perform an audit of financial statements is designed to provide ''reasonable assurance'' about whether the financial statements are free of material misstatement. *See, e.g.,* PCAOB Interim Attestation Standard, *AT Section 101* at ¶ .54.

[309] *See PCAOB Proposing Release* at 5.

[310] *Id.*

[311] *See, e.g., ABA Letter; AICPA Letter; Citrin Letter; E&Y Letter; Van Kampen/Invesco Letter.*

[312] *See Citrin Letter.* The Commission also received many comments seeking additional time to transition to the final rules. Those comments are discussed below in section V. of this release.

[313] *See AICPA Letter.*

[314] *See Broker-Dealer Reports,* 76 FR at 37575.

[315] *See ABA Letter.*

[316] *Id.*

[317] *Id.* As stated below, AICPA guidance will no longer be applicable once standards of the PCAOB apply to broker-dealer annual reports.

[318] *See Grant Thornton Letter.*

[319] *See E&Y Letter.*

[320] *Id.*

[321] *See Citrin Letter.*

[322] *See Angel Letter.*

[323] *See Deloitte Letter; KPMG Letter; PWC Letter.*

calculate net capital, it will not be feasible to attest to the effectiveness of internal control over the financial responsibility rules without also attesting to internal control over financial reporting.[324] The commenter stated that, accordingly, it is necessary to include internal control over financial reporting within the scope of the rule. The commenter stated its understanding that accountants expect to include internal control over financial reporting in their attestation scope over the financial responsibility rules, and that the process will include documenting all existing processes and engaging internal audit to validate the effectiveness of the procedures implemented through procedural walkthroughs and control testing to validate management's assertions.[325] This commenter also stated its belief that independent public accountants will need ''to include an attestation of the additional in scope processes within the scope of their audit work in order to comply with PCAOB requirements.'' [326]

As noted above in section II.B.4.ii. of this release, with respect to the independent public accountant's review of the exemption reports, one commenter stated that, for example, a bank or clerical error that results in a broker-dealer that operates under an exemption to Rule 15c3–3 finding itself in possession of customer assets overnight once during the fiscal year should not ''warrant the 'material modification' of a broker-dealer's Exemption Report.'' [327] Another commenter noted that ''to consider a single instance of a broker-dealer failing to promptly forward a customer's securities as an instance that would necessitate a material modification creates an unworkable standard.'' [328]

iii. The Final Rule

The Commission is adopting amendments to the engagement of the accountant requirements in Rule 17a–5 substantially as proposed, except for revisions, as discussed in detail below, to clarify the rule's requirements and to make technical changes. Paragraph (g) of Rule 17a–5 as adopted provides that the independent public accountant engaged by the broker-dealer to provide reports on the financial report and either the compliance report or exemption report must, as part of the engagement undertake to: (1) Prepare a report based on an examination of the broker-dealer's financial report in accordance with standards of the PCAOB; and (2) prepare a report based on an examination of certain enumerated statements of the broker-dealer in the compliance report [329] in accordance with standards of the PCAOB or prepare a report based on a review of the statements in the broker-dealer's exemption report in accordance with standards of the PCAOB. Additionally, as proposed, the amendments delete paragraph (j) of Rule 17a–5, which, as explained above, required that the broker-dealer file with the annual audit report a material inadequacy report, as well as provisions in paragraph (g) of Rule 17a–5 requiring that the audit be conducted in accordance with GAAS and addressing the accountant's review for material inadequacies.

Various commenters suggested that GAAS instead of PCAOB standards should apply for engagements of accountants with respect to certain broker-dealer reports, such as reports of non-carrying broker-dealers.[330] The Commission believes that requiring GAAS for audits of broker-dealers that are exempt from Rule 15c3–3 would not be consistent with the provisions of the Dodd-Frank Act that provide the PCAOB with explicit authority to establish standards with regard to audits of broker-dealer reports filed with the Commission.[331] These provisions enable the PCAOB to exercise its standard-setting authority over audits of broker-dealers registered with the Commission. The change from GAAS to PCAOB auditing standards will facilitate the Commission's regulatory oversight authority because the Commission has direct oversight authority over the PCAOB, including the ability to approve or disapprove the PCAOB's rules and standards. The Commission also has greater confidence in the quality of audits conducted by an independent public accountant registered with, and subject to regular inspection by, the PCAOB.[332] Further, as the PCAOB develops and implements an inspection program of broker-dealer audits as contemplated by the Dodd-Frank Act, that program will include inspection of, among other things, ''registered public accounting firms' current compliance with laws, rules, and standards in performing audits of brokers and dealers.'' [333] The requirement that all broker-dealer independent public accountants comply with the standards established by the PCAOB should facilitate the development and implementation of its permanent inspection program, as contemplated by the Dodd-Frank Act.

As noted above, the PCAOB has proposed an auditing standard for supplemental information accompanying audited financial statements, including the supporting schedules broker-dealers must file as part of the financial report.[334] The PCAOB stated that a primary factor that led it to reexamine its requirements regarding supplemental information was the Commission's proposal to amend the reporting requirements of Rule 17a–5.[335] In addition, as noted above, the PCAOB has proposed specific attestation standards for examining compliance reports and reviewing exemption reports. The PCAOB's proposing release noted that the proposed standards ''are tailored to the requirements in SEC Proposed Rule 17a–5.'' [336] The proposed standards, if adopted, would establish a single and broker-dealer-specific approach to examining compliance reports and reviewing exemption reports. This should provide greater clarity as to procedures an independent public accountant should use in examining a compliance report and reviewing an exemption report.

With respect to comments suggesting that PCAOB standards should apply only to auditors of broker-dealers ''permanently subject to PCAOB inspection,'' [337] the PCAOB has not exempted the audits by independent

[324] *See Van Kampen/Invesco Letter.*

[325] *Id.*

[326] *Id.*

[327] *See SIFMA letter.*

[328] *See CAI Letter.*

[329] As discussed above in section II.B.3. of this release, the final rule does not use the term assertion—the assertions contained in the proposal are now referred to as statements. These changes are not intended to be substantive. Paragraph (g) of Rule 17a–5 specifies that the accountant prepare a report based on an examination of certain statements enumerated in the rule. Similar to the proposal, the statements subject to the examination do not include a statement as to whether the broker-dealer has established a system of internal control or a description of instances of non-compliance with certain financial responsibility rules.

[330] *See AICPA Letter; Citrin Letter.*

[331] *See* Public Law 111–203 § 982. For example, section 982(a) of the Dodd-Frank Act added section 110 to the Sarbanes-Oxley Act, which contains definitions of terms such as *audit, audit report,* and *professional standards.* These definitions apply to audits, audit reports, and professional standards with respect to audits of broker-dealers as well as audits of issuers. In addition, section 982(b) of the Dodd-Frank Act amended section 101 of the Sarbanes-Oxley Act to substitute the words ''issuers, brokers, and dealers'' for the word ''issuers.''

[332] *See Custody of Funds or Securities of Clients by Investment Advisers,* 75 FR at 1460.

[333] *See Temporary Rule for an Interim Program of Inspection Related to Audits of Brokers and Dealers,* PCAOB Release No. 2011–001, PCAOB Rulemaking Docket Matter No. 32, 1 (June 14, 2011).

[334] *See PCAOB Proposed Auditing Standard for Supplemental Information.*

[335] *Id.* at 2–3.

[336] *See PCAOB Proposing Release* at 5.

[337] *See AICPA Letter.*

public accountants of any class of broker-dealer from the PCAOB's permanent inspection program.[338] In fact, the PCAOB has established an interim inspection program for all broker-dealer audits by independent public accountants that will ''allow the Board to begin inspections of relevant audits and auditors and provide a source of information to help guide decisions about the scope and elements of a permanent program.'' [339] The PCAOB stated that it did not intend ''to postpone all use of its new inspection authority until after those judgments were made.'' [340]

At this time, there is no reason to expect that any type of broker-dealer audit will be exempt from the PCAOB's permanent inspection program, and any PCAOB determination to exempt broker-dealer audits from the PCAOB's permanent inspection program must be approved by the Commission. Therefore, notwithstanding any such exemption, paragraph (g) of Rule 17a–5 is amended to require that broker-dealer independent public accountants prepare reports covering the financial report and compliance report or exemption report in accordance with standards of the PCAOB.

On August 20, 2012, the PCAOB published its first report on the progress of the interim inspection program.[341] The report contains observations from inspections of portions of 23 broker-dealer audits conducted by ten independent public accounting firms that were all conducted in accordance with GAAS.[342] The inspections did not exclude any broker-dealer audits from being eligible for selection.[343] PCAOB staff identified deficiencies in all of the audits inspected.[344] For example, as to all of the 14 audits of broker-dealers that claimed an exemption from Rule 15c3–3, the staff stated that the accountant ''did not perform sufficient procedures to ascertain that the broker or dealer complied with the conditions of the exemption,'' [345] and in 21 of the 23 audits, that the accountant ''failed to perform sufficient audit procedures to obtain reasonable assurance that any material inadequacies found to exist since the date of the last examination . . . would have been disclosed in the accountant's supplemental report.'' [346] The deficiencies noted in the PCAOB's report on the progress of the interim inspection program provide further support for the amendments that the Commission is adopting today to establish the foundation for the PCAOB's development of standards that are tailored to Rule 17a–5, and to strengthen and facilitate consistent compliance with broker-dealer audit and reporting requirements.

Several commenters suggested that the Commission delay the applicability of these requirements because, among other things, PCAOB standards regarding broker-dealer audits, including standards that apply to compliance reports and exemption reports, will not be final when these rule amendments are adopted.[347] In response, as discussed below in section V. of this release, the Commission is delaying the effective dates of most of the rule amendments. In accordance with the effective dates, broker-dealers must file compliance reports or exemption reports, as applicable, and broker-dealers must file reports of independent public accountants covering compliance reports or exemption reports in accordance with Rule 17a–5 as amended, for fiscal years ending on or after June 1, 2014. In the interim, broker-dealers must continue to file material inadequacy reports in accordance with the provisions of Rule 17a–5 as they existed before today's amendments. Broker-dealer independent public accountants must prepare reports based on an examination of broker-dealer financial reports in accordance with PCAOB standards for fiscal years ending on or after June 1, 2014. In the interim, audits of broker-dealer financial statements filed with the Commission under Rule 17a–5 should continue to be understood to mean auditing standards generally accepted in the U.S., plus any applicable rules of the Commission.[348] The June 1, 2014 effective date should provide sufficient time for the PCAOB to finalize, subject to Commission approval, the standards for broker-dealer audits and for broker-dealers and their independent public accountants to prepare to comply with the new requirements and standards.

As noted above, one commenter stated the Commission should provide more guidance on what an independent public accountant must address, and that the requirement for PCAOB standards should not be effective unless the *AICPA Broker-Dealer Audit Guide* is revised and updated.[349] Another commenter sought clarification on what was expected of the auditor with respect to the books and records assertion.[350] In response to these comments, the Commission notes that the PCAOB's proposed standards with respect to the examination of the compliance report by the independent public accountant address, among other things: (1) The objective of the examination; (2) the relationship between the examination engagement and the audit of the financial report; (3) considerations for broker-dealers with multiple divisions or branches; (4) identifying risks of material non-compliance; (5) testing controls over compliance; (6) performing compliance tests; (7) testing information used to assert compliance; (8) evaluating the results of the examination procedures; (9) subsequent events; (10) obtaining a representation letter; (11) communication requirements; (12) reporting on the examination engagement; (13) the examination report date; and (14) examination report modifications.[351] The PCAOB's proposed standards with respect to the review of the exemption report by the independent public accountant address, among other things: (1) The objective of the review; (2) the relationship between the review engagement and the audit of the financial report; (3) the review procedures; (4) evaluating the results of the examination procedures; (5) obtaining a representation letter; (6) communication requirements; (7) reporting on the review engagement; (8) the review report date; and (9) review report modifications.[352] The Commission expects that the final standards of the PCAOB, which are subject to Commission approval, will provide sufficient guidance to independent public accountants performing examinations of compliance reports and reviews of exemption reports.

In response to the comment that the requirements with respect to the compliance reports and exemption reports should not be effective unless

[338] *See Public Company Accounting Oversight Board: Order Approving Proposed Temporary Rule for an Interim Program of Inspection Related to Audits of Brokers and Dealers,* Exchange Act Release No. 65163 (Aug. 18, 2011), 76 FR at 52996 (Aug. 24, 2011).

[339] *Id.* at 52997.

[340] *Id.*

[341] *See* PCAOB, *Report on the Progress of the Interim Inspection Program Related to Audits of Brokers and Dealers,* PCAOB Release No. 2012–005 (August 20, 2012) (''*PCAOB Inspection Report*'').

[342] *Id.* at ii.

[343] *Id.* at 8.

[344] *Id.* at ii.

[345] *Id.* at iii.

[346] *Id.*

[347] *See, e.g., CAQ Letter; Deloitte Letter; Grant Thornton Letter; KPMG Letter; McGladrey Letter.*

[348] *See Commission Guidance Regarding Auditing, Attestation, and Related Professional Practice Standards Related to Brokers and Dealers,* Exchange Act Release No. 62991 (Sept. 24, 2010), 75 FR 60616, 60617 (Oct. 1, 2010).

[349] *See ABA Letter.*

[350] *See Grant Thorton Letter.*

[351] *See PCAOB Proposing Release* app. 1.

[352] *See PCAOB Proposing Release* app. 2.

the *AICPA Broker-Dealer Audit Guide* is revised and updated, as stated above, once adopted, only the standards of the PCAOB apply to broker-dealer annual reports. The PCAOB has proposed standards with respect to the examination of the compliance report and the review of the exemption report and it is expected that final standards will be in place before the audit requirements with respect to the compliance report and the exemption report are effective. Consequently, there is no need to wait for the *AICPA Broker-Dealer Audit Guide* to be updated.

As noted above, several commenters requested clarity about the interaction between material weaknesses in internal control over financial reporting and material weaknesses in internal control over compliance with the financial responsibility rules.[353] Additionally, one commenter stated that due to the reliance placed on the financial books and records of the broker-dealer, it will not be feasible for the independent public accountant to attest to the effectiveness of internal control over the financial responsibility rules without also attesting to internal control over financial reporting.[354] As discussed above in section II.B.3.iii. of this release, although a broker-dealer is required to state in the compliance report that the information it used to state whether it was in compliance with Rule 15c3–1 and paragraph (e) of Rule 15c3–3 was derived from its books and records, the final rule does not require that the broker-dealer include a statement regarding the effectiveness of its internal control over the accuracy of its books and records, nor does it require that the independent public accountant attest to the effectiveness of internal control over the accuracy of the broker-dealer's books and records. Additionally, under the final rule, the independent public accountant is not required to opine on the effectiveness of the broker-dealer's internal control over financial reporting. However, the independent public accountant's existing obligation to gain an understanding and perform appropriate procedures relative to the broker-dealer's internal control over financial reporting, as a necessary part of the independent public accountant's financial report audit, remains unchanged.[355] Further, as discussed above in section II.B.3.iii. of this release, the examination of the compliance report would pertain solely to certain statements in the compliance report and not to the broker-dealer's process for arriving at the statements. The report of the independent public accountant, based on the examination of the compliance report, requires the accountant to perform its own independent examination of the related controls and procedures. Consequently, it is not necessary for the independent public accountant to provide an opinion with regard to the process that the broker-dealer used to arrive at its conclusions.

As noted above, one commenter stated that a review engagement should not be employed for the exemption report, because an accountant's inquiry and observation would not provide sufficient evidence regarding a broker-dealer's assertion that it is exempt from Rule 15c3–3, and under the PCAOB's attestation standards, an auditor should not accept an engagement to perform a ''review'' engagement related to an entity's compliance with specified requirements.[356] As an alternative, this commenter suggested an ''agreed-upon procedures'' approach or an examination engagement.[357]

The PCAOB's attestation standards *currently* provide that an accountant should not accept an engagement to perform a review of an entity's compliance with specified requirements or about the effectiveness of an entity's internal control over compliance, and that an agreed upon procedures engagement be considered as an alternative.[358] Irrespective of the PCAOB's current standards, Rule 17a–5, as amended, provides that the broker-dealer engage an independent public accountant to perform a review of the exemption report. Moreover, in July 2011, as part of its proposed standards for attestation engagements related to broker-dealer compliance reports or exemption reports, the PCAOB proposed replacing the provision cited by the commenter with the following: ''When a practitioner is engaged to perform a review engagement on assertions made by a broker or dealer in an exemption report that is prepared pursuant to SEC Proposed Rule 17a–5, the practitioner must conduct the review engagement pursuant to *Proposed Attestation Standard, Review Engagements Regarding Exemption Reports of Brokers and Dealers.''*[359] In addition, as discussed above, the PCAOB has proposed specific standards for an accountant to perform a review of the exemption report.[360] The PCAOB's final standards, which must be approved by the Commission, are intended by the PCAOB to clarify the procedures an independent public accountant will need to perform in a review of an exemption report.[361]

In response to the comment that a review engagement should not be employed for the exemption report because inquiry and observation would not provide sufficient evidence,[362] the independent public accountant would be able to obtain the moderate level of assurance contemplated by the required review through a combination of procedures that the accountant would perform in connection with the financial audit currently required under Rule 17a–5 and certain inquiries and other procedures specifically targeting the exemption report. Also, the PCAOB's proposal includes specific requirements for a review engagement regarding exemption reports of brokers and dealers. In addition to inquiry and observation, the PCAOB's proposal states that ''in performing the review engagement, the auditor should . . . [e]valuate whether the evidence obtained and the results of the procedures performed in the audit of the financial statements and supplemental information corroborate or contradict the broker's or dealer's assertion regarding compliance with the exemption conditions.''[363] Additionally, the auditor should ''[p]erform other procedures as necessary in the circumstances to obtain moderate assurance.''[364] The PCAOB's final standards will provide clarity on the procedures to be performed by the independent public accountant to obtain a moderate level of assurance to form a conclusion with respect to the review of the exemption report.[365]

The commenter's suggestion to use an ''agreed-upon procedures'' engagement for the exemption report was considered. The final rule, however, requires a review engagement as proposed. Under an ''agreed-upon procedures'' engagement, the independent public accountant is

[353] *See Deloitte Letter; KPMG Letter; PWC Letter.*

[354] *See Van Kampen/Invesco Letter.*

[355] *See* PCAOB Auditing Standard, *AS No. 12* (for audits of fiscal years beginning on or after December 15, 2010).

[356] *See E&Y Letter.*

[357] *Id.*

[358] *See* PCAOB Interim Attestation Standard, *AT Section 601* at ¶ 7.

[359] *See PCAOB Proposing Release* app. 3 at A3–4. The PCAOB's attestation standards currently provide that an accountant should not accept an engagement to perform a review of an entity's compliance with specified requirements or about the effectiveness of an entity's internal control over compliance or an assertion regarding those items. *See* PCAOB Interim Attestation Standard, *AT Section 601* at ¶ 7.

[360] *See PCAOB Proposing Release* app. 2.

[361] *Id.*

[362] *See E&Y Letter.*

[363] *See PCAOB Proposing Release* app. 2.

[364] *Id.*

[365] *Id.*

engaged by a client to issue a report of findings based on specific procedures performed on subject matter that the specified parties believe are appropriate.[366] Additionally, in an ''agreed-upon procedures'' engagement, the independent public accountant does not perform an examination or a review, and does not provide an opinion or negative assurance. Thus, no conclusion would be rendered as to the broker-dealer's statement that it met certain exemption provisions in Rule 15c3–3.

In addition to the commenter advocating an ''agreed-upon procedures'' standard,[367] a second commenter stated that the cost ''would not justify the need'' for an audit report covering the exemption report[368] and a third commenter stated that the exemption report should be replaced with a box to check on the FOCUS Report as the auditor attestation provided no added benefit.[369] In response to all these comments, the Commission notes that previously Rule 17a–5 required that if a broker-dealer is exempt from Rule 15c3–3, the independent public accountant is required to ascertain whether the conditions of the exemption were being complied with and that no facts came to the accountant's attention to indicate that the exemption had not been complied with.[370] Consequently, the rule previously required the independent public accountant to reach a conclusion with respect to a broker-dealer's claimed exemption from Rule 15c3–3. The Commission believes that the rule should continue to require a conclusion from the independent public accountant on the broker-dealer's claimed exemption from Rule 15c3–3 because of the importance of safeguarding customer securities and cash. Consequently, the Commission does not believe that it would be appropriate to use a lower standard (*i.e.,* the agreed-upon procedures standard) or to have no requirement for the independent public accountant to perform any work with respect to the exemption report. Moreover, because the independent public accountant was previously required to render a conclusion with respect to the broker-dealer's claimed exemption from Rule 15c3–3, the exemption report review should not result in significant incremental cost over the existing requirement.

As noted above, two commenters raised concerns that minor exceptions to meeting the exemption provisions of paragraph (k) of Rule 15c3–3 could result in the independent public accountant becoming aware of material modifications that should be made to the statement in the exemption report.[371] Under PCAOB standards for attestation engagements, the independent public accountant's review report on a statement in an exemption report would be required to include a statement about whether the accountant is aware of any material modifications that should be made to the statement in the exemption report in order for it to be fairly stated in all material respects.[372] As discussed above in section II.B.4.iii. of this release, the exemption report requirements have been modified from the proposal so that a broker-dealer must either state that it met the identified exemption provisions in paragraph (k) throughout the most recent fiscal year without exception or that it met the identified exemption provisions throughout the most recent fiscal year except as described in the report. Consequently, a broker-dealer that had exceptions will state that fact in the exemption report and describe the exceptions. Under PCAOB standards, if the statement is fairly stated in all material respects, including descriptions of any exceptions, the broker-dealer's independent public accountant would not need to state that the accountant is aware of any material modifications that should be made to the statement.[373]

The Commission did not receive comments regarding the proposed amendments to paragraph (i) of Rule 17a–5. However, the final rule has been revised from the proposal for clarity and consistency with the other amendments to Rule 17a–5. The title of the rule has been modified from the proposal to add a citation for clarity. As adopted, the title is, ''Reports of the independent public accountant required under paragraph (d)(1)(i)(C) of [Rule 17a–5].'' As adopted, paragraph (i)(1) of Rule 17a–5 provides, as proposed, that the independent public accountant's reports must: Be dated; be signed manually; indicate the city and state where issued; and identify without detailed enumeration the items covered by the reports.

Paragraph (i)(2) of Rule 17a–5, as adopted, is also consistent with the proposal except that the word ''Identify'' is substituted for the word ''Designate'' for clarity and the phrase ''opinions or conclusions'' is substituted for the phrase ''opinions or statement'' because as explained above, consistent with auditing standards, a review engagement will not result in an opinion, but in the accountant's conclusion in the form of ''negative assurance''—for example, a conclusion that no information came to the accountant's attention that indicates that a statement is not fairly stated in all material respects.[374] The rule therefore provides that the independent public accountant's reports must: (i) State whether the examinations or review, as applicable, were made in accordance with standards of the PCAOB; (ii) identify any examination and, if applicable, review procedures deemed necessary by the independent public accountant under the circumstances of the particular case that have been omitted and the reason for their omission. The rule also provides that: ''[n]othing in this section may be construed to imply authority for the omission of any procedure that independent public accountants would ordinarily employ in the course of an examination or review made for the purpose of expressing the opinions or conclusions required under [Rule 17a–5].''

Paragraph (i)(3) of Rule 17a–5, as adopted, is re-organized for clarity. Specific reference has been added to those statements in the compliance report that the accountant must examine, consistent with other amendments to Rule 17a–5 (*e.g.,* the amendments to paragraph (g)(2)(i) of Rule 17a–5 regarding the engagement of the accountant to prepare a report based on the examination of specified statements in the compliance report). In addition, a subparagraph is added to include a reference to the exemption

[366] *See* PCAOB Interim Attestation Standard, *AT Section 201* at ¶ .03.

[367] *See E&Y Letter.*

[368] *See Citrin Letter.*

[369] *See Angel Letter.*

[370] *See* 17 CFR 240.17a–5(g)(2).

[371] *See CAI Letter; SIFMA letter.*

[372] *See* PCAOB Interim Attestation Standard, *AT Section 101* at ¶ .90. *See also PCAOB Proposing Release* app. 2 at ¶ 11 (''The auditor should evaluate the identified instances of non-compliance with the exemption conditions to determine whether the instances of non-compliance, individually or in combination, cause the broker's or dealer's assertion not to be fairly stated, in all material respects. If the broker's or dealer's assertion is not fairly stated, in all material respects, the auditor should: (a) Modify the review report . . . and (b) evaluate the effect of the matter on the audit of the financial statements and supplemental information.'').

[373] *See* PCAOB Interim Attestation Standard, *AT Section 101* at ¶ .67 (stating that in expressing its conclusion, an independent public accounting ''should consider an omission or a misstatement to be material if the omission or misstatement—individually or when aggregated with others—is such that a reasonable person would be influenced by the omission or misstatement.'').

[374] *Id.* at ¶¶ .68, .88.

report.[375] The rule provides that the independent public accountant's reports must state clearly: (i) The opinion of the independent public accountant with respect to the financial report required under paragraph (d)(1)(i)(A) of Rule 17a–5 and the accounting principles and practices reflected in that report; (ii) the opinion of the independent public accountant with respect to the financial report required under paragraph (d)(1)(i)(A) of Rule 17a–5, as to the consistency of the application of the accounting principles, or as to any changes in those principles, that have a material effect on the financial statements; and (iii) either (A) the opinion of the independent public accountant with respect to the statements required under paragraphs (d)(3)(i)(A)(*2*), (*3*), (*4*), and (*5*) of Rule 17a–5 in the compliance report required under paragraph (d)(1)(i)(B)(*1*) of Rule 17a–5, or (B) the conclusion of the independent public accountant with respect to the statements required under paragraphs (d)(4)(i), (ii), and (iii) of Rule 17a–5. The specific references to the compliance report and exemption report in paragraph (i)(3) are intended to provide a complete description of what must be contained in the report of the independent public accountant under current attestation standards, which require a conclusion in the case of an examination to be expressed in the form of an opinion and a conclusion in the case of a review that is not expressed in the form of an opinion, but in the form of ''negative assurance.'' [376]

Paragraph (i)(4) of Rule 17a–5 has been modified from the proposal to add a reference to paragraph (d) to make it more clear that the annual reports referenced in the paragraph are the financial report, compliance report, and exemption report prescribed in paragraph (d). In addition—in the interest of using ''plain English'' in the Commission's rules—the word ''must'' has been substituted for the word ''shall'' and the word ''thereto'' has been eliminated. The rule as adopted therefore provides that ''[a]ny matters to which the independent public accountant takes exception must be clearly identified, the exceptions must be specifically and clearly stated, and, to the extent practicable, the effect of each such exception on any related items contained in the annual reports required under paragraph (d) of [Rule 17a–5] must be given.''

E. PCAOB Registration of Independent Public Accountant—Paragraph (f)(1) of Rule 17a–5

Prior to today's amendments, paragraph (f)(1) of Rule 17a–5 was titled ''Qualification of accountants'' and provided that: ''The Commission will not recognize any person as a certified public accountant who is not duly registered and in good standing as such under the laws of his place of residence or principal office.'' [377] Paragraph (f)(3) of Rule 17a–5 provided that the accountant ''shall be independent in accordance with the provisions of § 210.2–01 (b) and (c) of this chapter'' and, paragraph (e)(1)(i) of Rule 17a–5 provided that the accountant ''shall be in fact independent as defined in paragraph (f)(3) of this section.'' [378]

As discussed above, section 17(e)(1)(A) of the Exchange Act, as amended by the Dodd-Frank Act, requires registered broker-dealers to annually file financial statements with the Commission certified by ''an independent public accounting firm, or by a registered public accounting firm if the firm is required to be registered under the Sarbanes-Oxley Act of 2002.'' Accordingly, the Commission proposed amending paragraph (f)(1) to provide that: ''The independent public accountant must be qualified and independent in accordance with § 210.2–01 of this chapter and, in addition, the independent public accountant must be registered with the Public Company Accounting Oversight Board if required by the Sarbanes-Oxley Act of 2002.'' [379] The Commission further proposed deleting the accountant independence language in paragraph (e)(1)(i) of Rule 17a–5.[380] In addition, the Commission proposed deleting paragraph (f)(3) and re-designating paragraph (f)(4) as paragraph (f)(3).[381] These proposed amendments to paragraph (f) of Rule 17a–5 would consolidate the provisions of paragraphs (e)(1)(i), (f)(1), and (f)(3) of Rule 17a–5 into paragraph (f)(1) and make Rule 17a–5 consistent with other Commission requirements governing the qualifications of accountants. The Commission received no comments on these proposals and is adopting them substantially as proposed.[382]

Although the underlying independence requirements have not changed, broker-dealers and their independent public accountants are reminded that they must comply with the independence requirements of Rule 2–01 of Regulation S–X.[383] As a result of the Sarbanes-Oxley Act of 2002, Rule 2–01 of Regulation S–X was strengthened, including increased restrictions on the provision of certain non-audit services to an audit client.[384]

Under the Commission's rules, an accountant will not be recognized as independent with respect to an audit client if the accountant is not, or a reasonable investor with knowledge of all relevant facts and circumstances would conclude that the accountant is not, capable of exercising objective and impartial judgment on all issues encompassed within the accountant's engagement. In determining whether an accountant is independent, the Commission will consider all relevant circumstances, including all relationships between the accountant and the audit client, and not just those relating to reports filed with the Commission.[385] The standard is predicated largely on whether a relationship or the provision of a service: (1) Creates a mutual or conflicting interest between the accountant and the audit client; (2) places the accountant in the position of auditing his or her own work; (3) results in the accountant acting as management or an employee of the audit client; or (4) places the accountant in a position of being an advocate for the audit client.[386]

Further, Rule 2–01 of Regulation S–X sets forth a non-exclusive specification

[375] As proposed, paragraph (i)(3) did not contain a reference to the exemption report. *See Broker-Dealer Reports,* 76 FR at 37607. The final rule makes clear that the auditor's conclusion must be included in the independent public accountant's report covering the exemption report.

[376] As noted above, the accountant's conclusion in an examination engagement will be expressed in the form of an opinion. For example, the accountant's conclusion based on an examination of an assertion could state that in the accountant's opinion, the assertion is fairly stated in all material respects. *See, e.g.,* PCAOB Interim Attestation Standard, *AT Section 101* at ¶ .84. The accountant's conclusion in a review engagement will be expressed, not in the form of an opinion, but in the form of ''negative assurance.'' *See, e.g.,* PCAOB Interim Attestation Standard, *AT Section 101* at ¶ .68. For example, the accountant's conclusion based on a review of an assertion could state that no information came to the accountant's attention that indicates that the assertion is not fairly stated in all material respects. *See, e.g.,* PCAOB Interim Attestation Standard, *AT Section 101* at ¶ .88.

[377] *See* 17 CFR 240.17a–5(f)(1).

[378] *See* 17 CFR 240.17a–5(f)(3).

[379] *See Broker-Dealer Reports,* 76 FR at 37593–37594.

[380] *Id.*

[381] *Id.*

[382] *See* paragraph (f)(1) of Rule 17a–5. The Commission has revised paragraph (f)(1) of Rule 17a–5 from the proposal to: Change the title from ''Qualification of accountants'' to ''Qualifications of independent public accountant;'' and deleting the words ''in addition.''

[383] *See* 17 CFR 210.2–01.

[384] *See Strengthening the Commission's Requirements Regarding Auditor Independence,* Exchange Act Release No. 47265 (Jan. 28, 2003), 68 FR 6006 (Feb. 5, 2003). *See also Auditor Independence: SEC Review of Auditor Independence Rules,* NASD Notice to Members 02–19 (Mar. 2002).

[385] *See* 17 CFR 210.2–01(b).

[386] *See* 17 CFR 210.2–01, Preliminary Note 2.

of circumstances that are inconsistent with the general standard. For example, the accountant is prohibited from providing the following non-audit services, among others, to an audit client: [387]

- Bookkeeping or other services related to the accounting records or financial statements of the audit client;
- Financial information systems design and implementation; and
- Management functions or human resources.

With respect to bookkeeping or other services related to the accounting records or financial statements of the audit client, Rule 2–01(c)(4)(i) of Regulation S–X specifies that these services include: (1) Maintaining or preparing the audit client's accounting records; (2) preparing financial statements that are filed with the Commission or the information that forms the basis of financial statements filed with the Commission; or (3) preparing or originating source data underlying the audit client's financial statements.[388]

Not all of the independence requirements in Rule 2–01 of Regulation S–X that are applicable to audits of issuers are applicable to engagements under Rule 17a–5. Specifically, auditors of broker-dealers are not subject to the partner rotation requirements or the compensation requirements of the Commission's independence rules because the statute mandating those requirements is limited to issuers.[389] Additionally, auditors of broker-dealers are not subject to the audit committee pre-approval requirements [390] or the cooling-off period requirements for employment [391] because those requirements only reference issuers.

F. Notification of Non-Compliance or Material Weakness

As discussed in detail below, the Commission is amending the notification provisions in Rule 17a–5 and amending Rule 17a–11 to align that rule with the amendments to Rule 17a–5. Under Rule 17a–11, a broker-dealer must provide notice to the Commission and its DEA in certain circumstances.[392] For example, paragraph (b)(1) of Rule 17a–11 requires a broker-dealer to give notice if its net capital declines below the minimum amount required under Rule 15c3–1.[393] Rule 15c3–1 and Rule 15c3–3 also require broker-dealers to provide notification in certain circumstances.[394] For example, paragraph (i) of Rule 15c3–3 requires a carrying broker-dealer to immediately notify the Commission and its DEA if it fails to make a deposit into its customer reserve account as required by paragraph (e) of Rule 15c3–3.[395]

1. New Notification Requirements—Paragraph (h) of Rule 17a–5

Prior to today's amendments, paragraph (h)(2) of Rule 17a–5 provided that if, during the course of the audit or interim work, the independent public accountant determined that any ''material inadequacies'' existed, then the independent public accountant was required to inform the chief financial officer (''CFO'') of the broker-dealer, who, in turn, was required to give notice to the Commission and the broker-dealer's DEA within 24 hours in accordance with the provisions of Rule 17a–11.[396] The rule also provided that the broker-dealer must furnish the independent public accountant with the notice, and if the independent public accountant failed to receive the notice within the 24 hour period, or if the accountant disagreed with any statements contained in the notice, the independent public accountant was required to inform the Commission and the DEA within the next 24 hours.[397] In that event, the independent public accountant was required to describe any material inadequacies found to exist or, if the broker or dealer filed a notice, the independent public accountant was required to detail the aspects of the broker-dealer's notice with which the independent public accountant did not agree.[398]

i. The Proposed Amendments

The proposed amendments to Rule 17a–5 would have replaced references to material inadequacies, including the material inadequacy report, with a requirement applicable to carrying broker-dealers to identify an instance of ''material non-compliance'' with the financial responsibility rules and any material weakness in internal control over compliance with the financial responsibility rules in the compliance report and the requirement to engage an independent public accountant to examine the compliance report.[399] Consistent with those proposed changes, the Commission proposed amending the notification provisions of paragraph (h)(2) of Rule 17a–5 to replace the term ''material inadequacy'' with the term ''material non-compliance,'' which would result in a requirement to notify the Commission upon the discovery by the accountant during the course of preparing a report based on an examination of the compliance report of an instance of material non-compliance as that term was proposed to be defined under the amendments.[400]

The Commission also proposed amending provisions regarding the notification process.[401] Under the proposal, the accountant would have been required to notify the Commission and the broker-dealer's DEA directly.[402] In the proposing release, the Commission stated that it preliminarily believed these changes would provide more effective and timely notice of broker-dealer compliance deficiencies and enable the Commission to react more quickly to protect customers and others adversely affected by those deficiencies.[403] The amendments also would have been consistent with the notification requirement in Rule 206(4)–2 that is triggered in the context of a ''surprise'' examination of an investment adviser.[404]

ii. Comments Received

The Commission received numerous comments in response to this proposal.[405] Most of these commenters objected to the proposed notification process.[406] Among the reasons given were that it would be inappropriate to require the accountant to notify the Commission and the DEA directly, because, among other things, the broker-dealer is principally responsible for compliance with the securities laws,

[387] *See* 17 CFR 210.2–01(c).

[388] *See* 17 CFR 210.2–01(c)(4)(i).

[389] *See* 15 U.S.C. 78j–1.

[390] *See* 17 CFR 210.2–01(c)(7).

[391] *See* 17 CFR 210.2–01(c)(2).

[392] *See* 17 CFR 240.17a–11.

[393] *See* 17 CFR 240.17a–11(b)(1).

[394] *See, e.g.,* 17 CFR 240.15c3–1(a)(6)(iv)(B); 17 CFR 240.15c3–1(a)(6)(v); 17 CFR 240.15c3–1(a)(7)(ii); 17 CFR 240.15c3–1(c)(2)(x)(C)(*1*); 17 CFR 240.15c3–1(e); 17 CFR 240.15c3–1d(c)(2); 17 CFR 240.15c3–3(i).

[395] *See* 17 CFR 240.15c3–3(i).

[396] *See* 17 CFR 240.17a–5(h)(2).

[397] *Id.*

[398] *Id.*

[399] *See Broker-Dealer Reports,* 76 FR at 37575–37579.

[400] *Id.* at 37579.

[401] *Id.*

[402] *Id.*

[403] *Id.*

[404] *Id.* Rule 206(4)–2 provides, in pertinent part, that upon finding any ''material discrepancies'' during the ''surprise'' examination of an investment adviser to verify client funds and securities, the independent public accountant must notify the Commission within one business day. 17 CFR 275.206(4)–2(a)(4)(ii).

[405] *See ABA Letter; CAI Letter; CAQ Letter; Deloitte Letter; E&Y Letter; Grant Thornton Letter; KPMG Letter; McGladrey Letter; PWC Letter; SIFMA Letter; Van Kampen/Invesco Letter.*

[406] *See ABA Letter; CAI Letter; CAQ Letter; Deloitte Letter; E&Y Letter; Grant Thornton Letter; KPMG Letter; McGladrey Letter; PWC Letter; Van Kampen/Invesco Letter.*

including timely notification;[407] that PCAOB standards provide that ''the practitioner should not take on the role of the responsible party;''[408] and that PCAOB attestation standards (which were referenced in the proposing release) clearly provide that management is responsible for the subject matter to which it is asserting, and not the accountant.[409] In addition, one commenter stated that alignment of notification procedures (that is, to require the accountant to notify the Commission directly) between Rule 17a–5 and Rule 206(4)–2 is not necessary, given the other auditing and reporting responsibilities in place or proposed.[410] In addition to suggestions that the notification process that existed prior to today's amendments should not be changed,[411] one commenter stated that the rule should require simultaneous notice by the accountant to the Commission and to the firm's management.[412]

In addition, one commenter asked whether the notification provisions apply to a review of the exemption report.[413] Another commenter stated that a report of non-compliance also will trigger a Rule 17a–11 notice, which would be duplicative and create confusion.[414]

iii. The Final Rule

In part in response to comments received, and to achieve consistency with other revisions to the proposed rule amendments described above, the notification provisions in the final rule have been modified from the proposed amendments.[415] First, the Commission is persuaded by comments received that the primary obligation to notify the Commission should remain with the broker-dealer.[416] Therefore, the notification process in place before today's amendments generally has been retained.

Second, the final rule amendments require that, if the independent public accountant determines that the broker-dealer ''is not in compliance with'' any of the financial responsibility rules during the course of preparing the accountant's reports, the independent public accountant must immediately notify the broker-dealer's CFO of the nature of the non-compliance.[417] As proposed, the independent public accountant would have been required to provide notification if the accountant determined that any ''material non-compliance'' existed. As discussed above in section II.D.3. of this release, the final rule does not include a definition of the term *material non-compliance,* as in the proposal. Thus, the independent public accountant will be required to provide notification to the broker-dealer of all instances of non-compliance with the financial responsibility rules as opposed to the proposal, which required the independent public accountant to report to the Commission and the DEA only instances of material non-compliance. While this may increase the number of times the independent public accountant must provide notification of non-compliance with the financial responsibility rules, the independent public accountant will not have to analyze whether an instance of non-compliance is ''material non-compliance'' under the proposed definition.

If the independent public accountant provides notice to the broker-dealer of an instance of non-compliance with the financial responsibility rules, the broker-dealer must provide notice to the Commission and its DEA in accordance with the notification provisions of Rule 15c3–1, Rule 15c3–3, or Rule 17a–11, but only if the notice provided by the independent public accountant concerns an instance of non-compliance that requires the broker-dealer to provide notification under those rules. The proposal would have required the accountant to notify the Commission ''upon determining that any material non-compliance exists.''[418] Rule 15c3–1, Rule 15c3–3, and Rule 17a–11 specify instances of non-compliance that require notification by the broker-dealer, and paragraph (h) of Rule 17a–5, as amended, refers to the notification provisions in those rules.

The broker-dealer must provide a copy of the notification to the accountant within one business day and, if the accountant does not receive the notice or the accountant does not agree with any statements in the notice, the accountant must provide a report to the Commission and the broker-dealer's

[407] *See Deloitte Letter.*

[408] *See KPMG Letter. See also* PCAOB Interim Attestation Standard, *AT Section 101* at ¶ .13.

[409] *See PWC Letter. See also* PCAOB Interim Attestation Standard, *AT Section 101* at ¶¶ .11–.13.

[410] *See E&Y Letter.*

[411] *See, e.g., ABA Letter; E&Y Letter; McGladrey Letter.*

[412] *See Van Kampen/Invesco Letter.*

[413] *See KPMG Letter.*

[414] *See ABA Letter.*

[415] *See* paragraph (h) of Rule 17a–5.

[416] As the proposal noted, the proposed amendment to require the independent public accountant to notify the Commission directly of material non-compliance would have been consistent with the surprise examination notification requirement in Rule 206(4)–2 under the Advisers Act. A surprise examination of an investment adviser by an independent public accountant generally verifies that client funds and securities of which the investment adviser has custody are held by a qualified custodian, such as a bank or broker-dealer. The accountant's surprise examination report opines on the adviser's compliance with the custody rule requirement that client funds and securities are maintained by a qualified custodian and also opines on the adviser's compliance with certain recordkeeping obligations between surprise examinations. The difference in nature and scope of custodial and other activities between broker-dealers and advisers results in significantly broader examination requirements for broker-dealers. Broker-dealers are required to undergo an annual examination by an independent public accountant of their financial statements and certain supporting schedules: A computation of net capital under Rule 15c3–1, a computation for determining reserve requirements under Rule 15c3–3, and information relating to the possession and control requirements of Rule 15c3–3. Moreover, under today's amendments, the independent public accountant must examine the compliance report of broker-dealers that maintain custody of customer funds or securities. The differences in the overall nature of an examination also supports continuing to maintain today's model under which a broker-dealer has the primary notification obligation (*e.g.,* unlike in the case of a surprise examination of an investment adviser, a broker-dealer would already be making its own assessment and preparing its own report in the case of a compliance report examination). Further, the Dodd-Frank Act provided the PCAOB with explicit authority to, among other things, establish (subject to Commission approval) auditing and related attestation, quality control, ethics, and independence standards for registered public accounting firms with respect to their preparation of audit reports to be included in broker-dealer filings with the Commission, and the authority to conduct and require an inspection program of registered public accounting firms that audit broker-dealers. The PCAOB oversight of broker-dealer examinations provides additional regulatory oversight with respect to the examination of the broker-dealer further supporting the retention of the primary obligation with the broker-dealer to provide notice to the Commission and the broker-dealer's DEA.

[417] *Id.* Under the current provisions of paragraph (h) of Rule 17a–5 (which are being amended), the independent public accountant ''shall call it to the attention'' of the CFO of the broker-dealer any material inadequacies. *See* 17 CFR 240.17a–5(h)(2). In the final rule, the independent public accountant is required to ''immediately notify'' the CFO of the ''nature'' of any non-compliance with the financial responsibility rules or material weakness. This change from the current notification requirement is designed to make the rule more clear as ''shall call it to the attention'' does not specify when the notification must be given. Further, as proposed, the independent public accountant would have been required to provide the Commission with notice of any material non-compliance within one business day of determining that the material non-compliance exists. *See Broker-Dealer Reports,* 76 FR at 37606. Under the final rule, the independent public accountant provides notice to the broker-dealer's CFO of any non-compliance with the financial responsibility rules or material weakness and the CFO, in turn, is required to provide the Commission and other securities regulators with notice if the non-compliance requires notice under Rule 15c3–1, Rule 15c3–3, or Rule 17a–11 or in the case of a material weakness. Consequently, because there is an intermediate step before the Commission receives notice, it is important that the independent public accountant notify the CFO immediately so that the Commission and other securities regulators receive timely notice.

[418] *See Broker-Dealer Reports,* 76 FR at 37606.

DEA within one business day.[419] The report from the accountant must, if the broker-dealer failed to file a notification, describe any instances of non-compliance that required the broker-dealer to provide a notification.[420] If the broker-dealer filed a notification but the independent public accountant does not agree with the statements in the notice, the report from the accountant must detail the aspects of the notification of the broker-dealer with which the accountant does not agree.[421] This notification process is generally the same as that in place before today's amendments.

While the final rule incorporates the existing notification process, the Commission wants to emphasize the importance of broker-dealers providing notification to the Commission and other securities regulators of non-compliance with Rule 15c3–1 as required by Rule 17a–11 and non-compliance with paragraph (e) of Rule 15c3–3 as required by paragraph (i) of Rule 15c3–3.[422] Consequently, the Commission is adding a note to paragraph (h) of Rule 17a–5 calling the attention of the broker-dealer and independent public accountant to these notification requirements.[423] Further, an important element of this process is the back-up provided by the independent public accountant in terms of the obligation under the rule to provide the Commission and DEA with notification of the instance of non-compliance if the accountant does not receive a copy of the broker-dealer's notification or the accountant does not agree with the statements in the notification. Therefore, of necessity, the independent public accountant would have to have measures in place to determine whether, and if so when, the accountant received a copy of the notification required to be provided by the broker-dealer to the Commission or the broker-dealer's DEA. An independent public accountant could decide not to rely solely on the receipt of a copy of the notice from the broker dealer and take other steps to check whether the broker-dealer provided notice to the Commission and the DEA, such as obtaining a copy of a facsimile transmission from the broker-dealer to the Commission and DEA.

Third, the proposal has been modified to add that, if the accountant determines in connection with the audit of a carrying broker-dealer's annual reports that any material weakness (as defined in paragraph (d)(3)(iii) of Rule 17a–5) exists, the independent public accountant must immediately notify the broker-dealer's CFO of the nature of the material weakness.[424] As discussed above, before today's amendments, paragraph (h)(2) of Rule 17a–5 required the accountant to notify the broker-dealer's CFO if the accountant determined that any ''material inadequacies'' existed. However, as explained above in section II.B.3. of this release, the final rules do not contain the concept of material inadequacy. Also, as the term *material weakness* is defined with respect to the compliance report, this notification requirement only applies to carrying broker-dealers, whereas the requirement to provide notification of a material inadequacy applied to carrying and non-carrying broker-dealers.

As discussed in more detail below in section II.F.2. of this release, the Commission is amending Rule 17a–11 to provide that a broker-dealer must provide notification to the Commission and its DEA if the broker-dealer discovers, or is notified by its independent public accountant, of the existence of a material weakness.[425] Paragraph (h) of Rule 17a–5, as stated above, requires that the independent public accountant notify the broker-dealer if the accountant determines that a material weakness exists.[426] The rule also requires the broker-dealer to provide notice in accordance with the provisions of Rule 17a–11, which, among other things, require the broker-dealer to provide notice to the Commission and its DEA in accordance with paragraph (g) of Rule 17a–11 within 24 hours and transmit a report within 48 hours of the notice stating what the broker-dealer has done or is doing to correct the situation.[427] Paragraph (h) of Rule 17a–5 requires the broker-dealer to provide the accountant with a copy of the notice it sends to the Commission within one business day and, if the accountant does not receive the notice or the accountant does not agree with the statements in the notice, the accountant must provide a report to the Commission and the broker-dealer's DEA within one business day.[428] The report from the accountant must, if the broker-dealer failed to file a notification, describe any material weakness.[429] If the broker-dealer filed a notification and the accountant does not agree with the statements in the notification, the report from the accountant must detail the aspects of the notification of the broker-dealer with which the accountant does not agree.[430] Again, this notification process is generally the same as the one in place before today's amendments.[431] In response to the comment that the rule should require simultaneous notice by the accountant to the Commission and to the firm's management, the notification procedures adopted today require that the accountant notify management of the broker-dealer and also ensure that the Commission receives timely notice.

As stated above, one commenter asked whether the notification provisions apply to a review of an exemption report.[432] The notification provisions in paragraph (h) of Rule 17a–5 with respect to non-compliance with the financial responsibility rules apply regardless of whether the independent public accountant is engaged to prepare a report based on examination of a broker-dealer's compliance report or a review of a broker-dealer's exemption report.[433] An independent public accountant may determine that a broker-dealer is not in compliance with a requirement in the financial responsibility rules (*e.g.,* not in compliance with Rule 15c3–1) during

[419] *See* paragraph (h) of Rule 17a–5.

[420] *Id.*

[421] *Id.*

[422] Paragraph (b)(1) of Rule 17a–11 provides, among other things, that every broker-dealer whose net capital declines below the minimum amount required pursuant to Rule 15c3–1 shall give notice of such deficiency that same day in accordance with paragraph (g) of Rule 17a–11 and that the notice shall specify the broker-dealer's net capital requirement and its current amount of net capital. *See* 17 CFR 240.17a–11(b)(1). Paragraph (g) of Rule 17a–11 provides, among other things, that the notice shall be given or transmitted to the principal office of the Commission in Washington, DC, the regional office of the Commission for the region in which the broker-dealer has its principal place of business, the DEA of which such broker-dealer is a member, and the CFTC if the broker-dealer is registered as a futures commission merchant with such Commission, and that the notice shall be given or transmitted by telegraphic notice or facsimile transmission. *See* 17 CFR 240.17a–11(g). Paragraph (i) of Rule 15c3–3 provides that if a broker-dealer shall fail to make a reserve bank account or special account deposit, as required by Rule 15c3–3, the broker-dealer shall by telegram immediately notify the Commission and the regulatory authority for the broker-dealer, which examines such broker-dealer as to financial responsibility and shall promptly thereafter confirm such notification in writing. *See* 17 CFR 240.15c3–3(i). The Commission staff is considering ways to modernize the process by which broker-dealers file these and other notices with the Commission.

[423] *See* note to paragraph (h) of Rule 17a–5, as adopted.

[424] *See* paragraph (h) of Rule 17a–5.

[425] *See* paragraph (e) of Rule 17a–11.

[426] *See* paragraph (h) of Rule 17a–5.

[427] *See* paragraph (h) of Rule 17a–5; 17 CFR 240.17a–11(g).

[428] *See* paragraph (h) of Rule 17a–5.

[429] *Id.*

[430] *Id.*

[431] One change from the current rule (which is being amended) is to provide that required actions be completed within ''one business day'' as opposed to within a ''24 hour period.'' This change is designed to account for non-business days during which certain actions may not be feasibly completed.

[432] *See KPMG Letter.*

[433] *See* paragraph (h) of Rule 17a–5.

the course of an audit engagement of a non-carrying broker-dealer that files an exemption report either as part of the examination of the broker-dealer's financial statements or the review of certain statements the broker-dealer's exemption report. In this case, the independent public accountant would need to immediately notify the CFO of the broker-dealer of the nature of the non-compliance. The notification provisions with respect to an instance of material weakness only apply to broker-dealers that file a compliance report because material weakness is defined for purposes of the compliance report.

The rule as amended does not require the accountant to notify the Commission directly when the accountant determines that a non-compliance with the financial responsibility rules exists, which eliminates the concern of a commenter that a report of non-compliance by the accountant, as proposed, would also trigger a Rule 17a–11 notice, which would be duplicative and create confusion.[434] As adopted, the responsibility to provide notification rests with the broker-dealer in the first instance.

2. Conforming and Technical Amendments to Rule 17a–11

Before today's amendments, paragraph (e) of Rule 17a–11 provided that whenever a broker-dealer discovered, or was notified by an independent public accountant, pursuant to paragraph (h)(2) of Rule 17a–5 or paragraph (f)(2) of Rule 17a–12 of the existence of any material inadequacy as defined in paragraph (g) of Rule 17a–5 or paragraph (e)(2) of Rule 17a–12, the broker-dealer was required to give notice to the Commission within 24 hours of the discovery or notification and transmit a report to the Commission within 48 hours of the notice stating what the broker-dealer has done or was doing to correct the situation.[435] The Commission proposed amending paragraph (e) of Rule 17a–11 to delete the references to Rule 17a–5 and to correct the references to Rule 17a–12.[436]

One commenter stated that the current notification process under paragraph (h)(2) of Rule 17a–5 and paragraph (e) of Rule 17a–11 satisfies the objective of notifying the Commission in a timely manner and that the commenter was concerned that the proposal could undermine the effectiveness of the notification process in part because it would require notice to the Commission only when the accountant determines that there is a deficiency, and not when it is independently discovered by the broker-dealer.[437]

The Commission agrees with the commenter that notification should be provided to the Commission when a deficiency in internal control is discovered by the broker-dealer, in addition to when it is notified by its accountant of the existence of any material weakness. Therefore, the final rule retains references to Rule 17a–5 in paragraph (e) of Rule 17a–11. The Commission is conforming paragraph (e) of Rule 17a–11 to today's amendments to Rule 17a–5 to substitute the term *material weakness* as defined in paragraph (d)(3)(iii) of Rule 17a–5 for the term material inadequacy with respect to Rule 17a–5 and to replace the reference to paragraph (h)(2) of Rule 17a–5 with a reference to paragraph (h) of Rule 17a–5. Specifically, the final rule provides that whenever a broker-dealer discovers, or is notified by its accountant under paragraph (h) of Rule 17a–5 of the existence of any material weakness, the broker-dealer must: (1) Give notice of the material weakness within 24 hours of the discovery or notification; and (2) transmit a report within 48 hours of the notice stating what the broker or dealer has done or is doing to correct the situation.[438] The rule retains a reference to material inadequacy as defined in paragraph (h)(2) of Rule 17a–12, but the amendments correct citations to that rule.

G. Other Amendments to Rule 17a–5

1. Information Provided to Customers—Paragraph (c) of Rule 17a–5

i. Background

Paragraph (c) of Rule 17a–5 generally requires a broker-dealer that carries customer accounts to send its balance sheet with appropriate notes and certain other financial information to each of its customers twice a year.[439] The Commission did not propose to amend this requirement. Accordingly, a broker-dealer that carries customer accounts must continue to send its customers: (1) An audited balance sheet with footnotes, including a footnote specifying the amount of the broker-dealer's net capital and required net capital, under paragraph (c)(2) of Rule 17a–5;[440] and (2) an unaudited balance sheet dated six months after the date of the audited balance sheet with footnotes, including a footnote regarding the amount of the broker-dealer's net capital and required net capital, under paragraph (c)(3) of Rule 17a–5.[441] The information required by paragraphs (c)(2) and (c)(3) of Rule 17a–5 must either be mailed to customers, or, if the broker-dealer meets certain conditions under paragraph (c)(5) of Rule 17a–5, the broker-dealer can semi-annually send its customers summary information regarding its net capital, as long as it also provides customers with a toll-free number to call for a free copy of its balance sheet with appropriate notes, makes its balance sheet with appropriate notes available to customers on its Web site, and meets other specified requirements.[442]

ii. Availability of Independent Public Accountant's Comments on Material Inadequacies—Paragraph (c)(2) of Rule 17a–5

Prior to today's amendments, paragraph (c)(2)(iii) of Rule 17a–5 provided that if, in conjunction with a broker-dealer's most recent audit report, the broker-dealer's independent public accountant commented on any material inadequacies in the broker-dealer's internal controls, its accounting system, or certain of its practices and procedures[443] under paragraphs (g) and (h) of Rule 17a–5, and paragraph (e) of Rule 17a–11, the broker-dealer's audited statements sent to customers were required to include a statement that a copy of the auditor's comments were available for inspection at the Commission's principal office in Washington, DC, and the regional office of the Commission in which the broker-

[434] *See ABA Letter.*

[435] *See* 17 CFR 240.17a–11(e).

[436] *See Broker-Dealer Reports,* 76 FR at 37579. Rule 17a–12 contains reporting requirements for over-the-counter (''OTC'') derivatives dealers. *See* 17 CFR 240.17a–12. The rule is similar to Rule 17a–5. *Compare* 17 CFR 240.17a–12, with 17 CFR 240.17a–5. For example, paragraph (h)(2) of Rule 17a–12 describes material inadequacies and paragraph (i)(2) of Rule 17a–12 provides that if the accountant determines that any material inadequacy exists, the accountant must call it to the attention of the CFO of the OTC derivatives dealer, who must inform the Commission. *See* 17 CFR 240.17a–12(h)(2) and (i). The Commission did not propose amending Rule 17a–12. Consequently, Rule 17a–12 retains the concept of material inadequacy.

[437] *See Deloitte Letter.*

[438] *See* paragraph (e) of Rule 17a–11. As stated above, this provision only applies to broker-dealers that file compliance reports, as the tern material weakness is defined with respect to the compliance report.

[439] *See* 17 CFR 240.17a–5(c).

[440] 17 CFR 240.17a–5(c)(2).

[441] 17 CFR 240.17a–5(c)(3).

[442] *See* 17 CFR 240.17a–5(c)(5). *See also Broker-Dealer Exemption from Sending Certain Financial Information to Customers,* Exchange Act Release No. 48282 (Aug. 1, 2003), 68 FR 46446 (Aug. 6, 2003).

[443] These practices and procedures include, for example, periodic net capital computations under Rule 15c3–1 and periodic counts of securities under Rule 17a–13.

dealer had its principal place of business.[444]

As discussed above in sections II.D.3. and II.F. of this release, the Commission proposed deleting references to, and the definition of, the term material inadequacy in Rule 17a–5, and proposed amending paragraph (h) of Rule 17a–5 to require a broker-dealer's independent public accountant to notify the Commission and the broker-dealer's DEA if the accountant determined that any material non-compliance existed at the broker-dealer during the course of preparing its reports.[445] Consequently, the Commission proposed replacing paragraph (c)(2)(iii) of Rule 17a–5, which contained the term material inadequacies, with a requirement that, if a broker-dealer's accountant provided notice to the Commission of an instance of material non-compliance, the financial information sent to customers under paragraph (c)(2) of Rule 17a–5 must include a statement that a copy of the accountant's notice was available for customers' inspection at the principal office of the Commission in Washington, DC.[446] Under this proposal, notices to the Commission regarding an accountant's determination that one or more instances of material non-compliance existed at a broker-dealer would be publicly available.

Three commenters responded to the proposed amendments to paragraph (c)(2) of Rule 17a–5.[447] These commenters each stated that the Commission should accord confidential treatment to accountants' notices to the Commission regarding determinations of material non-compliance.[448] One commenter stated that due to the technical nature of the financial responsibility rules, there was a risk that notices of material non-compliance could be misinterpreted by the media and others.[449]

The Commission is revising its proposal to amend paragraph (c)(2) of Rule 17a–5 to be consistent with the new notification provisions in paragraph (h) described above relating to the identification by a broker-dealer's accountant of a material weakness rather than an instance of material non-compliance.[450] Specifically, if, in connection with the most recent annual reports, the report of the independent public accountant covering the broker-dealer's compliance report identifies a material weakness, the broker-dealer must include a statement that one or more material weaknesses have been identified and that a copy of the report of the independent public accountant is currently available for the customer's inspection at the principal office of the Commission in Washington, DC, and the regional office of the Commission for the region in which the broker-dealer has its principal place of business.[451]

In response to commenters' concerns about making the report of material non-compliance available to the public, the report that now will be made publicly available is a report that identifies the existence of a material weakness—not a report of material non-compliance. In addition, making the report of the independent public accountant covering the compliance report publicly available if it identifies the existence of a material weakness is consistent with the previous treatment of a report of a material inadequacy. Providing customers notice of an accountant's finding that goes directly to the financial and operational condition of their broker-dealer and making the report containing the finding publicly available will make available to customers information that facilitates their ability to make more informed decisions in selecting broker-dealers through which they prefer to conduct business. For these reasons, the final rule does not accord confidential treatment to a report of an independent public accountant covering the compliance report if it identifies a material weakness as some commenters suggested should be the case with respect to the proposed—but not adopted—report of material non-compliance. Consequently, an independent public accountant's report covering the compliance report will be made available for the customer's inspection at the principal office of the Commission in Washington, DC, and the regional office of the Commission for the region in which the broker-dealer has its principal place of business if the report identifies the existence of a material weakness.[452]

iii. Exemption From Mailing Financial Information to Customers—Paragraph (c)(5) of Rule 17a–5

Before today's amendments, paragraph (c)(5) of Rule 17a–5 provided a conditional exemption from the requirement that a broker-dealer send paper copies of financial information to customers if the broker-dealer mailed to customers a financial disclosure statement with summary information and an Internet link to its balance sheet and other information on the broker-dealer's Web site.[453] One of the conditions of the exemption, contained in paragraph (c)(5)(vi) of Rule 17a–5, was that the broker-dealer was not required by paragraph (e) of Rule 17a–11 to give notice of a material inadequacy during the prior year. The Commission proposed revising the condition in paragraph (c)(5)(vi) of Rule 17a–5 to provide that the broker-dealer's financial statements must receive an unqualified opinion from the independent public accountant and neither the broker-dealer, under proposed paragraph (d) of Rule 17a–5, nor the independent public accountant, under proposed paragraph (g) of Rule 17a–5, identified a material weakness or an instance of material non-compliance.[454]

The Commission received several comments on the proposal.[455] One commenter stated that broker-dealers should be able to deliver the financial information available to customers via its Web site regardless of whether an instance of material non-compliance or material weakness was identified.[456] Another commenter stated that the rule should not require a 100% rate of compliance with the financial responsibility rules to qualify for the exemption.[457] A third commenter stated that the proposed amendment should be eliminated, or replaced with the requirement that broker-dealers include a notice of the material weakness or non-compliance on customer account

[444] *See* 17 CFR 240.17a–5(c)(2)(iii).

[445] *See Broker-Dealer Reports,* 76 FR at 37579.

[446] This proposal would have been codified in paragraph (c)(2)(iv) of Rule 17a–5 as a result of paragraph (c)(2)(iii) being removed and paragraph (c)(2)(iv) being redesignated as paragraph (c)(iii). *See Broker-Dealer Reports,* 76 FR at 37603.

[447] *See ABA Letter; CAI Letter; Deloitte Letter.*

[448] *Id.*

[449] *See ABA Letter.*

[450] *See* paragraph (c)(2)(iv) of Rule 17a–5.

[451] *Id.*

[452] Paragraph (c)(2)(iv) of Rule 17a–5, as adopted, includes both the principal office of the Commission in Washington, DC and the regional office of the Commission for the region in which a broker-dealer has its principal place of business as locations where the accountant's reports are available. Including the applicable regional office of the Commission as a location where these notices are available will make them more accessible to customers and is consistent with the previous treatment of material inadequacy reports.

[453] 17 CFR 240.17a–5(c)(5).

[454] *See Broker-Dealer Reports,* 76 FR at 37577.

[455] *See ABA Letter; CAI Letter; SIFMA Letter.*

[456] *See ABA Letter.*

[457] *See CAI Letter.* This commenter stated that as FINRA has proposed that broker-dealers send customer account statements monthly instead of quarterly, broker-dealers are already potentially facing ''extremely high'' costs of sending information to customers. FINRA withdrew its proposals to send customer account statements monthly instead of quarterly on July 30, 2012. *See Proposed Rule Change to Adopt FINRA Rule 2231 (Customer Account Statements) in the Consolidated FINRA Rulebook,* File No. SR–2009–028, (July 30, 2012), *available at http://www.finra.org/web/groups/industry/@ip/@reg/@rulfil/documents/rulefilings/p143262.pdf* (withdrawal of proposed rule change).

statements for a year following its identification.[458]

In response to comments received, the Commission has decided not to adopt the proposed condition in paragraph (c)(5)(vi) of Rule 17a–5 for qualifying for the conditional exemption. Requiring paper delivery of financial information to customers when a broker-dealer's financial statements do not receive an unqualified opinion from its independent public accountant, or when the broker-dealer fails to comply with certain regulatory requirements, will not necessarily result in a more effective means of communication to customers and runs counter to the dominant trend toward electronic communications between financial entities and their customers. Further, as discussed above, if a broker-dealer or its independent public accountant provides notice to the Commission of a material weakness in the broker-dealer's Internal Control Over Compliance, paragraph (c)(2)(iv) of Rule 17a–5 as adopted requires the broker-dealer to include with the semi-annual financial disclosure statement it sends its customers a statement that the independent public accountant identified a material weakness and that a copy of the report of the independent public accountant is available for the customers' inspection.

2. Technical Amendments

i. Deletion of Paragraph (b)(6) of Rule 17a–5

Before today's amendments, paragraph (b)(6) of Rule 17a–5 provided that ''a copy of [a broker-dealers] annual audit report shall be filed at the regional office of the Commission for the region in which the broker or dealer has its principal place of business and the principal office of the designated examining authority for said broker or dealer. Two copies of said report shall be filed at the Commission's principal office in Washington, DC. Copies thereof shall be provided to all self-regulatory organizations of which said broker or dealer is a member.'' The Commission proposed to delete this paragraph because the same provisions are in paragraph (d)(6) of Rule 17a–5.[459] The Commission received no comments on this proposal and is deleting paragraph (b)(6) of Rule 17a–5 as proposed.

ii. Deletion of Provisions Relating to the Year 2000

Before today's amendments, paragraph (e)(5) of Rule 17a–5 required broker-dealers to file Form BD–Y2K. Form BD–Y2K elicited information with respect to a broker-dealer's readiness for the year 2000 and any potential problems that could arise with the advent of the new millennium.[460] Form BD–Y2K was required to be filed in April 1999 and only then. In the proposing release, the Commission proposed to delete paragraph (e)(5) of Rule 17a–5 in its entirety because the provisions of that paragraph are now moot.[461] The Commission received no comments on this proposal and is deleting paragraph (e)(5) of Rule 17a–5 as proposed.

iii. Deletion of Paragraph (i)(5) of Rule 17a–5

In the proposing release, the Commission proposed to delete paragraph (i)(5) of Rule 17a–5, which, before today's amendments, provided that ''the terms *audit* (or *examination*), *accountant's report,* and *certified* shall have the meanings given in § 210.1–02 of this chapter.''[462] The Commission received no comments on this proposal and is deleting paragraph (i)(5) of Rule 17a–5 as proposed.

iv. Amendments to Paragraph (f)(2) of Rule 17a–5

Before today's amendments, paragraph (f)(2) of Rule 17a–5 provided that a broker-dealer that was required to file an annual audit report must file a statement with the Commission and its DEA that it has designated an independent public accountant responsible for performing the annual audit of the broker-dealer, which was called ''Notice pursuant to Rule 17a–5(f)(2)''.[463] Paragraph (f)(2)(iii) of Rule 17a–5 prescribed the items that were required to be included in the notice: the name, address, telephone number and registration number of the broker-dealer; the name, address and telephone number of the accounting firm; and the audit date of the broker-dealer for the year covered by the agreement.[464]

In addition to the proposed amendments discussed below in section III. of this release, the Commission proposed certain technical amendments to paragraph (f)(2) of Rule 17a–5.[465] First, the Commission proposed amending the language in paragraph (f)(2)(i) of Rule 17a–5 to streamline the paragraph and to add a reference to proposed paragraph (f)(2)(ii) of Rule 17a–5, which would have prescribed the information a broker-dealer would have been required to include in its notice designating its accountant. In addition, the Commission proposed to amend paragraph (f)(2)(i) of Rule 17a–5 to require that a broker-dealer include a statement in its notice as to whether the engagement with its independent public accountant was for a single year or was of a continuing nature. This statement was previously required by paragraph (f)(2)(ii) of Rule 17a–5, which the Commission proposed to delete as part of its revisions to that paragraph. The Commission did not receive any comments on these proposed changes and is adopting them as proposed. The Commission also proposed to retain the annual December 10 filing deadline for the statements provided pursuant to paragraph (f)(2), but also added the language ''(or 30 calendar days after the effective date of its registration as a broker or dealer, if earlier).'' The Commission did not receive any comments on this amendment and is adopting it as proposed. In addition, the final rule adds a conforming change to the date of the statement designating the independent public accountant. Under the proposal, the statement must be dated ''no later than December 1.'' Under the final rules, the statement must be dated ''no later than December 1 (or 20 calendar days after the effective date of its registration as a broker or dealer, if earlier)'' to make the timing consistent with the filing deadlines described above.

As discussed in the proposing release, notices pursuant to paragraph (f)(2) of Rule 17a–5 currently on file with the Commission do not contain the representations that are required by the amendments to paragraph (f)(2) that the Commission is adopting today. Accordingly, broker-dealers subject to paragraph (f)(2) of Rule 17a–5 (*i.e.,* all broker-dealers that are required to file audited annual reports) must file a new ''statement regarding the independent

[458] *See SIFMA Letter.*

[459] *See Broker-Dealer Reports,* 76 FR at 37593. As discussed above in section II.B.6. of this release, the Commission is amending paragraph (d)(6) of Rule 17a–5 to require that a copy of a broker-dealer's annual report must be filed with SIPC. Specifically, the Commission is amending paragraph (d)(6) to provide that a broker-dealer's annual reports ''must be filed at the regional office of the Commission for the region in which the broker or dealer has its principal place of business, the Commission's principal office in Washington, DC, the principal office of the designated examining authority for the broker or dealer, and with the Securities Investor Protection Corporation ('SIPC') if the broker or dealer is a member of SIPC. Copies of the reports must be provided to all self-regulatory organizations of which the broker or dealer is a member, unless the self-regulatory organization by rule waives this requirement.''

[460] *See Reports to be Made by Certain Brokers and Dealers,* Exchange Act Release No. 40608 (Oct. 28, 1998), 63 FR 59208 (Nov. 3, 1998).

[461] *See Broker-Dealer Reports,* 76 FR at 37593.

[462] *Id.* at 37594.

[463] *See* 17 CFR 240.17a–5(f)(2).

[464] *See* 17 CFR 240.17a–5(f)(2)(iii)(A)–(C).

[465] *See Broker-Dealer Reports,* 76 FR at 37583–37584, 37605–37606.

public accountant under Rule 17a–5(f)(2).'' [466] As specified in the new rule, if the engagement covered by the new statement is of a continuing nature, no subsequent filing would be required unless and until the broker-dealer changes its independent public accountant or amends the engagement with the accountant.[467]

v. Further Technical Amendments

In the proposing release, the Commission proposed additional technical amendments to Rule 17a–5, including changes that would consistently use the term ''independent public accountant'' throughout Rule 17a–5 when referring to a broker-dealer's accountant,[468] to make the rule gender neutral,[469] and to replace the term ''balance sheet'' with the term ''Statement of Financial Condition'' in all places where that term appeared in Rule 17a–5.[470] These technical amendments were designed to modernize the language of Rule 17a–5, and to make the rule easier to understand. The Commission received no comments on these amendments and is adopting them as proposed.

The Commission is making further technical amendments that are consistent with the Commission's ''plain English'' initiative and do not substantively affect the requirements of Rule 17a–5.[471] In addition, for clarity and consistency throughout Rule 17a–5, the Commission is amending Rule 17a–5 to replace the words ''date selected for the annual audit of financial statements'' that were previously contained in paragraphs (a)(2)(ii) and (iii) of Rule 17a–5 with the words ''end of the fiscal year of the broker or dealer.'' [472] The phrase ''date selected for the annual audit of the financial statements'' has the same meaning as the phrase ''end of the fiscal year of the broker or dealer.'' As discussed earlier, this change eliminates outdated language and conforms the text in paragraph (a) of Rule 17a–5 to the text in paragraph (n) of Rule 17a–5. The Commission is making a technical amendment to paragraph (a)(3) of Rule 17a–5. As proposed, paragraph (a)(3) provided that the reports required under paragraph (a) of Rule 17a–5 were considered filed when received at the Commission's principal office and the regional office of the Commission where the broker-dealer has its principal place of business. However, Form Custody, which broker-dealers must file under paragraph (a)(5) of Rule 17a–5, as amended, must be filed with the broker-dealer's DEA and not with the Commission. The Commission is therefore amending paragraph (a)(3) of Rule 17a–5 to clarify that this provision applies to reports ''that must be filed with the Commission.'' As a result, the Commission is making technical amendments to paragraphs (a)(2)(i) through (a)(2)(iv) of Rule 17a–5 to specify that the FOCUS Reports required under these provisions must be filed with the Commission.

The Commission also is making technical amendments to paragraph (m)(1) of Rule 17a–5, which relates to extensions and exemptions for filing annual reports, and (n)(2) of Rule 17a–5, which relates to a broker-dealer's notification requirements when changing its fiscal year, to replace the words ''annual audit reports'' and ''audit report,'' respectively, with the words ''annual reports.'' The Commission also is deleting an unnecessary citation to paragraph (d)(1)(i) of Rule 17a–5 that was previously included in paragraph (n)(2) of Rule 17a–5.

H. Coordination With Investment Advisers Act Rule 206(4)–2

1. Background

The amendments to Rule 17a–5 that the Commission is adopting today will permit carrying broker-dealers that either also are registered as investment advisers or maintain client assets of an affiliated investment adviser and are subject to the internal control report requirement in Rule 206(4)–2 to satisfy that requirement with a report prepared by the broker-dealer's independent public accountant based on an examination of certain of the broker-dealer's statements in the compliance report.

2. Rule 206(4)–2

Rule 206(4)–2 provides that a registered investment adviser is prohibited from maintaining custody of client funds or securities unless a ''qualified custodian'' maintains those funds and securities: (1) In a separate account for each client under that client's name; or (2) in accounts that contain only the investment adviser's clients' funds and securities, under the investment adviser's name as agent or trustee for the clients.[473] Under Rule 206(4)–2, only banks, certain savings associations, registered broker-dealers, FCMs, and certain foreign financial institutions may act as qualified custodians.[474]

In addition, when an investment adviser or its related person maintains client funds and securities as qualified custodian in connection with advisory services provided to clients, the adviser annually must obtain, or receive from its related person, a written internal control report prepared by an independent public accountant registered with, and subject to regular inspection by, the PCAOB.[475] This report must be supported by the independent public accountant's examination of the qualified custodian's custody controls.[476]

The Commission has issued guidance identifying the control objectives that should be included in the scope of the internal control examination required under Rule 206(4)–2.[477] The control objectives for the Rule 206(4)–2 examination are more general than the specific operational requirements in the

[466] *See* paragraph (f)(2) of Rule 17a–5.

[467] *See* paragraph (f)(2)(i) of Rule 17a–5.

[468] *See Broker-Dealer Reports,* 76 FR at 37594.

[469] *Id.*

[470] *Id.* at 37593.

[471] These amendments replace the term ''shall'' with ''must,'' the term ''pursuant to'' with ''under,'' the term ''said'' with ''the'' or ''that,'' the term ''such'' with ''the'' or ''that,'' the term ''other than'' with ''not,'' and the term ''therewith'' with ''with the.''

[472] For example, 17 CFR 240.17a–5(a)(5), (d)(3)(i)(B), and (d)(5) each refer to the ''end of the fiscal year of the broker or dealer.''

[473] *See* 17 CFR 275.206(4)–2(a)(1)(i)–(ii).

[474] *See* 17 CFR 275.206(4)–2(d)(6).

[475] *Id.*

[476] Rule 206(4)–2 provides that the internal control report must include an opinion of an independent public accountant as to whether controls have been placed in operation as of a specific date, and are suitably designed and are operating effectively to meet control objectives relating to custodial services, including the safeguarding of funds and securities held by either the adviser or its related person on behalf of advisory clients, during the year. The rule also requires that the accountant ''verify that the funds and securities are reconciled to a custodian other than [the adviser or its] related person.'' *See* 17 CFR 275.206(4)–2.

[477] *See Commission Guidance Regarding Independent Public Accountant Engagements Performed Pursuant to Rule 206(4)–2 Under the Investment Advisers Act of 1940,* Advisers Act Release No. 2969 (Dec. 30, 2009), 75 FR 1492 (Jan. 11, 2010) (identifying the following specified objectives: (1) Documentation for the opening and modification of client accounts is received, authenticated, and established completely, accurately, and timely on the applicable system; (2) client transactions, including contributions and withdrawals, are authorized and processed in a complete, accurate, and timely manner; (3) trades are properly authorized, settled, and recorded completely, accurately, and timely in the client account; (4) new securities and changes to securities are authorized and established in a complete, accurate and timely manner; (5) securities income and corporate action transactions are processed to client accounts in a complete, accurate, and timely manner; (6) physical securities are safeguarded from loss or misappropriation; (7) cash and security positions are reconciled completely, accurately and on a timely basis between the custodian and depositories; and (8) account statements reflecting cash and security positions are provided to clients in a complete, accurate and timely manner).

financial responsibility rules.[478] This approach allows different types of qualified custodians (banks, certain savings associations, broker-dealers, FCMs, and certain foreign financial institutions) to establish controls and procedures that meet the identified control objectives in a manner that reflects differences in business models, regulatory requirements, and other factors.[479]

3. Broker-Dealers Acting as Qualified Custodians Under Rule 206(4)–2

Broker-dealers that also are registered as investment advisers may, acting in their capacity as broker-dealers, maintain client securities and funds as qualified custodians in connection with advisory services provided to clients.[480] As a result of being the adviser and qualified custodian to its clients, under Rule 206(4)–2 these broker-dealers must obtain an internal control report relating to the custody of those assets from an independent public accountant that is registered with, and subject to regular inspection by, the PCAOB. In addition, broker-dealers acting as qualified custodians also may maintain advisory client assets in connection with advisory services provided by related or affiliated investment advisers. Rule 206(4)–2 requires such a broker-dealer to provide an internal control report to its related investment adviser.[481]

4. Proposal to Allow Report Based on Examination of Compliance Report to Satisfy Rule 206(4)–2

i. The Proposal

Broker-dealers that maintain custody of customer funds and securities are subject to specific operational requirements in the financial responsibility rules with respect to handling and accounting for customer assets.[482] The operational requirements of the financial responsibility rules are consistent with the control objectives outlined in the Commission's guidance on Rule 206(4)–2.[483] As a result of the proposed amendments to Rule 17a–5, the Commission stated in the proposing release that a broker-dealer subject to an examination by an independent public accountant of its compliance report that also acts as a qualified custodian for itself as an investment adviser or for its related investment advisers under Rule 206(4)–2 would be able to use the independent public accountant's report resulting from the examination to satisfy the internal control report requirement under Rule 206(4)–2.[484]

ii. Comments on the Proposal

The Commission received several comments regarding the proposal that the independent public accountant's report based on an examination of the compliance report would satisfy the internal control report under Rule 206(4)–2. One commenter stated that it is ''critically important'' that there be a single independent public accountant engagement of the custody function at both the broker-dealer and investment adviser operations of any dually registered entity (or of affiliated broker-dealers and investment advisers) and that this engagement use a single, consistent standard for evaluating custody at both the broker-dealer and investment adviser operations.[485] Two commenters noted that there are non-carrying broker-dealers that act as qualified custodians under the Advisers Act and that these broker-dealers would not be subject to the proposed compliance report requirements and, consequently, would not be able to use the report of the independent public accountant covering the compliance report to satisfy the internal control report requirement in Rule 206(4)–2 because the broker-dealers would be filing exemption reports instead of compliance reports.[486] One commenter characterized this as an area of redundancy that could be eliminated by allowing an accountant's review of a non-carrying broker-dealer's transmittal procedures to be ''recognized by the Investment Adviser regulatory regime promulgated by the Commission.''[487]

In addition, two commenters asked for clarification regarding the interaction of the proposed compliance report requirements with the requirement in Rule 206(4)–2 that investment advisers undergo an annual surprise examination by an independent accountant to verify customer funds and securities held in custody.[488] Specifically, both asked that the Commission clarify whether the independent public accountant performing the surprise examination would be able to place reliance on the proposed compliance report and related compliance examination to determine the nature and extent of the procedures for the surprise examination.[489] One of the commenters also asked that, if the Commission clarifies that the independent public accountant performing the surprise examination is expected to rely on the proposed compliance report requirements, what factors should the independent public accountant consider, given that the report based on an examination of the compliance report would not be required to be completed until 60 days after the fiscal year end while the surprise examination may occur at any time.[490]

5. Adoption of Proposal Relating to Rule 206(4)–2

As discussed above, under today's amendments, a carrying broker-dealer must prepare, and file with the Commission and its DEA, a compliance report on, among other things, its Internal Control Over Compliance, and must file with the compliance report a report prepared by its independent public accountant based on an examination of the compliance report.[491] As a result of the amendments to Rule 17a–5, the Commission has determined that the independent public accountant's report based on an examination of the compliance report

[478] *Compare* the control objectives described in *Commission Guidance Regarding Independent Public Accountant Engagements Performed Pursuant to Rule 206(4)–2 Under the Investment Advisers Act of 1940,* 75 FR at 1494, *with* the requirements in 17 CFR 240.15c3–1, 17 CFR 240.15c3–3, 17 CFR 240.17a–13, and the DEA Account Statement Rules.

[479] *See Broker-Dealer Reports,* 76 FR at 37580.

[480] The Commission staff has estimated that approximately 18% of FINRA-registered broker-dealers also are registered as investment advisers with the Commission or with a state. *See* Commission staff, *Study on Investment Advisers and Broker-Dealers, as required by Section 913 of the Dodd-Frank Wall Street Reform and Consumer Protection Act* (Jan. 2011).

[481] *See* 17 CFR 275.206(4)–2(a)(6). Based on data collected from the Investment Adviser Registration Depository as of August 2012, close to 200 investment advisers reported on Form ADV that client assets were being held at a qualified custodian that was related to the adviser.

[482] While Rule 15c3–1 prescribes broker-dealer net capital requirements, it also contains provisions relating to custody. For example, a broker-dealer must take net capital charges for short security differences unresolved after specifically enumerated timeframes. *See* 17 CFR 240.15c3–1(c)(2)(v)(A).

[483] *See Broker-Dealer Reports,* 76 FR at 37579–37580; *Commission Guidance Regarding Independent Public Accountant Engagements Performed Pursuant to Rule 206(4)–2 Under the Investment Advisers Act of 1940,* 75 FR at 1493–1494.

[484] *See Broker-Dealer Reports,* 76 FR at 37579–37580.

[485] *See CFP Letter.*

[486] *See CAI Letter; Deloitte Letter.*

[487] *See Deloitte Letter.*

[488] *See CAQ Letter; PWC Letter.* Paragraph (a)(4) of Rule 206(4)–2 requires, among other things, that client funds and securities of which an investment adviser has custody must be verified by actual examination at least once during each calendar year by an independent public accountant, pursuant to a written agreement between the investment adviser and the accountant, at a time that is chosen by the accountant without prior notice or announcement to the investment adviser and that is irregular from year to year. *See* 17 CFR 275.206(4)–2.

[489] *See CAQ Letter; PWC Letter.*

[490] *See PWC Letter.*

[491] *See* 17 CFR 240.17a–5(d)(3) and (g)(2)(i).

will satisfy the internal control report requirement under Rule 206(4)–2 because the operational requirements of the financial responsibility rules are consistent with the control objectives outlined in the Commission's guidance on Rule 206(4)–2.[492] For example, to be able to include a statement that the broker-dealer has established and maintained Internal Control Over Compliance (which is defined as internal controls that have the objective of providing the broker-dealer with reasonable assurance that non-compliance with the financial responsibility rules will be prevented or detected on a timely basis),[493] a broker-dealer's internal control over compliance with Rule 17a–13 will result in controls over the safeguarding of securities from loss or misappropriation and the completeness, accuracy, and timeliness of the securities reconciliation process.[494] To make a similar statement with respect to the Account Statement Rules, a broker-dealer would of necessity have internal controls over compliance with the Account Statement Rules designed to ensure that customers receive complete, accurate, and timely information concerning securities positions and other assets held in their accounts.[495] A statement that the broker-dealer has established and maintained Internal Control Over Compliance would cover these and other internal controls over compliance with the financial responsibility rules and would be examined by the independent public accountant during the examination of the compliance report.

As commenters noted, broker-dealers that are not carrying broker-dealers are not subject to the compliance report requirements and, therefore, those broker-dealers must comply with the internal control report requirement in Rule 206(4)–2 if they are subject to that requirement. The exemption report is not redundant of the internal control report requirement in Rule 206(4)–2 because, among other things, the scope of the required statements included in a broker-dealer's exemption report is different than the scope of the internal control report requirement in Rule 206(4)–2.[496]

As noted above, commenters also asked whether the accountant would be able to place reliance on the proposed compliance report and related examination of the compliance report to determine the nature and extent of the procedures for the surprise examination. PCAOB attestation standards require an independent public accountant ''to obtain an understanding of internal control over compliance sufficient to plan the engagement and to assess control risk for compliance with specified requirements.'' [497] The Commission agrees that the independent public accountant's understanding of internal controls related to custody at the broker-dealer acting as a qualified custodian, as well as other facts and circumstances, may affect the nature and extent of procedures performed for the annual surprise examination.[498] The Commission has provided interpretive guidance on the relationship between the annual surprise examination and the internal control report for engagements performed pursuant to Rule 206(4)–2.[499]

III. Access to Accountant and Audit Documentation

The Commission proposed amending paragraph (f)(2) of Rule 17a–5 to require that each clearing broker-dealer [500] include a representation in its statement regarding its independent public accountant that the broker-dealer agrees to allow Commission and DEA examination staff to review the audit documentation associated with its annual audit reports required under Rule 17a–5 and to allow its independent public accountant to discuss findings relating to the audit reports with Commission and DEA examination staff if requested for the purposes of an examination of the broker-dealer.[501] This proposed requirement was intended to facilitate examinations of clearing broker-dealers by Commission and DEA examination staff.[502] Access to information obtained from audit documentation and discussions with a clearing broker-dealer's independent public accountant would enhance the efficiency and effectiveness of Commission and DEA examinations by providing examiners with access to additional relevant information to plan their examinations.[503]

The Commission proposed to limit this requirement to clearing broker-dealers, which generally have more complex business operations than non-carrying firms.[504] Thus, access to accountants and audit documentation was considered of substantially greater value when preparing for regulatory examinations of these types of broker-dealers, as compared to firms with more limited business models.

To facilitate Commission and DEA examination staff access to a clearing broker-dealer's independent public accountant and the accountant's audit documentation, the Commission proposed amending paragraph (f)(2) of

[492] *See Commission Guidance Regarding Independent Public Accountant Engagements Performed Pursuant to Rule 206(4)–2 Under the Investment Advisers Act of 1940,* 75 FR at 1494; *Broker-Dealer Reports,* 76 FR at 37579–37580. As discussed above in section II.D.3. of this release, the independent public accountant must examine the compliance report in accordance with attestation standards promulgated by the PCAOB. Consequently, the PCAOB's attestation standards are integral to the Commission's determination that the independent public accountant's report based on an examination of the compliance report satisfies the internal control report requirement under Rule 206(4)–2. The Commission could revisit this determination if the PCAOB's attestation standards do not support the determination.

[493] *See* paragraphs (d)(3)(i)(A)(*1*) and (d)(3)(ii) of Rule 17a–5.

[494] *See* 17 CFR 240.17a–13. As discussed above in section II.D.3. of this release, the PCAOB proposed attestation standards related to the compliance report. The PCAOB's proposed attestation standards include a requirement that the independent public accountant must perform procedures to obtain evidence about the existence of customer funds or securities held for customers, *e.g.,* confirmation of customer security positions directly with depositories and clearing organizations. *See PCAOB Proposing Release* app. 1, at ¶ 26. This procedure would be consistent with the tests of the qualified custodian's reconciliation that the Commission specified in the guidance on Rule 206(4)–2. *See Commission Guidance Regarding Independent Public Accountant Engagements Performed Pursuant to Rule 206(4)–2 Under the Investment Advisers Act of 1940,* 75 FR 1494.

[495] *See, e.g.,* CBOE Rule 9.12; NASD Rule 2340. *See also Commission Guidance Regarding Independent Public Accountant Engagements Performed Pursuant to Rule 206(4)–2 Under the Investment Advisers Act of 1940,* Advisers Act Release No. 2969 (Dec. 30, 2009), 75 FR 1494 (Jan. 11, 2010), which describes as a control objective for qualified custodians (including broker-dealer qualified custodians) that account statements reflecting cash and security positions are provided to clients in a complete, accurate and timely manner.

[496] *See supra* notes 299, 300.

[497] *See* PCAOB Interim Attestation Standard, *AT Section 601. AT Section 601* requires an independent public accountant ''to obtain an understanding of internal control over compliance sufficient to plan the engagement and to assess control risk for compliance with specified requirements. In planning the examination, such knowledge should be used to identify types of potential non-compliance, to consider factors that affect the risk of material noncompliance, and to design appropriate tests of compliance.'' *Id.* at ¶ .45.

[498] *Id.*

[499] *See Commission Guidance Regarding Independent Public Accountant Engagements Performed Pursuant to Rule 206(4)–2 Under the Investment Advisers Act of 1940,* Advisers Act Release No. 2969 (Dec. 30, 2009), 75 FR 1492 (Jan. 11, 2010).

[500] For the purpose of this release, a ''clearing broker-dealer'' is a broker-dealer that clears transactions or carries customer accounts.

[501] *See Broker-Dealer Reports,* 76 FR at 37583–37584.

[502] *Id.*

[503] For example, where an independent public accountant has performed extensive testing of a carrying broker-dealer's custody of funds and securities by confirming holdings at custodians and sub-custodians, examiners could focus their efforts on other matters that had not been the subject of prior testing and review.

[504] *See Broker-Dealer Reports,* 76 FR at 37583.

Rule 17a–5 to require that a clearing broker-dealer's notice designating its independent public accountant include, among other things, representations: (1) That the broker-dealer agrees to allow representatives of the Commission or the broker-dealer's DEA, if requested for purposes of an examination of the broker-dealer, to review the documentation associated with the reports of its independent public accountant prepared pursuant to paragraph (g) of Rule 17a–5; and (2) that the broker-dealer agrees to permit its independent public accountant to discuss with representatives of the Commission and the DEA, if requested for the purposes of an examination of the broker-dealer, the findings associated with the reports of the accountant prepared pursuant to paragraph (g) of Rule 17a–5.[505] Proposed paragraph (f)(2)(iii) of Rule 17a–5 provided that a broker-dealer that does not clear transactions or carry customer accounts would not be required to include these representations in its notice.[506]

Eight commenters addressed the proposed changes to paragraph (f)(2) of Rule 17a–5.[507] Generally, commenters requested that the Commission do one or more of the following: (1) Clarify the type of documentation that the Commission and DEA examiners would seek to access [508]; (2) grant confidential treatment to documentation obtained by the Commission under this provision [509]; (3) clarify the process by which Commission and DEA examiners would seek access to a broker-dealer's independent public accountant and its audit documentation [510]; and (4) limit the use of information and documentation obtained from a broker-dealer's independent public accountant.[511] In addition, one commenter raised general concerns that providing Commission and DEA examiners with access to a broker-dealer's auditor and audit documentation will discourage communications between broker-dealers and their auditors and may require auditors to produce documentation protected by attorney-client and/or accountant-client privilege.[512] Finally, one commenter asserted that it is reasonable for securities regulators to be able to validate any concerns promptly with a broker-dealer's accountant.[513]

In response to requests for clarity as to the types of audit documentation that Commission and DEA examiners would seek to access under the proposal, the Commission revised proposed paragraph (f)(2)(ii)(F) of Rule 17a–5 to clarify that ''audit documentation'' has the meaning established by PCAOB standards.[514] This revision, which was specifically suggested by two commenters,[515] is not intended to alter an independent public accountant's obligations with respect to audit documentation; rather, it is intended to clarify the types of audit documentation that the Commission and DEA examiners may ask to review in connection with a broker-dealer examination.

In response to questions regarding the process by which Commission and DEA examiners might seek to access audit documentation, the Commission agrees with a commenter that suggested that these requests be in writing because that will provide independent public accountants with a record of requests for information and specify the documentation the Commission or DEA examination staff would like to access.[516] Therefore, the Commission has modified the rule from the proposal to provide that a request to a broker-dealer's independent public accountant for the accountant to discuss audit findings or for access to audit documentation be made in writing.

Independent public accountants can seek to protect information obtained by examiners from being disclosed to Freedom of Information Act (''FOIA'') requestors by specifically requesting confidential treatment of audit documentation following the process described in Rule 83 of the Commission's Rules on Information and Requests.[517] The Commission anticipates that it will accord confidential treatment to such documents to the extent permitted by law.[518]

Two commenters requested that the Commission clarify the intended use of information and documents obtained from an independent public accountant.[519] One recommended that the Commission clarify that the information obtained from the independent public accountant not be used for any purpose other than in connection with a regulatory examination of the broker-dealer.[520] The other suggested that the rule text state that the requests for information should be solely for the purposes of conducting a regulatory examination of the clearing broker-dealer.[521] The Commission does not believe that it is necessary to modify the proposed rule text in response to these comments. The Commission stated that it did not propose that examiners would use the requested information for the purpose of inspecting independent public accountants.[522] As the Commission stated in the proposing release, the purpose of this access requirement is to enhance and improve the efficiency and effectiveness of Commission and DEA examinations of broker-dealers.[523] The PCAOB is responsible for inspections of independent public accountants that audit broker-dealers.[524] In response to these comments, the Commission reiterates its intention, as stated in the proposing release, that any requests for

[505] *Id.*

[506] *Id.*

[507] *See CAI Letter; CAQ Letter; CFP Letter; Deloitte Letter; E&Y Letter; KPMG Letter; PWC Letter; SIFMA Letter.*

[508] *See CAQ Letter; Deloitte Letter; E&Y Letter; KPMG Letter.*

[509] *See CAI Letter; KPMG Letter; PWC Letter; SIFMA Letter.*

[510] *See Deloitte Letter; E&Y Letter; KPMG Letter.*

[511] *See E&Y Letter; PWC Letter.*

[512] *See CAI Letter.*

[513] *See CFP Letter.*

[514] PCAOB Auditing Standard 3 defines ''Audit documentation'' as the ''written record of the basis for the auditor's conclusions that provides the support for the auditor's representations, whether those representations are contained in the auditor's report or otherwise. Audit documentation also facilitates the planning, performance, and supervision of the engagement, and is the basis for the review of the quality of the work because it provides the reviewer with written documentation of the evidence supporting the auditor's significant conclusions. Among other things, audit documentation includes records of the planning and performance of the work, the procedures performed, evidence obtained, and conclusions reached by the auditor. Audit documentation also may be referred to as *work papers* or *working papers.*''

[515] *See CAQ Letter; KPMG Letter.*

[516] *See KPMG Letter. See also Deloitte Letter,* which suggests that Commission and DEA examiners first provide notice to the broker-dealer, in writing, of plans to request access to the broker-dealer's audit documentation and then make a written request to the accountant. Although, in practice, Commission and DEA examiners may provide advance or simultaneous notice to a broker-dealer of requests to access audit documentation from the broker-dealer's accountant, the Commission is not adopting a requirement that examiners so notify broker-dealers of such requests. This additional notification would likely delay an examiner's ability to gain access to the broker-dealer's audit documentation and is not necessary given the broker-dealer's prior consent. In addition, a broker-dealer can request that its accountant provide notice when examiners request audit documentation, and, expects that, in practice, accountants will provide such notice. *See also E&Y Letter.*

[517] 17 CFR 200.83. Generally, persons who submit information to the Commission may request that the Commission accord confidential treatment to the information for any reason permitted by federal law.

[518] The Commission believes that this audit documentation likely would fall under exemptions (b)(8) and/or (b)(4) of FOIA. *See* 5 U.S.C. 522(b)(8); 5 U.S.C. 522(b)(4).

[519] *See E&Y Letter; PWC Letter.*

[520] *See PWC Letter.*

[521] *See E&Y Letter.*

[522] *See Broker-Dealer Reports,* 76 FR at 37583.

[523] *Id.*

[524] *Id.*

audit documentation under this provision would be made exclusively in connection with conducting a regulatory examination of a broker-dealer.[525]

One commenter stated that Commission and DEA examiners should be limited to inspecting audit documentation relating to a broker-dealer in the offices of the broker-dealer's independent public accountant and that the broker-dealer should be permitted to be present during conversations between Commission or DEA staff and the accountant.[526] The Commission has considered these comments and decided not to modify the proposal in response to these comments. However, Commission and DEA examiners may exercise discretion in determining whether to review audit documentation in the offices of the broker-dealer's accountant and whether to permit the broker-dealer to be present during conversations with the accountant. This commenter also requested that the Commission establish a process by which broker-dealers can object to overly broad or unduly burdensome requests.[527] The rule will not be modified in response to this comment and the Commission recommends that any concerns regarding the scope of audit documentation requests be directed to the examiner from whom the request was received. The examiner will consider the concerns and determine whether and how to limit the scope of the audit documentation request, if appropriate. The independent public accountant also can express concerns to senior examination staff if the scope of the audit documentation request remains a concern after discussions with the examiner.

Another commenter stated that the Commission must be responsible for returning all audit work papers that it receives for purposes of an examination of the broker-dealer to either the broker-dealer or its accountant.[528] The purpose of requesting access to audit documentation is to assist examiners in conducting a regulatory examination of the clearing broker-dealer. Upon completion of the examination, if the Commission and DEA, and any offices and divisions thereof, no longer need the audit documentation, the Commission and DEA will, upon the request of the independent public accountant and in the absence of unusual circumstances, return audit documentation to the independent public accountant or the broker-dealer within a reasonable time after the examination is complete.

One commenter stated that, if adopted, this requirement will discourage or ''chill'' communications between a broker-dealer and its auditor because ''the broker-dealer knows that regardless of the nature of an auditing issue and how it was discovered . . . it cannot freely seek advice from, or discuss the issue openly with[] the auditor[] without fear of the auditor misunderstanding the broker-dealer's response or simply drawing a conclusion that a broker-dealer's questions indicate the broker-dealer's lack of knowledge or admission of an issue.'' [529] Presumably, this ''chilling effect'' would result from a broker-dealer's desire to avoid the creation of audit documentation memorializing misunderstandings and miscommunications, which, when accessed by Commission and DEA examiners, could result in regulatory scrutiny. The Commission is not persuaded by this comment; while it is possible for miscommunications to occur between representatives of a broker-dealer and its auditor, potential misunderstandings or miscommunications should not limit the ability of the Commission or a DEA to have access to audit documentation or a broker-dealer's independent public accountant. Further, to the extent a misunderstanding or miscommunication between a broker-dealer and its accountant is reflected in the accountant's audit documentation relating to the broker-dealer, the broker-dealer could clarify the nature of the misunderstanding or miscommunication to examiners and explain how it was rectified if such clarification and rectification is not already described in subsequent audit documentation.

The same commenter also asserted that the requirement that broker-dealers allow regulators to access audit documentation may, in effect, require auditors to produce documentation protected by attorney-client privilege or accountant-client privilege.[530] The rule language providing Commission and DEA examiners with access to a broker-dealer's auditor and audit documentation is not designed to affect the circumstances in which privilege can be asserted. Any claims of privilege can be addressed on a case-by-case basis by appropriate Commission and DEA staff as those claims arise.

IV. Form Custody

A. Background

Proposed Form Custody was comprised of nine line items (each, an ''Item'') designed to elicit information about a broker-dealer's custodial activities.[531] As is discussed below, several Items on the proposed form contained multiple questions, and some required the completion of charts and the disclosure of custody-related information specific to the broker-dealer completing the form.[532]

The Commission received nine comment letters on proposed Form Custody.[533] While commenters generally supported the proposed form, the Commission received several comments on the timing of, exemptions from, and the compliance date for filing the form and whether a broker-dealer also would be required to file an accountant's attestation covering the form.[534] In addition, several commenters suggested that the Commission make certain revisions to the form and address certain technical interpretative questions.[535] One commenter, who agreed ''in concept'' that Form Custody is appropriate for custodial broker-dealers, also stated that the aggregate cost estimate of the proposed form was ''staggering.'' [536]

The Commission is adopting the requirement that broker-dealers file Form Custody with their DEAs, subject to modifications that, in part, respond to issues raised by commenters. A description of the comments on the proposed process for filing Form Custody is set forth below in section IV.B. of this release, together with a discussion of the final rule amendments that the Commission is adopting today. A description of the comments on the proposed form is set forth below in section IV.C. of this release, together with a discussion of the final form the Commission is adopting today.

B. Filing of Form Custody

1. Requirement to File Form Custody with FOCUS Reports

Under paragraph (a) of Rule 17a–5, a broker-dealer is required to file periodic

[525] *Id.*

[526] *See SIFMA Letter.*

[527] *Id.*

[528] *See CAI Letter.*

[529] *Id.*

[530] *Id.*

[531] *See Broker-Dealer Reports,* 76 FR at 37584–37592.

[532] *Id.*

[533] *See Angel Letter; Barnard Letter; CAI Letter; CFP Letter; E&Y Letter; IMS Letter; KPMG Letter; Shatto Letter; SIFMA Letter.*

[534] *See CAI Letter; E&Y Letter; KPMG Letter; Shatto Letter; SIFMA Letter.*

[535] *See Angel Letter; CFP Letter; SIFMA Letter.*

[536] *See IMS Letter.* This commenter, however, did not provide any suggestion for reducing the costs associated with Form Custody. *See* section VII. below for an economic analysis of the costs and benefits relating to Form Custody.

FOCUS Reports with the Commission and the broker-dealer's DEA.[537] In the proposing release, the Commission proposed adding paragraph (a)(5) to Rule 17a–5 to require the filing of Form Custody, which was designed to elicit information concerning whether a broker-dealer maintained custody of customer and non-customer assets, and, if so, how such assets were maintained.[538] Under this proposed amendment, a broker-dealer would be required to file Form Custody with its DEA at the same time it filed its periodic FOCUS Report with its DEA under paragraph (a) of Rule 17a–5.[539] The DEA, in turn, would be required to maintain the information obtained through the filing of Form Custody and to transmit such information to the Commission at such time as it transmits FOCUS Report data to the Commission under paragraph (a)(4) of Rule 17a–5.[540]

A broker-dealer's FOCUS Report provides the Commission and a broker-dealer's DEA with information relating to the broker-dealer's financial and operational condition but does not solicit detailed information on how a broker-dealer maintains custody of assets.[541] Proposed Form Custody was intended to provide additional information about a broker-dealer's custodial activities and to make it easier for examiners to identify risks and possible violations of laws and regulations concerning the broker-dealer's custody of assets.[542] If, upon reviewing Form Custody, regulatory authorities were to become aware of inconsistencies or other red flags in information contained on the form, they could initiate a more focused and detailed analysis of the broker-dealer's custodial activities. Such an analysis could, in turn, identify potential abuses related to customer assets. Moreover, proposed Form Custody was intended to expedite the examination of a broker-dealer's custodial activities and reduce examination costs, as examiners would no longer need to request basic custody-related information already disclosed on the form.[543]

The Commission proposed that a broker-dealer file Form Custody with its DEA within 17 business days after the end of each calendar quarter and within 17 business days after the date selected for the broker-dealer's annual report where that date was other than the end of a calendar quarter.[544] The Commission received one comment regarding proposed paragraph (a)(5) of Rule 17a–5, which supported the Commission's proposal as to when a broker-dealer should be required to file Form Custody.[545]

The Commission is adopting paragraph (a)(5) of Rule 17a–5 substantially as proposed. As to when a broker-dealer must file its Form Custody with its DEA, the Commission is adopting its proposal that a broker-dealer file Form Custody with its DEA within 17 business days after the end of each calendar quarter.[546] However, for year end filings of Form Custody by a broker-dealer that has selected a fiscal year end date that is not the end of a calendar year, the Commission has modified its proposal to provide that a broker-dealer also must file Form Custody with its DEA within 17 business days after the end of the broker-dealer's fiscal year.[547]

The Commission did not receive any comments relating to when DEAs are required to transmit Form Custody information to the Commission and is adopting this requirement as proposed.

2. Requests for Exemption From Filing Form Custody

One commenter recommended that the Commission include a provision in Rule 17a–5 that would enable the Commission to exempt broker-dealers from the requirement to file Form Custody if the Commission determined that receiving the form for a particular firm, or type of firm, would serve no useful purpose.[548] For example, the commenter stated that no useful purpose would be served by receiving Form Custody from a firm that has no customer or non-customer accounts.[549]

The Commission intends for all broker-dealers to file Form Custody without exception. The Commission is concerned about circumstances where broker-dealers falsely represent to regulators and others that they do not handle funds or securities or issue trade confirmations or account statements. One of the purposes of Form Custody is to assist Commission and DEA examiners in identifying potential misrepresentations relating to broker-dealers' custody of assets. Through Form Custody, examiners will be in a position to better understand a broker-dealer's custody profile and identify custody-related violations and misconduct. For example, if a broker-dealer represents on Form Custody that it does not issue account statements, but an examiner receives an account statement issued by the broker-dealer (*e.g.,* in connection with a customer complaint or in the course of an examination of the broker-dealer), the examiner will be able to react more quickly to the misrepresentation. Further, the requirements to file the form will promote greater focus and attention to custody practices by requiring that broker-dealers make specific representations in this regard.

In addition, although the Commission does not currently contemplate any circumstance in which it would exempt a broker-dealer from having to file Form Custody, if the Commission subsequently determines that it is appropriate to exempt a broker-dealer, or type of broker-dealer, from such requirements, the Commission can act under existing authority. In particular, under section 36 of the Exchange Act, the Commission, by rule, regulation, or order, may exempt any person, or any class or classes of persons, from any rule under the Exchange Act to the extent that such exemption is necessary or appropriate in the public interest and is consistent with the protection of investors.[550]

Nonetheless, the Commission understands that a number of Items on Form Custody may not apply to certain types of broker-dealers (*e.g.,* broker-

[537] *See* 17 CFR 240.17a–5(a); 17 CFR 249.617. FOCUS Reports are one of the primary means of monitoring the financial and operational condition of broker-dealers and enforcing the broker-dealer financial responsibility rules. The completed forms also are used to determine which firms are engaged in various securities-related activities and how economic events and government policies might affect various segments of the securities industry. The FOCUS Report was designed to eliminate overlapping regulatory reports required by various SROs and the Commission and to reduce reporting burdens as much as possible. FOCUS Reports and Form Custody are deemed confidential under paragraph (a)(3) of Rule 17a–5.

[538] *See Broker-Dealer Reports,* 76 FR at 37592. For purposes of Form Custody, the term ''customer'' means a person that is a ''customer'' for purposes of Rule 15c3–3(a), and a ''non-customer'' means a person other than a ''customer'' as that term is defined in Rule 15c3–3(a). *See* 17 CFR 240.15c3–3(a); FINRA, *Interpretations of Financial and Operational Rules,* Rule 15c3–3(a)(1)/01, *available at http://www.finra.org/Industry/Regulation/Guidance/FOR/.*

[539] *See Broker-Dealer Reports,* 76 FR at 37592.

[540] *Id.*

[541] *See* Form X–17A–5 Schedule I, Part II, Part IIa, Part IIb, and Part III.

[542] *See Broker-Dealer Reports,* 76 FR at 37585.

[543] *Id.*

[544] *Id.* at 37592.

[545] *See Shatto Letter.*

[546] *See* paragraph (a)(5) of Rule 17a–5.

[547] *Id.* Consistent with the proposal, a broker-dealer must file Form Custody with its DEA at the same time that the broker-dealer files its FOCUS Report with its DEA. However, since the final rule changes the date for the filing of the year end FOCUS Report to ''within 17 business days after the end of the fiscal year where that date is not the end of a calendar quarter,'' the deadline for the year end filing of Form Custody is correspondingly changed to ''within 17 business days after the end of the fiscal year of the broker or dealer where that date is not the end of a calendar quarter.''

[548] *See CAI Letter.*

[549] *Id.*

[550] 15 U.S.C. 78mm.

dealers that do not carry customer, non-customer, or proprietary securities accounts) and has modified the form's instructions to make clear that questions on the form that cannot be answered because the broker-dealer does not engage in a particular activity do not need to be answered.[551]

3. Attest Engagement Not Required for Form Custody

In response to a question posed by the Commission in the proposing release, one commenter stated that the Commission should not require a broker-dealer to engage a PCAOB-registered independent public accountant to audit Form Custody.[552] This commenter stated that an audit of Form Custody is not necessary since the intent of the form is to gather custody-related information, which in some cases may not be derived from the broker-dealer's books and records.[553] This commenter also does not believe that the benefits of performing an audit of the information included on Form Custody would outweigh the costs or that an audit is necessary for the Commission to achieve its principal objective of using the information in the examination of a broker-dealer's custody activities.[554]

The Commission did not propose to require that a broker-dealer engage an independent public accountant to review Form Custody, and agrees that such a requirement should not be imposed. Accordingly, under today's amendments, broker-dealers are not required to enter into an attestation engagement with an independent public accountant for purposes of reviewing Form Custody.

C. Form Custody

As is discussed above, proposed Form Custody was comprised of nine Items designed to elicit information about a broker-dealer's custodial activities. Set forth below is a description of each of the Items.

1. Item 1—Accounts Introduced on a Fully Disclosed Basis

Item 1 consists of two subparts. Item 1.A, as proposed, would have elicited information concerning whether the broker-dealer introduced customer accounts to another broker-dealer on a fully disclosed basis by requiring the broker-dealer to check the appropriate ''Yes'' or ''No'' box.[555] Item 1.B of Form Custody would require broker-dealers that check ''Yes'' on Item 1.A to identify each broker-dealer to which customer accounts are introduced on a fully disclosed basis.[556] The Commission did not receive any comments on Item 1.A or 1.B and is adopting this Item as proposed.

As is discussed in the proposing release, many broker-dealers enter into agreements (''carrying agreements'') with another broker-dealer in which the two firms allocate certain responsibilities with respect to the handling of accounts.[557] These carrying agreements are governed by applicable SRO rules, which require a broker-dealer entering into a carrying agreement to allocate certain responsibilities associated with introduced accounts.[558]

Typically, under a carrying agreement, one broker-dealer (''introducing broker-dealer'') agrees to act as the customer's account representative (*e.g.,* by providing the customer with account opening documents, ascertaining the customer's investment objectives, and making investment recommendations). The carrying broker-dealer typically agrees to receive and hold the customer's cash and securities, clear transactions, make and retain records relating to the transactions and the receipt and holding of assets, and extend credit to the customer in connection with the customer's securities transactions.

Item 1.A, as adopted, elicits information concerning whether the broker-dealer introduces customer accounts to another broker-dealer on a fully disclosed basis, rather than asking whether the broker-dealer is an ''introducing broker-dealer.'' The Commission is presenting the question in this manner because some broker-dealers operate as carrying broker-dealers (*i.e.,* they hold cash and securities) for one group of customers but also introduce the accounts of a second group of customers on a fully disclosed basis to another broker-dealer. For example, a broker-dealer may incur the capital expense and cost of acting as a carrying broker-dealer for certain products (*e.g.,* equities) but not for other products (*e.g.,* options). In this case, the firm operates as a hybrid introducing/carrying broker-dealer by introducing on a fully disclosed basis to a carrying broker-dealer those customers that trade securities for which the broker-dealer is not prepared to provide a full range of services. Broker-dealers also may introduce customer accounts on an omnibus basis, as is discussed below in section IV.C.2. of this release.

If the broker-dealer answers Item 1.A by checking the ''Yes'' box, the broker-dealer will be required under Item 1.B to identify each broker-dealer to which customer accounts are introduced on a fully disclosed basis. The carrying broker-dealer in such an arrangement maintains the cash and securities of the introduced customers and is therefore obligated to return cash and securities to the introduced customers. Commission and DEA examiners could use the identification information provided by a broker-dealer in response to Item 1.B to confirm the existence of an introducing/carrying relationship.

2. Item 2—Accounts Introduced on an Omnibus Basis

Item 2 of Form Custody consists of two subparts. Item 2.A, as proposed, would have elicited information concerning whether the broker-dealer introduced customer accounts to another broker-dealer on an omnibus basis by requiring the broker-dealer to check the appropriate ''Yes'' or ''No'' box.[559] Item 2.B, as proposed, would require a broker-dealer that checks ''Yes'' in response to Item 2.A to identify each broker-dealer to which customer accounts are introduced on an omnibus basis.[560] The Commission did not receive any comments on Items 2.A or 2.B and is adopting this Item as proposed.

An omnibus account is an account carried and cleared by another broker-dealer that contains accounts of undisclosed customers on a commingled basis and that are carried individually on the books of the broker-dealer introducing the accounts.[561] Disclosure of this information is important because when a broker-dealer introduces customer accounts to another broker-dealer on an omnibus basis, the introducing broker-dealer (in addition to the broker-dealer carrying the omnibus account) is considered to be a carrying broker-dealer with respect to those accounts under the Commission's broker-dealer financial responsibility

[551] *See* General Instruction A to Form Custody.

[552] *See KPMG Letter. See also Broker-Dealer Reports,* 76 FR at 37592.

[553] *See KPMG Letter.*

[554] *Id.*

[555] *See Broker-Dealer Reports,* 76 FR at 37585. *See AICPA Broker-Dealer Audit Guide* glossary (defining the term *fully disclosed basis* as a ''situation in which a nonclearing broker introduces a customer to a clearing broker and the customer's name and statement are carried by, and disclosed to, that clearing broker.'').

[556] *See Broker-Dealer Reports,* 76 FR at 37585.

[557] *Id.*

[558] *See, e.g.,* FINRA Rule 4311.

[559] *See Broker-Dealer Reports,* 76 FR at 37585–37586.

[560] *Id.* at 37586.

[561] *See AICPA Broker-Dealer Audit Guide* at ¶¶ 5.144–5.145.

rules.[562] Thus, in these arrangements, the broker-dealer introducing the omnibus account is obligated to return cash and securities in the account to customers.[563]

If the broker-dealer checks the ''Yes'' box in Item 2.A, it will be required to identify in Item 2.B each broker-dealer to which accounts are introduced on an omnibus basis. Commission and DEA examiners could use this information to confirm whether the cash and securities introduced to the carrying broker-dealer are in fact being held in an omnibus account at the carrying broker-dealer and that the books and records of the broker-dealer that introduced the customer accounts to the carrying broker-dealer reflect the correct amounts of customer cash and securities held in the omnibus account.

3. Item 3—Carrying Broker-Dealers

Item 3 of Form Custody, as proposed, would have elicited information concerning how a carrying broker-dealer held cash and securities.[564] Proposed Item 3 was comprised of five subparts, as described below.[565] Two commenters specifically addressed this Item, in particular regarding subparts 3.C., 3.D, and 3.E, which also are discussed below.[566]

i. Items 3.A and 3.B

The first question of Item 3 of proposed Form Custody—Item 3.A—would have elicited information concerning whether the broker-dealer carried securities accounts for customers by requiring the broker-dealer to check the appropriate ''Yes'' or ''No'' box.[567] The General Instructions to Form Custody specify that the term ''customer'' as used in the Form means a ''customer'' as defined in Rule 15c3–3.

The next question of Item 3—Item 3.B—would have elicited information concerning whether the broker-dealer carried securities accounts for persons that are not ''customers'' under the definition in Rule 15c3–3.[568] For example, under Rule 15c3–3, persons that are not ''customers'' include an accountholder that is a general partner, director, or principal officer of the carrying broker-dealer, and accountholders that are themselves broker-dealers.[569] The Commission did not receive any comments on Item 3.A or 3.B and is adopting these questions as proposed.

ii. Item 3.C

a. Background

Item 3.C, as proposed, would have required the broker-dealer to identify in three charts the types of locations where it held securities and the frequency with which it performed reconciliations between the information on its stock record and information on the records of those locations.[570] Each of these charts, which are set forth in Items 3.C.i through 3.C.iii, is discussed in more detail below.

b. General Comments to Item 3.C

One commenter suggested that it would be helpful to require the broker-dealer to disclose the identities of specific entities at which it custodies securities.[571] This commenter stated that such disclosure would allow regulators to identify potential discrepancies more easily, as well as changes in custody relationships that may warrant further investigations.[572]

The Commission has considered this suggestion and determined that providing the identities of a broker-dealer's custodians instead of the types of locations would significantly increase the burden on broker-dealers in preparing the form, which is intended to be a starting point for Commission and DEA examiners in assessing a broker-dealer's compliance with its custody requirements. Large broker-dealers often maintain custody of customers' securities in many locations, which can total in the hundreds, particularly if the broker-dealer carries a large number of uncertificated investments for customers, such as alternative investments. Requiring broker-dealers to disclose this level of detail on Form Custody could significantly increase the costs of preparing the form for a number of broker-dealers. Although the Commission acknowledges that requiring the additional information the commenter suggested would enhance the ability of regulators to identify discrepancies, the Commission believes that the information on Form Custody provides sufficient information to allow examiners to determine whether it is appropriate to seek additional information from a particular broker-dealer. To the extent a Commission or DEA examiner believes that it is appropriate to obtain this information from a particular broker-dealer, the examiner could do so in a document request to that firm, a method that the Commission expects would be less costly than requiring this information from all broker-dealers on Form Custody. Accordingly, the Commission has determined not to require that broker-dealers identify on the form the specific identities of all of their custodians.

Another commenter to Item 3.C requested that the Commission clarify the distinction between ''locations where the broker-dealer holds securities directly in the name of the broker-dealer'' and ''locations where the broker-dealer holds securities only through an intermediary.''[573] In making this distinction, the Commission intended to distinguish between locations that are aware of the identity of the broker-dealer and act directly upon the broker-dealer's instructions and locations that are not aware of the identity of the broker-dealer or that will not act on instructions directly from the broker-dealer. In the latter scenario, the location holding securities for the broker-dealer would act only on instructions relating to the broker-dealer's securities from the broker-dealer's intermediary. The Commission has modified the instructions to Item 3.C of Form Custody to reflect this clarification.

c. Item 3.C.i

The first chart in Item 3.C—set forth in Item 3.C.i—identifies the most common locations where broker-dealers hold securities. Many of the locations identified on the first chart, and described below, are locations deemed to be satisfactory control locations under paragraph (c) of Rule 15c3–3.[574] The Commission did not receive any comments on Item 3.C.i of proposed Form Custody and is adopting it as proposed.

The first location identified in the chart is the broker-dealer's vault. Broker-dealers primarily hold securities in fungible bulk at other institutions. In some cases, however, broker-dealers may physically hold securities certificates (*e.g.,* in the case of restricted securities).

The second location identified in the chart is another U.S. registered broker-dealer. For example, a broker-dealer may hold customers' foreign securities at another U.S. broker-dealer, or may

[562] *See Net Capital Rule,* Exchange Act Release No. 31511 (Nov. 24, 1992), 57 FR 56973, 56978 n.16 (Dec. 2, 1992).

[563] *Id.*

[564] *See Broker-Dealer Reports,* 76 FR at 37586.

[565] *Id.* at 37586–37589.

[566] *See CFP Letter; SIFMA Letter.*

[567] *See Broker-Dealer Reports,* 76 FR at 37586.

[568] *Id.*

[569] *See* 17 CFR 240.15c3–3(a)(1).

[570] *See Broker-Dealer Reports,* 76 FR at 37586–37587.

[571] *See CFP Letter.*

[572] *Id.*

[573] *See SIFMA Letter.*

[574] *See* 17 CFR 240.15c3–3(c).

hold securities in an omnibus account at another broker-dealer.

The third and fourth locations identified in the chart are the Depository Trust Company and the Options Clearing Corporation. These are the two most common securities clearing and depository organizations for equities and options in the U.S. and, consequently, are identified by name rather than by type of location.

The fifth location identified in the chart is a U.S. bank. Broker-dealers may have arrangements with U.S. banks to receive and hold securities for the accounts of the broker-dealer's customers and non-customers, as well as for the broker-dealer's own account. Obtaining information about a broker-dealer's relationships with U.S. banks could enable examiners to test and confirm the accuracy of the broker-dealer's representations on Form Custody (*i.e.,* that a U.S. bank holds securities for the broker-dealer), and, in addition, facilitate the collection of information regarding the relationship between the broker-dealer and the bank. For instance, customer fully paid and excess margin securities must be in the possession or control of the broker-dealer and therefore cannot be pledged as collateral for a loan to the broker-dealer, among other things, and customer margin securities may not be commingled with proprietary securities that are pledged as collateral for a bank loan. Form Custody could, for example, lead examiners to seek account statements and documentation governing the broker-dealer's relationship with the U.S. bank to ensure customer fully paid and excess margin securities are not pledged as collateral for a loan to the broker-dealer.

The sixth location identified in the chart is the transfer agent of an open-end investment management company registered under the Investment Company Act of 1940 (*i.e.,* a mutual fund). Generally, mutual funds issue securities only in book-entry form. This means that the ownership of securities is not reflected on a certificate that can be transferred but rather through a journal entry on the books of the issuer maintained by the issuer's transfer agent. A broker-dealer that holds mutual funds for customers generally holds them in the broker-dealer's name on the books of the mutual fund.

d. Item 3.C.ii

The second chart in Item 3.C—set forth in Item 3.C.ii—is intended to capture all other types of U.S. locations where a broker-dealer may hold securities that are not specified in the chart included in Item 3.C.i. This category would include, for example, securities held in book-entry form by the issuer of the securities or the issuer's transfer agent. A broker-dealer that holds securities at such locations must list the types of locations in the spaces provided in the chart and indicate the frequency with which the broker-dealer performs asset reconciliations with those locations. The Commission did not receive any comments on Item 3.C.ii of proposed Form Custody and is adopting it as proposed.

e. Item 3.C.iii

The third chart in Item 3.C—set forth in Item 3.C.iii—pertains to foreign locations where the broker-dealer maintains securities. Under the proposal, the Commission did not list categories of foreign locations because terminology used to identify certain locations may differ by jurisdiction.[575] For example, in some foreign jurisdictions, banks may operate a securities business, making it difficult to classify whether securities are held at a bank or a broker-dealer. A broker-dealer that holds securities in a foreign location must list the types of foreign locations where it maintains securities in the spaces provided in the chart and indicate the frequency with which reconciliations are performed with the location. The Commission did not receive any comments on Item 3.C.iii of proposed Form Custody and is adopting it as proposed.

iii. Items 3.D and 3.E

Items 3.D and 3.E of proposed Form Custody each contained three identical subparts (discussed in more detail below) designed to elicit information about the types and amounts of securities and cash the broker-dealer held, whether those securities were recorded on the broker-dealer's stock record and, if not, why they were not recorded, and where the broker-dealer held free credit balances.[576] The General Instructions to proposed Form Custody defined ''free credit balances'' as liabilities of a broker-dealer to customers or non-customers which are subject to immediate cash payment to customers or non-customers on demand, whether resulting from sales of securities, dividends, interest, deposits, or otherwise.[577]

The difference between proposed Item 3.D and proposed Item 3.E is that the former would have elicited information with respect to securities and free credit balances held for the accounts of customers, whereas the latter would have elicited information with respect to securities and free credit balances held for the accounts of persons who are not customers.[578] Accordingly, the proposed form asked two sets of identical questions to elicit information about each category of accountholder—customer and non-customer.[579]

a. Items 3.D.i and 3.E.i

Items 3.D.i and 3.E.i of proposed Form Custody would have elicited information about the types and dollar amounts of the securities the broker-dealer carried for the accounts of customers and non-customers, respectively.[580] Specifically, for each Item, the broker-dealer would have been required to complete information on a chart to the extent applicable.[581] The proposed charts were comprised of twelve rows, with each row representing a category of security. These categories included: (1) U.S. Equity Securities; (2) Foreign Equity Securities; (3) U.S. Listed Options; (4) Foreign Listed Options; (5) Domestic Corporate Debt; (6) Foreign Corporate Debt; (7) U.S. Public Finance Debt; (8) Foreign Public Finance Debt; (9) U.S. Government Debt; (10) Foreign Sovereign Debt; (11) U.S. Structured Debt; and (12) Foreign Structured Debt. A thirteenth row was included in each chart to identify any securities not specifically listed in the first twelve rows. The types of securities were categorized this way because the various categories ordinarily are associated with certain types of locations. Thus, as examiners review the form, they could assess whether the types of securities held by the broker-dealer were maintained at locations generally known to hold such securities. If a broker-dealer's completed form indicated that some types of securities were held at a location atypical for such securities, the examiner could refine the focus of the examination to evaluate whether customer assets were properly safeguarded. The Commission is adopting these requirements, with modifications, as discussed below.

One commenter requested that the Commission clarify whether alternative investments, mutual funds, and exchange traded funds fall within the

[575] *See Broker-Dealer Reports,* 76 FR at 37587.

[576] *Id.* at 37587–37589.

[577] This definition is similar to the definition of the term *free credit balance* in Rule 15c3–3, except that the definition in the rule is limited to liabilities to *customers* whereas the definition in the Form contemplates liabilities to customers and non-customers. *See* 17 CFR 240.15c3–3(a)(8).

[578] *See Broker-Dealer Reports,* 76 FR at 37587–37589.

[579] *Id.*

[580] *Id.* at 37587.

[581] *Id.*

scope of ''Other'' securities within the thirteenth row of Items 3.D.i and 3.E.i.[582] The Commission has considered this comment and determined that those investments are other types of securities that should be part of Items 3.D.i and 3.E.i, but that it would be useful to separately identify each of these categories of securities in Items 3.D.i and 3.E.i, rather than group them together in the ''Other'' category. By identifying these types of investments separately on Form Custody, Commission and DEA examiners will have a better understanding of a broker-dealer's business activities and a more refined understanding of the types of securities held by the broker-dealer. This information, in turn, could facilitate more focused examinations by Commission and DEA examiners. Accordingly, Items 3.D.i and 3.E.i of Form Custody, as adopted, will contain six additional rows to account for both domestic and foreign alternative investments (referred to on the form as ''private funds''), mutual funds, and exchange traded funds. The Commission is referring to the term ''private funds'' on the form, rather than the term ''alternative investments,'' for purposes of clarity; while both terms are often used interchangeably in practice, the term ''private fund'' is a regulatory term defined in other contexts of the securities laws (*e.g.,* on Form ADV), whereas the term ''alternative investments'' is not. For purposes of Form Custody, the term ''private fund'' is given the same meaning as is used by the Commission on Form ADV—that is, an investment company as defined in section 3 of the Investment Company Act of 1940 but for section 3(c)(1) or 3(c)(7) of that Act. Items 3.D.i and 3.E.i of Form Custody and the related Instructions to those Items, as adopted, reflect these changes.

The charts in Items 3.D.i and 3.E.i, as proposed, would have each had eight columns. The first column contained boxes for each category of security specified in the Item (and identified in the second column), as discussed above.[583] The broker-dealer would have been required to check the box in each chart for every applicable category of security it holds for the accounts of customers and non-customers, respectively. The second column would have identified the category of security. The third through eighth columns represented ranges of dollar values: (1) Up to $50 million; (2) greater than $50 million up to $100 million; (3) greater than $100 million up to $500 million; (4) greater than $500 million up to $1 billion; (5) greater than $1 billion up to $5 billion; and (6) greater than $5 billion. In each chart, the broker-dealer would have been required to check the box in the column reflecting the approximate dollar value for every category of security that the broker-dealer carried for the accounts of customers and non-customers, respectively.[584]

The Commission proposed identifying dollar ranges for the values of the securities, as opposed to actual values, to ease compliance burdens.[585] The intent was to elicit information about the relative dollar value of securities the broker-dealer held for customers and non-customers in each category of security. Values would be reported as of the date specified in the broker-dealer's accompanying quarterly FOCUS Report.

One commenter noted that the charts set forth in Items 3.D.i and 3.E.i of proposed Form Custody did not include boxes to check to reflect the approximate dollar values for the categories of securities the broker-dealer carried for the accounts of customers and non-customers.[586] This commenter requested guidance on whether broker-dealers would be required to populate the chart with checkmarks or more precise estimates of market value.[587] The Commission intended to include boxes to check to reflect approximate dollar values in the charts set forth in Items 3.D.i and 3.E.i of proposed Form Custody, and the form, as adopted, includes these boxes.

b. Items 3.D.ii and 3.E.ii

Items 3.D.ii and 3.E.ii of proposed Form Custody would have elicited information concerning whether the broker-dealer had recorded all the securities it carried for the accounts of customers and non-customers, respectively, on its stock record by requiring the broker-dealer to check the appropriate ''Yes'' or ''No'' box.[588] If the broker-dealer checked ''No,'' it would have been required to explain in the space provided why it had not recorded such securities on its stock record and indicate the type of securities and approximate U.S. dollar market value of such unrecorded securities.[589] The Commission did not receive any comments on Items 3.D.ii and 3.E.ii of proposed Form Custody and is adopting these Items as proposed.

The Commission anticipates that a broker-dealer ordinarily would answer ''Yes'' in response to Items 3.D.ii and 3.E.ii because the stock record—which a broker-dealer is required to create pursuant to Rule 17a–3 [590]—is a record of custody of securities. A long position in the stock record indicates ownership of the security or a right to the possession of the security. Thus, the ''long side'' of the stock record indicates the person to whom the broker-dealer owes the securities. Common examples of ''long side'' positions are securities received from customers (*e.g.,* fully paid or excess margin securities), securities owned by the firm (*i.e.,* securities held in the broker-dealer's inventory for its own account), securities borrowed, and fails-to-deliver (*i.e.,* securities sold to or through another broker-dealer but not delivered).

A short position in the stock record indicates either the location of the securities or the responsibility of other parties to deliver the securities to the broker-dealer. Every security owned or held by the broker-dealer must be accounted for by its location. Since securities are fungible, the short side of the stock record does not in fact designate where particular securities are located. Rather, it indicates the total amount of securities, on a security-by-security basis, held at each location, which could include, for example, securities depositories. Common short-side stock record locations also include banks (*e.g.,* when a broker-dealer pledges securities to a bank as collateral for a loan), stock loan counterparties (*e.g.,* when a broker-dealer lends securities to another firm as part of a securities lending transaction), and counterparties failing to deliver securities to the broker-dealer (*e.g.,* when the broker-dealer has purchased securities that have not yet been received from the counterparty).

The Commission's goals in asking this question were twofold. First, the question would elicit the disclosure of the unusual circumstance in which a broker-dealer carries securities for the account of a customer or non-customer but does not reflect them on its stock record.[591] The Commission and other securities regulators could use this information to assess whether the broker-dealer is properly accounting for securities. Second, this question could prompt a broker-dealer to identify, and self-correct, circumstances in which it

[582] *See SIFMA Letter.*

[583] *See Broker-Dealer Reports,* 76 FR at 37587.

[584] *Id.*

[585] *Id.*

[586] *See SIFMA Letter.*

[587] *Id.*

[588] *See Broker-Dealer Reports,* 76 FR at 37587.

[589] *Id.*

[590] *See* 17 CFR 240.17a–3(a)(5).

[591] *See Broker-Dealer Reports,* 76 FR at 37588.

did not include securities on its stock record as required by Rule 17a-3.[592]

c. Items 3.D.iii and 3.E.iii

Items 3.D.iii and 3.E.iii of proposed Form Custody would have elicited information as to how the broker-dealer treated free credit balances in securities accounts of customers and non-customers, respectively.[593] The information would have been elicited through a chart the broker-dealer would be required to complete. The chart in Item 3.D.iii of proposed Form Custody had five rows with each row representing a different process for treating free credit balances. The chart would have disclosed whether free credit balances were: (1) Included in a computation under Rule 15c3–3(e); (2) held in a bank account under Rule 15c3–3(k)(2)(i); (3) swept to a U.S. bank; (4) swept to a U.S. money market fund; and/or (5) ''other,'' with a space to describe such other treatment. The options were not intended to be mutually exclusive in that a broker-dealer may treat free credit balances in several different ways (*e.g.,* a broker-dealer may be instructed by certain customers to sweep their free credit balances to a bank, and by other customers to sweep their free credit balances to a U.S. money market fund). The Commission did not receive any comments on Items 3.D.iii and 3.E.iii of proposed Form Custody and is adopting these Items as proposed.

A broker-dealer will be required to check the box in the first column of the chart for every process that applies to the broker-dealer's treatment of free credit balances in customer and non-customer accounts, respectively. The first process identified on each chart is that the broker-dealer treats customer and non-customer free credit balances in accordance with the customer reserve computation required under paragraph (e) of Rule 15c3–3. Paragraph (e) of Rule 15c3–3 requires a broker-dealer to maintain a special reserve bank account for the exclusive benefit of its customers and maintain deposits in that account (to the extent a deposit is required) in amounts computed in accordance with Exhibit A to Rule 15c3–3.[594] Rule 15c3–3 requires that a broker-dealer comply with these reserve account provisions only with respect to customer-related credit balances. The Commission has, however, proposed amendments to Rule 15c3–3 that would require a broker-dealer to maintain a reserve account and perform a reserve computation for non-customer accountholders that are domestic and foreign broker-dealers.[595]

The second process identified on the chart is that the broker-dealer handles free credit balances by placing funds in a ''bank account under Rule 15c3–3(k)(2)(i).'' Paragraph (k)(2)(i) of Rule 15c3–3 prescribes a process by which a broker-dealer can qualify for an exemption from the requirements of Rule 15c3–3. Specifically, the exemption applies to a broker-dealer that does not carry margin accounts, promptly transmits all customer funds and delivers all securities received in connection with its activities, does not otherwise hold funds or securities for, or owe money or securities to, customers and effectuates all financial transactions between the broker-dealer and its customers through one or more bank accounts that are each designated as a ''Special Account for the Exclusive Benefit of Customers of (the name of broker or dealer).'' [596]

The third process identified in the chart—''swept to a U.S. bank''—is included because some broker-dealers engage in ''bank sweep programs.'' Rather than hold customer funds in securities accounts, some broker-dealers require or offer the option to transfer free credit balances in securities accounts to a specific money market fund or interest bearing bank account (''Sweep Programs''). The customer earns dividends on the money market fund or interest on the bank account until such time as the customer chooses to liquidate the position in order to use the cash, for example, to purchase securities.[597] Customers must make a request to the broker-dealer for the return of funds swept from their securities accounts to the bank.

The fourth option identified in the chart is that the broker-dealer sweeps free credit balances into a money market fund as part of a Sweep Program. In most cases when a broker-dealer sweeps free credit balances into a money market fund, the broker-dealer purchases shares in the money market fund, which are registered in the name of the broker-dealer. The money market fund understands that these shares are not proprietary positions of the broker-dealer, and any interest earned on the shares from the money market fund are payable to the customers.

Finally, the fifth option in the chart covers any other process that is not described in the other options.

4. Item 4—Carrying for Other Broker-Dealers

Item 4 of proposed Form Custody would have required a broker-dealer to disclose whether it acted as a carrying broker-dealer for other broker-dealers.[598] There were two sets of questions in Item 4—Item 4.A.i, ii, and iii and Item 4.B.i, ii, and iii. The first set of questions would have elicited information from a broker-dealer as to whether it carried transactions for other broker-dealers on a fully disclosed basis.[599] The second set of questions would have elicited information from a broker-dealer as to whether it carried transactions for other broker-dealers on an omnibus basis.[600] The Commission did not receive any comments to Item 4 of proposed Form Custody and is adopting this Item as proposed.

Items 4.A.i and 4.B.i require a broker-dealer to indicate by checking the appropriate ''Yes'' or ''No'' box whether it carries customer accounts for another broker-dealer on a fully disclosed basis and on an omnibus basis, respectively. Items 4.A.ii and 4.B.ii require a broker-dealer, if applicable, to indicate the number of broker-dealers with which it has an arrangement to carry accounts on a fully disclosed basis and on an omnibus basis, respectively. Items 4.A.iii and 4.B.iii require a broker-dealer, if applicable, to identify any affiliated broker-dealers that introduce accounts to the broker-dealer on a fully disclosed basis and on an omnibus basis, respectively.

As the Commission has noted, related person custody arrangements can present higher risks to ''advisory clients'' than maintaining assets with an independent custodian.[601] Consistent with the definition of the term in other contexts applicable to broker-dealers, including Form BD,[602] the General

[592] *Id.*

[593] *Id.*

[594] *See* Rule 15c3–3(e) and Rule 15c3–3a.

[595] *See Amendments to Financial Responsibility Rules for Broker-Dealers,* Exchange Act Release No. 55431 (Mar. 9, 2007), 72 FR 12862 (Mar. 19, 2007); *Amendments to Financial Responsibility Rules for Broker-Dealers* (Reopening of Comment Period), Exchange Act Release No. 34–66910 (May 3, 2012), 77 FR 27150 (May 9, 2012). *See also* letter from Michael A. Macchiaroli, Associate Director, Division of Market Regulation, Commission, to Raymond J. Hennessy, Vice President, New York Stock Exchange (''NYSE''), and Thomas Cassella, Vice President, NASD Regulation, Inc. (Nov. 10, 1998).

[596] *See* 17 CFR240.15c3–3(k)(2)(i).

[597] *See Amendments to Financial Responsibility Rules for Broker-Dealers,* Exchange Act Release No. 55431 (Mar. 9, 2007), 72 FR 12862 (Mar. 19, 2007) at 12866.

[598] *See Broker-Dealer Reports,* 76 FR at 37589.

[599] *Id.*

[600] *Id.*

[601] *See Custody of Funds or Securities of Clients by Investment Advisers,* 75 FR at 1462.

[602] Form BD is the uniform application for broker-dealer registration with the Commission. Form BD states that a person is presumed to control a company if, among other things, that person has directly or indirectly the right to vote 25% or more

Continued

Instructions for Form Custody define the term ''affiliate'' as any person who directly or indirectly controls the broker-dealer or any person who is directly or indirectly controlled by or under common control with the broker-dealer. The definition also specifies that ownership of 25% or more of the common stock of the broker-dealer introducing accounts to the broker-dealer submitting the Form Custody is deemed *prima facie* evidence of control; this provision also is consistent with the definition used in Form BD.[603]

Item 4 in Form Custody elicits information about broker-dealers' custodial responsibilities with respect to accounts held for the benefit of *other* broker-dealers, and requires broker-dealers to identify such broker-dealers that are affiliates of the broker-dealer.[604] The Commission believes that this information will provide the Commission with an enhanced understanding of, and useful and readily available information relating to, the scope of broker-dealer introducing/carrying relationships and activities, and the custodial practices of broker-dealers involved in such relationships.

5. Item 5—Trade Confirmations

Item 5 of Form Custody, as proposed, would have required broker-dealers to disclose whether they send transaction confirmations to customers and other accountholders by checking the appropriate ''Yes'' or ''No'' box.[605] Confirmations are important safeguards that enable customers to monitor transactions that occur in their securities accounts. Timely confirmations alert customers of unauthorized transactions and provide customers with an opportunity to object to the transactions. The Commission received one comment on Item 5 of proposed Form Custody. As discussed below, the Commission is modifying the instructions to Item 5 in response to this comment and is otherwise adopting Item 5 as proposed.

Exchange Act Rule 10b–10 specifies the information a broker-dealer must disclose to customers on a trade confirmation at or before completion of a securities transaction.[606] Generally, Rule 10b–10 requires a confirmation to include, among other things: (1) The date and time of the transaction and the identity, price, and number of shares or units (or principal amount) of such security purchased or sold by such customer; (2) the broker-dealer's capacity (agent or principal) and its compensation; (3) the source and amount of any third party remuneration it has received or will receive; and (4) other information, both general (*e.g.,* that the broker-dealer is not a SIPC member, if such is the case) and transaction-specific (*e.g.,* certain yield information in most transactions involving debt securities).[607]

The information contained on a trade confirmation should reconcile with customer statements and the broker-dealer's journal entries.[608] In this regard, there is a link between trade confirmations sent by a broker-dealer and the broker-dealer's records pertaining to custody of customer assets.[609] How a broker-dealer answers Item 5 could assist examiners in focusing their inspections. For example, if the form indicates that a third party is responsible for sending trade confirmations, the examiners can confirm with that third party that it is in fact sending confirmations.

With respect to Item 5.A, one commenter requested clarification as to whether a broker-dealer should indicate that it sends trade confirmations directly to customers (by checking ''yes'') where it employs a vendor to do so.[610] The Commission has considered this comment and determined that a broker-dealer should affirmatively respond to Item 5 of Form Custody, as adopted, by checking the ''yes'' box on the form if it employs a vendor to send trade confirmations to customers on its behalf because, in such an arrangement, the broker-dealer is ultimately responsible for complying with its trade confirmation obligations, not the vendor. The Commission has modified the instructions to Item 5 to reflect this clarification.

6. Item 6—Account Statements

Item 6 of proposed Form Custody would have required broker-dealers to disclose whether they send account statements directly to customers and other accountholders by checking the appropriate ''Yes'' or ''No'' box.[611] The Commission received one comment on Item 6 of proposed Form Custody.[612] As is discussed below, the Commission is modifying the instructions to Item 6 in response to this comment and is otherwise adopting Item 6 as proposed.

Account statements generally are sent to customers and other accountholders on a monthly or quarterly basis and typically set forth the assets held in the investor's securities account as of a specific date and the transactions that occurred in the account during the relevant period. SROs impose requirements on broker-dealers with respect to the statements they must send to their customers.[613] For example, FINRA generally requires any member that conducts a general securities business and also carries customer accounts or holds customer funds or securities, at least once each calendar quarter, to send an account statement to each customer whose account had a security position, money balance, or account activity since the last statement was sent.[614] The account statement

of a class of a voting security or has the power to sell or direct the sale of 25% or more of a class of voting securities, or, in the case of a partnership, the right to receive upon dissolution, or has contributed, 25% or more of the firm's capital.

[603] This definition of the term *affiliate* is the same as the definition in Form BD, including the specification that ownership of 25% or more of the common stock is deemed *prima facie* evidence of control.

[604] Form Custody does not require a broker-dealer to identify unaffiliated broker-dealers for which it carries accounts, though, as discussed above, it would need to indicate that it carries accounts for such broker-dealers. The Commission believes that this approach provides the Commission and DEA examiners with access to useful information involving a broker-dealer's custody practices while alleviating potential time and cost burdens associated with completing Form Custody given that some broker-dealers carry accounts for hundreds of unaffiliated broker-dealers. The Commission notes that information about these broker-dealers would be part of the books and records of the carrying broker-dealer. Therefore, an affirmative answer to Item 4 could prompt the Commission and DEA examiners to request information about the identities of the unaffiliated broker-dealers. *See Broker-Dealer Reports,* 76 FR at 37589 n.143.

[605] *See Broker-Dealer Reports,* 76 FR at 37589–37590.

[606] 17 CFR 240.10b–10.

[607] *Id.*

[608] *See* 17 CFR 240.17a–3(a)(1), which requires the broker-dealer to make ''[b]lotters (or other records of original entry) containing an itemized daily record of all purchases and sales of securities, all receipts and deliveries of securities (including certificate numbers), all receipts and disbursements of cash and all other debits and credits. Such records shall show the account for which each such transaction was effected, the name and amount of securities, the unit and aggregate purchase or sale price (if any), the trade date, and the name or other designation of the person from whom purchased or received or to whom sold or delivered.''

[609] Although broker-dealers may allocate the function of sending confirmations to other broker-dealers or to service providers, the allocating broker-dealer retains the responsibility for sending confirmations. *See New York Stock Exchange, Inc.; Order Approving Proposed Rule Change,* Exchange Act Release No. 18497 (Feb. 19, 1982), 47 FR 8284 (Feb. 25, 1982) at n.2 (providing ''no contractual arrangement for the allocation of functions between an introducing and carrying organization can operate to relieve either organization from their respective responsibilities under the federal securities laws and applicable SRO rules'').

[610] *See SIFMA Letter.*

[611] *See Broker-Dealer Reports,* 76 FR at 37590–37591.

[612] *See SIFMA Letter.*

[613] *See, e.g.,* NASD Rule 2340.

[614] *See* NASD Rule 2340. NASD Rule 2340 defines a *general securities member* as any member that conducts a general securities business and is required to calculate its net capital pursuant to Rule 15c3–1. NASD Rule 2340(d)(2). Additionally, NASD Rule 2340 defines *account activity* broadly so that

must contain a description of any securities positions, money balances, or account activity in the account. In addition, the account statement must include a statement that advises the customer to report promptly any inaccuracy or discrepancy in that person's account to the brokerage firm.[615] The statement also is required to advise the customer that any oral communications made to the broker-dealer regarding inaccuracies or discrepancies should be re-confirmed in writing to further protect the customer's rights, including rights under SIPA.[616]

Like trade confirmations, account statements are important safeguards that allow investors to monitor transactions that occur in their securities accounts. If the account statements are sent by a broker-dealer other than the broker-dealer completing Form Custody, this fact will need to be disclosed on the Form in Item 6.B. Item 6.C asks whether the broker-dealer sends account statements to anyone other than the beneficial owner of the account.[617] In response to a request for clarification raised by one commenter to proposed Item 6.C,[618] a broker-dealer also would check ''Yes'' to Item 6.C if the broker-dealer sends account statements to the beneficial owner of an account and duplicate account statements to persons other than the beneficial owner of the account. The Commission has modified the instructions to Item 6 to reflect this clarification.

The Commission is requiring broker-dealers to answer the questions in Item 6 to enhance its understanding of a broker-dealer's relationship with customers, particularly in the context of the broker-dealer's custodial responsibilities. Broker-dealers do not currently disclose to the Commission whether they send account statements directly to customers. Collecting this information on Form Custody will provide examiners with additional background information that could be used to refine the focus of their inspections. Further, the Commission anticipates that examiners would make further inquiries to the extent the Form reveals answers that are inconsistent with industry practice.

A review of Item 6 also may facilitate an examiner's preparation for an inspection. For example, if a broker-dealer indicates on Form Custody that it holds customer accounts and sends account statements to customers, the examiner could prepare a more targeted document request to the broker-dealer. In this regard, an examiner could request customer account statements from the broker-dealer, as well as statements from the custodian(s) of the broker-dealer's customer securities and cash.[619] Examiners could then review and reconcile these documents to verify whether customer securities and cash are held at the custodian(s) identified by the broker-dealer.

7. Item 7—Electronic Access to Account Information

Item 7 of proposed Form Custody would have required broker-dealers to indicate whether they provided customers and other accountholders with electronic access to information about the securities and cash positions in their accounts by checking the appropriate ''Yes'' or ''No'' box.[620] Electronic access to account information can provide investors with an efficient means of monitoring transactions that occur in their securities accounts. This inquiry would inform the Commission as to how readily customers are able to access and review their account information. The Commission did not receive any comments to Item 7 of proposed Form Custody and is adopting this Item as proposed.

The Commission believes that electronic access to account information is beneficial to customers, who can more easily monitor the performance of their accounts and perhaps more quickly identify any discrepancies or inaccuracies. The Commission is including this Item in Form Custody because it will help to inform examiners as to how readily customers can access and review account information.

8. Item 8—Broker-Dealers Registered as Investment Advisers

Item 8 of Form Custody, as proposed, would have elicited information, if applicable, as to whether and how the broker-dealer operated as an investment adviser.[621] Proposed Item 8 was comprised of three subparts, as described below.

The first question of Item 8—Item 8.A—would have required the broker-dealer to indicate whether it was registered as an investment adviser with the Commission under the Advisers Act or with one or more states pursuant to the laws of a state.[622] If the broker-dealer indicated that it was registered with the Commission under the Advisers Act or pursuant to state law (or both), then it would have been required to respond to the remaining questions under Item 8.[623]

The next question of Item 8 of proposed Form Custody—Item 8.B—would have required the broker-dealer to disclose the number of its investment adviser clients.[624] This would provide the Commission with information about the scale of the broker-dealer's investment adviser activities.

The third question of Item 8 of proposed Form Custody—Item 8.C—would have required the broker-dealer to complete a chart, consisting of six columns, in which the broker-dealer would have provided information about the custodians where the assets of the investment adviser clients were held.[625]

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it includes, but is not limited to, purchases, sales, interest credits or debits, charges or credits, dividend payments, transfer activity, securities receipts or deliveries and/or journal entries relating to securities or funds in the possession or control of the member. NASD Rule 2340(d)(1). *See also Order Approving Proposed Rule Change Relating to Rule 2340 Concerning Customer Account Statements,* Exchange Act Release No. 54411 (Sept. 7, 2006), 71 FR 54105 (Sept. 13, 2006) (order granting approval of a proposed rule change relating to Rule 2340 concerning customer account statements).

[615] If the customer's account is serviced by both an introducing broker-dealer and a clearing broker-dealer, the statement must inform customers that such reports must be made to both firms. *See* NASD Rule 2340(a).

[616] *Id.*

[617] Generally, the beneficial owner of an account represents the person entitled to the economic benefits of ownership. With respect to securities, the term beneficial owner is defined in Rule 13d–3 under the Exchange Act. *See* 17 CFR 240.13d–3.

[618] *See SIFMA Letter.*

[619] As is discussed above in section IV.C.3. of this release, the fact that a broker-dealer uses a custodian to hold customer securities and cash, and the type of custodian, will be disclosed in response to Items 3.C and 3.D of Form Custody.

[620] *See Broker-Dealer Reports,* 76 FR at 37591.

[621] *Id.* at 37591–37592.

[622] *Id.* Section 203A of the Advisers Act prohibits certain investment advisers from registering with the Commission based on the advisers' assets under management, among other factors. *See* 17 CFR 275.203A.

[623] *See Broker-Dealer Reports,* 76 FR at 37591.

[624] *Id.*

[625] *Id.* Under Rule 206(4)–2, it is a ''fraudulent, deceptive, or manipulative act, practice or course of business'' for an investment adviser registered or required to be registered under section 203 of the Advisers Act (15 U.S.C. 80b–3) to have custody of client funds or securities unless, among other things, a qualified custodian maintains those funds or securities. *See* 17 CFR 275.206(4)–2(a)(1). A qualified custodian is: (1) A bank as defined in section 202(a)(2) of the Advisers Act or savings association as defined in section 3(b)(1) of the Federal Deposit Insurance Act (12 U.S.C. 1813(b)(1)) that has deposits insured by the Federal Deposit Insurance Corporation under the Federal Deposit Insurance Act (2 U.S.C. 1811); (2) a broker-dealer registered under section 15(b)(1) of the Exchange Act holding the client assets in customer accounts; (3) an FCM registered under section 4f(a) of the Commodity Exchange Act (7 U.S.C. 6f(a)), holding the client assets in customer accounts, but only with respect to clients' funds and security futures, or other securities incidental to transactions in contracts for the purchase or sale of a commodity for future delivery and options thereon; and (4) a foreign financial institution that customarily holds financial assets for its customers, provided that the foreign financial institution keeps the advisory

Continued

In the first column, the broker-dealer would have been required to disclose the name of the custodian, and in the second column, the broker-dealer would have been required to identify the custodian by either SEC file number or CRD number, as applicable.[626]

The third and fourth columns of the chart would have elicited information about the scope of the broker-dealer/investment adviser's authority over the accounts held at the custodian by requiring the broker-dealer/investment adviser to check the appropriate ''Yes'' or ''No'' box.[627] Specifically, in the third column, the broker-dealer/investment adviser would have been required to indicate whether it had the authority to effect transactions in the advisory client accounts at the custodian. In the fourth column, the broker-dealer/investment adviser would have been required to indicate whether it had the authority to withdraw funds and securities from those accounts.

In the fifth column, the broker-dealer/investment adviser would have been required to indicate whether the custodian sends account statements directly to the broker-dealer's investment adviser clients.[628] The Commission recently adopted amendments to Rule 206(4)–2 to require that investment advisers have a reasonable basis, after due inquiry, for believing that qualified custodians of advisory client assets send account statements to the investment advisers' clients. As stated in the release adopting that requirement, the Commission believes that the direct delivery of account statements by qualified custodians provides greater assurance of the integrity of account statements received by clients.[629]

In the sixth column, the broker-dealer/investment adviser would have been required to indicate whether investment adviser client assets were recorded on the broker-dealer's stock record.[630] If the broker-dealer was acting as custodian for such assets, the Commission anticipates that those assets would be recorded on the broker-dealer's stock record.[631]

The Commission received one comment in response to Item 8 of Form Custody, as proposed.[632] This commenter stated that the information sought in Item 8 was largely redundant with information collected from investment advisers on Form ADV. The Commission is aware that some overlap exists between the information collected from investment advisers on Form ADV and the information that would be collected from broker-dealers dually-registered as investment advisers in Item 8 of proposed Form Custody. However, these two forms also contain a significant amount of non-overlapping material, reflecting their different purposes and uses. Form Custody is intended to be a single source of readily-available information to assist Commission and DEA examiners in preparing for and performing focused custody exams, and it is particularly important that such information be readily available in the case of dually-registered firms. Accordingly, the Commission is adopting Item 8 of Form Custody substantially as proposed.[633]

9. Item 9—Broker-Dealers Affiliated With Investment Advisers

Item 9 of Form Custody consists of two subparts. Item 9.A, as proposed, would have elicited information concerning whether the broker-dealer was an affiliate of an investment adviser.[634] Item 9.B.i, as proposed, would have elicited information from a broker-dealer that checks ''Yes'' in response to Item 9.A to identify whether it has custody of client assets of the adviser, and, if Item 9.B.i is checked ''Yes,'' to indicate the approximate U.S. dollar market value of the adviser client assets of which the broker-dealer has custody.[635] The Commission did not receive any comments to Item 9 of proposed Form Custody and is adopting this Item as proposed. The additional information obtained from a broker-dealer in response to Item 9 will provide SEC and DEA examiners with a better understanding of a broker-dealer's custody profile and, in particular, custodial relationships with investment adviser affiliates.

For purposes of Item 9, an affiliate is any person who directly or indirectly controls the broker-dealer or any person who is directly or indirectly controlled by or under common control with the broker-dealer. Ownership of 25% or more of the common stock of the investment adviser is deemed *prima facie* evidence of control.[636]

V. Effective Dates

As discussed below, the Commission has established December 31, 2013 as the effective date for the requirement to file Form Custody and the requirement to file annual reports with SIPC. The Commission is delaying the effective date for the requirements relating to broker-dealer annual reports to June 1, 2014. These delayed effective dates are intended to provide time for broker-dealers, broker-dealer independent public accountants, and broker-dealer DEAs to prepare for the changes that will result from these new requirements. The amendments relating to broker-dealer annual reports and the other amendments to Rule 17a–5 (including the technical amendments) affect numerous paragraphs in that rule and two paragraphs in Rule 17a–11. Given the complexity and practical difficulty of having certain provisions become effective before others, the amendments to Rule 17a–5 and the amendments to Rule 17a–11 will become effective on June 1, 2014, regardless of whether they relate to the annual report requirements, except that there will be different effective dates for the amendments to paragraph (a) of Rule 17a–5 (which includes the filing requirement for Form Custody), Form Custody, the deletion of paragraph (e)(5) of Rule 17a–5 (which sets forth the requirement to file Form BD–Y2K), and the requirement to file annual reports with SIPC. The effective dates for the remaining paragraphs of Rule 17a–5 and Rule 17a–11 are discussed further below.

clients' assets in customer accounts segregated from its proprietary assets. *See* 17 CFR 275.206(4)–2(d)(6). A qualified custodian must maintain client funds and securities: (1) In a separate account for each client under that client's name; or (2) in accounts that contain only the clients' funds and securities, under the investment adviser's name as agent or trustee for the clients. *See* 17 CFR 275.206(4)–2(a)(1).

[626] *See Broker-Dealer Reports,* 76 FR at 37591.

[627] *Id.*

[628] *Id.*

[629] *See, e.g., Custody of Funds or Securities of Clients by Investment Advisers,* 75 FR at 1465.

[630] *See Broker-Dealer Reports,* 76 FR at 37591.

[631] If the broker-dealer acts as custodian for an investment adviser client's securities, and does not record those securities on its stock record, the broker-dealer would need to explain why those securities were not recorded on its stock record in response to the question in Item 3.D.ii of Form Custody.

[632] *See Angel Letter.*

[633] Column 2 of Item 8.C of Form Custody, as proposed, would have required a broker-dealer/investment adviser to identify the SEC File No. or CRD No. of each custodian where assets of investment adviser clients were held. However, not all custodians of investment adviser client assets have an SEC File No. or CRD No. Accordingly, the instructions applicable to Column 2 of Item 8.C, as adopted, have been modified to provide that a broker-dealer needs to identify custodians in the column by SEC File No. or CRD No., ''if applicable.'' Thus, a broker-dealer can leave Column 2 of Item 8.C blank if assets of its investment adviser clients are held at a custodian that does not have an SEC File No. or CRD No.

[634] *See Broker-Dealer Reports,* 76 FR at 37592.

[635] *Id.*

[636] *See supra* note 603 and corresponding text which specifies the same ownership percentage on Form BD.

A. Amendments Effective 60 Days After Publication in the ***Federal Register***

Before today's amendments, paragraph (e)(5) of Rule 17a–5 required a broker-dealer to file Form BD–Y2K, which elicits information with respect to a broker-dealer's readiness for the year 2000 and any potential problems that could arise with the advent of the new millennium. The Commission is deleting this paragraph from Rule 17a–5 as the requirement is no longer applicable. The amendment deleting paragraph (e)(5) of Rule 17a–5 will be effective 60 days after this release is published in the **Federal Register**.

B. Amendments Effective on December 31, 2013

The amendments to paragraph (a) of Rule 17a–5 and the rule establishing Form Custody (17 CFR 249.639) are effective on December 31, 2013. The amendments to paragraph (a) include the requirement for a broker-dealer to file Form Custody with its DEA.[637] Consequently, broker-dealers subject to this filing requirement must begin filing Form Custody with their DEAs 17 business days after the calendar quarter or fiscal year, as applicable, ended December 31, 2013.

Two commenters requested that the Commission provide broker-dealers with sufficient time to develop, test, and implement the systems that they will use to comply with the Form Custody filing requirements.[638] The Commission understands that broker-dealers will need to allocate personnel and systems resources to comply with the Form Custody filing requirements, particularly for a broker-dealer's initial filing. DEAs also will need to be prepared to receive the forms that are filed by broker-dealers. Establishing December 31, 2013 as the effective date of the Form Custody requirements is designed to accommodate the efforts that need to be undertaken by both broker-dealers and DEAs in connection with the filing and receipt of Form Custody.

Additionally, the amendment to paragraph (d)(6) of Rule 17a–5 is effective on December 31, 2013. Broker-dealer annual reports must be filed with SIPC for fiscal years ending on or after December 31, 2013.

C. Amendments Effective on June 1, 2014

The amendments to paragraphs (b), (c), (d)(1), (d)(2), (d)(3), (d)(4), (d)(5), (e)(1), (e)(2), (e)(3), (e)(4), (f), (g), (h), (i), (k), (l), (m) and (n) and the deletion of paragraph (j) of Rule 17a–5 and the amendments to Rule 17a–11 are effective on June 1, 2014. Consequently, all of the amendments to Rule 17a–5 not discussed above in sections V.A. and V.B. of this release and the amendments to Rule 17a–11 are effective on that date. This includes the amendments relating to the annual report requirements, with the exception of the requirement to file annual reports with SIPC, which is effective on December 31, 2013. In 2014, therefore, the annual report requirements will apply to all broker-dealers subject to these requirements that have a fiscal year ending on or after June 1, 2014.

The Commission proposed that the amendments would apply for fiscal years ending on or after December 15, 2011, with a first-year transition period for carrying broker-dealers required to file compliance reports with fiscal years ending on or after December 15, 2011 but before September 15, 2012.[639] The Commission received 14 comments concerning the compliance date of the amendments.[640] Most commenters recommended that the Commission delay the compliance date. One commenter, however, stated that broker-dealers should start working on compliance immediately.[641] Several stated that the compliance date of the amendments should be aligned with the effective date of the proposed PCAOB standards for engagements related to compliance reports and exemption reports.[642] One commenter suggested that the Commission postpone the assertion requirements until the rule has been in effect for one year.[643] Another commenter stated that the rules should be effective for fiscal years ending on or before December 15, 2012 ''to allow sufficient time to complete robust documentation and testing of the processes related to the Financial Responsibility Rules and the Financial Statements.'' [644] Similarly, another commenter stated that the effective date should be deferred to fiscal years ending on or before December 15, 2012 ''to give broker-dealers and their auditors time to adequately address the final rules,'' and that the effective date should be aligned with the effective date of PCAOB standards.[645] Another commenter stated that the rule amendments should apply only to annual reports filed on or after December 15, 2012, and that implementation of the proposal must be postponed until after the PCAOB establishes auditing and attestation standards and broker-dealers have had ample time to plan and budget for the new standards.[646] Finally, a commenter stated that broker-dealers should be required to file the first compliance report or exemption report no earlier than one quarter after the adoption of the final rule amendments and to report identified instances of material non-compliance or material weaknesses in annual reports filed no earlier than five quarters after the adoption of the final rule amendments, with a transition period as proposed of no less than five quarters after the adoption of the final rule amendments.[647] This commenter also suggested that the Commission require the filing of the first Form Custody no earlier than three quarters after the effective date of the final rule.[648]

The amendments, among other things, establish important new safeguards with respect to broker-dealer custody of customer funds and securities. However, the Commission recognizes that broker-dealers and other affected parties may need additional time to prepare to comply with the new requirements.

Amendments to provisions regarding broker-dealer annual reports and the engagement of an independent public accountant in paragraphs (d)(1), (d)(2), (d)(3), (d)(4), (d)(5), (e)(1), (e)(2), (e)(3), (e)(4), (g), and (i) of Rule 17a–5 and the deletion of paragraph (j) of Rule 17a–5 generally will apply for broker-dealers with fiscal years ending on or after June 1, 2014. In particular, broker-dealers must file compliance reports or exemption reports, as applicable, and broker-dealers must file reports of independent public accountants covering compliance reports or exemption reports in accordance with Rule 17a–5 as amended, for fiscal years ending on or after June 1, 2014, with no transition period. Similarly, PCAOB standards, rather than GAAS, apply to examinations of financial reports for fiscal years ending on or after June 1, 2014. For broker-dealers with fiscal years that end before June 1, 2014,

[637] *See* paragraph (a)(5) of Rule 17a–5.

[638] *See E&Y Letter; SIFMA Letter.*

[639] *See Broker-Dealer Reports,* 76 FR at 37581. During the transition period, the statement in the compliance report as to whether internal control was effective would have been a point-in-time statement as of the date of the report, rather than covering the entire fiscal year.

[640] *See, e.g., ABA Letter; AICPA Letter; CAQ Letter; Citrin Letter; Deloitte Letter; E&Y Letter; Grant Thornton Letter; KPMG Letter; McGladrey Letter; PWC Letter; SIFMA Letter; Shatto Letter; CAI Letter; Van Kampen/Invesco Letter.*

[641] *See Shatto Letter.*

[642] *See, e.g., CAQ Letter; Deloitte Letter; Grant Thornton Letter; KPMG Letter; McGladrey Letter.*

[643] *See ABA Letter.*

[644] *See Van Kampen/Invesco Letter.*

[645] *See E&Y Letter.*

[646] *See CAI Letter.*

[647] *See SIFMA Letter.*

[648] *Id.*

applicable reports must be filed in accordance with the provisions of Rule 17a–5 as they existed before today's amendments.

Amendments to the customer statement provisions of paragraph (c) of Rule 17a–5 apply for fiscal years ending on or after June 1, 2014, and in the interim broker-dealers must comply with those provisions as they existed before today's amendments.

Paragraph (f)(2) of Rule 17a–5 requires a broker-dealer to file a statement regarding its independent public accountant on December 10 of each year. As a result of today's amendments, all broker-dealers that are required by Rule 17a–5 to engage an independent public accountant must file a new statement by December 10, 2013 that contains the information and representations required under paragraph (f)(2) of Rule 17a–5 as amended. For example, after today's amendments, the statement must include a representation that the accountant has undertaken the engagement of the accountant provisions of paragraph (g) of Rule 17a–5 as amended. The statement also must include, if applicable, representations regarding access to the broker-dealer's independent public accountant and the audit documentation of the independent public accountant.

The amendments to the notification provisions in paragraph (h) of Rule 17a–5 and amendments to Rule 17a–11 are effective on June 1, 2014. In the interim, these provisions as they existed before today's amendments continue to apply.

Finally, the amendments to paragraphs (b), (c), (d)(1), (d)(2), (d)(3), (d)(4), (d)(5), (e)(1), (e)(2), (e)(3), (e)(4), (f), (g), (h), (i), (k), (l), (m), and (n) of Rule 17a–5 and the amendments to Rule 17a–11 not discussed above, including technical amendments, are effective on June 1, 2014.

With respect to the annual report requirements, the June 1, 2014 effective date should provide sufficient time for the PCAOB to finalize, and for the Commission to consider, proposed standards applicable to broker-dealer examinations and reviews and for broker-dealers and their accountants to become familiar with, and be prepared to comply with, those standards. The Commission has chosen a specific effective date, instead of aligning that date with the date of adoption of the rule amendments or the date that the Commission approves PCAOB standards applicable to broker-dealer examinations and reviews, as suggested by commenters, to provide certainty regarding the date by which broker-dealers and their accountants must comply with the new requirements. Certain commenters referenced AICPA guidance with respect to broker-dealer audits. However, this guidance will no longer be applicable for fiscal years ending on or after June 1, 2014, when standards of the PCAOB begin to apply.

One commenter suggested that the effective date for non-carrying and smaller broker-dealers to comply with amendments to the annual reporting requirements should be one year after the adoption of the amendments.[649] The Commission notes that most smaller broker-dealers are non-carrying firms and, therefore, will be required to file the exemption report and a report of the independent public accountant based on a review of the exemption report. As discussed in sections VI. and VII. of this release, the hour burdens and costs of the exemption report requirements will be substantially less than the hour burdens and costs of the compliance report requirements. Consequently, the Commission does not believe the effective date should be extended further for smaller broker-dealers.

As stated above, another commenter suggested that the Commission postpone the assertion requirements until the rule has been in effect for one year.[650] The Commission recognizes that all broker-dealers subject to these requirements and their independent public accountants will need time to prepare to comply with the requirements. The effective date the Commission is establishing should provide sufficient time for small or non-carrying firms, as well as larger carrying firms, to prepare for compliance with the new requirements.

VI. Paperwork Reduction Act

Certain provisions of the final rule amendments contain ''collection of information'' requirements within the meaning of the Paperwork Reduction Act of 1995 (''PRA'').[651] The Commission solicited comment on the estimated burden associated with the collection of information requirements in the proposed amendments.[652] The Commission submitted the proposed collection of information requirements to the Office of Management and Budget (''OMB'') for review in accordance with 44 U.S.C. 3507 and 5 CFR 1320.11.

The titles and OMB control numbers for the collections of information are:

(1) Rule 17a–5, Reports to be made by certain brokers and dealers (OMB Control Number 3235–0123);

(2) Rule 17a–11, Notification provisions for brokers and dealers (OMB Control Number 3235–0085); and

(3) Form Custody (OMB Control Number 3235–0691).

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information requirement unless it displays a currently valid OMB control number. As discussed above, the Commission received 27 comment letters on the proposed rulemaking. Some of these comments relate directly or indirectly to the PRA. These comments are addressed below. Finally, some initial burden estimates have been adjusted, as discussed below, to reflect updated information used to make the estimates.

A. Summary of the Collection of Information Requirements

As discussed in greater detail above in sections II., III., and IV. of this release, the Commission is adopting amendments to Rules 17a–5 and 17a–11 and is adopting new Form Custody for broker-dealers to file with their DEA.

Under the amendments to Rule 17a–5, broker-dealers must, among other things, file with the Commission annual reports consisting of a financial report and one of two new reports—either a compliance report or an exemption report that are prepared by the broker-dealer, and generally must also file reports prepared by an independent public accountant registered with the PCAOB covering those reports in accordance with PCAOB standards.[653] The financial report must contain the same types of financial statements that were required to be filed under Rule 17a–5 prior to these amendments (a statement of financial condition, a statement of income, a statement of cash flows, and certain other financial statements).[654] In addition, the financial report must contain, as applicable, the supporting schedules that were required to be filed under Rule 17a–5 prior to these amendments (a computation of net capital under Rule 15c3–1, a computation of the reserve requirements under Rule 15c3–3, and information relating to the possession or control requirements under Rule 15c3–3).

A broker-dealer that does not claim an exemption from Rule 15c3–3 through the most recent fiscal year—generally a carrying broker-dealer—must file the compliance report, and a broker-dealer that claimed an exemption from Rule 15c3–3 throughout the most recent

[649] *See Citrin Letter.*

[650] *See ABA Letter.*

[651] 44 U.S.C. 3501 *et seq.*

[652] *See Broker-Dealer Reports,* 76 FR at 37594–37598.

[653] *See* discussion above in sections II.B.1., II.B.2., II.B.3., and II.B.4. of this release.

[654] *See* discussion above in section II.B.2. of this release.

fiscal year must file the exemption report. In the compliance report and exemption report, a broker-dealer must make certain statements and provide certain information relating to the financial responsibility rules.

In addition to preparing and filing the financial report and the compliance report or exemption report, a broker-dealer must engage a PCAOB-registered independent public accountant to prepare a report based on an examination of the broker-dealer's financial report in accordance with PCAOB standards.[655] A broker-dealer that files a compliance report also must engage the PCAOB-registered independent public accountant to prepare a report based on an examination of certain statements in the compliance report.[656] A broker-dealer that files an exemption report must engage the PCAOB-registered independent public accountant to prepare a report based on a review of certain statements in the broker-dealer's exemption report. In each case, the examination or review must be conducted in accordance with PCAOB standards. A broker-dealer must file these reports of the independent public accountant with the Commission along with the financial report and the compliance report or exemption report prepared by the broker-dealer.

The amendments add a requirement that the annual reports also be filed with SIPC if the broker-dealer is a member of SIPC.[657] In addition, broker-dealers must generally file with SIPC a supplemental report on the status of the membership of the broker-dealer in SIPC.[658] The supplemental report must include a report of the independent public accountant based on certain procedures specified in the rule in accordance with PCAOB standards. In the future, SIPC may determine the format of this report by rule, subject to Commission approval.

Under the amendments, the PCAOB-registered independent public accountant must immediately notify the broker-dealer if the accountant determines during the course of preparing the accountant's reports that the broker-dealer was not in compliance at any time during the fiscal year with the financial responsibility rules or if the accountant determines that any material weakness existed in the broker-dealer's Internal Control Over Compliance during the fiscal year.[659] The broker-dealer, in turn, must file a notification with the Commission and its DEA under Rule 15c3–1, Rule 15c3–3, or Rule 17a–11 if the accountant's notice concerns an instance of non-compliance that would trigger notification under those rules. Under amendments to Rule 17a–11, a broker-dealer also must file a notification with the Commission and its DEA if the accountant's notice concerns (or if the broker-dealer discovers) a material weakness in the broker-dealer's Internal Control Over Compliance.

The amendments also require a broker-dealer that clears transactions or carries customer accounts to agree to allow representatives of the Commission or the broker-dealer's DEA to review the documentation associated with the reports of the broker-dealer's independent public accountant and to allow the accountant to discuss its findings with the representatives, if requested in writing for purposes of an examination of the broker-dealer.[660]

Finally, the amendments require broker-dealers to file a new Form Custody, which elicits information concerning the custody practices of the broker-dealer.[661] Form Custody must be filed with the DEA each quarter. The DEA must transmit the information obtained from Form Custody to the Commission at the same time that it transmits FOCUS Report data to the Commission under paragraph (a)(4) of Rule 17a–5.

The burdens associated with the collection of information requirements in the amendments are discussed below.

B. Use of Information

The proposed amendments relating to the reports to be filed by the broker-dealer are designed to enhance the ability of the Commission to oversee broker-dealer custody practices and, among other things, to: (1) Increase the focus of carrying broker-dealers and their independent public accountants on compliance, and internal control over compliance, with the financial responsibility rules; (2) facilitate the ability of the PCAOB to implement the explicit oversight authority of broker-dealer audits provided to the PCAOB by the Dodd-Frank Act; and (3) with respect to broker-dealers that are dually-registered as investment advisers, satisfy the internal control report requirement that was added by the amendment to Rule 206(4)–2 noted above with the accountant's report based on an examination of the compliance report. Securities regulators will use these reports to monitor the financial condition of broker-dealers. In addition, the components of the reports that are made public may be used by investors to review the financial condition of broker-dealers with which they have accounts or obtain other securities related services. SIPC can use the annual reports to monitor the financial strength of broker-dealers and to assess the adequacy of the SIPC Fund.

The amendment requiring a broker-dealer that clears transactions or carries customer accounts to allow Commission and DEA examination staff to review the audit documentation associated with its annual audit reports required under Rule 17a–5 and to allow its independent public accountant to discuss findings relating to the audit reports with Commission and DEA examination staff is intended to facilitate examinations of clearing broker-dealers by Commission and DEA examination staff. Commission and DEA examiners will use the information obtained from audit documentation and discussions with the broker-dealer's independent public accountant to plan their examinations.

Finally, Commission and DEA examiners will use Form Custody to understand a broker-dealer's custody profile and identify custody-related violations and misconduct. For example, if a broker-dealer represents on Form Custody that it does not issue account statements, but an examiner discovers that an account statement has been issued by the broker-dealer (*e.g.,* in connection with a customer complaint or in the course of an examination of the broker-dealer), the examiner will be able to react more quickly to the misrepresentation. Further, the requirement to prepare and file the form should motivate broker-dealers to focus more attention on their custody practices.

C. Respondents

The Commission estimated in the proposal that there were 5,063 registered broker-dealers that would be affected by the proposed amendments and that, of these, 305 were carrying broker-dealers, 528 were carrying or clearing broker-dealers, and 4,752 were broker-dealers that claimed exemptions from Rule 15c3–3.[662] The Commission did not receive comments regarding these estimates, but the Commission has

[655] *See* discussion above in section II.D.3. of this release.

[656] *See* paragraphs (f)(1) and (g)(2)(i) of Rule 17a–5.

[657] *See* discussion above in section II.B.6. of this release.

[658] *See* discussion above in section II.C.4. of this release.

[659] *See* discussion above in section II.F. of this release.

[660] *See* discussion above in section III. of this release.

[661] *See* discussion above in section IV. of this release.

[662] *See Broker-Dealer Reports,* 76 FR at 37595.

updated the estimates to reflect more recent information.[663]

As of December 31, 2011, 4,709 broker-dealers filed FOCUS Reports with the Commission. Of these, 4,417 broker-dealers claimed exemptions from Rule 15c3–3. Consequently, the Commission estimates that there are approximately 292 carrying broker-dealers (4,709 − 4,417 = 292). Based on FOCUS Report data, the Commission further estimates that there are approximately 513 carrying or clearing broker-dealers. According to SIPC, as of March 31, 2012, 217 broker-dealers claimed exemptions from SIPC membership. Therefore, the Commission estimates that 4,492 (4,709 − 217 = 4,492) broker-dealers are members of SIPC.

D. Total Initial and Annual Burdens

As discussed in detail below, the Commission estimates that the total PRA burden resulting from the amendments to Rules 17a–5 and 17a–11 and new Form Custody include an initial, one-time burden of approximately 13,522 hours[664] and an annual burden of approximately 276,717 hours.[665] There is significant variance between the largest broker-dealers and the smallest broker-dealers. Consequently, the estimates described below are averages across all types of broker-dealers expected to be affected by the amendments.

1. Annual Reports To Be Filed

i. The Financial Report

The Commission's amendments to Rule 17a–5 retain the current requirement that broker-dealers annually file financial statements and supporting schedules that must be audited by a PCAOB-registered accountant. As a result, the Commission's estimate of the hour burden for broker-dealers to prepare and file the financial report has not changed as a result of the amendments to Rule 17a–5.

ii. The Compliance Report

Under the amendments, a carrying broker-dealer must prepare and file with the Commission a new compliance report each year. The compliance report must contain statements as to whether: (1) The broker-dealer has established and maintained Internal Control Over Compliance; (2) the Internal Control Over Compliance of the broker-dealer was effective during the most recent fiscal year; (3) the Internal Control Over Compliance of the broker-dealer was effective as of the end of the most recent fiscal year; (4) the broker-dealer was in compliance with Rule 15c3–1 and paragraph (e) of Rule 15c3–3 as of the end of the most recent fiscal year; and (5) the information the broker-dealer used to state whether it was in compliance with Rule 15c3–1 and paragraph (e) of Rule 15c3–3 was derived from the books and records of the broker-dealer. In addition, if applicable, the compliance report must contain a description of: (1) Each identified material weakness in the broker-dealer's Internal Control Over Compliance during the most recent fiscal year, including those that were identified as of the end of the fiscal year; and (2) any instance of non-compliance with Rule 15c3–1 or paragraph (e) of Rule 15c3–3 as of the end of the most recent fiscal year.

The Commission estimated that, on average, carrying broker-dealers would spend approximately 60 hours each year to prepare the compliance report, as proposed.[666]

One commenter stated that the proposal did not ''address the additional costs broker-dealers would incur in preparing Compliance Reports.''[667] The commenter, however, did not comment directly on the estimated hour burden or provide specific examples of costs, in addition to the hour burdens, that broker-dealers would bear.[668] Another commenter also stated that the proposed estimate of 60 hours ''is not an accurate estimate of the time burden to complete the Compliance Report'' and that the burdens in the proposing release are understated.[669] The commenter stated that completing the compliance report will require extensive collaboration between management, internal audit and the independent public accountants resulting in added hours to perform the validation and evidence gathering of the existing processes necessary to make the assertions in the proposed compliance report.[670] The commenter, however, did not provide a different estimate of the number of hours it would take to complete the compliance report.

In response to these comments, the Commission notes that the final rule modifies the proposal in ways that may modestly reduce the time burden. For example, the final rule requires a statement as to whether the broker-dealer was in compliance with Rule 15c3–1 and paragraph (e) of Rule 15c3–3 as of the end of the most recent fiscal year and, if applicable, a description of any instances of non-compliance with these rules as of the fiscal year end, rather than the proposed assertion that the broker-dealer is in compliance with the financial responsibility rules in all material respects and proposed description of any material non-compliance with the financial responsibility rules. This reflects two changes from the proposal: (1) Elimination of the concepts of ''material non-compliance'' and ''compliance in all material respects'' with Rule 15c3–1 and 15c3–3 for the purposes of reporting in the compliance report; and (2) a narrowing of these statements and description requirements from compliance with all of the financial responsibility rules to compliance with Rule 15c3–1 and paragraph (e) of Rule 15c3–3.

As modified, the final rule no longer requires the broker-dealer to evaluate whether an instance of non-compliance with the financial responsibility rules was material, a component of the proposal that generated significant comment. In addition, the broker-dealer only needs to report instances of non-compliance with Rule 15c3–1 and paragraph (e) of Rule 15c3–3. In this regard, broker-dealers currently are required to include supporting schedules to their financial statements containing a computation of net capital and the reserve requirement under paragraph (e) of Rule 15c3–3. Consequently, the work required under this pre-existing requirement should provide the broker-dealer with the information it needs to make the statement as to whether it is in compliance with Rule 15c3–1 and paragraph (e) of Rule 15c3–3 as of the fiscal year end.

Given these modifications, the statements in the compliance report concerning the broker-dealer's Internal Control Over Compliance likely will be responsible for the bulk of the hour burden associated with preparing the

[663] The updated estimates are based on FOCUS Report data as of year end 2011. As discussed above, FOCUS Reports are deemed confidential pursuant to paragraph (a)(3) of Rule 17a–5.

[664] As discussed below, the total one-time burden relates to the requirement to draft and file a revised statement regarding the independent public accountant under Rule 17a–5(f)(2). The Commission estimated a total one-time burden of 10,214 hours in the proposing release for the statement regarding the independent public accountant and for SIPC forms. *See Broker-Dealer Reports,* 76 FR at 37595.

[665] As discussed below, the total annual hour burden relates to the compliance report (17,520 hours), the exemption report (30,919 hours), the filing of annual reports with SIPC (2,246 hours), and Form Custody (226,032 hours). The Commission estimated a total annual burden of 287,325 hours in the proposing release. *See Broker-Dealer Reports,* 76 at FR 37595.

[666] *See Broker-Dealer Reports,* 76 FR at 37596.

[667] *See SIFMA Letter.*

[668] *Id.*

[669] *See Van Kampen/Invesco Letter.*

[670] *Id.*

compliance report. For example, the broker-dealer will need to evaluate whether its Internal Control Over Compliance with the financial responsibility rules was effective during the most recent fiscal year.

The Commission believes that the modifications to the final rule discussed above may modestly reduce the hour burden of the final rule as compared to the hour burden that would have resulted from the proposed rule; namely, because a broker-dealer will not need to evaluate whether instances of non-compliance with the financial responsibility rules are material and will only need to report instances of non-compliance with Rule 15c3–1 and paragraph (e) of Rule 15c3–3. In light of the comments suggesting that the proposing release underestimated the burden, the Commission is not reducing the hour burden estimate for the rule to reflect the potential reduction in hour burden associated with the requirement. Thus, to the extent the proposing release underestimated the burden associated with making the statements in the compliance report about the broker-dealer's Internal Control Over Compliance, the amount of the burden reduction realized through the modifications discussed above is now attributed to the burden associated with the statements about Internal Control Over Compliance.

For these reasons, the Commission is retaining the rule's overall hour burden estimate without revision. The Commission, however, is updating the number of carrying broker-dealers to reflect more recently available data from the broker-dealer FOCUS Reports. The Commission now estimates that there are 292 carrying broker-dealers. Consequently, the Commission estimates that the total annual reporting burden to prepare and file the compliance report is approximately 17,520 hours per year for all carrying broker-dealers.[671]

iii. The Exemption Report

Under the amendments, a non-carrying broker-dealer must file the exemption report.[672] In the exemption report, the broker-dealer must provide to its best knowledge and belief: (1) A statement that identifies the provisions in paragraph (k) of Rule 15c3–3 under which the broker-dealer claimed an exemption from Rule 15c3–3; (2) a statement that the broker-dealer met the identified exemption provisions in paragraph (k) throughout the most recent fiscal year without exception or that it met the identified exemption provisions in paragraph (k) throughout the most recent fiscal year except as described in the exemption report; and (3) if applicable, a statement that identifies each exception during the most recent fiscal year in meeting the identified provisions in paragraph (k) and that briefly describes the nature of each exception and the approximate date(s) on which the exception existed.

The Commission estimated that it would take a non-carrying broker-dealer approximately five hours to prepare and file the proposed exemption report.[673] The Commission did not receive any comments on this hour estimate. As discussed above in section II.B.4. of this release, the Commission is adopting, with modifications, the requirements regarding the exemption report. These provisions generally clarified the scope and application of the report. However, one modification provides that if the broker-dealer states that it met the identified exemption provisions in paragraph (k) of Rule 15c3–3 throughout the most recent fiscal year except as described in the report, the broker-dealer must identify each exception during the most recent fiscal year in meeting the identified provisions in paragraph (k) of Rule 15c3–3 and that briefly describes the nature of each exception and the approximate date(s) on which the exception existed. The Commission expects that non-carrying broker-dealers generally track exceptions as part of monitoring compliance with the exemption provisions in paragraph (k) of Rule 15c3–3. The requirement to identify and describe exceptions would create an incremental burden over the rule as proposed. Based on staff experience with the application of Rule 17a–5, the Commission estimates that the additional work associated with describing exceptions in the exemption report would take two hours. Therefore, the Commission is revising the hour estimate associated with the exemption report to seven hours.

The Commission now estimates that there are approximately 4,417 non-carrying broker-dealers that must file exemption reports. Therefore, the Commission estimates that the annual reporting burden for all non-carrying broker-dealers to prepare and file the exemption report is approximately 30,919 hours per year.[674]

iv. Additional Burden and Cost To File the Annual Reports

The filing requirements for the annual reports are being amended.[675] In particular, Rule 17a–5 previously provided that a broker-dealer must file two copies of its annual reports with the Commission's principal office in Washington, DC. The final rule no longer requires that two copies be filed, so that, in accordance with paragraph (d)(6) of Rule 17a–5, broker-dealers must file only one copy of the annual reports with the Commission's principal office. This change could reduce slightly the hour burden and cost associated with filing the annual reports with the Commission.[676]

Amendments to paragraph (d)(6) of Rule 17a–5 require that a broker-dealer also file a copy of its annual reports with SIPC. The Commission estimated that it would take 30 minutes to prepare an additional copy of the annual reports and mail it to SIPC as required by the proposed amendments.[677] The Commission did not receive comments regarding this estimate. In addition, the clarification to the final rule that only broker-dealers that are members of SIPC must file a copy of their annual reports with SIPC will not affect the final PRA hour burden estimate. Therefore, the Commission is retaining this estimate without revision. The Commission now estimates that 4,492 broker-dealers are members of SIPC.[678] Therefore, the Commission estimates that the annual industry-wide reporting burden associated with this amendment is approximately 2,246 hours per year.[679]

There would be postage costs associated with sending a copy of the annual reports to SIPC that are estimated to be, on average,[680] approximately $12.05 per broker-dealer

[671] 60 hours × 292 carrying broker-dealers = 17,520 hours. *See* the discussion below regarding the external costs associated with obtaining the accountant's report on the compliance report.

[672] *See* discussion above in sections II.B.1. and II.B.4. of this release.

[673] *See Broker-Dealer Reports,* 76 FR at 37596.

[674] 7 hours × 4,417 non-carrying broker-dealers = 30,919 hours. *See* the discussion below regarding the external costs associated with obtaining the accountant's report on the exemption report.

[675] *See* discussion above in section II.B.6. of this release.

[676] The Commission does not expect the compliance report, exemption report, and related reports of the independent public accountant to increase the mailing costs of the annual reports because these additional reports in the aggregate should not significantly increase the size and weight of the package of annual reports.

[677] *See Broker-Dealer Reports,* 76 FR at 37596.

[678] As discussed in subsection C. above, according to SIPC, as of March 31, 2012, 217 broker-dealers claimed exemptions from SIPC membership. The Commission therefore estimates that 4,492 (4,709 − 217 = 4,492) broker-dealers are members of SIPC.

[679] ½ hour × 4,492 broker-dealers = 2,246 hours.

[680] The number of pages of an annual report, and consequently the associated postage costs, likely will vary significantly based on the size of the broker-dealer and the types of business in which it engages.

per year.[681] Thus, the Commission estimates that the total annual postage costs associated with sending a copy of the annual reports to SIPC would be approximately $54,128 per year for all broker-dealers that are SIPC members.[682]

Finally, the Commission notes that paragraph (d)(1)(ii) of Rule 17a–5 of the final rule was amended to require that a copy of a DEA's written approval to change a broker-dealer's fiscal year end must be sent to the Commission's principal office in Washington DC, in addition to the regional office of the Commission for the region in which the broker-dealer has its principal place of business. Based on the number of copies of approvals received by the Commission and staff experience in the application of Rule 17a–5, the Commission estimates that approximately 75 broker-dealers will receive approval each year to change their fiscal year end. The Commission estimates that it would take 10 minutes to copy and send an additional copy of the approval to the Commission's principal office in Washington, DC for a total industry-wide annual hour burden of approximately 12.5 hours,[683] and a total industry-wide cost of approximately $33.75 per year to mail the approval.[684]

v. Supplemental Report on SIPC Membership

Prior to today's amendments, paragraph (e)(4) of Rule 17a–5 provided that a broker-dealer must file with its annual report a supplemental report on the status of the membership of the broker-dealer in SIPC, which was required to be ''covered by an opinion of the independent public accountant'' if the annual report of the broker-dealer was required to be audited. The Commission is adopting amendments to paragraph (e)(4) of Rule 17a–5 to provide that broker-dealers must file with SIPC—but no longer with the Commission after an interim period if SIPC adopts a rule under paragraph (e)(4)(i) that is approved by the Commission—a report of an independent public accountant designed to help administer the collection of assessments from broker-dealers for purposes of establishing and maintaining SIPC's broker-dealer liquidation fund.[685] The Commission is adopting the proposed amendments to paragraph (e)(4) of Rule 17a–5 substantially as proposed. One modification is that, as adopted, the final rule provides that the accountant must perform the procedures specified in the rule in accordance with PCAOB standards. SIPC may determine the format of this report by rule, subject to Commission approval.

Because broker-dealers are currently required to file these reports with both the Commission and SIPC, the final rule amendment does not result in any change to the Commission's current estimate of the hour burden for broker-dealers to comply with this requirement under the current PRA collection for Rule 17a–5. Although broker-dealers will file the supplemental report on SIPC membership only with SIPC if a SIPC rule change to implement this amendment is approved by the Commission, as noted in the current PRA collection, the variation in the size and complexity of broker-dealers subject to Rule 17a–5 makes it difficult to calculate the burden of the information collection of Rule 17a–5. Therefore, the Commission will determine whether it is appropriate to revise the PRA estimate for Rule 17a–5 after any SIPC rule filing is approved or after the end of the two-year sunset provision.

In the proposing release the Commission estimated, however, that SIPC would incur a one-time burden associated with filing a rule change with the Commission to implement this proposed amendment of approximately 100 hours.[686] The process and requirements for SIPC to file rule changes with the Commission, however, is set out in SIPA.[687] Any burden on SIPC to file a rule change with the Commission would be associated with the requirements under SIPA. Therefore, the Commission is deleting the proposed one-time 100 hours from the final rule amendments.

vi. Statement Regarding Independent Public Accountant

The Commission is amending paragraph (f)(2) of Rule 17a–5 to revise the statement regarding identification of a broker-dealer's independent public accountant that broker-dealers must file each year with the Commission and their DEA (except that if the engagement is of a continuing nature, no further filing is required).[688] The revised statement contains additional information that includes a representation that the independent public accountant has undertaken to provide a report regarding the broker-dealer's financial reports and a report regarding the broker-dealer's compliance report or exemption report, as applicable.[689] In addition, the statement provided by a clearing or carrying broker-dealer must include representations regarding the access to its accountant requirements described above.[690] Therefore, all broker-dealers will generally be required to file a new statement regarding their independent public accountant. The Commission estimated that the one-time hour burden associated with amending its existing statement and filing the new statement with the Commission, in order to comply with the proposed amendments, would be an average of approximately two hours on a one-time basis for each broker-dealer, as the statement can be continuing in nature.[691]

The Commission is revising this estimate for clearing and carrying broker-dealers, as these broker-dealers will likely need to renegotiate their agreements with their independent public accountants. The Commission estimates, based on staff experience, that it will take a carrying or clearing broker-dealer approximately ten hours on a one-time basis to renegotiate its agreement with its accountant, amend its statement regarding its accountant, and file the new statement with the Commission. The Commission estimates that the one-time burden for all carrying

[681] Based on Commission staff experience with annual report filings of broker-dealers under Rule 17a–5, the Commission staff estimates that approximately 50% of broker-dealers file their annual reports using an overnight mail delivery service. These broker-dealers would consequently incur higher postage costs than broker-dealers which choose to mail their annual reports using first class mail or delivery methods other than overnight mail. Therefore, postage costs will vary depending on the size of the annual report and method of delivery. The Commission estimates that the cost to mail the additional reports would be, on average, $12.05 per broker-dealer. As of October 2012, the $12.05 rate is an average rate of the cost of an Express Mail Flat Rate Envelope of $18.95 and a Priority Mail Flat Rate Envelope of $5.15, based on costs obtained on the Web site of the U.S. Postal Service at: *www.usps.gov*. ($18.95 + $5.15) = $24.10/2 = $12.05.

[682] 4,492 broker-dealers × $12.05 = $54,128.

[683] (75 approvals × 10 minutes)/60 = 12.5 hours.

[684] 75 approvals × $0.45 (current price of a letter sent first class) = $33.75.

[685] *See* discussion above in section II.C.4. of this release.

[686] *See Broker-Dealer Reports,* 76 FR at 37597.

[687] 15 U.S.C. 78ccc(e)(2). The statute generally requires that the Board of Directors of SIPC file with the Commission a copy of any proposed rule change accompanied by a concise general statement of the basis and purpose of such proposed rule change. In addition, the statute states that ''the Commission shall, upon the filing of any proposed rule change, publish notice thereof, together with the terms of substance of such proposed rule change or a description of the subjects and issues involved'' and that the ''Commission shall give interested persons an opportunity to submit written data, views, and arguments with respect to such proposed rule change.'' 15 U.S.C. 78ccc(e)(2)(A).

[688] *See* discussion above in section III. of this release.

[689] *See* Rule 17a–5(f)(2)(ii). 17 CFR 240.17a–5(f)(2)(ii).

[690] *See* Rule 17a–5(f)(2)(ii)(F) and (G).

[691] *See Broker-Dealer Reports,* 76 FR at 37596.

or clearing broker-dealers is approximately 5,130 hours[692] and the one-time burden for all broker-dealers that neither carry customer accounts nor clear transactions is approximately 8,392 hours,[693] for a total industry-wide reporting burden of approximately 13,522 hours on a one-time basis.

Finally, the Commission believes there will be postage costs associated with sending the amended statement regarding the accountant, which must be sent to the Commission's principal office in Washington, DC, the regional office of the Commission for the region in which the broker-dealer's principal place of business is located, and to its DEA. The Commission estimates that each mailing will cost approximately $0.45, for a total cost of approximately $6,357 for all broker-dealers on a one-time basis.[694]

vii. External Costs of Engagement of Accountant

The amendments to Rule 17a–5 retain the current requirement that broker-dealers annually file with the Commission a financial report and a report prepared by a PCAOB-registered accountant based on an audit of the financial report.[695] However, the financial report must be audited in accordance with standards of the PCAOB, instead of in accordance with GAAS, as previously required. The amendments also require a broker-dealer to file with the Commission either a compliance report or an exemption report and to obtain an independent accountant's report based on an examination or review of those reports, respectively.[696]

Broker-dealers incur annual external costs associated with the PRA burden in terms of hiring outside auditors and accountants to comply with the requirements of Rule 17a–5. Any external costs of accountants' reports included in the PRA collection of information for these final rule amendments are averages across all broker-dealers. The external PRA costs incurred by a broker-dealer to comply with the final rule amendments will generally depend on its size and the complexity of its business activities. Because the size and complexity of broker-dealers varies significantly, the Commission provides estimates of the average external cost per broker-dealer across all broker-dealers.[697]

The Commission received various comments regarding the costs of the proposed requirements and engagement of the accountant provisions. More specifically, the Commission received comments addressing: (1) The costs of the change from GAAS to PCAOB standards for the financial report; (2) the costs of the examination of the new compliance report; and (3) the costs of the review of the new exemption report. The comments received with respect to these three areas and the Commission's responses are addressed in detail in each subsection below.

a. Financial Report (Including Change From GAAS to PCAOB Standards)

Two commenters stated that the Commission did not address the costs associated with the change from GAAS to PCAOB standards.[698] These costs would affect the external costs of broker-dealers under the PRA burden to the extent the change in standards caused an increase in external accounting fees incurred by broker-dealers. One commenter also stated that the Commission may need to consider the PCAOB's proposed rules before it can make a reasonable estimate, and that transition to PCAOB standards may require substantial revisions to audit programs.[699] Another commenter stated that the economic analysis was ''inconclusive'' because the PCAOB has not yet established auditing and attestation standards for broker-dealers.[700] In response to this comment, the Commission estimates the costs of its rules using the best information available to it at the time.

Based on information currently available, including the proposed PCAOB standards, the Commission does not expect that the move to PCAOB standards for audits of broker-dealer financial reports will result in significant one-time implementation costs or recurring annual costs. The proposed PCAOB standards for audits of financial reports (financial statements and supporting schedules) generally incorporate concepts and requirements contained within GAAS, thereby minimizing the potential costs to broker-dealer auditors of this change. As such, the Commission is not including any additional external PRA costs related to the change from GAAS to PCAOB auditing standards.[701] However, in response to the comment, the Commission will examine the effect of any final PCAOB standards on the external costs associated with this collection of information in subsequent extensions of this collection of information and make any necessary cost adjustments.

b. Compliance Report

The Commission estimated that the incremental external cost to a carrying broker-dealer of obtaining the independent public accountant's report based on an examination of the proposed compliance report would be an average incremental cost of approximately $150,000 per carrying broker-dealer per year.[702] The Commission is including these external costs in this collection of information.

One commenter stated that the Commission underestimated the cost of examining the compliance report.[703] This commenter believed that the auditing costs associated with the compliance examinations were underestimated given that the proposing release contemplated a move from GAAS to PCAOB auditing standards.[704] This commenter stated that the transition may require substantial revisions to independent public accountant audit programs, including implementation of new auditing techniques and processes and the associated training programs and noted that the proposed PCAOB standards were not released until after the publication of the proposing release.[705] Another commenter stated that completing both the compliance reports and exemption reports ''will require extensive collaboration between management, internal audit, and the independent public accountants'' and that due to the ''significant increase in hours,'' the proposed amendments have ''the potential to double the total current audit fees and have a material impact'' on firms.[706] These commenters did not quantify their cost estimates in terms of dollars; nor did they provide data to support their conclusions.

As explained above in section II.D. of this release, before today's amendments, Rule 17a–5 required a broker-dealer to

[692] 10 hours × 513 carrying or clearing broker-dealers = 5,130 hours.

[693] 2 hours × 4,196 non-carrying and non-clearing broker-dealers = 8,392 hours.

[694] 4,709 broker-dealers × $0.45 cost for first class postage × 3 mailings = $6,357.15.

[695] *See* discussion above in section II.D.3. of this release.

[696] *Id.*

[697] In the proposing release, these costs were included in the Economic Analysis. The Commission is also including these costs in the PRA amendments to more accurately reflect external costs incurred by broker-dealers as a result of the PRA hour burdens imposed by the final rule amendments, and in response to comments.

[698] *See, e.g., McGladrey Letter; SIFMA Letter.*

[699] *See ABA Letter.*

[700] *See CAI Letter.*

[701] *See* section VII. of this release (discussing benefits and costs of changing from GAAS to PCAOB auditing standards).

[702] *See Broker-Dealer Reports,* 76 FR at 37599.

[703] *See ABA Letter.*

[704] *Id.*

[705] *Id.*

[706] *See Van Kampen/Invesco Letter.*

engage an independent public accountant to prepare a material inadequacy report based on, among other things, a review of the accounting system, internal accounting control, and procedures for safeguarding securities of the broker-dealer, including appropriate tests, for the period since the prior examination date. In addition, the accountant was required to review the practices and procedures followed by the broker-dealer in, among other things, (1) making periodic computations of net capital and under paragraph (e) of Rule 15c3–3, (2) making quarterly securities examinations, counts, verifications, and comparisons under Rule 17a–13, and (3) obtaining and maintaining physical possession or control of all fully paid and excess margin securities of customers as required by Rule 15c3–3.

Consequently, under requirements before today's amendments relating to a material inadequacy report that are being replaced by the examination of the compliance report, the broker-dealer was required to engage the independent public accountant to review the internal controls, practices, and procedures of the broker-dealer with respect to key elements of the financial responsibility rules.

For these reasons, the Commission continues to believe that the average incremental cost of $150,000 per carrying broker-dealer to obtain the accountant's report covering the compliance report is reasonable. Moreover, as stated above, the Commission is adopting the proposed amendments to Rule 17a–5 with respect to the compliance report with modifications. For example, the final rule requires a statement as to whether the broker-dealer was in compliance with Rule 15c3–1 and paragraph (e) of Rule 15c3–3 as of the end of the most recent fiscal year and, if applicable, a description of any instances of non-compliance with these rules as of the fiscal year end, rather than the proposed assertion that the broker-dealer is in compliance with the financial responsibility rules in all material respects and the proposed description of any material non-compliance with the financial responsibility rules. This reflects two changes from the proposal: (1) Elimination of the concepts of ''material non-compliance'' and ''compliance in all material respects'' with Rule 15c3–1 and 15c3–3 for the purposes of reporting in the compliance report; and (2) a narrowing of these statements and description requirements from compliance with all of the financial responsibility rules to compliance with Rule 15c3–1 and paragraph (e) of Rule 15c3–3.

As modified, the final rule no longer requires the independent public accountant to evaluate whether an instance of non-compliance with the financial responsibility rules was material. While there may be an increase in the number of reported instances of non-compliance than under the proposal, the independent public accountant will not be required to determine whether an instance of non-compliance is material. Consequently, the reporting of instances of non-compliance (as compared to instances of material non-compliance) is not expected to increase costs of the engagement of the accountant from those estimated for the proposal and may decrease costs.

In addition, the final rule has been modified from the proposal so that the independent public accountant will not be required to examine a broker-dealer statement that encompassed compliance with all the financial responsibility rules. Instead, the independent public accountant must examine a statement about compliance with Rule 15c3–1 and paragraph (e) of Rule 15c3–3. In this regard, the Commission has not amended the requirement, which existed before today's amendments, that the independent public accountant examine the supporting schedules to the broker-dealer's financial statements, which contain a computation of net capital under Rule 15c3–1 and the reserve requirement under paragraph (e) of Rule 15c3–3.

Given these modifications, the statements in the compliance report concerning the broker-dealer's Internal Control Over Compliance will likely account for the bulk of the work of the independent public accountant and, as noted above, before today's amendments, the independent public accountant was required to include internal control within the scope of the audit.

The Commission believes that the modifications to the final rule discussed above should modestly reduce the external cost of the final rule as compared to the cost that would have resulted from the proposed rule. Further, elimination of the requirement that the accountant prepare a material inadequacy report will result in some cost savings.[707] While these modifications to the final rule may result in reduced costs, the Commission continues to believe that the average estimated incremental cost of $150,000 per carrying broker-dealer, which may be at the high end of the range of estimated costs, is reasonable.

For these reasons, the Commission has not changed its average estimate of the incremental cost of the accountants' reports covering the compliance report. The Commission therefore estimates that the average industry-wide annual external reporting incremental cost of this requirement is approximately $43,800,000 per year ($150,000 × 292 carrying broker-dealers = $43,800,000).

c. Exemption Report

The Commission estimated that the external cost to a non-carrying broker-dealer of obtaining the independent public accountant's report based on a review of the proposed exemption report would be an average of approximately $3,000 per non-carrying broker-dealer per year, for a total estimated annual cost associated with this proposal of $14,256,000.[708] The Commission did not receive any specific comments regarding this cost estimate.

In the proposing release, the Commission stated its belief that an independent public accountant's review of the exemption assertion would add an incremental cost to that incurred as a result of the annual financial audit.[709] As discussed above, independent public accountants engaged by broker-dealers were required, before today's amendments, to ''ascertain that the conditions of the exemption were being complied with as of the examination date and that no facts came to [the independent public accountant's] attention to indicate that the exemption had not been complied with during the period since [the independent public accountant's] last examination.'' [710]

The Commission continues to believe that $3,000 is a reasonable estimate of the cost of obtaining the accountant's report covering the exemption report. The Commission now estimates that

[707] The Commission also stated in the proposing release that the Commission estimated that amendments to the IA Custody Rule would impose external costs of $250,000 per investment adviser, and that the Commission estimated that the examination of the compliance report would incrementally cost $150,000 because the IA Custody Rule imposed new requirements on investment advisers, and, unlike the final rule amendments being adopted today, was not based on existing obligations. *See Broker-Dealer Reports,* 76 FR at 37599. Based on this comparison, the Commission continues to believe that the average estimated incremental cost of $150,000 per carrying broker-dealer is reasonable and that the changes discussed above generally should not materially impact the cost estimate as they may, in some cases, result in a modest reduction in burden.

[708] *See Broker-Dealer Reports,* 76 FR at 37599–37600. The Commission estimated that there were 4,752 non-carrying broker-dealers. 4,752 × $3,000 = $14,256,000.

[709] *Id.* at 37599.

[710] *See* 17 CFR 240.17a–5(g)(2).

there are approximately 4,417 non-carrying broker-dealers. The Commission therefore estimates that the total industry-wide external annual reporting cost of this requirement is approximately $13,251,000 per year (4,417 non-carrying broker-dealers × $3,000 = $13,251,000).

d. Access to Accountant and Audit Documentation

The amendments to Rule 17a–5 require that carrying or clearing broker-dealers agree to allow Commission and DEA staff, if requested in writing for purposes of an examination of the broker-dealer, to review the work papers of the independent public accountant and to allow the accountant to discuss its findings with the examiners.

In the proposing release, the Commission estimated that a carrying or clearing broker-dealer's accountant would charge the broker-dealer for time its personnel spend speaking with the Commission or the broker-dealer's DEA and providing them with audit documentation.[711] Thus, the Commission estimated that the additional cost of accountant time associated with this amendment to all clearing and carrying broker-dealers would be approximately $660,000 annually.[712] As the Commission now estimates that the number of carrying or clearing broker-dealers is 513, the new estimate is approximately $641,250.[713]

2. Conforming and Technical Amendments to Rule 17a–11

The Commission proposed technical amendments to Rule 17a–5 and proposed amending paragraph (e) of Rule 17a–11 to eliminate a reference to Rule 17a–5.[714] The Commission stated that these changes should not result in an additional hour burden for the Rule 17a–11 collection of information. As discussed above in section II.F.2. of this release, in response to a comment, paragraph (e) of Rule 17a–11, as adopted, retains a reference to Rule 17a–5. In addition, the Commission is adopting conforming amendments to substitute the term *material weakness* as defined in paragraph (d)(3)(iii) of Rule 17a–5 for the term material inadequacy with respect to Rule 17a–5. Specifically, the final rule provides that whenever a broker-dealer discovers, or is notified by its accountant under paragraph (h) of Rule 17a–5 of the existence of any material weakness, the broker-dealer must: (1) Give notice of the material weakness within 24 hours of the discovery or notification; and (2) transmit a report within 48 hours of the notice stating what the broker-dealer has done or is doing to correct the situation.[715]

The Commission does not expect any change in the number of notices filed per year as a result of the final amendments because the material inadequacy notification requirement is being replaced by a material weakness notification requirement. Therefore, the final amendments to Rule 17a–11 should not result in a change in the current PRA burden for Rule 17a–11. However, the Commission will take into account any changes in the number of notices associated with this collection of information in subsequent extensions of this collection of information and make any necessary adjustments, as appropriate.

3. Form Custody

As described more fully above, the amendments require that all broker-dealers registered with the Commission file Form Custody quarterly with their DEA. The Commission estimated that the hour burden associated with completing and filing proposed Form Custody would be approximately 12 hours per quarter, or 48 hours per year, on average, for each broker-dealer.[716]

In section IV. of this release, in adopting the final amendments to Form Custody, the Commission received one comment in response to Item 8 of Form Custody, as proposed, noting that the information sought in Item 8 was largely the same as information collected from investment advisers on Form ADV.[717] As stated above in section IV. of this release, the Commission is aware that some overlap exists between the information collected from investment advisers on Form ADV and the information that would be collected from broker-dealers dually-registered as investment advisers in Item 8 of proposed Form Custody. However, these two forms also contain a significant amount of non-overlapping material, reflecting their different purposes and uses. Form Custody is intended to be a single source of readily-available information to assist Commission and DEA examiners in preparing for and performing focused custody exams, and it is particularly important that such information be readily available in the case of dually-registered firms. Consequently, the Commission believes that the PRA burden for Form Custody is reasonable in light of its intended purpose, as discussed above in section IV. of this release. Additionally, the commenter did not indicate disagreement with the hour burden estimate as proposed. Therefore, the Commission is retaining the hour burden estimate without revision.

The Commission now estimates that there are approximately 4,709 broker-dealers that must file Form Custody. The Commission therefore estimates that the total annual burden associated with completing and filing Form Custody for all 4,709 broker-dealers is approximately 226,032 hours per year (4,709 broker-dealer times 4 responses per year times 12 hours = 226,032 hours).

One commenter stated that the estimated costs to the industry of $69,179,670 is ''staggering,'' and that such costs would likely indirectly be passed on to customers.[718] The commenter did not disagree with the PRA estimate in the proposing release; rather, the commenter focused on size of the total estimated costs. The Commission recognizes that the requirement to file Form Custody will increase compliance costs for broker-dealers and, consequently, the PRA estimates reflect these costs. The PRA hour burden estimates (and associated internal burden costs), however, are averages across all broker-dealers. The costs incurred by a broker-dealer to comply with the requirement to file Form Custody will depend on its size and the complexity of its business activities. Because the size and complexity of broker-dealers varies significantly, the Commission provides estimates of the average cost per broker-dealer across all broker-dealers.

For these reasons, the Commission believes the internal costs related to the PRA for this hour burden are reasonable and, therefore, the Commission is not adjusting the final cost estimate, except to reflect updated data with respect to

[711] In the proposing release, the Commission estimated that a broker-dealer's accountant would spend approximately 5 hours per year speaking with Commission or DEA staff and providing them with audit documentation.

[712] In the proposing release, the Commission multiplied 528 clearing and carrying broker-dealers × 5 hours × $250/hour = $660,000.

[713] 513 clearing and carrying broker-dealers × $1,250 in increased costs per clearing broker-dealer = $641,250.

[714] *See Broker-Dealer Reports,* 76 FR at 37597.

[715] *See* paragraph (e) of Rule 17a–11. This provision retains references to material inadequacy with respect to Rule 17a–12.

[716] *See Broker-Dealer Reports,* 76 FR at 37597.

[717] *See Angel Letter.*

[718] *See IMS Letter.* The cost of $69,179,670 was reflected in the Economic Analysis in the proposing release. *See Broker-Dealer Reports,* 76 FR at 37601. This cost was calculated as an internal cost of the estimated PRA hours and is the total cost divided among 5,057 firms. *Id.* at 37601 n.215. This internal cost would amount to an average of $13,680 per broker-dealer.

the number of broker-dealers and compensation.[719]

E. Collection of Information Is Mandatory

The collection of information obligations imposed by the rule amendments are mandatory for broker-dealers that are registered with the Commission.

F. Confidentiality

The Commission expects to receive confidential information in connection with the proposed collections of information. Paragraph (e)(3) of Rule 17a–5, as amended, provides that broker-dealer annual reports filed with the Commission are not confidential, except that if the Statement of Financial Condition is bound separately from the balance of the annual reports, and each page of the balance of the annual reports is stamped ''confidential,'' then the balance of the annual reports shall be deemed confidential to the extent permitted by law.[720] However, under paragraph (c)(2)(iv) of Rule 17a–5, if there are material weaknesses, the accountant's report on the compliance report must be made available for customers' inspection and, consequently, it would not be deemed confidential. In addition, paragraph (c)(2)(i) of Rule 17a–5 requires a broker-dealer to furnish to its customers annually a balance sheet with appropriate notes prepared in accordance with GAAP and which must be audited if the broker-dealer is required to file audited financial statements with the Commission.[721] With respect to the other information collected under the amendments, a broker-dealer can request the confidential treatment of the information.[722] If such a confidential treatment request is made, the Commission anticipates that it will keep the information confidential to the extent permitted by law.[723]

VII. Economic Analysis

The Commission is sensitive to the costs and benefits of its rules. When engaging in rulemaking that requires the Commission to consider or determine whether an action is necessary or appropriate in the public interest, section 3(f) of the Exchange Act requires that the Commission consider, in addition to the protection of investors, whether the action will promote efficiency, competition, and capital formation.[724] In addition, section 23(a)(2) of the Exchange Act requires that the Commission consider the effects on competition of any rules the Commission adopts under the Exchange Act, and prohibits the Commission from adopting any rule that would impose a burden on competition not necessary or appropriate in furtherance of the purposes of the Exchange Act.[725]

In the proposing release, the Commission solicited comment on the costs and benefits of the proposed amendments and new form, including whether estimates of the costs and benefits were accurate and comprehensive.[726] The Commission further encouraged commenters to provide specific data and analysis in support of their views.[727] The Commission also requested comment on whether the proposed amendments would place a burden on competition, and promote efficiency, competition, and capital formation.[728]

The Commission received 27 comment letters on the proposed amendments. A number of commenters addressed the Commission's estimates of the cost and benefits of the proposed amendments.[729] Generally, these commenters stated that the Commission's cost and benefit estimates failed to include all of the costs associated with the proposed amendments and that the costs that the Commission did include in its analysis were underestimated. For example, one commenter stated that the proposed amendments ''place unnecessary regulatory burdens and costs on industry, in general, and smaller firms, in particular'' and that ''broker-dealers compete against investment advisers who are not burdened by the same regulatory requirements,'' including the requirements in the proposed amendments.[730] While commenters stated that the Commission underestimated costs, they did not provide alternative quantified estimates of the costs.[731]

As discussed throughout this release, in part in response to comments, the Commission has modified the proposed rules to reduce compliance burdens where consistent with investor protection. In addition, as discussed below, where commenters identified costs the Commission did not consider, the Commission has revised its economic analysis of the final rules to take these costs into account.

In adopting the rule amendments and new form, the Commission has been mindful of the associated costs and benefits. The costs and benefits that the Commission has considered in adopting these amendments and new form are discussed below. The discussion focuses on the Commission's reasons for adopting these amendments and new form, the affected parties, and the costs and benefits of the amendments and new form compared to the baseline, described below, and to alternative courses of action.

Many of the benefits and costs discussed below are difficult to quantify, in particular when discussing increases in investor confidence and improvements in investor protection. For example, the extent to which the increased ability of the Commission and DEAs to oversee compliance with the financial responsibility rules will help limit future violations of the rules is unknown. Similarly, it is unknown how much increasing the focus of broker-dealers on the financial responsibility rules will result in enhanced compliance with those rules. Moreover, limited public data exists to study the costs of broker-dealer audits. Therefore, much of the discussion is qualitative in nature but, where possible, the Commission attempted to quantify the costs.

A. Motivation for the Amendments

The rule amendments and new form being adopted today are designed to provide additional safeguards with respect to broker-dealer custody of customer securities and funds. The motivation for these amendments, which are discussed throughout this release, are summarized below.

[719] *Id.*

[720] *See* paragraph (e)(3) of Rule 17a–5.

[721] *See* 17 CFR 240.17a–5(c)(2)(i).

[722] *See* 17 CFR 200.83. Information regarding requests for confidential treatment of information submitted to the Commission is *available at http://www.sec.gov/foia/howfo2.htm#privacy.*

[723] *See, e.g.,* 15 U.S.C. 78x (governing the public availability of information obtained by the Commission); 5 U.S.C. 552 *et seq.*

[724] 15 U.S.C. 78c(f).

[725] 15 U.S.C. 78w(a)(2).

[726] *See Broker-Dealer Reports,* 76 FR at 37598. An economic analysis was included in the proposing release. *Id.* at 37598–37601.

[727] *Id.* at 37598.

[728] *Id.*

[729] *See ABA Letter; AICPA Letter; Angel Letter; CAI Letter; Citrin Letter; IMS Letter; KPMG Letter; McGladrey Letter; SIFMA Letter; Van Kampen/Invesco Letter.*

[730] *See IMS Letter.*

[731] For example, one commenter stated that the Commission's estimate of the costs of the compliance report have ''the potential to double the total current audit fees and have a material impact'' on firms. *See Van Kampen/Invesco Letter.* The commenter, however, did not provide a quantified baseline estimate of current audit fees incurred by broker-dealers with which to compare the Commission's estimate of the incremental cost that the compliance report amendments will have on audit fees.

First, as mentioned above in section I.A. of this release, over the last several years, the Commission has brought several cases alleging fraudulent conduct by investment advisers and broker-dealers, including among other things, alleged misappropriation or other misuse of customer securities and funds.[732] These cases highlight the need for enhancements to the rules governing broker-dealer custody of customer assets. Such enhancements include both increased focus on compliance and internal compliance controls by broker-dealers and their auditors, as well as measures to increase the ability of the Commission and broker-dealer DEAs to oversee broker-dealer custody practices by requiring broker-dealers to provide more information about these practices.

Second, as discussed above in section II.D. of this release, certain provisions of Rule 17a–5 before today's amendments were inconsistent with current audit practices, standards, and terminology, which have evolved since these provisions were adopted. This inconsistency has resulted in disparate audit practices and inconsistent compliance with the rule. As discussed above in section II.D.3.iii. of this release, the PCAOB has published a report containing observations from inspections of portions of 23 broker-dealer audits conducted by ten accounting firms.[733] According to the report, PCAOB inspections staff identified deficiencies in all of the audits inspected.[734] The deficiencies noted in the report provide support for the need to strengthen and clarify broker-dealer audit and reporting requirements in order to facilitate consistent compliance with these requirements.

Third, as discussed in section II.D. of this release, prior to today's amendments, Rule 17a–5 required that broker-dealer audits be conducted in accordance with GAAS, which are established by the Auditing Standards Board of the AICPA. The amendments—by requiring that the audits be conducted in accordance with PCAOB standards—recognize the PCAOB's explicit oversight authority over broker-dealer audits as provided by the Dodd-Frank Act, including the authority to establish (subject to Commission approval) and enforce auditing and related attestation, quality control, ethics, and independence standards.[735] In addition, the Commission has direct oversight authority over the PCAOB, including the authority to approve or disapprove the PCAOB's rules and standards.[736] Consequently, requiring that broker-dealer audits be conducted in accordance with standards the Commission has approved will better ensure alignment between broker-dealer audits and the regulatory policy objectives reflected in the Commission's financial responsibility rules.

Fourth, as discussed in section II.B.6. of this release, because broker-dealers have not been required to file with SIPC their annual audited financial statements, SIPC has received limited information regarding the financial condition of its broker-dealer members. SIPC can use this information, among other things, to assess whether the SIPC Fund is appropriately sized to the risks of a large broker-dealer failure. In addition, at least one court, the New York Court of Appeals, has held that in cases where SIPC is required to fund the liquidation of a broker-dealer, SIPC could not maintain a claim against the auditor of the broker-dealer based on an alleged failure to comply with auditing standards because SIPC did not receive the audited financial statements and therefore could not have relied upon them.

Fifth, as discussed in section III. of this release, the audit work performed by independent public accountants with respect to audits of carrying and clearing broker-dealers can provide useful information to Commission and DEA examiners in terms of planning the scope and focus of the examination of the broker-dealer. Providing Commission and DEA examiners with access to the independent public accountant that audited the broker-dealer and audit documentation related to the audit will allow the examiners to gain an understanding of the work the accountant did in auditing the broker-dealer and any areas of concern highlighted by the auditor. This will enable the examiners to conduct risk-based examinations of carrying and clearing broker-dealers and assist the examiners in determining areas of focus for their examinations. Furthermore, the amendments will make it clear to the independent public accountant that the broker-dealer has agreed that the accountant can provide this information and, consequently, eliminate uncertainty as to whether the broker-dealer consents to the disclosure of the information.

Sixth, as discussed in section IV. of this release, because broker-dealers were not required to provide comprehensive or consolidated information about their custody practices to the Commission or their DEA, the Commission and the broker-dealer's DEA had a fragmented and incomplete picture of whether a broker-dealer maintained custody of customer and non-customer assets, and if so, how such assets were maintained. This hindered the ability of the Commission and DEAs to efficiently plan, prioritize, and perform examinations.

B. Economic Baseline

The regulatory changes adopted today amend requirements that apply to broker-dealers registered with the Commission and independent public accountants that audit or attest to broker-dealer annual reports. The discussion below includes approximate numbers of broker-dealers and accountants that would be affected by today's amendments and a description of the economic baseline against which the costs and benefits, as well as the impact on efficiency, competition, and capital formation, of today's amendments and new form are measured.

1. Broker-Dealers

The broker-dealers registered with the Commission vary significantly in terms of their size, business activities, and the complexity of their operations. For example, carrying broker-dealers hold customer securities and funds.[737]

[732] *See, e.g., SEC* v. *Donald Anthony Walker Young, et al.,* Litigation Release No. 21006 (Apr. 20, 2009); *SEC* v. *Isaac I. Ovid, et al.,* Litigation Release No. 20998 (Apr. 14, 2009); *SEC* v. *The Nutmeg Group, LLC, et al.,* Litigation Release No. 20972 (Mar. 25, 2009); *SEC* v. *WG Trading Investors, L.P., et al.,* Litigation Release No. 20912 (Feb. 25, 2009); *SEC* v. *Stanford International Bank, et al.,* Litigation Release No. 20901 (Feb. 17, 2009); *SEC* v. *Bernard L. Madoff, et al.,* Litigation Release No. 20889 (Feb. 9, 2009). The Commission also has brought an enforcement action against an accountant that purported to audit financial statements and disclosures of one of these broker-dealers. *See SEC* v. *David G. Friehling, C.P.A., et al.,* Litigation Release No. 20959 (Mar. 18, 2009).

[733] *See PCAOB Inspection Report* at p. ii.

[734] *Id.*

[735] *See* discussion in section II.D.3. of this release.

[736] Section 107(a) of the Sarbanes-Oxley Act provides that the Commission ''shall have oversight and enforcement authority over the [PCAOB] as provided by the [Sarbanes-Oxley Act].'' Section 107(b) of the Sarbanes-Oxley act provides that ''[n]o rule of the [PCAOB] shall become effective without prior approval of the Commission'' other than certain initial or transitional standards. Section 107(c) of the Sarbanes-Oxley Act provides for Commission review of disciplinary action taken by the PCAOB. Section 107(d) of the Sarbanes-Oxley Act provides that the Commission may censure and impose other sanctions on the PCAOB in certain circumstances.

[737] Rule 15c3–1, the Commission's net capital rule, specifies that a broker-dealer shall be deemed to carry customer or broker-dealer accounts ''if, in connection with its activities as a broker or dealer, it receives checks, drafts, or other evidences of indebtedness made payable to itself or persons other than the requisite registered broker or dealer carrying the account of a customer, escrow agent, issuer, underwriter, sponsor, or other distributor of

Continued

Clearing broker-dealers clear transactions as members of security exchanges and the Depository Trust & Clearing Corporation and the Options Clearing Corporation.[738] Many clearing broker-dealers are carrying broker-dealers, but some clearing broker-dealers clear only their own transactions and do not hold customer securities and cash.

As stated in section I.B.1. above, a broker-dealer that claims an exemption from Rule 15c3–3 is generally referred to as ''non-carrying broker-dealer.'' Non-carrying broker-dealers include ''introducing brokers.'' [739] These non-carrying broker-dealers accept customer orders and introduce their customers to a carrying broker-dealer that will hold the customers' securities and cash along with the securities and cash of customers of other introducing broker-dealers and those of direct customers of the carrying broker-dealer. The carrying broker-dealer generally receives and executes the orders of the introducing broker-dealer's customers.[740] Carrying broker-dealers also prepare trade confirmations, settle trades, and organize book entries of the securities.[741] Introducing broker-dealers also may use carrying broker-dealers to clear the firm's proprietary trades and carry the firm's securities. Another group of non-carrying broker-dealers effects transactions in securities such as mutual funds on a subscription-way basis, where customers purchase the securities by providing the funds directly to the issuer. [742] Finally, some non-carrying broker-dealers act as finders by referring prospective purchasers of securities to issuers.[743]

The broker-dealer industry is the primary industry affected by the rule amendments and the new form. In some cases, the amendments impose different requirements on different types of broker-dealers. For example, carrying broker-dealers must file the compliance report and an independent public accountant's report covering the compliance report, while non-carrying broker-dealers must file the exemption report and an independent public accountant's report covering the exemption report. Only carrying and clearing broker-dealers must agree to allow Commission and DEA examiners to review the audit documentation of their independent public accountants and to allow accountants to discuss their findings with the examiners. All broker-dealers must file Form Custody, but many of the line items on the form apply only to carrying broker-dealers.

To establish a baseline for competition among broker-dealers, the Commission looks at the status of the broker-dealer industry detailed below. In terms of size, the following tables illustrate the variance among broker-dealers with respect to total capital. The information in the table is based on FOCUS Report data for calendar year 2011.

BROKER-DEALER CAPITAL AT CALENDAR YEAR END 2011[744]

[$ millions]

Capital	Number of firms	Aggregate total capital
Less than $500,000	2,506	$347
Greater than or equal to $500,000 and less than $5 million	1,320	2,212
Greater than or equal to $5 million and less than $50 million	608	10,520
Greater than or equal to $50 million and less than $100 million	80	5,672
Greater than or equal to $100 million and less than $500 million	125	26,655
Greater than or equal to $500 million and less than $1 billion	28	19,248
Greater than or equal to $1 billion and less than $5 billion	27	61,284
Greater than or equal to $5 billion and less than $10 billion	6	41,175
Greater than or equal to $10 billion	9	175,585
Total	4,709	342,698

According to FOCUS Report data, as of December 31, 2011, there were approximately 4,709 broker-dealers registered with the Commission.[745] Nine broker-dealers dominate the broker-dealer industry, holding over half of all capital held by broker-dealers. Of the 4,709 registered broker-dealers, 4,417 firms claimed exemptions from Rule 15c3–3 on their FOCUS Reports. Accordingly, the Commission estimates that there are approximately 292

securities'' or ''if it does not promptly forward or promptly deliver all of the securities of customers or of other brokers or dealers received by the firm in connection with its activities as a broker or dealer.'' 17 CFR 240.15c3–11(a)(2)(i). Further, Rule 15c3–3, the Commission's customer protection rule governing reserves and custody of securities, defines the term ''securities carried for the account of a customer'' to mean ''securities received by or on behalf of a broker or dealer for the account of any customer and securities carried long by a broker or dealer for the account of any customer,'' as well as securities sold to, or bought for, a customer by a broker-dealer. 17 CFR 240.15c3–3(a)(2).

[738] *See Definitions of Terms and Exemptions Relating to the ''Broker'' Exceptions for Banks,* Final Rule, Exchange Act Release No. 56501 (Sept. 24, 2007), 72 FR 56514, 56541 n.269 (Oct. 3, 2007).

[739] *Id.* at ¶ 1.15; *see also* Exchange Act Release No. 31511 (Nov. 24, 1992), 57 FR 56973 (Dec. 2, 1992) (describing role of introducing broker-dealers).

[740] Exchange Act Release No. 31511 (Nov. 24, 1992), 57 FR 56973 (Dec. 2, 1992).

[741] *See, e.g.,* FINRA Rule 4311 (Carrying Agreements). This FINRA rule governs the requirements applicable to FINRA members when entering into agreements for the carrying of any customer accounts in which securities transactions can be effected. Historically, the purpose of this rule has been to ensure that certain functions and responsibilities are clearly allocated to either the introducing or carrying firm, consistent with the requirements of the SRO's and Commission's financial responsibility and other rules and regulations, as applicable. *See also Notice of Filing of Amendment No. 1 and Order Granting Accelerated Approval of a Proposed Rule Change Adopting, as Modified by Amendment No. 1, Rules Governing Guarantees, Carrying Agreements, Security Counts and Supervision of General Ledger Accounts in the Consolidated FINRA Rulebook,* Exchange Act Release 34–63999 (Mar. 7, 2011), 76 FR 12380 (Mar. 7, 2011).

[742] *See Books and Records Requirement for Brokers and Dealers Under the Securities Exchange Act of 1934,* Exchange Act Release 34–44992 (Nov. 2, 2001) (''[T]he Commission recognizes that for some types of transactions, such as purchases of mutual funds or variable annuities, the customer may simply fill out an application or a subscription agreement that the broker-dealer then forwards directly to the issuer.'').

[743] *See* American Bar Association, *Report and Recommendations of the Task Force on Private Placement Broker-Dealers* 23–24 (2005); *see also* Exchange Act Release No. 31511 (Nov. 24, 1992), 57 FR 56973 (Dec. 2, 1992).

[744] The information in this chart is based on FOCUS Report data filed by broker-dealers in 2011.

[745] Not all broker-dealers registered with the Commission are SIPC members. According to SIPC, as of March 31, 2012, 217 broker-dealers claimed exemptions from SIPC membership. The Commission therefore estimates that 4,492 (4,709 − 217 = 4,492) broker-dealers are members of SIPC.

carrying broker-dealers (4,709 − 4,417 = 292). Further, based on FOCUS Report data, the Commission also estimates that there are approximately 513 broker-dealers that are clearing or carrying firms. The Commission staff has estimated that approximately 18% of broker-dealers registered with FINRA [746] also are registered as investment advisers with the Commission or with a state.[747]

2. Independent Public Accountants That Audit Broker-Dealer Reports

Independent public accountants that audit broker-dealer reports also will be impacted by the rule amendments. Based on the audit reports filed by broker-dealers in 2011, approximately 900 accounting firms audited broker-dealer reports that were filed with the Commission. However, six large accounting firms dominate the market performing audits for approximately 20% of all broker-dealers registered with the Commission, and those broker-dealers audited by the six large accounting firms had total capital that was more than 90% of the total capital of all broker-dealers registered with the Commission.[748] These statistics highlight the current baseline for competition under which the accountants are operating.

Prior to today's amendments, the AICPA established the auditing and attestation standards to be followed by the independent public accountants of broker-dealers (*i.e.,* GAAS). The AICPA's auditing standards are revised and updated from time to time. For example, the AICPA recently revised GAAS (including audit standards that apply to audits of broker-dealer financial statements), and the revised standards were generally effective for fiscal years that ended on or after December 31, 2012.[749] Consequently, the independent public accountants of broker-dealers have from time to time had to familiarize themselves with updates and revisions to GAAS.

3. SIPC Lawsuits Against Accountants

SIPC was established in 1971. In the period from 1971 to 2011, SIPC initiated 324 proceedings under SIPA to liquidate a failed broker-dealer.[750] This results in an average of approximately 8 SIPA proceedings per year, though 109 of the 324 proceedings were initiated in the period from 1971 to 1974, which was the immediate aftermath of the financial crisis of 1968–1970.[751] According to SIPC staff, SIPC has brought 9 lawsuits against accountants since 1971, which is one lawsuit for every 36 SIPA proceedings.[752] The SIPC staff reports that two of these lawsuits were brought after the 2001 New York decision discussed in section II.B.6.iii. of this release and three lawsuits were brought in liquidation proceedings that were active at or about the same time as the 2001 New York decision. The suits initiated around the time of the 2001 decision and thereafter were brought in jurisdictions other than New York.

4. Overview of Broker-Dealer Reporting, Auditing, and Notification Requirements Before Today's Amendments

i. Broker-Dealer Reporting

Before today's amendments, Rule 17a–5 generally required broker-dealers to prepare and file a financial report with the Commission and the broker-dealer's DEA, as well as a report of a PCAOB-registered independent public accountant covering the financial report. Brokers-dealers also were required to file concurrently with the audited financial report a material inadequacy report prepared by the independent public accountant.

With regard to the material inadequacy report, broker-dealers generally made representations to their independent public accountants about their compliance with certain financial responsibility rules in a representation letter.[753] However, broker-dealers did not file reports with the Commission or their DEA containing such representations. GAAS does not prescribe specific or standardized representations to be made by a broker-dealer to its accountant with regard to an attestation engagement performed under Rule 17a–5.[754] Therefore, broker-dealers' representations to their independent public accountant relating to compliance with certain financial responsibility rules varied depending on what was required by the terms of the individual engagements.

ii. Engagement of the Accountant

As noted above, prior to today's amendments, broker-dealers generally were required to file with the Commission: (1) A report of an independent public accountant based on an audit of the broker-dealer's financial statements and supporting schedules; and (2) a material inadequacy report prepared by the accountant, based on, among other things, a review of a broker-dealer's accounting system, internal accounting control, and procedures for safeguarding securities. The accountant was required to be registered with the PCAOB. However, Rule 17a–5 required that the audit be performed in accordance with GAAS, which are issued by the AICPA. Consequently, the standard setting body for broker-dealer audits has been the AICPA (rather than the PCAOB) notwithstanding the requirement that broker-dealers be audited by a PCAOB-registered independent public accountant.[755]

With regard to the independent public accountant's preparation of the material inadequacy report, Rule 17a–5 required that the scope of the accountant's review be sufficient to provide ''reasonable assurance'' that any material inadequacies[756] existing at the

[746] Per FINRA's Web site, there were 4,456 FINRA member firms at year end 2011. *See http://www.finra.org/Newsroom/Statistics/.*

[747] *See* Commission staff, *Study on Investment Advisers and Broker-Dealers, as required by Section 913 of the Dodd-Frank Wall Street Reform and Consumer Protection Act* (Jan. 2011).

[748] This data is based on audited reports filed by broker-dealers in 2011 and FOCUS Report data.

[749] *See* AICPA, *Improving the Clarity of Auditing Standards, available at http://www.aicpa.org/InterestAreas/FRC/AuditAttest/Pages/ImprovingClarityASBStandards.aspx.* The AICPA announced the clarification and convergence project in July 2008. *See http://www.aicpa.org/InterestAreas/FRC/AuditAttest/DownloadableDocuments/Clarity/Archive/ASB_Clarity_%20and_Convergence_(8.5x11).pdf.*

[750] *See* SIPC, *Annual Report 2011,* at 6.

[751] *Id. See also* Commission, *Study of Unsafe and Unsound Practices of Brokers and Dealers: Report and Recommendations of the Securities and Exchange Commission* (December 1971) (discussing the financial crisis of 1968–1970). Since its inception through 2001, SIPC initiated 299 proceedings under SIPA.

[752] *See* discussion above in section II.B.6. of this release.

[753] *See, e.g., AICPA Broker-Dealer Audit Guide* app. H (sample representation letter).

[754] According to GAAS, auditors ''should consider obtaining a representation letter'' in an examination or review engagement, and ''specific written representations will depend on the circumstances of the engagement and the nature of the subject matter and the criteria.'' *See* AICPA, *AT Section 101* at ¶ .60. Further, while the *AICPA Broker-Dealer Audit Guide* contains a sample representation letter, publications such as this guide ''are not auditing standards'' but are ''recommendations on the application of the [auditing standards] in specific circumstances, including engagements for entities in specialized industries.'' *See* AICPA, *AU Section 150,* at ¶ .05.

[755] *See* below discussion in section VII.C.1.i. of this release.

[756] Prior to today's amendments, paragraph (g)(3) of Rule 17a–5 describes a ''material inadequacy'' in a broker-dealer's accounting system, internal accounting controls, procedures for safeguarding securities, and practices and procedures to include ''any condition which has contributed substantially to or, if appropriate corrective action is not taken, could reasonably be expected to: (i) inhibit a broker or dealer from promptly completing securities transactions or promptly discharging his responsibilities to customers, other brokers or dealers or creditors; (ii) result in material financial loss; (iii) result in material misstatements in the broker's or dealer's financial statements; or (iv) result in violations of the Commission's recordkeeping or financial responsibility rules to an

Continued

date of examination would be disclosed. As discussed above in section II.D.3. of this release, the *AICPA Broker-Dealer Audit Guide* provided guidance regarding preparation of the material inadequacy report. Specifically, AICPA guidance stated that the material inadequacy report should address what the independent public accountant concluded in its ''study'' of the adequacy of the broker-dealer's practices and procedures in complying with the financial responsibility rules in relation to the definition of material inadequacy as stated in Rule 17a–5. The requirement to issue a ''study'' does not generally exist outside the context of broker-dealer audits, however, and, while auditing standards at one time referred to the performance of a study, current auditing standards no longer contain such references.

If the broker-dealer was exempt from Rule 15c3–3, Rule 17a–5 required the independent public accountant to ascertain that the conditions of the exemption were being complied with as of the examination date and that no facts came to the independent public accountant's attention to indicate that the exemption had not been complied with during the period since the last examination.

iii. Filing of Annual Reports With SIPC

Prior to today's amendments, broker-dealers that are members of SIPC were required to file only limited information with SIPC. This information is elicited on Form SIPC–6, the ''General Assessment Payment Form'' and Form SIPC–7, the ''Annual General Assessment Reconciliation.'' In addition, for any period during which the SIPC assessment was not a minimum assessment as provided for in section 4(d)(1)(c) of SIPA, paragraph (e)(4) of Rule 17a–5 generally required broker-dealers to submit to SIPC a supplemental report on the status of the membership of the broker-dealer in SIPC. The supplemental report, among other things, had to include a comparison of the amounts reflected in the annual financial report the broker-dealer filed with the Commission with amounts reported on Form SIPC–7. Form SIPC–6 is filed for the first half of the fiscal year and Form SIPC–7 is filed at the end of the fiscal year with a place to deduct the assessment due and paid as reflected on Form SIPC–6. These forms elicit information from a broker-dealer that is a SIPC member about the broker-dealer's sources of revenue attributable to its securities business.

Prior to today's amendments, broker-dealers did not file with SIPC the annual audited financial statements and accompanying schedules and reports they filed with the Commission and their DEA under Rule 17a–5. Therefore, for example, broker-dealers did not file their balance sheets, which contain information concerning their assets, liabilities, and net worth, or notes to their financial statements with SIPC. This information is necessary to understand the financial conditions of the broker-dealer and, therefore, in order for SIPC to determine whether the SIPC Fund is appropriately sized to the risks of the broker-dealer industry.

iv. Notification Requirements

Prior to today's amendments, the reporting provisions of Rule 17a–5 included references to the term ''material inadequacy.'' [757] The term also was used in the Rule 17a–5 and Rule 17a–11 notification provisions discussed below.

Rule 17a–5 required that if, during the course of the audit, the independent public accountant determined that any material inadequacies existed, the independent public accountant was required to inform the CFO of the broker-dealer, who was required to give notice to the Commission and the broker-dealer's DEA within 24 hours. The rule also provided that the broker-dealer must furnish the independent public accountant with the notice. If the independent public accountant failed to receive the notice within the 24-hour period, or if the accountant disagreed with the statements contained in the notice, the accountant was required to inform the Commission and the DEA within the next 24 hours and describe any material inadequacies found to exist or, if the broker-dealer filed a notice, detail the aspects of the broker-dealer's notice with which the accountant did not agree.

In addition, Rule 17a–11 required that when a broker-dealer discovers a material inadequacy, or is notified by its independent public accountant under Rule 17a–5 that a material inadequacy exists, the broker-dealer must notify the Commission and its DEA and must transmit a report stating what the broker-dealer has done or is doing to correct the situation.

v. Information Provided to Customers

Prior to today's amendments, Rule 17a–5 provided that, if the independent public accountant commented on any material inadequacies, the financial information a broker-dealer was required to send to customers annually must include a statement that a copy of the accountant's report and comments was available for customers' inspection. In addition, Rule 17a–5 provided a conditional exemption from the requirement that a broker-dealer send paper copies of financial information to customers, if the broker-dealer was not required during the prior year to give notice of a material inadequacy.

vi. Access to Accountants

Prior to today's amendments, carrying and clearing broker-dealers were not required to provide Commission and DEA examination staff access to their independent public accountants and accountant work papers. Such access would enable Commission and DEA examiners to obtain information, for example, regarding areas on which the accountants focused in order to plan and conduct risk-based examinations of carrying and clearing broker-dealers.

vii. Form Custody

Generally, prior to today's amendments, broker-dealers were not required to provide comprehensive or consolidated information about their custody practices to the Commission or their DEA. Some information relating to a broker-dealer's custody practices is included in a broker-dealer's exchange membership agreements and clearing agreements, and in the books and records of the broker-dealer. In addition, some information is included on Form ADV and, therefore, if the broker-dealer also is a registered investment adviser, the information is available to the Commission. Although Commission and DEA examiners could obtain the information provided on Form Custody through detailed examinations of the broker-dealer's books and records and by requesting information from other sources, the Commission and the broker-dealer's DEA did not have a profile of a broker-dealer's custodial activities that could serve as a starting point to perform more focused examinations.

C. Costs and Benefits of the Rule Amendments

This section discusses costs and benefits of the rule amendments and new forms for the affected parties against the economic baseline identified above, both in terms of each of the specific changes from the baseline, as well as in terms of the overall impact. In considering these costs, benefits, and impacts, this discussion addresses, among other things, comments received,

extent that could reasonably be expected to result in the conditions described in [(i) through (iii) above].'' 17 CFR 240.17a–5.

[757] *See supra* note 756, at 216.

modifications made to the proposed amendments and form, and reasonable alternatives, where applicable.

The costs incurred by a broker-dealer to comply with the rule amendments and new form generally will depend on its size and the complexity of its business activities. Because the size and complexity of broker-dealers vary significantly as indicated in the economic baseline, their costs could vary significantly. In some cases, the Commission is providing estimates of the average cost per broker-dealer across all broker-dealers, taking into consideration the variance in the size of broker-dealers and the complexity of their business activities.

1. Broker-Dealer Annual Reporting Amendments

i. Changing the Broker-Dealer Audit Standard Setter From the AICPA to the PCAOB and the Standards From GAAS to PCAOB Standards

Today's amendments require that audits of broker-dealer financial statements and schedules be conducted in accordance with the standards of the PCAOB, thereby replacing the AICPA as the standard setter. The amendments also require that broker-dealers file one of two new reports—either a compliance report or an exemption report—and a report of an independent public accountant based on an examination of the compliance report or a review of the exemption report. This section discusses the costs and benefits of the change from the AICPA to the PCAOB as the standard setter for broker-dealer audits and the corresponding change from GAAS to PCAOB standards with respect to the audit of the financial statements and schedules. The costs and benefits of requiring the use of PCAOB standards with respect to examinations and reviews of the new compliance report and exemption report are discussed separately below in section VII.C.1.iii. of this economic analysis regarding the engagement of the accountant.

The change from the AICPA to the PCAOB as standard setter for broker-dealer audits and the corresponding change from GAAS to PCAOB auditing standards for audits of broker-dealer financial reports and supporting schedules provides several benefits. By requiring that these audits be conducted in accordance with PCAOB standards, the amendments align Rule 17a–5 with statutory provisions. As discussed above, the Sarbanes-Oxley Act amended the Exchange Act to require that certain broker-dealer financial reports filed with the Commission be audited by an accounting firm registered with the PCAOB. The Dodd-Frank Act, enacted in July 2010, amended the Sarbanes-Oxley Act to provide the PCAOB with explicit authority to, among other things, establish (subject to Commission approval) auditing and related attestation, quality control, ethics, and independence standards for registered public accounting firms with respect to their preparation of audit reports to be included in broker-dealer filings with the Commission, and the authority to conduct an inspection program of registered public accounting firms that audit broker-dealers.[758] However, Rule 17a–5 provided that broker-dealer audits be performed in accordance with GAAS; namely, auditing standards issued by the AICPA.

After today's amendments, the PCAOB will be the standard setter for two types of entities: issuers that are public companies and broker-dealers. Given this mandate, the PCAOB can focus on establishing standards tailored to these types of entities. For example, with respect to the audit of the financial report, the PCAOB has proposed a standard for auditing supplemental information accompanying audited financial statements filed with the Commission, including supporting schedules broker-dealers must file with the Commission and the broker-dealer's DEA, such as schedules regarding the computation of net capital and the customer reserve requirement and information related to the broker-dealer's possession or control of customer securities.[759] In addition, the PCAOB included the Commission's proposal to amend Rule 17a–5 as one of the factors that led the PCAOB to ''reexamine its requirements regarding supplemental information.'' [760] Consequently, the PCAOB has proposed a standard that would be used for the supplemental reports to the broker-dealer's financial report.[761] The PCAOB stated that ''[t]he proposed standard enhances existing PCAOB standards by: (1) [R]equiring the auditor to perform certain audit procedures to test and evaluate the supplemental information, and (2) [e]stablishing requirements that promote enhanced coordination between the work performed on the supplemental information with work performed on the financial statement audit and other engagements, such as a compliance attestation engagement for brokers and dealers.'' [762]

The change to the PCAOB as the audit standard setter for broker-dealers should facilitate the development of the PCAOB's permanent inspection program as contemplated by the Dodd-Frank Act, because audits of broker-dealers will be inspected by the PCAOB in accordance with its own standards, and not those of another standard setter, and because of feedback that can be obtained through the inspections process regarding gaps and areas that may need improvement. Further, the Commission has direct oversight authority over the PCAOB, including the ability to approve or disapprove the PCAOB's rules.[763] This may help to increase investor confidence in the independent public accountants that audit broker-dealers. In addition, as previously stated, the Commission has greater confidence in the quality of audits conducted by an independent public accountant registered with, and subject to regular inspection by, the PCAOB.[764]

As an alternative approach, one commenter argued that GAAS should apply for audits of non-carrying broker-dealers.[765] Another commenter stated that PCAOB standards should apply only for broker-dealers ''permanently subject to PCAOB inspection,'' and that the Commission should not require that audits of broker-dealers be performed in accordance with PCAOB standards for non-issuer broker-dealers until the PCAOB determines which non-issuer

[758] *See* Public Law 111–203 § 982.

[759] *See Proposed Auditing Standard, Auditing Supplemental Information Accompanying Audited Financial Statements and Related Amendments to PCAOB Standards,* PCAOB Release No. 2011–05, PCAOB Rulemaking Docket Matter No. 036, 3 (July 12, 2011) (''*PCAOB Proposed Auditing Standard for Supplemental Information*''). As discussed above, the PCAOB has also proposed standards for attestation engagements related to broker-dealer compliance or exemption reports. *See PCAOB Proposing Release.*

[760] *See PCAOB Proposed Auditing Standard for Supplemental Information* at 2–3.

[761] *Id.* at 2 (''The proposed standard would benefit investors and other users of financial statements by updating and enhancing the required audit procedures when the auditor of the financial statements is engaged to audit and report on whether supplemental information accompanying the financial statements is fairly stated, in all material respects, in relation to the financial statements as a whole.'').

[762] *Id.* at 4–5.

[763] Section 107 of the Sarbanes-Oxley Act states that no rule of the PCAOB ''shall become effective without prior approval of the Commission in accordance with this section, other than as provided in section 103(a)(3)(B) with respect to initial or transitional standards.'' *See* Public Law 107–204 § 107. This section also states that the Commission ''shall approve a proposed rule, if it finds that the rule is consistent with the requirements of this Act and the securities laws, or is necessary or appropriate in the public interest or for the protection of investors'', and generally provides that the proposed rule procedures follow the same rule filing procedure for SROs under section 19(b) of the Exchange Act. *Id.*

[764] *See Custody of Funds or Securities of Clients by Investment Advisers,* 75 FR at 1456.

[765] *See Citrin Letter.*

broker-dealers will be subject to its permanent inspection program.[766]

The Commission has determined that all audits of broker-dealer financial statements and supporting schedules should be performed in accordance with PCAOB standards for several reasons. First, allowing the use of more than one auditing standard would introduce inconsistencies in audits of broker-dealer financial reports. Second, allowing the use of non-PCAOB auditing standards for certain broker-dealer audits would reduce the benefits discussed above of requiring that all audits of broker-dealer financial reports be conducted in accordance with PCAOB standards. Third, as discussed in more detail below, the switch from GAAS to PCAOB standards should not result in significant incremental costs.

Independent public accountants that audit issuers are already familiar with PCAOB audit standards, which should ease any transition to PCAOB standards for their audits of broker-dealers. Although the retention of two standards could reduce the incremental costs of switching from GAAS to PCAOB standards for some independent public accountants that do not audit issuers, it would not reduce the incremental costs for all such independent public accountants. For example, a requirement that the financial statements of one class of broker-dealer be audited in accordance with GAAS and the financial statements of another class of broker-dealer be audited in accordance with PCAOB standards would avoid the incremental costs only for independent public accountants that limit their audit engagements to the former class of broker-dealer. These independent public accountants would not need to stay current with PCAOB standards and adopt their procedures to those standards. However, independent public accountants that were engaged to audit broker-dealers in both classes would need to stay current with both sets of standards and adopt their procedures to both sets of standards, which could increase their incremental costs. Further, the PCAOB may determine, subject to Commission approval, to adopt specific auditing standards for certain types of broker-dealers (for example, carrying and non-carrying broker-dealers). This could decrease costs for certain broker-dealer audits.

The Commission received several comments on the costs of its proposal to replace GAAS with PCAOB standards with respect to audits of broker-dealer financial reports. Several commenters stated that the Commission did not address the costs associated with the change from GAAS to PCAOB standards.[767] One commenter also stated that the transition to PCAOB standards from GAAS may require substantial revisions to broker-dealer audit programs.[768]

Current PCAOB standards for audits of financial information generally incorporate concepts and requirements contained within GAAS, thereby minimizing the potential costs of this change to independent public accountants that audit broker-dealers. For example, in April 2003, the PCAOB adopted interim auditing standards consisting of GAAS then in existence, to the extent not superseded or amended by the PCAOB.[769] The PCAOB's Web site lists 50 such standards, including, for example, a standard relating to auditing accounting estimates (AU 342) and a standard relating to auditing fair value measurements and disclosures (AU 328).[770] The PCAOB has adopted, and the Commission has approved, 16 PCAOB auditing standards, beginning with a standard relating to references in audit reports to PCAOB standards.[771]

While some independent public accountants of broker-dealers may incur one-time implementation costs to update their broker-dealer audit programs to reflect PCAOB standards, the costs should not be significant. As stated above, most of the PCAOB's current standards for audits of financial reports incorporate concepts and requirements contained within GAAS. Thus, the independent public accountants of broker-dealers already should be familiar with many of the PCAOB's standards. In addition, as discussed in the economic baseline, the AICPA from time-to-time updates and revises its standards. On such an occurrence, an independent public accountant would need to take steps to become familiar with the updates and revisions and change its broker-dealer audit program accordingly. This need for continuing education presumably already is priced into the audit fees independent public accountants charge broker-dealers.

In contrast to the views expressed by some commenters, the Commission does not expect that a requirement that an audit of financial statements and supporting schedules be conducted in accordance with standards of the PCAOB instead of with GAAS will result in substantial changes for broker-dealer audit programs and therefore the Commission does not anticipate that this change will result in significant costs to broker-dealers in the form of increased audit fees.[772]

ii. Requirement To File New Reports

Under the amendments, a broker-dealer will need to file one of two new reports: a compliance report or an exemption report.[773] A carrying broker-dealer (*i.e.,* one that does not claim an exemption from Rule 15c3–3) must file the compliance report, and a broker-dealer that claimed an exemption from Rule 15c3–3 throughout the most recent fiscal year must file the exemption report. In the reports, a broker-dealer must make certain statements and provide certain information relating to the financial responsibility rules. In addition to preparing and filing the compliance report, a carrying broker-dealer must engage the PCAOB-registered independent public accountant to prepare a report based on an examination of certain statements in the broker-dealer's compliance report.[774] A broker-dealer that claimed an exemption from Rule 15c3–3 throughout the most recently ended fiscal year must engage the PCAOB-registered independent public accountant to prepare a report based on a review of certain statements in the broker-dealer's exemption report. In each case, the examination or review must be conducted in accordance with PCAOB standards.

a. Compliance Report

Under the amendments, a carrying broker-dealer must prepare and file with the Commission a new compliance report each year, along with a report prepared by a PCAOB-registered independent public accountant based on an examination of certain statements made in the compliance report in accordance with PCAOB standards.[775] The compliance report must contain statements as to whether: (1) The broker-dealer has established and

[766] *See AICPA Letter.*

[767] *See, e.g., McGladrey Letter; SIFMA Letter.*

[768] *See ABA Letter.*

[769] *See* PCAOB Auditing Standards (AS) and Interim Auditing Standards (AU) (2013), *available at www.pcaobus.org/standards/auditing.*

[770] *Id.*

[771] *See* PCAOB Auditing Standard No. 1 (AS No. 1). At least one of these audit standards would not apply to audits of broker-dealer financial reports. *See* PCAOB Auditing Standard No. 5, ''An Audit of Internal Control Over Financial Reporting that is Integrated with an Audit of Financial Statements.''

[772] As discussed in section V. of this release, the Commission has delayed the compliance date for this requirement to provide sufficient time for broker-dealers and their accountants to prepare to comply with the new requirement.

[773] *See* discussion above in sections II.B.1., II.B.3., and II.B.4. of this release.

[774] *See* paragraphs (f)(1) and (g)(2)(i) of Rule 17a–5.

[775] *See* discussion above in sections II.B.1., II.B.3., and II.D.3. of this release.

maintained Internal Control Over Compliance; (2) the Internal Control Over Compliance of the broker-dealer was effective during the most recent fiscal year; (3) the Internal Control Over Compliance of the broker-dealer was effective as of the end of the most recent fiscal year; (4) the broker-dealer was in compliance with Rule 15c3–1 and paragraph (e) of Rule 15c3–3 as of the end of the most recent fiscal year; and (5) the information the broker-dealer used to state whether it was in compliance with Rule 15c3–1 and paragraph (e) of Rule 15c3–3 was derived from the books and records of the broker-dealer. In addition, if applicable, the compliance report must contain a description of: (1) Each identified material weakness in the Internal Control Over Compliance during the most recent fiscal year, including those that were identified as of the end of the fiscal year; and (2) any instance of non-compliance with Rule 15c3–1 or paragraph (e) of Rule 15c3–3 as of the end of the most recent fiscal year.

The compliance report requirements provide a number of benefits. For example, specifying and standardizing the statements required in the compliance report should promote consistent compliance with Rule 17a–5 and should ensure that the Commission receives information relating to aspects of a carrying broker-dealer's compliance with the financial responsibility rules that are of particular concern. Although, as discussed above in section II.D.3. of this release, current auditing standards require that independent public accountants obtain written representations from management as part of the audits of financial statements and attestation engagements, GAAS only provide examples of management representations and do not mandate that specific management representations be made. By clearly specifying and standardizing the statements, the compliance report should increase consistency with respect to the matters examined by the independent public accountants as part of the examination of the compliance report.

The specification and standardization of the statements also should facilitate Commission and DEA oversight of broker-dealer compliance with the financial responsibility rules to the benefit of broker-dealer customers, by helping the Commission and DEAs to more quickly identify broker-dealers with potential problems. Moreover, as adopted, the final rule requires a broker-dealer's compliance report to include information regarding whether the broker-dealer's internal control was effective as of the end of the fiscal year, in addition to information regarding whether there were material weaknesses in the Internal Control Over Compliance during the fiscal year. This will provide the Commission and the DEA with information on whether the broker-dealer has taken action by the end of the fiscal year to cure any material weaknesses in the Internal Control Over Compliance that existed during the fiscal year.

Requiring the compliance report to be filed with the Commission and the broker-dealer's DEA also should increase broker-dealers' focus on ensuring the accuracy of the statements being made and enhance compliance with the financial responsibility rules given the penalties for false filings. For example, filers are subject to penalties for willfully making false statements in any application, report, or document filed with the Commission.[776]

One commenter stated that incremental benefits of having the assertion in the compliance report with respect to internal controls pertain to the whole year rather than the fiscal year end does not justify the costs.[777] In response, the Commission notes that key requirements in the financial responsibility rules must be complied with on an on-going basis throughout the year. Therefore, it is critical to have internal controls over compliance with these rules that are effective throughout the year rather than just at fiscal year end. Therefore, the Commission believes that there are benefits to having a carrying broker-dealer state that its Internal Control Over Compliance was effective throughout the year.

Broker-dealers will incur costs associated with preparing the compliance report. The level of effort required by carrying broker-dealers to prepare a compliance report will depend on the nature of the activities of the broker-dealer. For example, the controls necessary for a carrying broker-dealer that engages in limited custodial activities generally should be less complex than the controls necessary for a carrying broker-dealer that engages in more extensive custodial activities. Therefore, a carrying broker-dealer with limited custodial activities should have to expend less effort to make its statements in the compliance report relating to the effectiveness of its Internal Control Over Compliance. To the extent that the amount of custodial activity is related to the size of a broker-dealer, the cost of preparing the compliance report should be lower for smaller carrying broker-dealers.

The Commission estimated in the proposing release that, on average, carrying broker-dealers would spend approximately 60 hours each year to prepare the proposed compliance report.[778] One commenter stated that the proposal did not ''address the additional costs broker-dealers would incur in preparing Compliance Reports.'' [779] However, the commenter did not comment on the estimated hour burden or provide specific data and analysis on the additional costs that broker-dealers would incur in preparing compliance reports. Another commenter stated that the proposed estimate of 60 hours ''is not an accurate estimate of the time burden to complete the Compliance Report'' and that the burdens in the proposing release are understated.[780] This commenter, however, did not provide a quantified alternative estimate of the costs or specific data to support its statement.

The Commission is retaining the 60-hour estimate for the reasons discussed below. The final rules contain two changes from the proposal that could result in lower costs than if the rules had been adopted as proposed: (1) Elimination of the concepts of ''material non-compliance'' and ''compliance in all material respects'' with Rule 15c3–1 and 15c3–3 for the purposes of reporting in the compliance report; and (2) a narrowing of these statements and description requirements from compliance with all of the financial responsibility rules to compliance with Rule 15c3–1 and paragraph (e) of Rule 15c3–3.

As previously discussed, many commenters raised concerns about how firms would determine whether an instance of non-compliance constitutes material non-compliance.[781] Commenters urged the Commission to provide guidance with additional specific examples or quantitative and qualitative factors to be considered when determining whether non-compliance was material,[782] or proposing alternate definitions or examples of non-compliance that should not be regarded as material.[783] Under the rules as adopted, broker-dealers will not be required to conduct

[776] *See, e.g.,* 15 U.S.C. 78ff(a).

[777] *See E&Y Letter.*

[778] *See Broker-Dealer Reports,* 76 FR 37596.

[779] *See SIFMA Letter.*

[780] *See Van Kampen/Invesco Letter.*

[781] *See ABA Letter; CAI Letter; CAQ Letter; Deloitte Letter; E&Y Letter; Grant Thornton Letter; KPMG Letter; McGladrey Letter; PWC Letter; SIFMA Letter; Van Kampen/Invesco Letter.*

[782] *See ABA Letter; CAQ Letter; E&Y Letter; KPMG Letter; McGladrey Letter; PWC Letter.*

[783] *See SIFMA Letter.*

a separate evaluation of materiality when determining instances of non-compliance that must be reported. This should reduce the likelihood that inconsistent approaches be taken both among broker-dealers and between broker-dealers and their independent public accountants.

The ''material non-compliance'' and ''compliance in all material respects'' concepts were designed to limit the types of instances of non-compliance that would need to be identified in the report. To retain a limiting principle, the final rule focuses on provisions that trigger notification requirements when they are not complied with, namely, Rule 15c3–1 and the customer reserve requirement in paragraph (e) of Rule 15c3–3.[784] Any instances of non-compliance with these requirements as of the fiscal year end must be described in the compliance report. As stated in the proposing release, failing to maintain the required minimum amount of net capital under Rule 15c3–1 or failing to maintain the minimum deposit requirement in a special reserve bank account under Rule 15c3–3 would have been instances of material non-compliance under the proposed rule.[785] Accordingly, under the proposal, a broker-dealer would have been required to describe all instances of non-compliance with Rule 15c3–1 and paragraph (e) of Rule 15c3–3. Under the proposal, a broker-dealer also would have been required to describe instances of material non-compliance with Rule 17a–13 and the Account Statement Rules. The final rule is narrower in that a broker-dealer only is required to describe instances of non-compliance with Rule 15c3–1 and paragraph (e) of Rule 15c3–3. While the final rules increase costs relative to the baseline, they should result in modestly lower costs to broker-dealers relative to the proposal.

The final rule also retains the proposed requirement that the carrying broker-dealer provide a description of each identified material weakness in the internal control of the broker-dealer over compliance with the financial responsibility rules, but, in conformity with other modifications to the proposal, the final rule specifies that the material weaknesses include those identified during the most recent fiscal year as well as those that were identified as of the end of the fiscal year.[786] The Commission believes that the modifications to the final rule discussed above may modestly reduce the hour burden of the final rule as compared to the hour burden that would have resulted from the proposed rule; namely, because a broker-dealer will not need to evaluate whether instances of non-compliance with the financial responsibility rules are material and will only need to report instances of non-compliance with Rule 15c3–1 and paragraph (e) of Rule 15c3–3. While these modifications will result in additional costs to broker-dealers over the baseline, they are not expected to increase costs over those estimated for the proposed rule. This is because the proposed statement as to whether the broker-dealer's Internal Control Over Compliance was effective during the most recent fiscal year, and the related statement about material weakness, would also cover the fiscal year end. As noted above, the modification to require two statements (one covering the fiscal year and one covering the fiscal year end) was prompted by commenter suggestions that broker-dealers be permitted to report the remediation of a material weakness, or whether a material weakness still exists, at the end of the fiscal year. These changes will provide information to the Commission and DEAs as to whether material weaknesses during the year have been remediated as of the fiscal year end. They also afford the broker-dealer the opportunity to state in the report that a material weakness has been remediated, if applicable.

The changes discussed above, in some cases, may result in a modest reduction in burden relative to the proposal. However, while some commenters suggested that the proposing release underestimated the burden, the Commission is not changing its estimate of the time required for a broker-dealer to prepare the compliance report. The Commission notes that, while commenters questioned the estimate, they did not provide data that would enable the Commission to revise its estimate.

The Commission, however, is updating its estimates of the number of broker-dealers that would be required to file the compliance report, which affects the cost estimates. The Commission now estimates that there are approximately 292 carrying broker-dealers. Therefore, the Commission estimates that the time required for all 292 carrying broker-dealers to prepare the report is approximately 17,520 hours per year.[787] Further, the Commission estimates that the total cost[788] associated with this requirement is approximately $5.6 million per year.[789]

b. Exemption Report

Broker-dealers that claim an exemption from Rule 15c3–3 are required to file an exemption report and a report of the independent public accountant based on a review of the exemption report. The exemption report must contain the following statements made to the best knowledge and belief of the broker-dealer: (1) A statement that identifies the provisions in paragraph (k) of Rule 15c3–3 under which the broker-dealer claimed an exemption from Rule 15c3–3; (2) a statement the broker-dealer met the identified exemption provisions in paragraph (k) of Rule 15c3–3 throughout the most recent fiscal year without exception or that it met the identified exemption provisions in paragraph (k) of Rule 15c3–3 throughout the most recent fiscal year except as described in the exemption report; and (3) if applicable, a statement that identifies each exception during the most recent fiscal year in meeting the identified provisions in paragraph (k) of Rule 15c3–3 and that briefly describes the

[784] *See* 17 CFR 240.15c3–1(a)(6)(iv)(B), (a)(6)(v), (a)(7)(ii), (a)(7)(iii), (c)(2)(x)(B)(*1*), (c)(2)(x)(F)(*3*); 17 CFR 240.17a –11(b)–(c); 17 CFR 240.15c3–3(i).

[785] *See Broker-Dealer Reports,* 76 FR at 37577.

[786] *See* 17 CFR 240.17a–5(d)(3)(i)(B).

[787] *See* discussion above in section VI.D.1.ii. of this release. 60 hours × 292 carrying broker-dealers = 17,520 hours per year.

[788] For purposes of this economic analysis, salary data is from the Securities Industry and Financial Markets Association (''SIFMA'') Report on Management and Professional Earnings in the Securities Industry 2011 (''SIFMA Report on Management and Professional Earnings in the Securities Industry''), which provides base salary and bonus information for middle-management and professional positions within the securities industry. The salary costs derived from the report and referenced in this cost benefit section are modified to account for an 1800-hour work year and multiplied by 5.35 to account for bonuses, firm size, employee benefits, and overhead.

[789] *See* discussion above in section VI.D.1.ii. of this release. Based on staff experience, the Commission believes that a carrying broker-dealer likely would have a Compliance Manager gather information necessary to validate the statements to be provided and that it would take the Compliance Manager approximately 45 hours to perform this task. In addition, the Commission believes that a carrying broker-dealer likely would have a Chief Compliance Officer review the information and make the attestation and that it would take the Chief Compliance Officer approximately 15 hours per year to perform this task. According to the SIFMA Report on Management and Professional Earnings in the Securities Industry, as modified by Commission staff to account for an 1,800-hour work-year and multiplied by 5.35 to account for bonuses, firm size, employee benefits and overhead, the hourly cost of a Compliance Manager is approximately $279/hour, and the hourly cost of a Chief Compliance Officer is approximately $433/hour. 292 carrying broker-dealers × 45 hours × $279 = $3,666,060. 292 carrying broker-dealers × 15 hours × $433 = $1,896,540. $3,666,060 + $1,896,540 = $5,562,600 per year.

nature of each exception and the approximate date(s) on which the exception existed.

The preparation of exemption reports by broker-dealers that claim an exemption from Rule 15c3–3 throughout the most recent fiscal year, as well as reviews of certain statements in the exemption reports by independent public accountants, should strengthen and facilitate consistent compliance with the Commission's financial responsibility rules, for many of the same reasons identified above with respect to the compliance report. Among other things, these reports should enhance compliance with the exemption provisions in Rule 15c3–3, thereby providing better protection of customer assets. This increased focus is enhanced further by requiring the direct filing of the exemption report with the Commission and the broker-dealer's DEA because of the potential penalties for false statements. In addition, the Commission and the broker-dealer's DEA will benefit from the information provided in the exemption report in conducting their supervisory oversight of the broker-dealer.

The Commission considered an alternative suggested by one commenter to replace the exemption report with a box to check on the FOCUS Report.[790] After careful consideration of this alternative, the Commission determined that it is not an appropriate alternative to the exemption report. As discussed above in section II.B.4.iii. of this release, a broker-dealer claiming an exemption from Rule 15c3–3 already is required to indicate the basis for the exemption on its FOCUS Report.[791] Second, the exemption report requires the broker-dealer to make certain statements that the independent public accountant must review. Thus, the exemption report will provide a standardized statement across all broker-dealers claiming an exemption from Rule 15c3–3 for the independent public accountant to review. Third, the exemption report will provide the Commission and the broker-dealer's DEA with more information than currently is reported by non-carrying broker-dealer's in the FOCUS Report. Specifically, it requires the broker-dealer to, among other things, state either that it met the identified exemption provisions in paragraph (k) throughout the most recent fiscal year without exception or that it met the identified exemption provisions throughout the most recent fiscal year except as described in the report. This will provide the Commission and the broker-dealer's DEA with information as to whether a broker-dealer is meeting the exemption provisions of paragraph (k) of Rule 15c3–3 (not simply that the broker-dealer is claiming the exemption as is reported in the FOCUS Report). The Commission expects that non-carrying broker-dealers generally track exceptions as part of monitoring compliance with the exemption provisions in paragraph (k) of Rule 15c3–3. Fourth, requiring that the exemption report be filed with the Commission should increase broker-dealers' focus on the statements being made, facilitating consistent compliance with the exemption provisions in Rule 15c3–3, and therefore, providing better protection of customer assets. Further, employing a ''check the box'' alternative would not substantially reduce compliance costs because the broker-dealer would need to take steps to ascertain that it has a valid basis for claiming the exemption, whether or not these steps result in an exemption report or ''check the box.''

The Commission estimated that it would take a non-carrying broker-dealer approximately five hours to prepare and file the proposed exemption report.[792] The Commission did not receive comments specifically addressing this estimate. However, because the rule was modified from the proposal to also require the identification of exceptions to the exemption provisions, the Commission is increasing the estimate to seven hours.[793] The Commission now estimates that there are approximately 4,417 non-carrying broker-dealers that must file exemption reports. Therefore, the Commission estimates that the annual reporting burden for all non-carrying broker-dealers to prepare and file the exemption report is approximately 30,919 hours per year.[794] The Commission estimates that the total industry-wide cost to prepare the exemption report is approximately $9.3 million per year.[795]

iii. Engagement of the Accountant

As discussed above, the amendments to Rule 17a–5 eliminate the requirement that the broker-dealer's independent public accountant prepare, and the broker-dealer file with the Commission and its DEA concurrently with its annual audited financial statements, a material inadequacy report, based on, among other things, a review of a broker-dealer's accounting system, internal accounting control, and procedures for safeguarding securities. The amendments replace this requirement with a requirement, among other things, that the broker-dealer file with its annual reports a report prepared by an accountant covering either the broker-dealer's compliance report or exemption report, as applicable. The accountant engaged by the broker-dealer must, as part of the engagement, undertake to prepare its reports based on an examination of certain statements in the compliance report or a review of certain statements in the exemption report, as applicable, in accordance with PCAOB standards.

With regard to the independent public accountant's preparation of the material inadequacy report, Rule 17a–5 required that the scope of the accountant's review be sufficient to provide ''reasonable assurance'' that any material inadequacies existing at the date of examination would be disclosed. If the broker-dealer was exempt from Rule 15c3–3, Rule 17a–5 provided that the accountant must ascertain that the conditions of the exemption were being complied with as of the examination date and that no facts came to the accountant's attention to indicate that the conditions of the exemption had not been complied with since the last examination. As discussed above, AICPA guidance provided that the material inadequacy report should address what the independent public accountant concluded in its ''study'' of the adequacy of the broker-dealer's practices and procedures in complying with the financial responsibility rules in

[790] *See Angel Letter.*

[791] *See* Item 24 of Part IIa of the FOCUS Report.

[792] *See Broker-Dealer Reports,* 76 FR at 37596.

[793] *See* discussion above in section VI.D.1.iii. of this release.

[794] *See* discussion above in section VI.D.1.iii. of this release. 7 hours × 4,417 non-carrying broker-dealers = 30,919 hours per year. *See* the discussion below regarding the external costs associated with obtaining the accountant's report on the exemption report.

[795] *See* discussion above in section VI.D.1.iii. of this release. Based on staff experience, a non-carrying broker-dealer likely would have a Compliance Manager gather information necessary to validate the information to be provided in the exemption report, and it would take the Compliance Manager approximately six hours to perform this task. In addition, a non-carrying broker-dealer likely would have a Chief Compliance Officer review the information and make the attestation, and it would take the Chief Compliance Officer approximately one hour to perform this task. According to the SIFMA Report on Management and Professional Earnings in the Securities Industry, as modified by Commission staff to account for an 1,800-hour work-year and multiplied by 5.35 to account for bonuses, firm size, employee benefits and overhead, the hourly cost of a Compliance Manager is approximately $279/hour, and the hourly cost of a Chief Compliance Officer is approximately $433/hour. 4,417 non-carrying broker-dealers × 6 hours × $279 = $7,394,058 per year. 4,417 non-carrying broker-dealers × 1 hour × $433 = $1,912,561 per year. $7,394,058 + $1,912,561 = $9,306,619 per year.

relation to the definition of material inadequacy as stated in Rule 17a–5.[796]

However, in the PCAOB's first report on the progress of its interim inspection program of broker-dealer audits, the PCAOB stated that as to 21 of the 23 audits inspected, the accountant ''failed to perform sufficient audit procedures to obtain reasonable assurance that any material inadequacies found to exist since the date of the last examination . . . would have been disclosed in the accountant's supplement report.'' [797] Further, for all of the 14 audits of broker-dealers that claimed an exemption from Rule 15c3–3, the PCAOB stated that the accountant ''did not perform sufficient procedures to ascertain that the broker or dealer complied with the conditions of the exemption.'' [798] The deficiencies noted in the PCAOB's report on the progress of the interim inspection program provide further support for the amendments that the Commission is adopting today to establish the foundation for the PCAOB's development of standards that are tailored to Rule 17a–5, and to strengthen and facilitate consistent compliance with broker-dealer audit and reporting requirements.

Generally, the engagement of accountant amendments should result in higher levels of compliance with the Commission's financial responsibility rules by increasing the focus of carrying broker-dealers and their independent public accountants on specific statements made in the compliance report relating to the broker-dealer's compliance, and internal control over compliance, with the financial responsibility rules and increasing the focus of non-carrying broker-dealers and their independent public accountants on whether the broker-dealer meets the exemption provisions in paragraph (k) of Rule 15c3–3. These amendments also clarify the scope and the standards that apply to broker-dealer audits and conform language in the rule with terminology in existing audit literature, which should reduce inconsistencies in broker-dealer compliance with Rule 17a–5. The replacement of the material inadequacy report with the report based on an examination of the compliance report or review of the exemption report facilitates the Commission's objective to provide clear and consistent terminology focused separately on compliance with the financial responsibility rules and internal control over compliance with the financial responsibility rules.

With regard to the examination of the compliance report, the amendments are intended to encourage greater focus by the independent public accountant on Internal Control Over Compliance, including, in particular, broker-dealer custody practices. By specifying the statements that must be made by a broker-dealer to the Commission, and hence, examined by the auditor, the compliance report should provide clarity and facilitate consistent compliance with Rule 17a–5 by independent public accountants. Additionally, the focus of independent public accountants on internal control over the custody practices of broker-dealers should better identify broker-dealers that have weak internal controls for safeguarding investor securities and cash. Similarly, with regard to the review of the exemption report, the amendments encourage greater focus by the accountant on whether the broker-dealer has appropriately claimed an exemption from Rule 15c3–3 by, among other things, reviewing whether the broker-dealer's statements in the exemption report as to meeting the exemption provisions without or with exceptions, and, if applicable, identifying exceptions to meeting those provisions, were fairly stated.[799] As stated above, the terminology in Rule 17a–5 with regard to the material inadequacy report was outdated and inconsistent with current audit practices.

The PCAOB stated that its proposed attestation standards for examining compliance reports and reviewing exemption reports were ''tailored'' to the proposed amendments to Rule 17a–5.[800] These standards, if adopted, are expected to establish a single and broker-dealer-specific approach to examining compliance reports and reviewing exemption reports and are expected to enable the accountant to scale the engagement based on the broker-dealer's size and complexity.

Based on its estimates of the costs associated with the cost of an internal control report under Rule 206(4)–2, the Commission estimated that the external cost to a carrying broker-dealer of obtaining the independent public accountant's report based on an examination of the proposed compliance report would be an average incremental cost of approximately $150,000 per carrying broker-dealer per year.[801] Based on staff experience, including communications with broker-dealers, broker-dealer independent public accountants, and independent public accountant industry groups, the Commission estimated that the external cost to a non-carrying broker-dealer of obtaining the independent public accountant's report based on a review of the proposed exemption report would cost an average of approximately $3,000 per non-carrying broker-dealer per year.[802] Before today's amendments, independent public accountants of broker-dealers were required to prepare a material inadequacy report. As that report is no longer required, the costs associated with engaging the independent public accountant to prepare a material inadequacy report have been eliminated and replaced by the costs associated with engaging the independent public accountant to prepare a report covering the compliance report or the exemption report. Therefore, the incremental cost of today's amendments related to the engagement of the independent public accountant is the amount that the cost exceeds the cost of engaging the independent public accountant to prepare the material inadequacy report. However, the Commission has not previously estimated the average cost of preparing the material inadequacy report. Consequently, the Commission is retaining the cost estimates set forth in the proposing release, while recognizing that costs could be lower as a result of cost savings attributable to the elimination of the material inadequacy report requirements.

The Commission received various comments regarding the engagement of accountant provisions as they relate to examining or reviewing the proposed compliance reports and exemption reports, respectively. One commenter stated that the Commission underestimated the cost of examining the compliance report and that the Commission may need to consider the

[796] *See AICPA Broker-Dealer Audit Guide* at ¶ 3.77.

[797] *See PCAOB Inspection Report* at iii.

[798] *Id.*

[799] As stated above, a review engagement is designed to provide a moderate level of assurance, and the accountant's conclusion could state, for example, that no information came to the accountant's attention that indicates that the exemption report is not fairly stated in all material respects.

[800] *See PCAOB Proposing Release* at 5.

[801] *See Broker-Dealer Reports,* 76 FR at 37599. *See also* discussion above in section VI.D.1.vii.b. of this release.

[802] *See Broker-Dealer Reports,* 76 FR at 37600. The Commission estimated that the average cost of an audit of a non-carrying broker-dealer's financial report was approximately $30,000 per year, based on a weighted average of estimates of that cost for broker-dealers with varying levels of net income. The Commission further estimated that the additional cost for a review of the exemption report would be an average of approximately $3,000 per non-carrying broker-dealer per year. *Id. See also* discussion above in section VI.D.1.vii.c. of this release.

PCAOB's proposed rules before it can reasonably estimate this cost.[803] Another commenter stated that the proposed amendments have ''the potential to double the total current audit fees and have a material impact'' on firms.[804] A third commenter stated that the economic analysis was ''inconclusive'' because the PCAOB has not yet established auditing and attestation standards for broker-dealers.[805] The commenters, however, did not provide quantified alternative cost estimates.

The Commission acknowledges that the total costs associated with these requirements will depend on the final PCAOB standards for attestation engagements to examine compliance reports or review exemption reports. However, as the PCAOB's proposed standards were tailored to the proposed amendments, nothing in those standards causes the Commission to change its estimates of the costs associated with these requirements, or to question that the benefits will justify the costs.

Before today's amendments, Rule 17a–5 required the independent public accountant to, among other things, review the accounting system, internal accounting control, and procedures for safeguarding securities of the broker-dealer, including appropriate tests, for the period since the prior examination date. The scope of the independent public accountant's review was required to be sufficient to provide reasonable assurance that any material inadequacies existing at the date of the auditor examination would be disclosed. Similarly, an examination of a compliance report performed under the PCAOB's attestation standard for examination engagements would require that the auditor obtain reasonable assurance to express an opinion on whether the broker-dealer's statements in the compliance report are fairly stated, in all material respects.[806]

Moreover, before today's amendments, if a broker-dealer was exempt from Rule15c3–3, Rule 17a–5 required the independent public accountant to ''ascertain that the conditions of the exemption were being complied with as of the examination date and that no facts came to [the independent public accountant's] attention to indicate that the exemption had not been complied with during the period since [the independent public accountant's] last examination.'' [807] The PCAOB's proposed review standard for the exemption report would require that the independent public accountant make inquiries and perform other procedures that are commensurate with the auditor's responsibility to obtain moderate assurance that the broker-dealer meets the identified conditions for an exemption from Rule 15c3–3.[808] These procedures would include evaluating relevant evidence obtained from the audit of the financial statements and supporting schedules and are designed to enable the auditor to scale the review engagement based on the broker-dealer's size and complexity.[809]

The compliance report as adopted includes an additional statement (relative to the proposal) as to whether the broker-dealer's Internal Control Over Compliance was effective as of the end of the most recent fiscal year. Therefore, costs of compliance with the final rules may be higher than costs of compliance with the proposed rules to the extent Internal Control Over Compliance has changed near or as of the fiscal year end. However, this increased cost is not expected to be significant, since the procedures needed to opine on these matters as of the fiscal year end should not be materially different from the procedures employed to opine as to the effectiveness of internal control over the course of the fiscal year.

As proposed, the broker-dealer would have been required to assert whether it was in compliance, in all material respects, with all of the financial responsibility rules as of its fiscal year end. As adopted, the broker-dealer must assert whether it is in compliance with Rule 15c3–1 and paragraph (e) of Rule 15c3–3 (*i.e.,* a narrower range of rule compliance than proposed). This modification of the broker-dealer's assertion could result in lower costs for accountants' reports on the compliance report as compared to the proposal as the scope of the matters to be covered by accountants' examinations will be narrower.

Although these modifications could modestly lower costs associated with the accountant's report covering the compliance report as compared to the proposal, the Commission is not changing its estimate of costs associated with accountants' reports covering compliance reports and exemption reports. Based on updated data, the Commission now estimates that there are approximately 292 carrying broker-dealers. The Commission therefore estimates that the industry-wide annual average incremental external reporting cost of accountants' reports based on examinations of compliance reports is approximately $44 million per year ($150,000 times 292 carrying broker-dealers = $43,800,000).[810] Based on updated data, the Commission now estimates that there are approximately 4,417 non-carrying broker-dealers. The Commission therefore estimates that the total industry-wide annual reporting cost of accountant's reports based on reviews of exemption reports is approximately $13.3 million per year (4,417 non-carrying broker-dealers times $3,000 = $13,251,000).[811] The Commission therefore estimates that the total industry-wide incremental external annual reporting cost to broker-dealers associated with the accountants' reports covering the compliance report and exemption report is approximately $57.3 million per year.

Finally, one commenter suggested that the Commission use an ''agreed-upon procedures'' engagement for the exemption report.[812] This alternative was considered. The final rule, however, requires a review engagement as proposed. Under an ''agreed-upon procedures'' engagement, the independent public accountant is engaged by a client to issue a report of findings based on specific procedures performed on subject matter that the specified parties believe are appropriate.[813] Additionally, in an ''agreed-upon procedures'' engagement, the independent public accountant does not perform an examination or a review, and does not provide an opinion or negative assurance. Thus, no conclusion would be rendered as to the broker-dealer's statements in the exemption report.

Another commenter stated that the benefit of receiving an audit report covering the exemption report would not justify the cost[814] and, similarly, a second commenter did not see a benefit from the auditor attestation of the

[803] *See ABA Letter.*

[804] *See Van Kampen/Invesco Letter.*

[805] *See CAI Letter.*

[806] *See PCAOB Proposing Release* at 5. An examination engagement is designed to provide a high level of assurance. *See, e.g.,* PCAOB Interim Attestation Standard, *AT Section 101* at ¶ .54. In this case, the accountant's conclusion will be expressed in the form of an opinion. For example, the accountant's conclusion based on an examination of an assertion could state that in the accountant's opinion, [the assertion] is fairly stated in all material respects. *See, e.g.,* PCAOB Interim Attestation Standard, *AT Section 101* at ¶ .84.

[807] *See* 17 CFR 240.17a–5(g)(2).

[808] *See PCAOB Proposing Release* at 8.

[809] *Id.* at 9.

[810] *See* discussion above in section VI.D.1.vii.b. of this release.

[811] *See* discussion above in section VI.D.1.vii.c. of this release.

[812] *See E&Y Letter.*

[813] *See* PCAOB Interim Attestation Standard, *AT Section 201* at ¶ .03.

[814] *See Citrin Letter.*

exemption report.[815] As noted above, before today's amendments, if a broker-dealer was exempt from Rule15c3–3, Rule 17a–5 required the independent public accountant to ''ascertain that the conditions of the exemption were being complied with as of the examination date and that no facts came to [the independent public accountant's] attention to indicate that the exemption had not been complied with during the period since [the independent public accountant's] last examination.'' [816] Consequently, the current rule requires the independent public accountant to reach a conclusion with respect to a broker-dealer's claimed exemption from Rule 15c3–3.

The Commission believes the rule should continue to require a conclusion from the independent public accountant on the broker-dealer's claimed exemption from Rule 15c3–3 because of the importance of safeguarding customer securities and cash. While the Commission anticipates there will be costs related to the audit of the exemption report, the Commission does not believe it would be appropriate to use a lower standard (*i.e.,* the agreed-upon procedures standard) or have no requirement for the independent public accountant to perform any work with respect to the exemption report.

iv. Filing of Annual Reports With SIPC

The amendments to Rule 17a–5 require broker-dealers that are SIPC members to file their annual reports with SIPC. SIPC plays an important role in the securities markets by serving as a backstop to protect customers of a failed broker-dealer that cannot promptly return customer securities and funds. In this capacity, SIPC has a legitimate interest in receiving the annual reports of its broker-dealer members to assist it with its maintenance of the SIPC Fund and to monitor trends in the broker-dealer industry. For example, SIPC presently obtains revenue information from broker-dealers, through Form SIPC–7, to determine how best to structure broker-dealer assessments to maintain the SIPC Fund at an appropriate level. However, the information collected in the form is limited and may not assist SIPC in assessing whether the SIPC Fund is appropriately sized to the risks of a large broker-dealer failure. The annual reports contain much more detailed information about the assets, liabilities, income, net capital, and Rule 15c3–3 customer reserve requirements of broker-dealers, and also include, for carrying broker-dealers, a compliance report containing information about the broker-dealer's compliance with, and controls over compliance with, the broker-dealer financial responsibility rules. The annual reports also generally include the independent public accountant's reports covering the financial report and compliance report or exemption report, as applicable, prepared by the broker-dealer. This information also will assist SIPC in monitoring the financial strength of broker-dealers and, therefore, in assessing the adequacy of the SIPC Fund.

In addition, by receiving the annual reports, SIPC may be able to overcome a potential legal hurdle to pursuing claims against a broker-dealer's accountant where the accountant's failure to adhere to professional standards in auditing a broker-dealer causes a loss to the SIPC Fund. As discussed in section II.B.6. of this release, SIPC has sought to recover money damages from the broker-dealer's independent public accountant based on an alleged failure to comply with auditing standards, but at least one court has held under New York law that SIPC could not maintain a claim because it was not a recipient of the annual audit filing and could not have relied on it.[817]

SIPC's improved ability to maintain the SIPC Fund will benefit investors. First, if the SIPC Fund is appropriately sized, customers of a failed broker-dealer in a SIPA liquidation should be able to recover their assets more quickly through advances from the fund than if the fund is not adequate. Also, to the extent the amendments overcome a potential legal hurdle to pursuing claims against a broker-dealer's accountant, the ability to recover damages from the broker-dealer's accountant in the context of a SIPA liquidation proceeding could increase the size of the estate of a failed broker-dealer. Increasing the size of the estate could benefit customers with claims that cannot be fully satisfied through distributions of customer property held by the failed broker-dealer and the SIPC advances.

The new requirement that broker-dealers that are members of SIPC file their annual reports with SIPC will increase these broker-dealers' compliance costs.[818] In the proposing release, the Commission estimated that it would take broker-dealers approximately 30 minutes to prepare and file the annual reports with SIPC, and commenters did not disagree with this estimate. Thus, the Commission estimates that the annual industry-wide reporting burden associated with this amendment is approximately 2,246 hours per year (½ hour times 4,492 SIPC members = 2,246 hours) and that the total annual cost is approximately $694,000.[819] There would be postage costs associated with sending a copy of the annual report to SIPC that are estimated to be, on average,[820] approximately $12.05 per broker-dealer per year.[821] Thus, the Commission estimates that the total annual postage costs associated with sending a copy of the annual report to SIPC would be approximately $54,128 per year for all broker-dealers that are SIPC members.[822]

While they did not provide estimates of potential litigation costs, several commenters stated that the Commission did not address the potential costs and benefits of requiring broker-dealers to file copies of their annual reports with SIPC, including potential litigation costs for independent public accountants.[823] The Commission recognizes that there may be increased litigation costs (or reserves for potential litigation costs) for accountants as a result of the amendment and that to the extent that there are such costs, some of them may be passed on to broker-dealers in the

[815] *See Angel Letter.*

[816] *See* 17 CFR 240.17a–5(g)(2).

[817] *See SIPC* v. *BDO Seidman, LLP,* 746 NE.2d 1042 (N.Y. 2001); aff'd, 245 F.3d 174 (2d Cir. 2001).

[818] *See Broker-Dealer Reports,* 76 FR at 37596.

[819] Based on staff experience, a broker-dealer likely would have a Financial Reporting Manager prepare an additional copy of its annual report and mail it to SIPC. According to the SIFMA Report on Management and Professional Earnings in the Securities Industry, as modified by Commission staff to account for an 1,800-hour work-year and multiplied by 5.35 to account for bonuses, firm size, employee benefits and overhead, the hourly cost of a Financial Reporting Manager is approximately $309/hour. 4,492 SIPC-member broker-dealers × ½ hour × $309 = $694,014.

[820] The number of pages of an annual report, and consequently the associated postage costs, likely will vary significantly based on the size of the broker-dealer and the types of business in which it engages.

[821] Based on Commission staff experience with annual report filings of broker-dealers under Rule 17a–5, the Commission staff estimates that approximately 50% of broker-dealers file their annual reports using an overnight mail delivery service. These broker-dealers would consequently incur higher postage costs than broker-dealers which choose to mail their annual reports using first class mail or delivery methods other than overnight mail. Therefore, postages costs will vary depending on the size of the annual report and method of delivery. The Commission estimates that the cost to mail the additional reports would be, on average, $12.05 per broker-dealer. As of October 2012, the $12.05 rate is an average rate of the cost of an Express Mail Flat Rate Envelope of $18.95 and a Priority Mail Flat Rate Envelope of $5.15, based on costs obtained on the Web site of the U.S. Postal Service, *available at www.usps.gov.* ($18.95 + $5.15) = $24.10/2 = $12.05.

[822] 4,492 broker-dealers × $12.05 = $54,128.

[823] *See, e.g., CAQ Letter; Deloitte Letter; KPMG Letter.*

form of increased fees charged by broker-dealers' independent public accountants. However, commenters did not provide estimates of potential litigation costs, and Commission staff were unable to find readily-available public information from which to estimate specific costs of possible litigation. To the extent that SIPC does bring an individual lawsuit as a direct result of this amendment (*e.g.,* a suit brought in New York), there would be costs in terms of legal fees. Based on staff experience, depending on the complexity, scope, and length of the litigation, the costs to defend an individual case could be quite signficant given the hourly fees charged by outside counsel. However, the Commission does not believe these costs would be significant in the aggregate. As indicated in the economic baseline, SIPC initiates a small number of proceedings each year, and most of these proceedings have not involved litigation by SIPC against the firm's independent public accountant. Moreover, SIPC continued to bring lawsuits against broker-dealer accountants after the 2001 New York decision in jurisdictions other than New York.[824] Consequently, while the amendment removes one potential legal hurdle to such suits, it may not significantly increase the frequency with which SIPC brings such lawsuits. Moreover, the other elements of any relevant cause of action would be unaffected. Accordingly, the Commission continues to believe that the requirement to file copies of the annual reports with SIPC is appropriate.

v. Notification Requirements

As discussed above in section II.F. of this release, the Commission is amending the notification provisions in Rule 17a–5 and is making conforming amendments to Rule 17a–11. Prior to today's amendments, paragraph (h)(2) of Rule 17a–5 provided that if, during the course of the audit or interim work, the independent public accountant determined that any ''material inadequacies'' existed, the independent public accountant was required to inform the CFO of the broker-dealer, who, in turn, was required to give notice to the Commission and the broker-dealer's DEA within 24 hours in accordance with the provisions of Rule 17a–11.[825]

Under Rule 17a–11, a broker-dealer must provide notice to the Commission and its DEA in certain circumstances.[826] For example, paragraph (b)(1) of Rule 17a–11 requires a broker-dealer to give notice if its net capital declines below the minimum amount required under Rule 15c3–1.[827] Before today's amendments, Rule 17a–11 required that whenever a broker-dealer discovered, or was notified by an independent public accountant of the existence of any material inadequacy, the broker-dealer must give notice to the Commission and transmit a report to the Commission stating what the broker or dealer has done or is doing to correct the situation. Rule 15c3–1 and Rule 15c3–3 also require broker-dealers to provide notification in certain circumstances.[828] For example, paragraph (i) of Rule 15c3–3 requires a carrying broker-dealer to immediately notify the Commission and its DEA if it fails to make a deposit into its customer reserve account as required by paragraph (e) of Rule 15c3–3.[829]

a. Amendments to Rule 17a–5

The Commission proposed amending the notification provisions in Rule 17a–5 to replace the term ''material inadequacy'' with the term ''material non-compliance.'' The term ''material non-compliance'' was defined in the context of the compliance report, which was required to be prepared and filed by carrying broker-dealers. This provision would therefore have applied to broker-dealers that filed compliance reports with the Commission. The Commission also proposed amending the notification process. Under the proposed new process, the accountant would be required to notify the Commission and the broker-dealer's DEA directly.

The Commission received numerous comments in response to this proposal.[830] Most of these commenters objected to the proposed notification process.[831] Among the reasons given were that it would be inappropriate to require the accountant to notify the Commission and the DEA directly, because, among other things, the broker-dealer is principally responsible for compliance with the securities laws, including timely notification;[832] that PCAOB standards provide that ''the practitioner should not take on the role of the responsible party''[833]; and that PCAOB attestation standards (which were referenced in the proposing release) clearly provide that management is responsible for the subject matter to which it is asserting, and not the accountant.[834] In addition to suggestions that the notification process that existed prior to today's amendments should not be changed,[835] one commenter stated that the rule should require simultaneous notice by the accountant to the Commission and to the firm's management.[836] In addition, one commenter asked whether the notification provisions apply to a review of the exemption report.[837] Another commenter stated that non-compliance also will trigger a Rule 17a–11 notice, which would be duplicative and create confusion.[838]

The final rule requires that if the accountant determines that there are any instances of non-compliance (as opposed to an instance of material non-compliance, as proposed) with the financial responsibility rules during the course of preparing the accountant's reports, the accountant must immediately notify the CFO of the broker-dealer of the nature of the non-compliance. If the accountant provides notice of an instance of non-compliance, the broker-dealer must notify the Commission and its DEA, but only if required to do so by existing provisions of Rule 15c3–1, Rule 15c3–3, or Rule 17a–11 that require such notification.[839]

[824] *See SIPC* v. *BDO Seidman, LLP,* 746 NE.2d 1042 (N.Y. 2001); aff'd, 245 F.3d 174 (2d Cir. 2001).

[825] *See* 17 CFR 240.17a–5(h)(2).

[826] *See* 17 CFR 240.17a–11.

[827] *See* 17 CFR 240.17a–11(b)(1).

[828] *See, e.g.,* 17 CFR 240.15c3–1(a)(6)(iv)(B); 17 CFR 240.15c3–1(a)(6)(v); 17 CFR 240.15c3–1(a)(7)(ii); 17 CFR 240.15c3–1(c)(2)(x)(C)(*1*); 17 CFR 240.15c3–1(e); 17 CFR 240.15c3–1d(c)(2); 17 CFR 240.15c3–3(i).

[829] *See* 17 CFR 240.15c3–3(i).

[830] *See ABA Letter; CAI Letter; CAQ Letter; Deloitte Letter; E&Y Letter; Grant Thornton Letter; KPMG Letter; McGladrey Letter; PWC Letter; SIFMA Letter; Van Kampen/Invesco Letter.*

[831] *See ABA Letter; CAI Letter; CAQ Letter; Deloitte Letter; E&Y Letter; Grant Thornton Letter; KPMG Letter; McGladrey Letter; PWC Letter; Van Kampen/Invesco Letter.*

[832] *See Deloitte Letter.*

[833] *See KPMG Letter. See also PCAOB Interim Attestation Standard, AT Section 101 at ¶ 13.*

[834] *See PWC Letter. See also PCAOB Interim Attestation Standard, AT Section 101 at ¶¶ 11–13.*

[835] *See, e.g., ABA Letter; E&Y Letter; McGladrey Letter.*

[836] *See Van Kampen/Invesco Letter.*

[837] *See KPMG Letter.*

[838] *See ABA Letter.*

[839] Under Rule 17a–11, a broker-dealer must provide notice to the Commission and its DEA in certain circumstances. For example, paragraph (b)(1) of Rule 17a–11 requires a broker-dealer to give notice if its net capital declines below the minimum amount required under Rule 15c3–1. In addition, Rule 15c3–1 and Rule 15c3–3 require broker-dealers to provide notifications in certain circumstances. For example, paragraph (a)(6)(iv) of Rule 15c3–1 requires a broker-dealer that operates as a specialist or market-maker and that operates under the provisions of paragraph (a)(6) of Rule 15c3–1 to obtain certain representations from the broker-dealer that carries its market maker or specialist account. The representations include that the broker-dealer carrying the account will provide a notification under Rule 17a–11 if the market maker or specialist fails to deposit the required amount of equity into the account within the required time frame as prescribed in paragraph (a)(6) of Rule 15c3–1. In addition, under paragraph

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Consequently, the final rule requires that any instance of non-compliance identified by the accountant will trigger a notification by the broker-dealer to the Commission and the firm's DEA to the same extent that notification is required if discovered by the broker-dealer other than in connection with its annual audit. Therefore, under the final rule, if the accountant determines that an instance of non-compliance with the financial responsibility rules exists, the accountant is not required to make a determination of whether that instance of non-compliance is material. This modification likely will result in a lower burden relative to the proposal on the independent public accountant as the accountant will not need to analyze whether an instance of non-compliance is material to determine whether the notification requirement has been triggered. On the other hand, the independent public accountant will need to provide notice to the broker-dealer of all instances of non-compliance rather than only instances of material non-compliance. Therefore, the modification will result in more required notifications from the independent public accountant to the broker-dealer.

Under the final rule, the independent public accountant also will be required to provide notice to the broker-dealer if the accountant determines that any material weaknesses exist. As in the proposal, *material weakness* is defined with regard to the compliance report and therefore applies only to broker-dealers that file compliance reports. In that report, a carrying broker-dealer must state whether its internal controls were effective during the fiscal year as well as at the end of the fiscal year. Internal controls are not effective if there are one or more material weaknesses in the controls. The broker-dealer also is required to describe any identified material weaknesses. The independent public accountant must undertake to prepare a report based on an examination of certain statements in the compliance report, including the statements as to whether the carrying broker-dealer's internal controls were effective.

As stated above, before today's amendments, Rule 17a–5 required the accountant to notify the broker-dealer if the accountant determined that any material inadequacies existed. The concept of material inadequacy generally applied to all broker-dealers and, therefore, the notification requirement applied with respect to independent public accountant engagements for non-carrying as well as carrying broker-dealers under Rule 17a–5. This requirement, however, may not have produced the intended benefits.

As discussed in section II.D.3. above, PCAOB inspection staff found that in 21 of 23 broker-dealer audits inspected, the accountant ''failed to perform sufficient audit procedures to obtain reasonable assurance that any material inadequacies found to exist since the date of the last examination . . . would have been disclosed in the accountant's supplemental report.'' [840] Material inadequacies which were expected to be reported by the accountant included any condition which contributed substantially to or, if appropriate corrective action was not taken, could reasonably be expected to: (1) Inhibit a broker-dealer from promptly completing securities transactions or promptly discharging its responsibilities to customers, other broker-dealers, or creditors; (2) result in material financial loss; (3) result in material misstatements of the broker-dealer's financial statements; or (4) result in violations of the Commission's recordkeeping or financial responsibility rules to an extent that could reasonably be expected to result in the conditions described in (1) through (3) above. The definition of *material weakness* is more specific: a *material weakness* includes a deficiency in internal control such that there is a reasonable possibility that non-compliance with Rule 15c3–1 and paragraph (e) of Rule 15c3–3 will not be prevented or detected on a timely basis or that non-compliance to a material extent with Rule 15c3–3, except paragraph (e), Rule 17a–13, or the Account Statement Rules will not be prevented or detected on a timely basis.

As discussed above, today's amendments generally replace the term material inadequacy and separate it into two components—a compliance component (non-compliance with the financial responsibility rules) and, for carrying broker-dealers, an internal control component (material weakness in Internal Control Over Compliance). The change is consistent with one of the objectives of the amendments: to provide clear and consistent terminology focused separately on compliance with key financial responsibility rules and internal control over compliance with the financial responsibility rules. The amended notification provisions in Rule 17a–5 reflect this change in terminology.

The Commission proposed amending the notification process so that the accountant would be required to notify the Commission and the broker-dealer's DEA directly. However, the Commission is not adopting this alternative because it agrees with the comments, discussed above, that the notification process in place before today's amendments should be retained.

As stated above, Rule 17a–5 before today's amendments required the accountant to notify the broker-dealer, and the broker-dealer to notify the Commission, if the accountant determined during the course of the audit or interim work that a material inadequacy existed. This requirement generally applied to all broker-dealer audits. The notification provisions in themselves did not direct the accountant to perform specific procedures with respect to the audit—those requirements were contained in other provisions of Rule 17a–5. The notification provisions in Rule 17a–5 were intended to require notification if, during the course of the audit, the accountant became aware of any material inadequacies. As amended, the notification provisions in Rule 17a–5 likewise do not in themselves require the accountant to perform specific procedures with respect to the examination of the financial report or an examination of a compliance report or review of an exemption report. Instead, the notification provisions are triggered when the accountant becomes aware, during the course of preparing the reports of the accountant required under Rule 17a–5, that the broker-dealer is not in compliance with the financial responsibility rules or, during the course of preparing a report based on an examination of a compliance report, that a material weakness exists. These notification requirements are designed to put the broker-dealer in a position to correct controls, processes, and systems that have caused or potentially could cause the firm to not comply with the financial responsibility rules. As discussed throughout this release, the financial responsibility rules serve an important investor protection function by requiring broker-dealers to maintain prudent levels of net capital and take steps to safeguard customer securities and cash.

The requirement to notify the broker-dealer when the independent public accountant determines that the broker-dealer is not in compliance with the financial responsibility rules or that any material weaknesses exist is not expected to increase costs for broker-dealers when compared to the baseline requirement to provide the broker-

(i) of Rule 15c3–3, a carrying broker-dealer must immediately notify the Commission and its DEA if it fails to make a deposit into its customer reserve account as required by paragraph (e) of Rule 15c3–3.

[840] *See PCAOB Inspection Report,* at ii.

dealer with notice when the independent public accountant determines that a material inadequacy exists. As discussed above, the notice requirements under today's amendments do not require the independent public accountant to perform specific procedures. Instead, they are triggered when the independent public accountant determines that any non-compliance or material weakness exists during the course of performing procedures to examine the financial report and to examine the compliance report or review the exemption report, as applicable. To the extent the obligation to provide the broker-dealer with notice is factored into the fee charged by the accountant, the Commission notes that before today's amendments the independent public accountant was required to give notice of a material inadequacy. This notification requirement has been eliminated and, therefore, to the extent it was factored into the fee, that cost has been eliminated. The Commission does not believe that the component of the independent public accountants' fee associated with the new notification requirements would be materially different than the component of the fee associated with the material inadequacy notification requirements. Therefore, the Commission believes these requirements would not result in increased compliance costs relative to the requirements in place before today's amendments.

b. Conforming and Technical Amendments to Rule 17a–11

As discussed above in section II.F.2., prior to today's amendments, paragraph (e) of Rule 17a–11 required that whenever a broker-dealer discovered, or was notified by an independent public accountant, pursuant to paragraph (h)(2) of Rule 17a–5 or paragraph (f)(2) of Rule 17a–12, of the existence of any material inadequacy, the broker-dealer was required to give notice to the Commission and transmit a report to the Commission stating what the broker-dealer has done or is doing to correct the situation.

The Commission is adopting conforming amendments to paragraph (e) of Rule 17a–11 to substitute a notice of the existence of any material weakness as defined in paragraph (d)(3)(iii) of Rule 17a–5 for a notice of the existence of any material inadequacy and to replace a reference to paragraph (h)(2) of Rule 17a–5 with a reference to paragraph (h) of Rule 17a–5.[841] Specifically, the final rule provides that whenever a broker-dealer discovers, or is notified by its accountant under paragraph (h) of Rule 17a–5 of the existence of any material weakness, the broker-dealer must: (1) Give notice of the material weakness within 24 hours of the discovery or notification; and (2) transmit a report within 48 hours of the notice stating what the broker-dealer has done or is doing to correct the situation.[842]

The notification requirements, among other things, alert the Commission and the DEA of the need to increase their monitoring of a broker-dealer and to obtain additional information when appropriate in order to address any concerns the Commission or the DEA may have as a result of the notification. A notification of a material weakness will alert the Commission and the broker-dealer's DEA to the existence of a condition that could impact the broker-dealer's ability to remain in compliance with the financial responsibility rules, which serve an important investor protection function by requiring broker-dealers to maintain prudent levels of net capital and take steps to safeguard customer securities and cash. Once alerted, the Commission and the DEA can respond to the situation through, for example, heightened monitoring of the broker-dealer to assess whether it has corrected the problem and whether it is properly safeguarding customer securities and cash.

The Commission believes these amendments will not result in increased compliance costs to broker-dealers. *Material weakness* is defined with regard to the compliance report and therefore applies only to broker-dealers that file compliance reports (*i.e.,* carrying broker-dealers). In contrast, the concept of material inadequacy generally applied to all broker-dealers and, therefore, the notification requirement applied with respect to independent public accountant engagements under Rule 17a–5 for non-carrying as well as carrying broker-dealers. As discussed above in section VII.B.1. of this release, the Commission estimates that there are approximately 4,709 broker-dealers registered with the Commission and that of those firms, approximately 292 are carrying broker-dealers. Consequently, before today's amendments, the notification requirements with respect to material inadequacy applied to approximately 4,709 broker-dealers, whereas after today's amendments the notification requirement with respect to material weakness will apply to approximately 292 broker-dealers.

The Commission proposed amending paragraph (e) of Rule 17a–11 to delete the references to Rule 17a–5. However, the Commission is not adopting this alternative because it agrees with a commenter that notification should be provided to the Commission when a deficiency in internal control is discovered by the broker-dealer. [843]

vi. Information Provided to Customers

Prior to today's amendments, paragraph (c)(2)(iii) of Rule 17a–5 provided that if, in conjunction with a broker-dealer's most recent audit report, the broker-dealer's independent public accountant commented on any material inadequacies in the broker-dealer's internal controls, its accounting system, or certain of its practices and procedures[844] under paragraphs (g) and (h) of Rule 17a–5, and paragraph (e) of Rule 17a–11, the broker-dealer's audited statements sent to customers were required to include a statement that a copy of the auditor's comments were available for inspection at the Commission's principal office in Washington, DC, and the regional office of the Commission in which the broker-dealer had its principal place of business.[845]

The Commission is revising its proposal with respect to amending paragraph (c)(2) of Rule 17a–5 to be consistent with the new notification provisions in paragraph (h) described above relating to the identification by a broker-dealer's accountant of a material weakness rather than an instance of material non-compliance.[846] Specifically, if, in connection with the most recent annual reports, the report of the independent public accountant on the broker-dealer's compliance report identifies a material weakness, the broker-dealer must include a statement that one or more material weaknesses have been identified and that a copy of the report of the independent public accountant is currently available for the customer's inspection at the principal office of the Commission in Washington, DC, and the regional office of the Commission for the region in

[841] The final rule retains a reference to material inadequacy as defined in paragraph (h)(2) of Rule 17a–12, but amendments correct citations to that rule.

[842] *See* paragraph (e) of Rule 17a–11. The rule retains provisions referencing the term *material inadequacy* as defined in Rule 17a–12.

[843] *See Deloitte Letter.*

[844] These practices and procedures include, for example, periodic net capital computations under Rule 15c3–1 and periodic counts of securities under Rule 17a–13.

[845] *See* 17 CFR 240.17a–5(c)(2)(iii).

[846] *See* paragraph (c)(2)(iv) of Rule 17a–5.

which the broker-dealer has its principal place of business.[847]

The Commission does not believe these amendments will result in incremental costs to broker-dealers over the baseline. *Material weakness* is defined with regard to the compliance report and therefore applies only to broker-dealers that file compliance reports (*i.e.,* carrying broker-dealers). In contrast, the concept of material inadequacy generally applied to all broker-dealers and, therefore, the customer notification requirement applied with respect to independent public accountant engagements under Rule 17a–5 for non-carrying as well as carrying broker-dealers. As discussed above in section VII.B.1. of this release, the Commission estimates that there are approximately 4,709 broker-dealers registered with the Commission and that of those firms, approximately 292 are carrying broker-dealers. Consequently, before today's amendments, the notification requirements with respect to material inadequacy applied to approximately 4,709 broker-dealers, whereas after today's amendments the notification requirement with respect to material weakness will apply to approximately 292 broker-dealers.

Rule 17a–5 also provides a conditional exemption from the requirement to send paper copies of financial information to customers if the broker-dealer mails a financial disclosure statement with summary information and an Internet link to the balance sheet and other information on the broker-dealer's Web site. Before today's amendments, one of the conditions of the exemption was that the broker-dealer was not required during the prior year to give notice of a material inadequacy. The Commission proposed revising this condition for using Web site disclosure to provide that the broker-dealer's financial statements must receive an unqualified opinion from the accountant and that neither the broker-dealer nor the accountant identified a material weakness or an instance of material non-compliance.

One commenter stated that a broker-dealer should be able to deliver the financial information available to customers via its Web site regardless of whether an instance of material non-compliance or material weakness was identified.[848] Another commenter stated that the rule should not require a 100% rate of compliance with the financial responsibility rules to qualify for the exemption.[849] A third commenter stated that the proposed amendment should be eliminated, or replaced with the requirement that broker-dealers include a notice of the material weakness or non-compliance on customer account statements for a year following its identification.[850]

The Commission has decided not to adopt the proposed condition for qualifying for the conditional exemption. The decision not to adopt should result in lower costs than would have been incurred had the Commission adopted the proposal without modification. Using the Internet to disclose information should be less costly and more efficient for the broker-dealer than mailing paper copies to all customers. It also will benefit customers, since they will be able to access relevant broker-dealer information more efficiently through the Internet (alternatively, customers can request a paper copy by phone at no cost to the customer).[851]

vii. Coordination With Investment Advisers Act Rule 206(4)–2

Advisers Act Rule 206(4)–2 provides that when a registered investment adviser or its related person maintains client funds and securities as a qualified custodian in connection with advisory services provided to clients, the adviser annually must obtain, or receive from its related person, a written internal control report prepared by an independent public accountant registered with, and subject to regular inspection by, the PCAOB. This report must be supported by the accountant's examination of the qualified custodian's custody controls. Under the amendments, a broker-dealer that also acts as a qualified custodian for itself as an investment adviser or for its related investment advisers may use the report of the independent public accountant based on an examination of its compliance report to meet the reporting obligations under Rule 206(4)–2. Therefore, such a broker-dealer will not be required to obtain an internal control report under Rule 206(4)–2 in addition to a report covering the compliance report from its independent public accountant. It also will result in efficiencies as a single audit will be able to address two audit requirements.

2. Access to Accountant and Audit Documentation

The amendments to Rule 17a–5 require that carrying or clearing broker-dealers agree to allow Commission and DEA staff, if requested in writing for purposes of an examination of the broker-dealer, to review the work papers of the independent public accountant and to allow the accountant to discuss the its findings with the examiners.

This requirement will enable the Commission and DEAs to more efficiently deploy examination resources.[852] Examiners reviewing the accountant's work papers will be able to tailor the scope of their examinations by identifying areas where extensive audit work was performed by the independent public accountant and focusing their examinations on other areas, allowing for more efficient oversight of broker-dealers by the Commission and DEA examination staff. Enabling Commission and DEA examination staff to conduct more focused and efficient examinations of broker-dealers could, in turn, allow for examination resources to be allocated more strategically.

The Commission is amending paragraph (f)(2) of Rule 17a–5 to revise the statement regarding identification of a broker-dealer's independent public accountant that broker-dealers must file each year with the Commission and their DEA (except that if the engagement is of a continuing nature, no further filing is required).[853] The revised statement contains additional information that includes a representation that the independent public accountant has undertaken to provide a report regarding the broker-dealer's financial reports and a report regarding the broker-dealer's compliance or exemption report, as applicable.[854] In addition, the statement provided by a clearing or carrying broker-dealer must include representations regarding the access to accountant requirements described above.[855] Therefore, all broker-dealers will generally be required to file a new

[847] *Id.*

[848] *See ABA Letter.*

[849] *See CAI Letter.* This commenter stated that FINRA has proposed that broker-dealers send customer account statements monthly instead of quarterly, broker-dealers are already potentially facing ''extremely high'' costs of sending information to customers. FINRA withdrew its proposals to send customer account statements monthly instead of quarterly on July 30, 2012. *See SR–FINRA–2009–028, Proposed Rule Change to Adopt FINRA Rule 2231 (Customer Account Statements) in the Consolidated FINRA Rulebook,* Withdrawal of Proposed Rule Change (July 30, 2012), *available at http://www.finra.org/web/groups/industry/@ip/@reg/@rulfil/documents/rulefilings/p143262.pdf.*

[850] *See SIFMA Letter.*

[851] *See* 17 CFR 240.17a–5(c)(5)(ii), (iv), and (v).

[852] As discussed previously, where an independent public accountant has performed extensive testing of a carrying broker-dealer's custody of securities and cash by confirming holdings at subcustodians, examiners could focus their efforts on matters that had not been the subject of prior testing and review.

[853] *See* discussion above in section III. of this release.

[854] *See* 17 CFR 240. 17a–5(f)(2)(ii).

[855] *See* 17 CFR 17a–5(f)(2)(ii)(F)–(G).

statement regarding their independent public accountant.

As discussed above in section III. of this release, one commenter stated that, the amendments would discourage or ''chill'' communications between a broker-dealer and its auditor because of the possibility that an auditor may misconstrue communications from representatives of the broker-dealer and wrongly conclude that the representatives lack knowledge or admit to an issue.[856] Presumably, this ''chilling effect'' would result from a broker-dealer's desire to avoid the creation of audit documentation memorializing misunderstandings and miscommunications, which when accessed by Commission and DEA examiners could result in regulatory scrutiny. As stated in section III. of this release, the Commission is not persuaded by this comment; while it is possible for miscommunications to occur between representatives of a broker-dealer and its auditor, potential misunderstandings or miscommunications should not limit the ability of the Commission or a DEA to have access to audit documentation or a broker-dealer's independent public accountant. Further, to the extent a misunderstanding or miscommunication between a broker-dealer and its accountant is reflected in the accountant's audit documentation relating to the broker-dealer, the broker-dealer could clarify the nature of the misunderstanding or miscommunication to examiners and how it was rectified if such clarification and rectification is not already described in subsequent audit documentation.

The Commission estimated that the one-time hour burden associated with amending its existing statement and filing the new statement with the Commission, in order to comply with the proposed amendments, would be an average of approximately two hours on a one-time basis for each broker-dealer, as the statement can be continuing in nature.[857]

As discussed in the PRA, the Commission is revising this estimate for clearing and carrying broker-dealers, as these broker-dealers will likely be required to renegotiate their agreements with their independent public accountants. The Commission estimates that the total one-time cost associated with this burden is approximately $5.2 million.[858] Additionally, the Commission believes there will be postage costs associated with sending the amended statement regarding the accountant and estimates that each mailing will cost approximately $0.45, for a total cost of approximately $6,357 for all broker-dealers on a one-time basis.[859]

In addition, in the proposing release, the Commission estimated that a carrying or clearing broker-dealer's accountant would charge the broker-dealer for time its personnel spend speaking with the Commission or the broker-dealer's DEA or providing them with audit documents and that, on average, the Commission or the broker-dealer's DEA may speak with each accountant for approximately five hours per year. Thus, the Commission estimated that the additional cost of accountant time associated with this amendment to all clearing and carrying broker-dealers would be approximately $660,000 annually.[860] As the Commission now estimates that the number of carrying or clearing broker-dealers is 513, the new estimate is approximately $641,250.[861]

3. Form Custody

The newly adopted Form Custody is to be filed quarterly at the same time that a broker-dealer is required to file its FOCUS Reports. The form elicits information concerning whether, and if so, how, a broker-dealer maintains custody of customer assets and, as discussed above, consolidates information about the broker-dealer's custodial responsibility and relationships with other custodians in one report so that the Commission and other securities regulators will be provided with a comprehensive profile of the broker-dealer's custody practices and arrangements. This should reduce the likelihood that fraudulent conduct, including misappropriation or other misuse of investor assets, can continue undetected. Further, the information provided in Form Custody should aid in the examination of broker-dealers, because the examination staff can use the information provided as another tool to prioritize and plan examinations.

The Form Custody amendments also should enhance investor confidence in the ability of the securities regulators to oversee broker-dealers and broker-dealer custody of investor assets. By establishing a discipline under which broker-dealers are required to report greater detail as to their custodial functions, investor perception as to the safety of their funds and securities held by broker-dealers should improve. Investors may be more willing to provide capital for investment. Further, the requirement by broker-dealers to provide detail as to their custodial practices may prompt them to identify and correct deficiencies. For example, if a broker-dealer preparing the information to be disclosed on the form discovers a discrepancy between its own records and the records of a custodian as to the nature or quantity of assets held by the custodian, the broker-dealer can act to resolve the discrepancy before filing the form.

The Commission estimated that the time required to complete and file Form Custody would be approximately 12 hours per quarter, or 48 hours per year, on average, for each broker-dealer.[862] The Commission did not receive comments regarding this estimate. The Commission now estimates that there are approximately 4,709 broker-dealers that must file Form Custody. The Commission therefore estimates that the total time required to complete and file Form Custody for all 4,709 broker-dealers is approximately 226,032 hours per year (4,709 broker-dealer times four responses per year times 12 hours = 226,032 hours). Further, the Commission estimates that the total cost associated with completing and filing Form Custody is approximately $69.8 million.[863]

[856] *See CAI Letter.*

[857] *See Broker-Dealer Reports,* 76 FR at 37596.

[858] *See* Section VI.D.1.vi. Based on staff experience, a broker-dealer that carries customer accounts or clears transactions likely would have its Controller and an Assistant General Counsel involved in renegotiating the agreement with auditors, and that those discussions would take, on average, approximately four hours. Broker-dealers would likely have an attorney prepare a new notification of designation of accountant, and that task would take the attorney, on average, approximately two hours. According to the SIFMA Report on Management and Professional Earnings in the Securities Industry, as modified by Commission staff to account for an 1,800-hour work-year and multiplied by 5.35 to account for bonuses, firm size, employee benefits and overhead, the hourly cost of a Controller is approximately $409/hour, the hourly cost of an Assistant General Counsel is approximately $407/hour, and the hourly cost of an Attorney is approximately $378/hour. 513 broker-dealers that carry customer accounts or clear transactions × 4 hours × $409 = $839,268. 513 broker-dealers that carry customer accounts or clear transactions × 4 hours × $407 = $835,164. 4,709 broker-dealers × 2 hours × $378 = $3,560,004. $839,268 + $835,164 + $3,560,004 = $5,234,436.

[859] *See* Section VI.D.1.vi. 4,709 broker-dealers × $0.45 cost for first class postage × 3 mailings = $6,375.15.

[860] *See* Section VI.D.1.vii.d. In the proposing release the Commission multiplied 528 clearing and carrying broker-dealers × 5 hours × $250/hour = $660,000.

[861] *See* Section VI.D.1.vii.d. 513 clearing and carrying broker-dealers × $1,250 in increased costs per clearing broker-dealer = $641,250.

[862] *See Broker-Dealer Reports,* 76 FR at 37597.

[863] Based on staff experience, a broker-dealer likely would have a Financial Reporting Manager complete and file Form Custody. According to the

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One commenter stated that the estimated costs to the industry of $69,179,670 in the proposing release was ''staggering,'' and that such costs would likely indirectly be passed on to customers.[864] The commenter did not disagree with the estimated cost in the proposing release; rather, the commenter focused on the size of the total estimated costs. The Commission notes that the $69 million estimate in the proposing release and the $69.8 million estimate in this release are estimates of the aggregate cost to the industry. The average cost to an individual broker-dealer would be approximately $15,000 per year.[865] As an average, the costs incurred by a broker-dealer to comply with the requirement to file Form Custody will depend on its size and the complexity of its business activities.

The Commission recognizes that the requirement to file Form Custody will increase compliance costs for broker-dealers and that these costs may be passed on to customers. The Commission, however, believes the investor protection benefits of the Form Custody requirements outweigh these costs. As noted above, Form Custody is designed to assist Commission and DEA examiners in identifying potential misrepresentations relating to broker-dealers' custody of assets. Further, the requirements to file the form will promote greater focus and attention to custody practices by requiring that broker-dealers make specific representations in this regard. The safeguarding of customer securities and cash held by broker-dealers is of paramount importance as demonstrated by recent cases where broker-dealers failed to protect customer securities and cash.[866]

4. Consideration of Burden on Competition, and Promotion of Efficiency, Competition, and Capital Formation

As discussed above, incremental costs will result from the annual reporting requirement amendments, the access to accountant amendments, and the Form Custody amendments. These incremental costs could result in higher barriers to entry for broker-dealers as compared with the baseline that existed prior to the amendments. This could be the case particularly for carrying broker-dealers given the incremental costs associated with the compliance report requirements, the applicability of the access to accountant amendments to carrying and clearing broker-dealers, and that most of the information elicited in Form Custody relates to carrying broker-dealer activities.

The annual reporting requirements have a mixed effect on competition across broker-dealers. The requirement to prepare and file a compliance report or exemption report may impose a burden on competition for smaller carrying broker-dealers to the extent that it imposes relatively high fixed costs, which would represent a greater amount of net income for smaller broker-dealers. On the other hand, as previously noted, a carrying broker-dealer with limited custodial activities should have to expend less effort to support its statements in the compliance report than a broker-dealer with more extensive custodial activities, and the attendant costs should similarly be lower. While the incremental costs of the annual reporting requirements may be lower for non-carrying broker-dealers (which generally are smaller broker-dealers), the costs could disproportionately impact smaller broker-dealers due to fixed cost components of the cost of compliance with these requirements.

The access to accountant amendments may place a burden on carrying and clearing broker dealers. To the extent that addressing contracts between auditors and broker-dealers is a fixed cost, the rule may impact smaller broker-dealers to a greater extent than it will larger broker-dealers. The amendments should not place a burden on competition for non-carrying broker-dealers.

The requirement to file Form Custody could have a burden on competition because it will increase compliance costs for broker-dealers. However, the requirement should not have a disproportionate effect on smaller broker-dealers. Smaller firms will incur fewer costs to complete Form Custody because less information is required to be disclosed. For example, broker-dealers that introduce customers on a fully disclosed basis and do not have custody of customer funds or assets would leave much of the form blank.

In sum, the costs of compliance resulting from the requirements in these amendments should not impose a burden on competition not necessary or appropriate in furtherance of the purposes of the Exchange Act and in light of the benefits discussed above.

Today's amendments are designed to reduce the likelihood that fraudulent conduct, or lack of appropriate custody procedures or other internal controls, will jeopardize customer securities and funds held by broker-dealers. To the extent that the amendments achieve that goal, investors should be more confident that the customer assets held by broker-dealers are safe. This in turn may promote capital formation as investor assets are able to be allocated more efficiently across the opportunity set.

One commenter asserted that the proposed amendments ''place unnecessary regulatory burdens and costs on industry, in general, and smaller firms, in particular'' and that ''broker-dealers compete against investment advisers who are not burdened by the same regulatory requirements,'' including the requirements in the proposed amendments.[867] The Commission recognizes, as explained above, that the amendments adopted today impose costs on broker-dealers that could result in higher barriers to entry. However, the Commission is of the opinion that these costs are justified by the numerous and significant benefits, in particular with respect to protection of customer assets, described in this economic analysis.

With respect to the commenter's statement about broker-dealers competing with investment advisers, recent Commission amendments to investment adviser rules are ''designed to provide additional safeguards . . . when a registered adviser has custody of client funds or securities'' including a requirement to undergo an annual surprise examination by an independent public accountant to verify client assets and a requirement to have a report of the internal controls relating to the custody of client assets from an accountant registered with, and subject to inspection by, the PCAOB unless client assets are maintained by an independent custodian.[868] Consequently, the regulations governing

SIFMA Report on Management and Professional Earnings in the Securities Industry, as modified by Commission staff to account for an 1,800-hour work-year and multiplied by 5.35 to account for bonuses, firm size, employee benefits and overhead, the hourly cost of a Financial Reporting Manager is approximately $309/hour. 4,709 broker-dealers × 48 hours × $309 = $69,843,888.

[864] *See IMS Letter.* The cost of $69,179,670 was reflected in the economic analysis in the proposing release. *See Broker-Dealer Reports,* 76 FR at 37601. This cost was calculated as an internal cost of the estimated PRA hours and is the total cost divided among 5,057 firms. *Id.* at 37601 n.215. This internal cost would amount to an average of $13,680 per broker-dealer. *Id.*

[865] 1 broker-dealer × 48 hours × $309 = $14,832.

[866] *See, e.g., SEC* v. *Bernard L. Madoff, et al.,* Litigation Release No. 20889 (Feb. 9, 2009).

[867] *See IMS Letter.*

[868] *See Custody of Funds or Securities of Clients by Investment Advisers,* 75 FR at 1456.

investment advisers have been strengthened in recent years through new requirements aimed at safeguarding customer assets. Today's amendments also are aimed at safeguarding customer assets. As both investment advisers and broker-dealers are now subject to new requirements, today's amendments should not create a competitive advantage for either class of registrant. Moreover, the recently adopted requirements for investment advisers and the amendments adopted today are, among other things, part of an effort to strengthen the Commission's rules regarding the safekeeping of customer assets, in part in response to several fraud cases brought by the Commission involving investment advisers and broker-dealers.[869]

If the amendments increase investor confidence in broker-dealers, they will promote capital formation. Moreover, for the reasons discussed above, today's amendments should not unduly restrict competition and should promote capital formation.[870]

The amendments also should increase efficiencies. With respect to the annual reporting amendments, updating the language of Rule 17a–5 to replace outdated or inconsistent audit terminology is designed to ensure that the requirements of the rule are better aligned with applicable current audit standards. Further, the amendments facilitate PCAOB oversight authority, including its ability to inspect audits of broker-dealers, by providing that examinations or reviews of broker-dealer annual reports be made in accordance with PCAOB standards. In addition, the amendments strengthen and promote consistent compliance with the financial responsibility rules for broker-dealers that maintain custody of customer securities and funds by increasing the focus of these broker-dealers and their independent public accountants on compliance, and internal control over compliance, with the financial responsibility rules. This, in turn, should help the Commission and the broker-dealer's DEA identify broker-dealers that have weak internal controls for safeguarding investor assets and improve the financial and operational condition of broker-dealers and thereby provide more protection for investor assets held by broker-dealers.

The access to accountant amendments should increase efficiencies by promoting more risk-based examinations by Commission and DEA staff. For example, the examiners in some cases may be able to leverage the work performed by the independent public accountants and, therefore, focus on areas the accountants did not review. Similarly, the Form Custody amendments should increase efficiencies by promoting more risk-based examinations by Commission and DEA staff as they will be able to use the profile of the broker-dealer's custody practices documented in Form Custody to focus their reviews. For this reason, examinations may also place fewer time demands on broker-dealer personnel.

In significant part, the effect of these rules on efficiency and capital formation are linked to the effect of these rules on competition. For example, markets that are competitive and trusted may be expected to promote the efficient allocation of capital. Similarly, rules that promote, or do not unduly restrict, trust in broker-dealers can be accompanied by regulatory benefits that minimize the risk of market failure and thus promote efficiency within the market. Such competitive markets would increase the efficiency by which market participants could transact with broker-dealers.

VIII. Final Regulatory Flexibility Analysis

The Regulatory Flexibility Act (''RFA'')[871] requires Federal agencies, in promulgating rules, to consider the impact of those rules on small entities. Section 603(a)[872] of the Administrative Procedure Act,[873] as amended by the RFA, generally requires the Commission to undertake a regulatory flexibility analysis of all proposed rules, or proposed rule amendments, to determine the impact of such rulemaking on small entities.[874] Section 605(b) of the RFA provides that this requirement does not apply to any proposed rule or proposed rule amendment, which if adopted, would not ''have a significant economic impact on a substantial number of small entities.''[875]

The Commission proposed amendments to Rules 17a-5 and 17a-11 and proposed new Form Custody. An Initial Regulatory Flexibility Analysis (''IRFA'') was included in the proposing release.[876] This Final Regulatory Flexibility Analysis has been prepared in accordance with the provisions of the RFA.

A. Need for and Objectives of the Amendments and New Form

The final rules amend certain broker-dealer annual reporting, audit, and notification requirements. The amendments include a requirement that broker-dealer audits be conducted in accordance with standards of the PCAOB, that broker-dealers file either a compliance report or an exemption report covered by a report prepared by an independent public accountant, and that clearing broker-dealers allow representatives of the Commission or the broker-dealer's DEA to review the documentation associated with certain reports of the broker-dealer's independent public accountant and to allow the accountant to discuss its findings with the representatives when requested in connection with a regulatory examination of the broker-dealer. The amendments also require a broker-dealer to file a new form with its DEA that elicits information about the broker-dealer's practices with respect to the custody of securities and funds of customers and others.

The amendments and new form are designed, among other things, to provide additional safeguards with respect to broker-dealer custody of customer securities and funds, to enhance the ability of the Commission to oversee broker-dealer custody practices, to increase the focus of carrying broker-dealers and their independent public accountants on compliance, and internal control over compliance, with certain financial and custodial requirements, to facilitate the ability of the PCAOB to implement the explicit oversight authority over broker-dealer audits provided to the PCAOB by the Dodd-Frank Act, and to satisfy the internal control report requirement in Rule 206(4)–2 for certain broker-dealers affiliated with, or dually-registered as, investment advisers.

[869] *Id.*

[870] The Commission stated in the proposing release that its preliminary view was that the proposed rule amendments promote efficiency, competition, and capital formation and that any burden on competition is justified by the benefits provided by the amendments. *See Broker-Dealer Reports,* 76 FR at 37598.

[871] 5 U.S.C. 601 *et seq.*

[872] 5 U.S.C. 603(a).

[873] 5 U.S.C. 551 *et seq.*

[874] Although section 601(b) of the RFA defines the term *small entity,* the statute permits agencies to formulate their own definitions. The Commission has adopted definitions for the term ''small entity'' for the purposes of Commission rulemaking in accordance with the RFA. Those definitions, as relevant to this rulemaking, are set forth in Rule 0–10. *See* 17 CFR 240.0–10. *See Statement of Management on Internal Accounting Control,* Exchange Act Release No. 18451 (Jan. 28, 1982), 47 FR 5215 (Feb. 4, 1982).

[875] *See* 5 U.S.C. 605(b).

[876] *See Broker-Dealer Reports,* 76 FR at 37601–37602.

B. Significant Issues Raised by Public Comments

The Commission requested comment with regard to matters discussed in the IRFA, including comments with respect to the number of small entities that may be affected by the proposed rule amendments and whether the effect on small entities would be economically significant.[877]

The Commission did not receive any comments specifically addressing the IRFA. However, several commenters discussed the impact of the proposal on small broker-dealers. One commenter stated that the proposed amendments ''place unnecessary regulatory burdens and costs on the industry, in general, and smaller firms in particular.'' [878] Another commenter stated that small broker-dealers may find the timing of the transition to be a ''burden,'' and requested that the Commission provide a longer transition period.[879] A third commenter suggested that the exemption report and the accountant's report on the exemption report be replaced with a ''check box on the FOCUS report'' and that with regard to these reports ''[t]he amount of paperwork involved for small firms that do not carry customer securities seems rather excessive.'' [880] A fourth commenter stated that the proposed transition period may burden smaller broker-dealers, and suggested that to facilitate the transition, the Commission should provide examples of best practices and deficiencies, with the cooperation of the AICPA.[881] This commenter also suggested that the effective date for the annual reporting requirements should be one year after publication of the final rule.[882]

The Commission is sensitive to the burdens the rule amendments and new form will have on small broker-dealers. To remove unnecessary burdens, the final rule amendments contain certain modifications from the proposal designed to alleviate some of the concerns regarding small broker-dealers.[883] The modifications are discussed in the following paragraphs.

As is discussed above, the Commission has modified the proposed amendments with respect to the exemption report in a manner that will likely result in lower costs for small broker-dealers than would have been the case if the Commission had adopted the proposed amendments without the modifications. In particular, the final rule provides that a broker-dealer can file the exemption report if it ''claimed that it was exempt'' from Rule 15c3–3 throughout the most recent fiscal year. This modification from the proposal—which provided that a broker-dealer could file the exemption report if the broker-dealer ''is exempt from Rule 15c3–3''—is designed to address concerns raised by commenters that a non-carrying broker-dealer might be required to file the compliance report because of an instance during the year in which it did not meet the relied on exemption provision in paragraph (k) of Rule 15c3–3.[884] As discussed in the economic analysis, the compliance report costs are significantly greater than the exemption report costs. The final rule clarifies that a non-carrying broker-dealer that has an exception to meeting the exemption provisions in paragraph (k) of Rule 15c3–3 need not file the compliance report; however, the broker-dealer would be required to identify, to its best knowledge and belief, in its exemption report each exception during the most recent fiscal year, if applicable, including a brief description of the exception and the approximate date on which the exception existed.

In addition, only clearing broker-dealers will be subject to the requirements that the Commission is adopting today that provide Commission and DEA examination staff with the ability to review audit documentation associated with broker-dealers' annual audit reports and allow their independent public accountants to discuss findings relating to the audit reports with Commission and DEA examination staff.

To alleviate burdens associated with Form Custody, the Commission has modified the form's instructions to make clear that questions on the form that cannot be answered because the broker-dealer does not engage in a particular activity do not need to be answered.

In response to comments, the Commission also has delayed the effective dates associated with the proposed reporting and attestation amendments, which will provide all broker-dealers, including smaller broker-dealers, with a longer transition period to prepare for the new requirements.

As is discussed above, the Commission considered the comment that it should replace the exemption report with a box to check on the FOCUS Report as the amount of paperwork for small firms ''seems rather excessive.'' [885] After careful consideration of this and other alternatives, the Commission determined that of the alternatives considered, none are appropriate alternatives to the exemption report. Requiring the broker-dealer to (1) create a separate written report stating that it is claiming the exemption and identifying the basis for the exemption, including any identified exceptions in meeting the conditions set forth in § 240.15c3–3(k) and (2) file this report with the Commission and the broker-dealer's DEA should increase broker-dealers' focus on the accuracy of its compliance with the statements being made because of the potential for liability for false statements, enhance compliance with the exemption conditions in Rule 15c3–3, and therefore provide better protection of customer assets.

Finally, with respect to the comment that the Commission should provide examples of best practices and deficiencies with the cooperation of the AICPA, the Commission notes that the question of whether further guidance is necessary is best answered after the requirements become effective and practical compliance questions arise. In addition, the Commission will publish a Small Entity Compliance Guide relating to these amendments.

C. Small Entities Subject to the Rules

Paragraph (c) of Rule 0–10 provides that, for purposes of the RFA, a small entity when used with reference to a broker-dealer (''small broker-dealer'') means a broker-dealer that: (1) Had total capital (net worth plus subordinated liabilities) of less than $500,000 on the date in the prior fiscal year as of which its audited financial statements were prepared pursuant to Rule 17a–5(d) or, if not required to file such statements, a broker-dealer that had total capital (net worth plus subordinated liabilities)

[877] *Id.* at 37602.

[878] *See IMS Letter.*

[879] *See Citrin Letter.*

[880] *See Angel Letter.*

[881] *See Citrin Letter.*

[882] *Id.* The commenter also specifically suggested that if non-carrying and smaller broker-dealers must use PCAOB standards, that the Commission should defer the effective date for one year after the approval of the amendments. *Id.*

[883] As is discussed below, small broker-dealers are in most instances not carrying broker-dealers. *See* section VIII.C. of this release.

[884] *See SIFMA Letter.* As discussed above in section II.B.1. of this release, there will be cases where a broker-dealer changes its business model to convert from a carrying broker-dealer to a non-carrying broker-dealer during the fiscal year. In this case, the broker-dealer could seek exemptive relief under section 36 of the Exchange Act (15 U.S.C. 78mm) from the requirement to file the compliance report and to instead file the exemption report. In analyzing such a request, the period of time the broker-dealer operated as a carrying broker-dealer would be a relevant consideration.

[885] *See* section II.B.4.iii. of this release.

of less than $500,000 on the last business day of the preceding fiscal year (or in the time that it has been in business if shorter); and (2) is not affiliated with any person (other than a natural person) that is not a small business or small organization.[886] Based on December 31, 2011 FOCUS Report data, the Commission estimates that there are approximately 812 broker-dealers that are classified as ''small'' entities for purposes of the RFA. Of these, the Commission estimates that there are approximately eight broker-dealers that are carrying broker-dealers. The Commission estimated for purposes of the IRFA that there were approximately 871 broker-dealers that were classified as small entities for purposes of the RFA and that there were no broker-dealers that were carrying firms that satisfied the definition of a small broker-dealer.[887]

D. Reporting, Recordkeeping, and Other Compliance Requirements

The Commission's amendments to Rule 17a–5 retain the current requirement that broker-dealers annually file financial statements and supporting schedules (''financial report'') that must be audited by a PCAOB-registered accountant. Under the amendments, the financial report must be audited in accordance with standards of the PCAOB, instead of in accordance with GAAS, as previously required.

In addition to the financial report, the amendments require broker-dealers to file one of two new reports: either a compliance report or an exemption report. If a broker-dealer did not claim that it was exempt from Rule 15c3–3 throughout the most recent fiscal year, the broker-dealer must prepare and file with the Commission a compliance report containing certain statements regarding the broker-dealer's internal control over compliance with the financial responsibility rules and compliance with certain of those rules. Alternatively, if the broker-dealer claimed that it was exempt from Rule 15c3–3 throughout the most recent fiscal year, the broker-dealer must prepare and file with the Commission an exemption report containing a statement that it claimed that it was exempt from Rule 15c3–3 during that period and identify the provisions under which it claimed that it was exempt from Rule 15c3–3.

The amendments to Rule 17a–5 also eliminate the ''material inadequacy'' concept and, among other things, replace the requirement that the broker-dealer's independent public accountant prepare, and the broker-dealer file with the Commission, a material inadequacy report with a requirement for the accountant to prepare a new report covering either the compliance report or the exemption report, as applicable. If the broker-dealer is a carrying broker-dealer, the accountant must prepare a report based on an examination, in accordance with PCAOB standards, of certain statements by the broker-dealer in the compliance report. If the broker-dealer claimed an exemption from Rule 15c3–3, the accountant must prepare a report based on a review, in accordance with PCAOB standards, of the exemption report. Broker-dealers must file these reports of the accountant with the Commission along with the financial report and either the compliance report or the exemption report.

Together, the financial report and the compliance report or the exemption report and the accountant's reports covering those reports comprise the annual reports that the broker-dealer must file each fiscal year with the Commission and the broker-dealer's DEA. The amendments require that the broker-dealer also file the annual reports with SIPC if the broker-dealer is a member of SIPC.

Amendments to Rule 17a–5 also require that if, during the course of an audit, a broker-dealer's independent public accountant determines that the broker-dealer is not in compliance with the financial responsibility rules, or that any material weaknesses exist, the accountant must immediately notify the broker-dealer. The broker-dealer must notify the Commission and its DEA of the material weakness and must notify the Commission and the DEA of the non-compliance if that non-compliance would otherwise trigger a notification requirement.

Amendments to Rule 17a–11 require that when a broker-dealer discovers, or is notified by its independent public accountant, of the existence of any material weakness under Rule 17a–5, the broker-dealer must notify the Commission and transmit a report to the Commission stating what the broker-dealer has done or is doing to correct the situation. The amendments substituted the term material weakness for the term material inadequacy with regard to Rule 17a–5.

Under the amendments, carrying broker-dealers or those that clear transactions must agree to allow Commission or DEA examination staff, if requested in writing for purposes of an examination of the broker-dealer, to review ''the documentation associated with the reports of the accountant'' and to discuss the accountant's findings with the accountant.

The amendments require broker-dealers to file a new ''Form Custody'' each quarter to elicit information concerning whether a broker-dealer maintains custody of customer and non-customer assets, and, if so, how such assets are maintained. Form Custody must be filed with the broker-dealer's DEA. The DEA must transmit the information obtained from Form Custody to the Commission at the same time that it transmits FOCUS Report data to the Commission under paragraph (a)(4) of Rule 17a–5.

The impact of the amendments on small broker-dealers will be substantially less than on larger firms. Most small broker-dealers are exempt from Rule 15c3–3 and therefore must file the exemption report. As discussed above, the exemption report must be reviewed by the independent public accountant, in lieu of the compliance report, which must be examined by the accountant. In addition, Form Custody would elicit less information from broker-dealers that do not maintain custody of customer assets, and therefore the form should be less burdensome for these broker-dealers.

E. Agency Action To Minimize Effect on Small Entities

Pursuant to section 3(a) of the RFA,[888] the Commission must consider significant alternatives that would accomplish the Commission's stated objectives, while minimizing any significant adverse impact on small entities. In connection with the final rules, the Commission considered the following alternatives: (1) Establishing differing compliance or reporting requirements or timetables that take into account the resources available to smaller entities; (2) clarifying, consolidating, or simplifying compliance and reporting requirements for smaller entities; (3) the use of performance standards rather than design standards; and (4) exempting smaller entities from coverage of the rules, or any part of the rules.

The Commission considered differing compliance and reporting requirements and timetables in adopting the amendments discussed in this release, which took into account the resources available to smaller entities. For

[886] 17 CFR 240.0–10(c).

[887] *See Broker-Dealer Reports,* 76 FR at 37602. Although the Commission received no comments regarding the its initial estimate that there were no small carrying broker-dealers, the estimate is nonetheless being revised based on additional analysis of available information.

[888] 5 U.S.C. 603(c).

example, as is discussed above, the Commission considered alternatives to the exemption report requirements, which resulted in modifications to the final rule that make clear that broker-dealers claiming exemptions from Rule 15c3–3 will remain subject to those requirements even if certain exceptions arise.[889] This reduces the burden on small broker-dealers that would otherwise be subject to the more resource-intensive compliance and examination report requirements applicable to carrying broker-dealers.

In addition, the Commission, in establishing effective dates for these amendments, considered the resources available to small broker-dealers. In this regard, the Commission is delaying the effective dates for the audit and reporting requirements, which will provide small broker-dealers with greater flexibility in allocating their resources while preparing to comply with applicable amendments.

The Commission also clarified, consolidated, and simplified compliance and reporting requirements for broker-dealers in connection with the amendments. As discussed above, the Commission clarified and simplified requirements applicable to Form Custody by specifying in the final form that broker-dealers are not required to answer questions that do not apply to their business activities. Further, in terms of consolidating regulatory requirements applicable to broker-dealers, a broker-dealer affiliated with, or dually-registered as, an investment adviser that is subject to the compliance report requirement can use the independent public accountant's examination of the compliance report to satisfy reporting obligations under Advisers Act Rule 206(4)–2.

The Commission generally used design standards rather than performance standards in connection with the final rule amendments because the Commission believes design standards will better accomplish its objectives of enhancing safeguards with respect to broker-dealer custody of securities and funds. The specific disclosure requirements in the final rule will promote comparable and consistent types of disclosures by broker-dealers, which will facilitate the ability of Commission and DEA staff to assess broker-dealer compliance with applicable requirements.

The Commission also considered, and is adopting, amendments that exempt certain types of broker-dealers from certain requirements. For example, broker-dealers that are not clearing broker-dealers, which include most small broker-dealers, do not need to comply with the access to accountant and audit documentation amendments. Most small broker-dealers also will not be subject to the new compliance and examination report requirements, as small broker-dealers are in most instances not carrying broker-dealers.

In addition, if the Commission subsequently determines that it is appropriate to exempt a broker-dealer, or type of broker-dealer, from such requirements, the Commission has existing authority under which it can act. In particular, under Exchange Act section 36, the Commission, by rule, regulation, or order, may exempt any person, or any class or classes of persons, from any rule under the Exchange Act to the extent that such exemption is necessary or appropriate in the public interest and is consistent with the protection of investors.[890]

IX. Statutory Authority

The Commission is amending Rule 17a–5 and Rule 17a–11 under the Exchange Act (17 CFR 240.17a–5 and 17 CFR 240.17a–11) and adopting new Form Custody (17 CFR 249.639) pursuant to the authority conferred by the Exchange Act, including sections 15, 17, 23(a) and 36.[891]

List of Subjects in 17 CFR Parts 240 and 249

Brokers, Confidential business information, Fraud, Reporting and recordkeeping requirements, Securities.

Text of the Amendments

For the reasons set out in the preamble, the Commission is amending Title 17, Chapter II, of the Code of Federal Regulations as follows:

PART 240—GENERAL RULES AND REGULATIONS, SECURITIES EXCHANGE ACT OF 1934

■ 1. The authority citation for part 240 continues to read, in part, as follows:

Authority: 15 U.S.C. 77c, 77d, 77g, 77j, 77s, 77z–2, 77z–3, 77eee, 77ggg, 77nnn, 77sss, 77ttt, 78c, 78c–3, 78c–5, 78d, 78e, 78f, 78g, 78i, 78j, 78j–1, 78k, 78k–1, 78*l,* 78m, 78n, 78n–1, 78o, 78o–4, 78o–10, 78p, 78q, 78q–1, 78s, 78u–5, 78w, 78x, 78*ll,* 78mm, 80a–20, 80a–23, 80a–29, 80a–37, 80b–3, 80b–4, 80b–11, 7201 *et seq.,* and 8302; 7 U.S.C. 2(c)(2)(E); 12 U.S.C. 5221(e)(3); 18 U.S.C. 1350; and Pub. L. 111–203, 939A, 124 Stat. 1376, (2010), unless otherwise noted.

* * * * *

■ 2. Section 240.17a–5 is amended by:

■ a. In paragraph (a)(2)(i), adding the word ''transactions'' after the word ''clears'' and removing the words ''shall file'' and adding in their place ''must file with the Commission.''

■ b. In paragraph (a)(2)(ii), removing the words ''shall file'' and adding in their place ''must file with the Commission'' and removing the phrase ''date selected for the annual audit of financial statements where said date is other than a calendar quarter'' and adding in its place ''end of the fiscal year of the broker or dealer where that date is not the end of a calendar quarter.'';

■ c. In paragraph (a)(2)(iii), removing the phrase ''who does not carry nor clear transactions nor carry customer accounts shall file'' and adding in its place ''that neither clears transactions nor carries customer accounts must file with the Commission'' and removing the phrase ''date selected for the annual audit of financial statements where said date is other than the end of the calendar quarter.'' and adding in its place ''end of the fiscal year of the broker or dealer where that date is not the end of a calendar quarter.'';

■ d. In paragraph (a)(2)(iv), removing the words ''shall file'' and adding in their place ''must file with the Commission'' and adding the phrase ''(''designated examining authority'')'' after the phrase ''section 17(d) of the Act'';

■ e. In paragraph (a)(3), in the first sentence, adding the words ''that must be filed with the Commission'' after the words ''provided for in this paragraph (a)'';

■ f. Redesignating paragraphs (a)(5) and (6) as paragraphs (a)(6) and (7);

■ g. In newly redesignated paragraph (a)(6)(ii)(A), removing the phrase ''(a)(5)(i)'' and adding in its place ''(a)(6)(i)'';

■ h. Adding new paragraph (a)(5);

■ i. Revising paragraph (b)(2);

■ j. In paragraph (b)(4), removing the word ''he'' and adding in its place ''the broker or dealer''.

■ k. Removing paragraph (b)(6);

■ l. In paragraph (c)(1)(i), removing the phrase ''his customers'' and adding in its place ''customers of the introducing broker or dealer'';

■ m. In paragraph (c)(1)(iii), removing the phrase ''in the manner contemplated by the $2,500 minimum net capital requirement of § 240.15c3–1'' and adding in its place ''and otherwise qualified to maintain net capital of no less than what is required under § 240.15c3–1(a)(2)(iv)'';

■ n. In paragraph (c)(2) introductory text, in the first sentence, removing the phrase ''date of the audited financial statements required by paragraph (d) of

[889] *See* sections II.B.4.iii. and VII.C.1.ii.b. of this release.

[890] 15 U.S.C. 78mm.

[891] 15 U.S.C. 78o, 78q, 78w(a) and 78mm.

this section'' and adding in its place ''end of the fiscal year of the broker or dealer'';

■ o. In paragraph (c)(2)(i) removing the phrase ''balance sheet with appropriate notes prepared in accordance with'' and adding in its place ''Statement of Financial Condition with appropriate notes prepared in accordance with U.S.'';

■ p. Removing paragraph (c)(2)(iii);

■ q. Redesignating paragraph (c)(2)(iv) as (c)(2)(iii);

■ r. In newly redesignated paragraph (c)(2)(iii), removing the phrase ''annual audit report of the broker or dealer pursuant to § 240.17a-5'' and adding in its place ''financial report of the broker or dealer under paragraph (d)(1)(i)(A) of this section'' and adding at the end the word ''and'';

■ s. Adding new paragraph (c)(2)(iv);

■ t. In paragraph (c)(4) introductory text removing the word '''customer''' and adding in its place ''*customer'';*

■ u. In paragraphs (c)(5)(ii)(A) and (c)(5)(iii) introductory text, removing the phrases ''Web site'' and ''Web sites'' and adding in their place ''website'' and ''websites'';

■ v. Removing paragraph (c)(5)(vi);

■ w. Revising paragraph (d);

■ x. In paragraph (e) introductory text, removing the phrase ''financial statements'' and adding in its place ''annual reports'' and removing the word ''shall'' and adding in its place ''must'';

■ y. Revising paragraphs (e)(1) through (4);

■ z. Removing paragraph (e)(5);

■ aa. Revising paragraphs (f) through (i);

■ bb. Removing and reserving paragraph (j);

■ cc. In paragraph (m)(1), removing the word ''audit'' after the word ''annual''; and

■ dd. In paragraph (n)(2) removing the phrase ''audit report'' and adding in its place ''annual reports''; adding the phrase ''in writing'' after the word ''approved'' and removing the phrase ''pursuant to paragraph (d)(1)(i) of this section'' and adding in its place ''of the broker or dealer''.

The revisions and additions read as follows:

§ 240.17a–5 Reports to be made by certain brokers and dealers.

(a) * * *

(5) Every broker or dealer subject to this paragraph (a) must file Form Custody (§ 249.639 of this chapter) with its designated examining authority within 17 business days after the end of each calendar quarter and within 17 business days after the end of the fiscal year of the broker or dealer where that date is not the end of a calendar quarter. The designated examining authority must maintain the information obtained through the filing of Form Custody and transmit the information to the Commission, at such time as it transmits the applicable part of Form X–17A–5 (§ 249.617 of this chapter) as required in paragraph (a)(4) of this section.

* * * * *

(b) * * *

(2) The broker or dealer must attach to the report required by paragraph (b)(1) of this section an oath or affirmation that to the best knowledge and belief of the person making the oath or affirmation the information contained in the report is true and correct. The oath or affirmation must be made before a person duly authorized to administer such oaths or affirmations. If the broker or dealer is a sole proprietorship, the oath or affirmation must be made by the proprietor; if a partnership, by a general partner; if a corporation, by a duly authorized officer; or if a limited liability company or limited liability partnership, by the chief executive officer, chief financial officer, manager, managing member, or those members vested with management authority for the limited liability company or limited liability partnership.

* * * * *

(c) * * *

(2) * * *

(iv) If, in connection with the most recent annual reports required under paragraph (d) of this section, the report of the independent public accountant required under paragraph (d)(1)(i)(C) of this section covering the report of the broker or dealer required under paragraph (d)(1)(i)(B)(*1*) of this section identifies one or more *material weaknesses,* a statement by the broker or dealer that one or more *material weaknesses* have been identified and that a copy of the report of the independent public accountant required under paragraph (d)(1)(i)(C) of this section is currently available for the customer's inspection at the principal office of the Commission in Washington, DC, and the regional office of the Commission for the region in which the broker or dealer has its principal place of business.

* * * * *

(d) *Annual reports.* (1)(i) Except as provided in paragraphs (d)(1)(iii) and (d)(1)(iv) of this section, every broker or dealer registered under section 15 of the Act must file annually:

(A) A financial report as described in paragraph (d)(2) of this section; and

(B)(*1*) If the broker or dealer did not claim it was exempt from § 240.15c3–3 throughout the most recent fiscal year, a compliance report as described in paragraph (d)(3) of this section executed by the person who makes the oath or affirmation under paragraph (e)(2) of this section; or

(*2*) If the broker or dealer did claim that it was exempt from § 240.15c3–3 throughout the most recent fiscal year, an exemption report as described in paragraph (d)(4) of this section executed by the person who makes the oath or affirmation under paragraph (e)(2) of this section;

(C) Except as provided in paragraph (e)(1)(i) of this section, a report prepared by an independent public accountant, under the engagement provisions in paragraph (g) of this section, covering each report required to be filed under paragraphs (d)(1)(i)(A) and (B) of this section.

(ii) The reports required to be filed under this paragraph (d) must be as of the same fiscal year end each year, unless a change is approved in writing by the designated examining authority for the broker or dealer under paragraph (n) of this section. A copy of the written approval must be sent to the Commission's principal office in Washington, DC, and the regional office of the Commission for the region in which the broker or dealer has its principal place of business.

(iii) A broker or dealer succeeding to and continuing the business of another broker or dealer need not file the reports under this paragraph (d) as of a date in the fiscal year in which the succession occurs if the predecessor broker or dealer has filed reports in compliance with this paragraph (d) as of a date in such fiscal year.

(iv) A broker or dealer that is a member of a national securities exchange, has transacted a business in securities solely with or for other members of a national securities exchange, and has not carried any margin account, credit balance, or security for any person who is defined as a *customer* in paragraph (c)(4) of this section, is not required to file reports under this paragraph (d).

(2) *Financial report.* The financial report must contain:

(i) A Statement of Financial Condition, a Statement of Income, a Statement of Cash Flows, a Statement of Changes in Stockholders' or Partners' or Sole Proprietor's Equity, and a Statement of Changes in Liabilities Subordinated to Claims of General Creditors. The statements must be prepared in accordance with U.S. generally accepted accounting principles and must be in a format that is consistent with the statements

contained in Form X–17A–5 (§ 249.617 of this chapter) Part II or Part IIA. If the Statement of Financial Condition filed in accordance with instructions to Form X–17A–5, Part II or Part IIA, is not consolidated, a summary of financial data, including the assets, liabilities, and net worth or stockholders' equity, for subsidiaries not consolidated in the Part II or Part IIA Statement of Financial Condition as filed by the broker or dealer must be included in the notes to the financial statements reported on by the independent public accountant.

(ii) Supporting schedules that include, from Part II or Part IIA of Form X–17A–5 (§ 249.617 of this chapter), a Computation of Net Capital Under § 240.15c3–1, a Computation for Determination of the Reserve Requirements under Exhibit A of § 240.15c3–3, and Information Relating to the Possession or Control Requirements Under § 240.15c3–3.

(iii) If either the Computation of Net Capital under § 240.15c3–1 or the Computation for Determination of the Reserve Requirements Under Exhibit A of § 240.15c3–3 in the financial report is materially different from the corresponding computation in the most recent Part II or Part IIA of Form X–17A–5 (§ 249.617 of this chapter) filed by the broker or dealer pursuant to paragraph (a) of this section, a reconciliation, including appropriate explanations, between the computation in the financial report and the computation in the most recent Part II or Part IIA of Form X–17A–5 filed by the broker or dealer. If no material differences exist, a statement so indicating must be included in the financial report.

(3) *Compliance report.* (i) The compliance report must contain:

(A) Statements as to whether:

(*1*) The broker or dealer has established and maintained *Internal Control Over Compliance* as that term is defined in paragraph (d)(3)(ii) of this section;

(*2*) The Internal Control Over Compliance of the broker or dealer was effective during the most recent fiscal year;

(*3*) The Internal Control Over Compliance of the broker or dealer was effective as of the end of the most recent fiscal year;

(*4*) The broker or dealer was in compliance with §§ 240.15c3–1 and 240.15c3–3(e) as of the end of the most recent fiscal year; and

(*5*) The information the broker or dealer used to state whether it was in compliance with §§ 240.15c3–1 and 240.15c3–3(e) was derived from the books and records of the broker or dealer.

(B) If applicable, a description of each material weakness in the Internal Control Over Compliance of the broker or dealer during the most recent fiscal year.

(C) If applicable, a description of any instance of non-compliance with §§ 240.15c3–1 or 240.15c3–3(e) as of the end of the most recent fiscal year.

(ii) The term *Internal Control Over Compliance* means internal controls that have the objective of providing the broker or dealer with reasonable assurance that non-compliance with § 240.15c3–1, § 240.15c3–3, § 240.17a–13, or any rule of the designated examining authority of the broker or dealer that requires account statements to be sent to the customers of the broker or dealer (an ''Account Statement Rule'') will be prevented or detected on a timely basis.

(iii) The broker or dealer is not permitted to conclude that its Internal Control Over Compliance was effective during the most recent fiscal year if there were one or more material weaknesses in its Internal Control Over Compliance during the most recent fiscal year. The broker or dealer is not permitted to conclude that its Internal Control Over Compliance was effective as of the end of the most recent fiscal year if there were one or more material weaknesses in its internal control as of the end of the most recent fiscal year. A *material weakness* is a deficiency, or a combination of deficiencies, in Internal Control Over Compliance such that there is a reasonable possibility that non-compliance with §§ 240.15c3–1 or 240.15c3–3(e) will not be prevented or detected on a timely basis or that non-compliance to a material extent with § 240.15c3–3, except for paragraph (e), § 240.17a–13, or any Account Statement Rule will not be prevented or detected on a timely basis. A *deficiency in Internal Control Over Compliance* exists when the design or operation of a control does not allow the management or employees of the broker or dealer, in the normal course of performing their assigned functions, to prevent or detect on a timely basis non-compliance with § 240.15c3–1, § 240.15c3–3, § 240.17a–13, or any Account Statement Rule.

(4) *Exemption report.* The exemption report must contain the following statements made to the best knowledge and belief of the broker or dealer:

(i) A statement that identifies the provisions in § 240.15c3–3(k) under which the broker or dealer claimed an exemption from § 240.15c3–3;

(ii) A statement that the broker or dealer met the identified exemption provisions in § 240.15c3–3(k) throughout the most recent fiscal year without exception or that it met the identified exemption provisions in § 240.15c3–3(k) throughout the most recent fiscal year except as described under paragraph (d)(4)(iii) of this section; and

(iii) If applicable, a statement that identifies each exception during the most recent fiscal year in meeting the identified exemption provisions in § 240.15c3–3(k) and that briefly describes the nature of each exception and the approximate date(s) on which the exception existed.

(5) The annual reports must be filed not more than sixty (60) calendar days after the end of the fiscal year of the broker or dealer.

(6) The annual reports must be filed at the regional office of the Commission for the region in which the broker or dealer has its principal place of business, the Commission's principal office in Washington, DC, the principal office of the designated examining authority for the broker or dealer, and with the Securities Investor Protection Corporation (''SIPC'') if the broker or dealer is a member of SIPC. Copies of the reports must be provided to all self-regulatory organizations of which the broker or dealer is a member, unless the self-regulatory organization by rule waives this requirement.

(e) * * *

(1)(i) The broker or dealer is not required to engage an independent public accountant to provide the reports required under paragraph (d)(1)(i)(C) of this section if, since the date of the registration of the broker or dealer under section 15 of the Act (15 U.S.C. 78o) or of the previous annual reports filed under paragraph (d) of this section:

(A) The securities business of the broker or dealer has been limited to acting as broker (agent) for the issuer in soliciting subscriptions for securities of the issuer, the broker has promptly transmitted to the issuer all funds and promptly delivered to the subscriber all securities received in connection with the transaction, and the broker has not otherwise held funds or securities for or owed money or securities to customers; or

(B) The securities business of the broker or dealer has been limited to buying and selling evidences of indebtedness secured by mortgage, deed of trust, or other lien upon real estate or leasehold interests, and the broker or dealer has not carried any margin account, credit balance, or security for any securities customer.

(ii) A broker or dealer that files annual reports under paragraph (d) of this

section that are not covered by reports prepared by an independent public accountant must include in the oath or affirmation required by paragraph (e)(2) of this section a statement of the facts and circumstances relied upon as a basis for exemption from the requirement that the annual reports filed under paragraph (d) of this section be covered by reports prepared by an independent public accountant.

(2) The broker or dealer must attach to the financial report an oath or affirmation that, to the best knowledge and belief of the person making the oath or affirmation,

(i) The financial report is true and correct; and

(ii) Neither the broker or dealer, nor any partner, officer, director, or equivalent person, as the case may be, has any proprietary interest in any account classified solely as that of a customer.

The oath or affirmation must be made before a person duly authorized to administer such oaths or affirmations. If the broker or dealer is a sole proprietorship, the oath or affirmation must be made by the proprietor; if a partnership, by a general partner; if a corporation, by a duly authorized officer; or if a limited liability company or limited liability partnership, by the chief executive officer, chief financial officer, manager, managing member, or those members vested with management authority for the limited liability company or limited liability partnership.

* * * * *

(3) The annual reports filed under paragraph (d) of this section are not confidential, except that, if the Statement of Financial Condition in a format that is consistent with Form X–17A–5 (§ 249.617 of this chapter), Part II, or Part IIA, is bound separately from the balance of the annual reports filed under paragraph (d) of this section, and each page of the balance of the annual reports is stamped ''confidential,'' then the balance of the annual reports shall be deemed confidential to the extent permitted by law. However, the annual reports, including the confidential portions, will be available for official use by any official or employee of the U.S. or any State, by national securities exchanges and registered national securities associations of which the broker or dealer filing such a report is a member, by the Public Company Accounting Oversight Board, and by any other person if the Commission authorizes disclosure of the annual reports to that person as being in the public interest. Nothing contained in this paragraph may be construed to be in derogation of the rules of any registered national securities association or national securities exchange that give to customers of a member broker or dealer the right, upon request to the member broker or dealer, to obtain information relative to its financial condition.

(4)(i) The broker or dealer must file with SIPC a report on the SIPC annual general assessment reconciliation or exclusion from membership forms that contains such information and is in such format as determined by SIPC by rule and approved by the Commission.

(ii) Until the earlier of two years after the date paragraph (e)(4)(i) of this section is effective or SIPC adopts a rule under paragraph (e)(4)(i) of this section and the rule is approved by the Commission, the broker or dealer must file with SIPC a supplemental report on the status of the membership of the broker or dealer in SIPC if, under paragraph (d)(1)(i)(C) of this section, the broker or dealer is required to file reports prepared by an independent public accountant. The supplemental report must include the independent public accountant's report on applying agreed-upon procedures based on the performance of the procedures enumerated in paragraph (e)(4)(ii)(C) of this section. The supplemental report must cover the SIPC annual general assessment reconciliation or exclusion from membership forms not previously reported on under this paragraph (e)(4) that were required to be filed on or prior to the date of the annual reports required by paragraph (d) of this section: Provided, that the broker or dealer is not required to file the supplemental report on the SIPC annual general assessment reconciliation or exclusion from membership form for any period during which the SIPC assessment is a specified dollar value as provided for in section 4(d)(1)(c) of the Securities Investor Protection Act of 1970, as amended. The supplemental report must be filed with the regional office of the Commission for the region in which the broker or dealer has its principal place of business, the Commission's principal office in Washington, DC, the principal office of the designated examining authority for the broker or dealer, and the principal office of SIPC. The supplemental report must include the following:

(A) A schedule of assessment payments showing any overpayments applied and overpayments carried forward including: payment dates, amounts, and name of SIPC collection agent to whom mailed; or

(B) If exclusion from membership was claimed, a statement that the broker or dealer qualified for exclusion from membership under the Securities Investor Protection Act of 1970, as amended; and

(C) *An independent public accountant's report.* The independent public accountant must be engaged to perform the following procedures:

(*1*) Comparison of listed assessment payments with respective cash disbursements record entries;

(*2*) For all or any portion of a fiscal year, comparison of amounts reflected in the annual reports required by paragraph (d) of this section with amounts reported in the Annual General Assessment Reconciliation (Form SIPC–7);

(*3*) Comparison of adjustments reported in Form SIPC–7 with supporting schedules and working papers supporting the adjustments;

(*4*) Proof of the arithmetical accuracy of the calculations reflected in Form SIPC–7 and in the schedules and working papers supporting any adjustments; and

(*5*) Comparison of the amount of any overpayment applied with the Form SIPC–7 on which it was computed; or

(*6*) If exclusion from membership is claimed, a comparison of the income or loss reported in the financial report required by paragraph (d)(2) of this section with the Certification of Exclusion from Membership (Form SIPC–3).

(f)(1) *Qualifications of independent public accountant.* The independent public accountant must be qualified and independent in accordance with § 210.2–01 of this chapter and the independent public accountant must be registered with the Public Company Accounting Oversight Board if required by the Sarbanes-Oxley Act of 2002.

(2) *Statement regarding independent public accountant.* (i) Every broker or dealer that is required to file annual reports under paragraph (d) of this section must file no later than December 10 of each year (or 30 calendar days after the effective date of its registration as a broker or dealer, if earlier) a statement as prescribed in paragraph (f)(2)(ii) of this section with the Commission's principal office in Washington, DC, the regional office of the Commission for the region in which its principal place of business is located, and the principal office of the designated examining authority for the broker or dealer. The statement must be dated no later than December 1 (or 20 calendar days after the effective date of its registration as a broker or dealer, if earlier). If the engagement of an

independent public accountant is of a continuing nature, providing for successive engagements, no further filing is required. If the engagement is for a single year, or if the most recent engagement has been terminated or amended, a new statement must be filed by the required date.

(ii) The statement must be headed ''Statement regarding independent public accountant under Rule 17a–5(f)(2)'' and must contain the following information and representations:

(A) Name, address, telephone number, and registration number of the broker or dealer.

(B) Name, address, and telephone number of the independent public accountant.

(C) The date of the fiscal year of the annual reports of the broker or dealer covered by the engagement.

(D) Whether the engagement is for a single year or is of a continuing nature.

(E) A representation that the independent public accountant has undertaken the items enumerated in paragraphs (g)(1) and (2) of this section.

(F) Except as provided in paragraph (f)(2)(iii) of this section, a representation that the broker or dealer agrees to allow representatives of the Commission or its designated examining authority, if requested in writing for purposes of an examination of the broker or dealer, to review the audit documentation associated with the reports of the independent public accountant filed under paragraph (d)(1)(i)(C) of this section. For purposes of this paragraph, ''audit documentation'' has the meaning provided in standards of the Public Company Accounting Oversight Board. The Commission anticipates that, if requested, it will accord confidential treatment to all documents it may obtain from an independent public accountant under this paragraph to the extent permitted by law.

(G) Except as provided in paragraph (f)(2)(iii) of this section, a representation that the broker or dealer agrees to allow the independent public accountant to discuss with representatives of the Commission and its designated examining authority, if requested in writing for purposes of an examination of the broker or dealer, the findings associated with the reports of the independent public accountant filed under paragraph (d)(1)(i)(C) of this section.

(iii) If a broker or dealer neither clears transactions nor carries customer accounts, the broker or dealer is not required to include the representations in paragraphs (f)(2)(ii)(F) and (G) of this section.

(iv) Any broker or dealer that is not required to file reports prepared by an independent public accountant under paragraph (d)(1)(i)(C) of this section must file a statement required under paragraph (f)(2)(i) of this section indicating the date as of which the unaudited reports will be prepared.

(3) *Replacement of accountant.* A broker or dealer must file a notice that must be received by the Commission's principal office in Washington, DC, the regional office of the Commission for the region in which its principal place of business is located, and the principal office of the designated examining authority for the broker or dealer not more than 15 business days after:

(i) The broker or dealer has notified the independent public accountant that provided the reports the broker or dealer filed under paragraph (d)(1)(i)(C) of this section for the most recent fiscal year that the independent public accountant's services will not be used in future engagements; or

(ii) The broker or dealer has notified an independent public accountant that was engaged to provide the reports required under paragraph (d)(1)(i)(C) of this section that the engagement has been terminated; or

(iii) An independent public accountant has notified the broker or dealer that the independent public accountant would not continue under an engagement to provide the reports required under paragraph (d)(1)(i)(C) of this section; or

(iv) A new independent public accountant has been engaged to provide the reports required under paragraph (d)(1)(i)(C) of this section without any notice of termination having been given to or by the previously engaged independent public accountant.

(v) The notice must include:

(A) The date of notification of the termination of the engagement or of the engagement of the new independent public accountant, as applicable; and

(B) The details of any issues arising during the 24 months (or the period of the engagement, if less than 24 months) preceding the termination or new engagement relating to any matter of accounting principles or practices, financial statement disclosure, auditing scope or procedure, or compliance with applicable rules of the Commission, which issues, if not resolved to the satisfaction of the former independent public accountant, would have caused the independent public accountant to make reference to them in the report of the independent public accountant. The issues required to be reported include both those resolved to the former independent public accountant's satisfaction and those not resolved to the former accountant's satisfaction. Issues contemplated by this section are those that occur at the decision-making level—that is, between principal financial officers of the broker or dealer and personnel of the accounting firm responsible for rendering its report. The notice must also state whether the accountant's report filed under paragraph (d)(1)(i)(C) of this section for any of the past two fiscal years contained an adverse opinion or a disclaimer of opinion or was qualified as to uncertainties, audit scope, or accounting principles, and must describe the nature of each such adverse opinion, disclaimer of opinion, or qualification. The broker or dealer must also request the former independent public accountant to furnish the broker or dealer with a letter addressed to the Commission stating whether the independent public accountant agrees with the statements contained in the notice of the broker or dealer and, if not, stating the respects in which independent public accountant does not agree. The broker or dealer must file three copies of the notice and the accountant's letter, one copy of which must be manually signed by the sole proprietor, a general partner, or a duly authorized corporate, limited liability company, or limited liability partnership officer or member, as appropriate, and by the independent public accountant, respectively.

(g) *Engagement of independent public accountant.* The independent public accountant engaged by the broker or dealer to provide the reports required under paragraph (d)(1)(i)(C) of this section must, as part of the engagement, undertake the following, as applicable:

(1) To prepare an independent public accountant's report based on an examination of the financial report required to be filed by the broker or dealer under paragraph (d)(1)(i)(A) of this section in accordance with standards of the Public Company Accounting Oversight Board; and

(2)(i) To prepare an independent public accountant's report based on an examination of the statements required under paragraphs (d)(3)(i)(A)(*2*) through (*5*) of this section in the compliance report required to be filed by the broker or dealer under paragraph (d)(1)(i)(B)(*1*) of this section in accordance with standards of the Public Company Accounting Oversight Board; or

(ii) To prepare an independent public accountant's report based on a review of the statements required under paragraphs (d)(4)(i) through (iii) of this section in the exemption report required to be filed by the broker or dealer under

paragraph (d)(1)(i)(B)(*2*) of this section in accordance with standards of the Public Company Accounting Oversight Board.

(h) *Notification of non-compliance or material weakness.* If, during the course of preparing the independent public accountant's reports required under paragraph (d)(1)(i)(C) of this section, the independent public accountant determines that the broker or dealer is not in compliance with § 240.15c3–1, § 240.15c3–3, or § 240.17a–13 or any rule of the designated examining authority of the broker or dealer that requires account statements to be sent to the customers of the broker or dealer, as applicable, or the independent public accountant determines that any material weaknesses (as defined in paragraph (d)(3)(iii) of this section) exist, the independent public accountant must immediately notify the chief financial officer of the broker or dealer of the nature of the non-compliance or material weakness. If the notice from the accountant concerns an instance of non-compliance that would require a broker or dealer to provide a notification under § 240.15c3–1, § 240.15c3–3, or § 240.17a–11, or if the notice concerns a material weakness, the broker or dealer must provide a notification in accordance with § 240.15c3–1, § 240.15c3–3, or § 240.17a–11, as applicable, and provide a copy of the notification to the independent public accountant. If the independent public accountant does not receive the notification within one business day, or if the independent public accountant does not agree with the statements in the notification, then the independent public accountant must notify the Commission and the designated examining authority within one business day. The report from the accountant must, if the broker or dealer failed to file a notification, describe any instances of non-compliance that required a notification under § 240.15c3–1, § 240.15c3–3, or § 240.17a–11, or any material weaknesses. If the broker or dealer filed a notification, the report from the accountant must detail the aspects of the notification of the broker or dealer with which the accountant does not agree.

Note to paragraph (h): The attention of the broker or dealer and the independent public accountant is called to the fact that under § 240.17a–11(b)(1), among other things, a broker or dealer whose net capital declines below the minimum required pursuant to § 240.15c3–1 shall give notice of such deficiency that same day in accordance with § 240.17a–11(g) and the notice shall specify the broker or dealer's net capital requirement and its current amount of net capital. The attention of the broker or dealer and accountant also is called to the fact that under § 240.15c3–3(i), if a broker or dealer shall fail to make a reserve bank account or special account deposit, as required by § 240.15c3–3, the broker or dealer shall by telegram immediately notify the Commission and the regulatory authority for the broker or dealer, which examines such broker or dealer as to financial responsibility and shall promptly thereafter confirm such notification in writing.

(i) *Reports of the independent public accountant required under paragraph (d)(1)(i)(C) of this section*—(1) *Technical requirements.* The independent public accountant's reports must:

(i) Be dated;

(ii) Be signed manually;

(iii) Indicate the city and state where issued; and

(iv) Identify without detailed enumeration the items covered by the reports.

(2) *Representations.* The independent public accountant's reports must:

(i) State whether the examinations or review, as applicable, were made in accordance with standards of the Public Company Accounting Oversight Board;

(ii) Identify any examination and, if applicable, review procedures deemed necessary by the independent public accountant under the circumstances of the particular case that have been omitted and the reason for their omission.

(iii) Nothing in this section may be construed to imply authority for the omission of any procedure that independent public accountants would ordinarily employ in the course of an examination or review made for the purpose of expressing the opinions or conclusions required under this section.

(3) *Opinion or conclusion to be expressed.* The independent public accountant's reports must state clearly:

(i) The opinion of the independent public accountant with respect to the financial report required under paragraph (d)(1)(i)(A) of this section and the accounting principles and practices reflected in that report;

(ii) The opinion of the independent public accountant with respect to the financial report required under paragraph (d)(1)(i)(A) of this section, as to the consistency of the application of the accounting principles, or as to any changes in those principles, that have a material effect on the financial statements; and

(iii)(A) The opinion of the independent public accountant with respect to the statements required under paragraphs (d)(3)(i)(A)(*2*) through (*5*) of this section in the compliance report required under paragraph (d)(1)(i)(B)(*1*) of this section; or

(B) The conclusion of the independent public accountant with respect to the statements required under paragraphs (d)(4)(i) through (iii) of this section in the exemption report required under paragraph (d)(1)(i)(B)(*2*) of this section.

(4) *Exceptions.* Any matters to which the independent public accountant takes exception must be clearly identified, the exceptions must be specifically and clearly stated, and, to the extent practicable, the effect of each such exception on any related items contained in the annual reports required under paragraph (d) of this section must be given.

* * * * *

■ 3. Section 240.17a–11 is amended by:

■ a. Revising paragraph (e); and

■ b. In paragraph (h), removing the citation ''17a–5(h)(2)'' and adding in its place the citation ''17a–5(h)'' and removing the citation ''17a–12(f)(2)'' and adding in its place the citation ''17a–12(i)(2).''

The revision reads as follows:

§ 240.17a–11 Notification provision for brokers and dealers.

* * * * *

(e) Whenever any broker or dealer discovers, or is notified by an independent public accountant under § 240.17a–12(i)(2), of the existence of any material inadequacy as defined in § 240.17a–12(h)(2), or whenever any broker or dealer discovers, or is notified by an independent public accountant under § 240.17a–5(h), of the existence of any material weakness as defined in § 240.17a–5(d)(3)(iii), the broker or dealer must:

(1) Give notice, in accordance with paragraph (g) of this section, of the material inadequacy or material weakness within 24 hours of the discovery or notification of the material inadequacy or the material weakness; and

(2) Transmit a report, in accordance with paragraph (g) of this section, within 48 hours of the notice stating what the broker or dealer has done or is doing to correct the situation.

* * * * *

PART 249—FORMS, SECURITIES EXCHANGE ACT OF 1934

■ 4. The authority citation for part 249 continues to read, in part, as follows:

Authority: 15 U.S.C. 78a *et seq.* and 7201 *et seq.;* 12 U.S.C. 5461 *et seq.;* and 18 U.S.C. 1350, unless otherwise noted.

* * * * *

Subpart G—Forms for Reports To Be Made by Certain Exchange Members, Brokers, and Dealers

■ 5. Add Form Custody (referenced in § 249.639) to subpart G to read as follows:

§ 249.639 Form custody.

This form shall be used for reports of information required by § 240.17a–5 of this chapter.

Note: The text of Form Custody will not appear in the Code of Federal Regulations.

BILLING CODE 8011–01–P

UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
Washington, D.C. 20549

FORM CUSTODY
For Broker-Dealers

(Please read instructions before preparing Form.)

Name of Broker/Dealer As of (Month/Day/Year)

_8-_____
SEC File No. CRD No.

Address of Principal Place of Business

(No. and Street) (City) (State) (Zip Code)

INSTRUCTIONS

GENERAL INSTRUCTIONS

A. Answer questions applicable to the broker-dealer's business activities and all "Yes" or "No" questions. Questions that cannot be answered because the broker-dealer does not engage in a particular activity do not need to be answered. For example, a broker-dealer that does not hold customer and non-customer funds or securities does not need to answer Items 3.C-3.E.

B. Definitions: for purposes of this Form:

1. "Affiliate" means any person who directly or indirectly controls the broker-dealer or any person who is directly or indirectly controlled by or under common control with the broker-dealer. Ownership of 25% or more of the common stock of an entity is deemed prima facie evidence of control.

2. "Bank" has the same meaning as in 15 U.S.C. 78c(a)(6).

3. "Broker" has the same meaning as in 15 U.S.C. 78c(a)(4).

4. "Dealer" has the same meaning as in 15 U.S.C. 78c(a)(5).

5. "Carrying broker-dealer" means a broker-dealer that carries customer or broker or dealer accounts and receives or holds funds or securities for those customers.

6. "Clearing broker-dealer" means a broker-dealer that clears transactions for itself or accounts of other broker-dealers either on a fully disclosed or omnibus basis.

7. "Customer" has the same meaning as in 17 CFR 240.15c3-3(a)(1).

8. "Free credit balance" means any liabilities of a broker-dealer to customers and non-customers that are subject to immediate cash payment to customers and non-customers on demand, whether resulting from sales of securities, dividends, interest, deposits, or otherwise, excluding, however, funds in commodity accounts that are segregated in accordance with the Commodity Exchange Act or in a similar manner.

9. "Money Market Fund" means any security issued by an investment company registered under section 8 of the Investment Company Act of 1940 that is considered a money market fund under Investment Company Act Rule 2a-7.

10. "Omnibus account" means an account carried and cleared by another broker-dealer and containing accounts of undisclosed customers on a commingled basis that are carried individually on the books of the broker-dealer introducing the accounts.

11. "Private Fund" means an issuer that would be an investment company as defined in section 3 of the Investment Company Act of 1940 but for section 3(c)(1) or 3(c)(7) of that Act.

12. "Structured debt" means any security or money market instrument issued by an asset pool or as part of any asset-backed or mortgage-backed securities transaction. Structured debt is a broad category of financial instrument and includes, but is not limited to, asset-backed securities such as residential mortgage-backed securities ("RMBS") and other types of structured debt instruments such as collateralized debt obligations ("CDOs"), including synthetic and hybrid CDOs, or collateralized loan obligations ("CLOs").

INSTRUCTIONS FOR SPECIFIC LINE ITEMS

Item 1.A Answer the question by checking the appropriate box. A broker-dealer must check "Yes" if it introduces any customer accounts to another broker-dealer on a fully disclosed basis. A broker-dealer that carries customer accounts and/or introduces customer accounts on an omnibus basis must check "Yes" if it also introduces one or more customer accounts to another broker-dealer on a fully disclosed basis.

Item 1.B Item 1.B applies to broker-dealers that introduce customer accounts on a fully disclosed basis to one or more other broker-dealers. If Item 1.B applies, identify each broker-dealer to which customer accounts are introduced on a fully disclosed basis.

Item 2.A Answer the question by checking the appropriate box. A broker-dealer must check "Yes" if it introduces any customer accounts to another broker-dealer on an omnibus basis. A broker-dealer that carries customer accounts (other than those introduced on an omnibus basis) and/or introduces customer accounts on a fully disclosed basis must check "Yes" if it also introduces one or more customer accounts to another broker-dealer on an omnibus basis.

Item 2.B Item 2.B applies to broker-dealers that introduce customer accounts on an omnibus basis to one or more other broker-dealers. If Item 2.B applies, identify each broker-dealer to which customer accounts are introduced on an omnibus basis.

Item 3.A Answer the question by checking the appropriate box. A broker-dealer that introduces customer accounts to another broker-dealer on an omnibus basis is a carrying broker-dealer with respect to those accounts under the Commission's broker-dealer financial responsibility rules. If those accounts are the only accounts carried by the broker-dealer, check "No" in Item 3.A, as those accounts are addressed in Items 2.A and 2.B.

Item 3.B Answer the question by checking the appropriate box. Answer "Yes" if accounts are carried by the broker-dealer for persons that are not "customers" as that term is defined in Rule 15c3-3 under the Securities Exchange Act of 1934. Examples of persons that are not customers of a broker-dealer include general partners, directors, or principal officers – such as the president, executive vice presidents, treasurer, secretary or any person performing similar functions – of the broker-

dealer and accountholders that are themselves broker-dealers (unless such broker-dealer accountholders are required to be treated as customers under Rule 15c3-3).

Item 3.C Identify the types of locations where the broker-dealer holds securities. Only identify types of locations where the broker-dealer holds securities directly in the name of the broker-dealer (*i.e.*, do not identify a type of location if the broker-dealer only holds securities at the location through an intermediary). A location holds securities directly in the name of the broker-dealer if the location is aware of the identity of the broker-dealer and acts directly upon the broker-dealer's instructions. A location holds securities through an intermediary if the location is not aware of the identity of the broker-dealer or will not act on instructions directly from the broker-dealer (*i.e.,* the location holding securities for the broker-dealer would only act on instructions relating to the broker-dealer's securities from the broker-dealer's intermediary). The information required by Items 3.C.i-iii is intended to identify all locations used by the broker-dealer to hold securities listed on the broker-dealer's stock record, and to elicit information concerning the frequency with which the broker-dealer performs reconciliations between the information on its stock record and information about the securities provided by the location. In Item 3.C.i, check all applicable boxes, and in Items 3.C.i-iii provide all applicable information as specified for each Item.

Item 3.D Answer the questions in Items 3.D.i-iii by checking appropriate boxes and entering appropriate financial information, where applicable, and by providing explanations as requested. In Item 3.D.i, check "Other" if a type of security carried by the broker-dealer for customers is not listed on the chart, and for each category of security, indicate by checking the approximate box for the approximate U.S. dollar market value of the securities.

Item 3.E Answer the questions in Items 3.E.i-iii by checking appropriate boxes and entering appropriate financial information, where applicable, and by providing explanations as requested. In Item 3.E.i, check "Other" if a type of security carried by the broker-dealer for persons that are not customers is not listed on the chart, and for each category of security, indicate by checking the appropriate box the approximate U.S. dollar market value of the securities.

Item 4 Answer the questions in Items 4.A.i-iii and 4.B.i-iii by checking appropriate boxes and, if applicable, providing requested information.

Item 5 Answer the questions in Items 5.A and 5.B by checking the appropriate box and, if applicable, providing requested information. A broker-dealer should respond to Item 5.A by checking "Yes" if it employs a vendor to send trade confirmations to customers on its behalf because the broker-dealer is ultimately responsible for complying with its trade confirmation obligations, not the vendor.

Item 6 Answer the questions by checking the appropriate boxes and, if applicable, providing requested information. In Item 6.C, check "Yes" if (i) a broker-dealer sends account statements to persons other than the beneficial owner of the account; or (ii) if a broker-dealer sends account statements to the beneficial owner of an account and duplicate account statements to persons other than the beneficial owner of the account.

Item 7 Answer the question by checking the appropriate box.

Item 8 Answer the questions in Item 8 by checking appropriate boxes and, if applicable, providing requested information.

Item 9 Answer the questions in Item 9 by checking appropriate boxes and, if applicable, providing requested information.

Item 1. A. Does the broker-dealer introduce customer accounts on a fully disclosed basis to another broker-dealer?

Yes ☐ No ☐

B. If the answer to question 1.A is "yes," identify below the broker-dealer(s) (by name, SEC No., and CRD No.) to which the customer accounts are introduced on a fully disclosed basis:

_____

_____

_____

Item 2. A. Does the broker-dealer introduce customer accounts to another broker-dealer on an omnibus basis?

Yes ☐ No ☐

B. If the answer to question 2.A is "yes," identify below the broker-dealer(s) (by name, SEC No., and CRD No.) to which the customer accounts are introduced on an omnibus basis:

_____

_____

_____

Item 3. A. Does the broker-dealer carry securities accounts (*i.e.*, accounts that are not introduced on a fully disclosed basis to another broker-dealer) for customers?

Yes ☐ No ☐

B. Does the broker-dealer carry securities accounts (*i.e.*, accounts that are not introduced on a fully disclosed basis to another broker-dealer) for non-customers?

Yes ☐ No ☐

C. Location of Securities (if the answer to question 3.A and/or 3.B is "yes")

i. Indicate in the chart below the types of U.S. locations used by the broker-dealer to hold securities that it carries by checking each box in the first column that applies. For each type of location selected, indicate in the third column the frequency (*e.g.*, daily, weekly, monthly, quarterly, semi-annually, annually) with which the broker-dealer performs a reconciliation between the information on its stock record and information about the securities provided by the location:

	Location	**Reconciliation Frequency**
☐	**The broker-dealer's vault**	
☐	**U.S. broker-dealer(s)**	
☐	**The Depository Trust Company**	
☐	**The Options Clearing Corporation**	
☐	**U.S. bank(s)**	
☐	**Transfer agents of mutual fund(s) under the Investment Company Act**	

ii. Indicate in the chart below the types of U.S. locations not identified in Item 3.C.i used by the broker-dealer to hold securities that it carries by describing the type of entity in the first column. For each type of location, indicate in the second column the frequency (*e.g.*, daily, weekly, monthly, quarterly, semi-annually, annually) with which the broker-dealer performs a reconciliation between the information on its stock record and information about the securities provided by location:

Other Types of U.S. Locations	Reconciliation Frequency

iii. Indicate in the chart below the types of foreign locations used by the broker-dealer to hold securities that it carries by describing the type of location in the first column. For each type of location indicate in the second column the frequency (*e.g.*, daily, weekly, monthly, quarterly, semi-annually, annually) with which the broker-dealer performs a reconciliation between the information on its stock record and information about the securities provided by the location:

Non-U.S. Locations	Reconciliation Frequency

D. Securities and Cash Carried for the Accounts of Customers (if the answer to question 3.A is "yes")

i. Indicate by checking the appropriate boxes on the chart below the types and approximate market value of securities that are carried by the broker-dealer for the accounts of customers:

	Type of Securities	$50 million or less	Greater than $50 million to $100 million	Greater than $100 million to $500 million	Greater than $500 million to $1 billion	Greater than $1 billion to $5 billion	Greater than $5 billion
☐	U.S. Equity Securities	☐	☐	☐	☐	☐	☐
☐	Foreign Equity Securities	☐	☐	☐	☐	☐	☐
☐	U.S. Listed Options	☐	☐	☐	☐	☐	☐
☐	Foreign Listed Options	☐	☐	☐	☐	☐	☐
☐	Domestic Corporate Debt	☐	☐	☐	☐	☐	☐
☐	Foreign Corporate Debt	☐	☐	☐	☐	☐	☐
☐	U.S. Public Finance Debt	☐	☐	☐	☐	☐	☐
☐	Foreign Public Finance Debt	☐	☐	☐	☐	☐	☐
☐	U.S. Government Debt	☐	☐	☐	☐	☐	☐
☐	Foreign Sovereign Debt	☐	☐	☐	☐	☐	☐
☐	U.S. Structured Debt	☐	☐	☐	☐	☐	☐
☐	Foreign Structured Debt	☐	☐	☐	☐	☐	☐
☐	U.S. Mutual Funds	☐	☐	☐	☐	☐	☐
☐	Foreign Mutual Funds	☐	☐	☐	☐	☐	☐
☐	U.S. Exchange Traded Funds	☐	☐	☐	☐	☐	☐
☐	Foreign Exchange Traded Funds	☐	☐	☐	☐	☐	☐
☐	U.S. Private Funds	☐	☐	☐	☐	☐	☐
☐	Foreign Private Funds	☐	☐	☐	☐	☐	☐
☐	Other	☐	☐	☐	☐	☐	☐

ii. Has the broker-dealer recorded all securities it carries for the accounts of customers on its stock record?

Yes ☐ No ☐

If the answer is "no," explain in the space provided why the broker-dealer has not recorded such securities on its stock record and provide the approximate U.S. dollar market value of such unrecorded securities:

_____
_____
_____

iii. Indicate in the chart below each process used by the broker-dealer with respect to free credit balances in cash accounts it holds for customers by checking all the boxes that apply and providing applicable information:

	Process
☐	Included in a computation under Rule 15c3-3(e)
☐	Held in a bank account under Rule 15c3-3(k)(2)(i)
☐	Swept to a U.S. bank
☐	Swept to a U.S. money market fund
☐	Other (Briefly describe in the space provided below) _____ _____ _____ _____ _____ _____

E. Securities and Cash Carried for the Accounts of Non-customers (if the answer to question 3.B is "yes")

i. Indicate by checking the appropriate boxes on the chart below the types and approximate market value of securities that are carried by the broker-dealer for the accounts of non-customers:

	Type of Securities	**$50 million or less**	**Greater than $50 million to $100 million**	**Greater than $100 million to $500 million**	**Greater than $500 million to $1 billion**	**Greater than $1 billion to $5 billion**	**Greater than $5 billion**
☐	**U.S. Equity Securities**	☐	☐	☐	☐	☐	☐
☐	**Foreign Equity Securities**	☐	☐	☐	☐	☐	☐
☐	**U.S. Listed Options**	☐	☐	☐	☐	☐	☐
☐	**Foreign Listed Options**	☐	☐	☐	☐	☐	☐
☐	**Domestic Corporate Debt**	☐	☐	☐	☐	☐	☐
☐	**Foreign Corporate Debt**	☐	☐	☐	☐	☐	☐
☐	**U.S. Public Finance Debt**	☐	☐	☐	☐	☐	☐
☐	**Foreign Public Finance Debt**	☐	☐	☐	☐	☐	☐
☐	**U.S. Government Debt**	☐	☐	☐	☐	☐	☐
☐	**Foreign Sovereign Debt**	☐	☐	☐	☐	☐	☐
☐	**U.S. Structured Debt**	☐	☐	☐	☐	☐	☐

☐	**Foreign Structured Debt**	☐	☐	☐	☐	☐	☐
☐	**U.S. Mutual Funds**	☐	☐	☐	☐	☐	☐
☐	**Foreign Mutual Funds**	☐	☐	☐	☐	☐	☐
☐	**U.S. Exchange Traded Funds**	☐	☐	☐	☐	☐	☐
☐	**Foreign Exchange Traded Funds**	☐	☐	☐	☐	☐	☐
☐	**U.S. Private Funds**	☐	☐	☐	☐	☐	☐
☐	**Foreign Private Funds**	☐	☐	☐	☐	☐	☐
☐	**Other**	☐	☐	☐	☐	☐	☐

ii. Has the broker-dealer recorded all securities it carries for the accounts of non-customers on its stock record?

Yes ☐ No ☐

If the answer is "no," explain in the space provided why the broker-dealer has not recorded such securities on its stock record and provide the approximate total U.S. dollar market value of such unrecorded securities:

_____
_____
_____

iii. Indicate in the chart below each process used by the broker-dealer with respect to free credit balances in the securities accounts of non-customers by checking all the boxes that apply and providing applicable information:

	Process
☐	Included in a reserve computation
☐	Swept to a U.S. bank
☐	Swept to a U.S. money market fund
☐	Other (Briefly describe in space provided below) _____ _____ _____ _____ _____ _____ _____

Item 4. Acting as a Carrying Broker-Dealer for Other Broker-Dealers

A. On a fully disclosed basis

i. Does the broker-dealer carry customer accounts for another broker-dealer(s) on a fully disclosed basis?

Yes ☐ No ☐

ii. If the answer to question 4.A.i is "yes," indicate the number of broker-dealers: _____.

iii. If the answer to question 4.A.i is "yes," identify any of these broker-dealers that are affiliates of the broker-dealer by name and "SEC File No.":

_____
_____
_____

B. On an omnibus basis

i. Does the broker-dealer carry customer accounts for another broker-dealer(s) on an omnibus basis?

Yes ☐ No ☐

ii. If the answer to question 4.B.i is "yes," indicate the number of broker-dealers: _____.

iii. If the answer to question 4.B.i is "yes," identify any of these broker-dealers that are affiliates of the broker-dealer by name and "SEC File No.":

_____
_____
_____

Item 5. A. Does the broker-dealer send trade confirmations directly to customers and other accountholders?

Yes ☐ No ☐

B. If the answer to question 5.A is "no," who sends the trade confirmations to customers and other accountholders? :_____.

Item 6. A. Does the broker-dealer send account statements directly to customers and other accountholders?

Yes ☐ No ☐

B. If the answer to question 6.A is "no," who sends the account statements to customers and other accountholders? :_____.

C. Does the broker-dealer send account statements to anyone other than the beneficial owner of the account?

Yes ☐ No ☐

Item 7. Does the broker-dealer provide customers and other accountholders with electronic access to information about the securities and cash positions in their accounts?

Yes ☐ No ☐

Item 8. A. Is the broker-dealer also registered as an investment adviser:

i. With the SEC under the Investment Advisers Act of 1940?

Yes ☐ No ☐

ii. With one or more U.S. states under the laws of the state?

Yes ☐ No ☐

If the answer to question 8.A.i or 8.A.ii is "yes," answer each of the following items:

B. Provide the number of investment adviser clients:_____.

C. Complete the following chart concerning the custodians of investment adviser client assets if any (including, if applicable, the broker-dealer):

Column 1: The name of the custodian
Column 2: The identity of the custodian by SEC File No. or CRD No. (if applicable)
Column 3: Whether the broker-dealer/investment adviser has the authority to effect transactions in these advisory client accounts at the custodian
Column 4: Whether the broker-dealer/investment adviser has the authority to withdraw funds and securities out of any accounts at the custodian
Column 5: Whether the custodian sends account statements directly to the investment adviser clients
Column 6: Whether the investment adviser client assets are on the broker-dealer's stock record

1	2	3	4	5	6
		Yes ☐ No ☐	Yes ☐ No ☐	Yes ☐ No ☐	Yes ☐ No ☐
		Yes ☐ No ☐	Yes ☐ No ☐	Yes ☐ No ☐	Yes ☐ No ☐
		Yes ☐ No ☐	Yes ☐ No ☐	Yes ☐ No ☐	Yes ☐ No ☐
		Yes ☐ No ☐	Yes ☐ No ☐	Yes ☐ No ☐	Yes ☐ No ☐
		Yes ☐ No ☐	Yes ☐ No ☐	Yes ☐ No ☐	Yes ☐ No ☐
		Yes ☐ No ☐	Yes ☐ No ☐	Yes ☐ No ☐	Yes ☐ No ☐
		Yes ☐ No ☐	Yes ☐ No ☐	Yes ☐ No ☐	Yes ☐ No ☐
		Yes ☐ No ☐	Yes ☐ No ☐	Yes ☐ No ☐	Yes ☐ No ☐
		Yes ☐ No ☐	Yes ☐ No ☐	Yes ☐ No ☐	Yes ☐ No ☐
		Yes ☐ No ☐	Yes ☐ No ☐	Yes ☐ No ☐	Yes ☐ No ☐

Item 9. A. Is the broker-dealer an affiliate of an investment adviser?

Yes ☐ No ☐

B.i. If the answer to Item 9.A is "yes," does the broker-dealer have custody of client assets of the adviser?

Yes ☐ No ☐

B.ii. If the answer to Item 9.B.i is "yes" indicate the approximate U.S. dollar market value of the adviser client assets of which the broker-dealer has custody: _____.

By the Commission.

Dated: July 30, 2013.

Elizabeth M. Murphy,

Secretary.

[FR Doc. 2013–18738 Filed 8–20–13; 8:45 am]

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Part IV

Department of Housing and Urban Development

30-Day Notice of Proposed Information Collections; Notices

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–5683–N–68]

30-Day Notice of Proposed Information Collection: Multifamily Project Construction Contract, Building Loan Agreement, & Construction Change Request

AGENCY: Office of the Chief Information Officer, HUD.

ACTION: Notice.

SUMMARY: HUD has submitted the proposed information collection requirement described below to the Office of Management and Budget (OMB) for review, in accordance with the Paperwork Reduction Act. The purpose of this notice is to allow for an additional 30 days of public comment.

DATES: *Comments Due Date:* September 20, 2013.

ADDRESSES: Interested persons are invited to submit comments regarding this proposal. Comments should refer to the proposal by name and/or OMB Control Number and should be sent to: HUD Desk Officer, Office of Management and Budget, New Executive Office Building, Washington, DC 20503; fax: 202–395–5806. Email: *OIRA_Submission@omb.eop.gov.*

FOR FURTHER INFORMATION CONTACT: Colette Pollard, Reports Management Officer, QDAM, Department of Housing and Urban Development, 451 7th Street SW., Washington, DC 20410; email Colette Pollard at *Colette.Pollard@hud.gov* or telephone 202–402–3400. Persons with hearing or speech impairments may access this number through TTY by calling the toll-free Federal Information Relay Service at (800) 877–8339. This is not a toll-free number. Copies of available documents submitted to OMB may be obtained from Ms. Pollard.

SUPPLEMENTARY INFORMATION: This notice informs the public that HUD has submitted to OMB a request for approval of the information collection described in Section A. The **Federal Register** notice that solicited public comment on the information collection for a period of 60 days was published on April 11, 2013.

A. Overview of Information Collection

Title of Information Collection: Multifamily Project Construction Contract, Building Loan Agreement, & Construction Change Request.

OMB Approval Number: 2502–0011.

Type of Request: Extension of a currently approved.

Form Number: HUD–92442, HUD–92437, HUD–92442–CA, HUD–92442–A, HUD–92442–A–CA, HUD–92441.

Description of the need for the information and proposed use: The information collected on the ''Multifamily Project Construction Contract, Building Loan Agreement, and Construction Change Request'' form provides HUD with information from contractors, mortgagors/borrowers, and mortgagees/lenders for construction of multifamily projects and to obtain approval of changes in previously approved contract drawings and/or specifications.

Estimation of the total number of hours needed to prepare the information collection including number of respondents, frequency of response, and hours of response: The number of burden hours is 9538. The number of respondents is 1158, the number of responses is 1158, the frequency of response is annually, and the burden hour per response is 3 hours.

B. Solicitation of Public Comment

This notice is soliciting comments from members of the public and affected parties concerning the collection of information described in Section A on the following:

(1) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(2) The accuracy of the agency's estimate of the burden of the proposed collection of information;

(3) Ways to enhance the quality, utility, and clarity of the information to be collected; and

(4) Ways to minimize the burden of the collection of information on those who are to respond; including through the use of appropriate automated collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

HUD encourages interested parties to submit comment in response to these questions.

Authority: Section 3507 of the Paperwork Reduction Act of 1995, 44 U.S.C. Chapter 35.

Dated: August 15, 2013.

Colette Pollard,

Department Reports Management Officer, Office of the Chief Information Officer.

[FR Doc. 2013–20289 Filed 8–20–13; 8:45 am]

BILLING CODE 4210–67–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–5683–N–69]

30-Day Notice of Proposed Information Collection: Final Endorsement of Credit Instrument

AGENCY: Office of the Chief Information Officer, HUD.

ACTION: Notice.

SUMMARY: HUD has submitted the proposed information collection requirement described below to the Office of Management and Budget (OMB) for review, in accordance with the Paperwork Reduction Act. The purpose of this notice is to allow for an additional 30 days of public comment.

DATES: *Comments Due Date:* September 20, 2013.

ADDRESSES: Interested persons are invited to submit comments regarding this proposal. Comments should refer to the proposal by name and/or OMB Control Number and should be sent to: HUD Desk Officer, Office of Management and Budget, New Executive Office Building, Washington, DC 20503; fax: 202–395–5806. Email: *OIRA_Submission@omb.eop.gov.*

FOR FURTHER INFORMATION CONTACT: Colette Pollard, Reports Management Officer, QDAM, Department of Housing and Urban Development, 451 7th Street, SW., Washington, DC 20410; email Colette Pollard at *Colette.Pollard@hud.gov* or telephone 202–402–3400. Persons with hearing or speech impairments may access this number through TTY by calling the toll-free Federal Relay Service at (800) 877–8339. This is not a toll-free number. Copies of available documents submitted to OMB may be obtained from Ms. Pollard.

SUPPLEMENTARY INFORMATION: This notice informs the public that HUD has submitted to OMB a request for approval of the information collection described in Section A. The **Federal Register** notice that solicited public comment on the information collection for a period of 60 days was published on April 11, 2013.

A. Overview of Information Collection

Title of Information Collection: Final Endorsement of Credit Instrument.

OMB Approval Number: 2502–0016.

Type of Request Revision of a currently approved collection.

Form Number: HUD–92023.

Description of the need for the information and proposed use: The information collected on the ''Final Endorsement of Credit Instrument'' form is used to request to request final

endorsement by HUD of the credit instrument. The mortgagee/lender submits information to indicate the schedule of advances made on the project and the final advances to be disbursed immediately upon final endorsement.

Estimation of the total numbers of hours needed to prepare the information collection including number of respondents, frequency of response, and hours of response: The number of burden hours is 5,126. The number of respondents is 5,126, the number of responses is 5,126, the frequency of response is on occasion, and the burden hour per response is 1 hr.

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.

HUD encourages interested parties to submit comment in response to these questions.

Authority: Section 3507 of the Paperwork Reduction Act of 1995, 44 U.S.C. Chapter 35.

Dated: August 15, 2013.

Colette Pollard,

Department Reports Management Officer, Office of the Chief Information Officer.

[FR Doc. 2013–20291 Filed 8–20–13; 8:45 am]

BILLING CODE 4210–67–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–5683–N–70]

30-Day Notice of Proposed Information Collection: Financial Statement of Corporate Applicant for Cooperative Housing Mortgage

AGENCY: Office of the Chief Information Officer, HUD.

ACTION: Notice.

SUMMARY: HUD has submitted the proposed information collection requirement described below to the Office of Management and Budget (OMB) for review, in accordance with the Paperwork Reduction Act. The purpose of this notice is to allow for an additional 30 days of public comment.

DATES: *Comments Due Date:* September 20, 2013.

ADDRESSES: Interested persons are invited to submit comments regarding this proposal. Comments should refer to the proposal by name and/or OMB Control Number and should be sent to: HUD Desk Officer, Office of Management and Budget, New Executive Office Building, Washington, DC 20503; fax: 202–395–5806. Email: *OIRA_Submission@omb.eop.gov.*

FOR FURTHER INFORMATION CONTACT: Colette Pollard, Reports Management Officer, QDAM, Department of Housing and Urban Development, 451 7th Street, SW., Washington, DC 20410; email Colette Pollard at *Colette.Pollard@hud.gov* or telephone 202–402–3400. Persons with hearing or speech impairments may access this number through TTY by calling the toll-free Federal Relay Service at (800) 877–8339. This is not a toll-free number. Copies of available documents submitted to OMB may be obtained from Ms. Pollard.

SUPPLEMENTARY INFORMATION: This notice informs the public that HUD has submitted to OMB a request for approval of the information collection described in Section A. The **Federal Register** notice that solicited public comment on the information collection for a period of 60 days was published on May 7, 2013.

A. Overview of Information Collection

Title of Information Collection: Financial Statement of Corporate Applicant for Cooperative Housing Mortgage.

OMB Approval Number: 2502–0058.

Type of Request Extension of a currently approved collection.

Form Number: HUD–93232–A.

Description of the need for the information and proposed use: The information collected on the ''Financial Statement of Corporate Application for Cooperative Housing Mortgage'' form provides HUD with information to determine feasibility, mortgagor/contractor acceptability as well as the financial data, costs, drawings, and specifications.

Estimation of the total numbers of hours needed to prepare the information collection including number of respondents, frequency of response, and hours of response: The number of burden hours to complete a survey is 1hour. The number of respondents is estimated to be 32 respondents. The total number of burden hours is 32 hours.

B. Solicitation of Public Comment

This notice is soliciting comments from members of the public and affected parties concerning the collection of information described in Section A on the following:

(1) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(2) The accuracy of the agency's estimate of the burden of the proposed collection of information;

(3) Ways to enhance the quality, utility, and clarity of the information to be collected; and

(4) Ways to minimize the burden of the collection of information on those who are to respond; including through the use of appropriate automated collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

HUD encourages interested parties to submit comment in response to these questions.

Authority: Section 3507 of the Paperwork Reduction Act of 1995, 44 U.S.C. Chapter 35.

Dated: August 15, 2013.

Colette Pollard,

Department Reports Management Officer, Office of the Chief Information Officer.

[FR Doc. 2013–20293 Filed 8–20–13; 8:45 am]

BILLING CODE 4210–67–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–5683–N–71]

30-Day Notice of Proposed Information Collection: Management Certification and Management Entity Profile

AGENCY: Office of the Chief Information Officer, HUD.

ACTION: Notice.

SUMMARY: HUD has submitted the proposed information collection requirement described below to the Office of Management and Budget (OMB) for review, in accordance with the Paperwork Reduction Act. The purpose of this notice is to allow for an additional 30 days of public comment.

DATES: *Comments Due Date:* September 20, 2013.

ADDRESSES: Interested persons are invited to submit comments regarding this proposal. Comments should refer to

the proposal by name and/or OMB Control Number and should be sent to: HUD Desk Officer, Office of Management and Budget, New Executive Office Building, Washington, DC 20503; fax: 202–395–5806. Email: *OIRA_Submission@omb.eop.gov.*

FOR FURTHER INFORMATION CONTACT: Colette Pollard, Reports Management Officer, QDAM, Department of Housing and Urban Development, 451 7th Street, SW., Washington, DC 20410; email Colette Pollard at *Colette.Pollard@hud.gov* or telephone 202–402–3400. Persons with hearing or speech impairments may access this number through TTY by calling the toll-free Federal Relay Service at (800) 877–8339. This is not a toll-free number. Copies of available documents submitted to OMB may be obtained from Ms. Pollard.

SUPPLEMENTARY INFORMATION: This notice informs the public that HUD has submitted to OMB a request for approval of the information collection described in Section A. The **Federal Register** notice that solicited public comment on the information collection for a period of 60 days was published on April 4, 2013.

A. Overview of Information Collection

Title of Information Collection: Management Certification and Management Entity Profile.

OMB Approval Number: 2502–0305.

Type of Request Extension of a currently approved collection.

Form Number: HUD–9832, HUD–9839A, HUD–9839B, HUD–9839C.

Description of the need for the information and proposed use: Owners of HUD-held, -insured, or subsidized multifamily housing projects must provide information for HUD's oversight of management agents/entities.

Estimation of the total numbers of hours needed to prepare the information collection including number of respondents, frequency of response, and hours of response: The number of burden hours is 3,181. The number of respondents is 29,942, the number of responses is 1,871, the frequency of response is on occasion, and the burden hour per response is 2.50.

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.

HUD encourages interested parties to submit comment in response to these questions.

Authority: Section 3507 of the Paperwork Reduction Act of 1995, 44 U.S.C. Chapter 35.

Dated: August 15, 2013.

Colette Pollard,

Department Reports Management Officer, Office of the Chief Information Officer.

[FR Doc. 2013–20294 Filed 8–20–13; 8:45 am]

BILLING CODE 4210–67–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–5683–N–72]

30-Day Notice of Proposed Information Collection: Multifamily Housing Service Coordinator Program

AGENCY: Office of the Chief Information Officer, HUD.

ACTION: Notice.

SUMMARY: HUD has submitted the proposed information collection requirement described below to the Office of Management and Budget (OMB) for review, in accordance with the Paperwork Reduction Act. The purpose of this notice is to allow for an additional 30 days of public comment.

DATES: *Comments Due Date:* September 20, 2013.

ADDRESSES: Interested persons are invited to submit comments regarding this proposal. Comments should refer to the proposal by name and/or OMB Control Number and should be sent to: HUD Desk Officer, Office of Management and Budget, New Executive Office Building, Washington, DC 20503; fax: 202–395–5806. Email: *OIRA_Submission@omb.eop.gov.*

FOR FURTHER INFORMATION CONTACT: Colette Pollard, Reports Management Officer, QDAM, Department of Housing and Urban Development, 451 7th Street SW., Washington, DC 20410; email Colette Pollard at *Colette.Pollard@hud.gov* or telephone 202–402–3400. Persons with hearing or speech impairments may access this number through TTY by calling the toll-free Federal Relay Service at (800) 877–8339. This is not a toll-free number. Copies of available documents submitted to OMB may be obtained from Ms. Pollard.

SUPPLEMENTARY INFORMATION: This notice informs the public that HUD has submitted to OMB a request for approval of the information collection described in Section A. The **Federal Register** notice that solicited public comment on the information collection for a period of 60 days was published on November 15, 2012.

A. Overview of Information Collection

Title of Information Collection: Multifamily Housing Service Coordinator Program.

OMB Approval Number: 2502–0447.

Type of Request: Revision of a currently approved collection.

Form Number: SF 424, HUD 2993, HUD 2994–A, HUD–92456, HUD–50080–SCMF, SF 424, HUD–2880, SF–LLL, HUD–91186–1, HUD–91186–A, HUD 96010, SF–269–A.

Description of the need for the information and proposed use: SF–424, HUD–91186, and other related documents) to assess the need and proposed use of grant funds and owners' ability to administer those funds. 2. HUD staff will use requests for extensions (HUD–91186–A) to evaluate anticipated program costs and the continued need for the program. 3. The LOCCS Payment Voucher (HUD–50080–SCMF) is used to monitor release of grant funds to reimburse eligible program costs over the term of the grant. Grant recipients will similarly use this voucher to track and record their requests for payment reimbursement for grant-funded expenses. 4. The Department is revising the Semi-Annual Performance Report, HUD–92456. Changes include the following: A. Additional sources of funding; B. Modification of resident statistics and the numbers of project tenants and neighborhood residents served by the Service Coordinator during the reporting period; C. Adding hire date for the Service Coordinator and date of program inception; D. Adding number of contacts to number of residents that the Service Coordinator links to various supportive services; E. Providing a glossary of definitions of supportive service types; F. Modifying the section for reporting time allocation of monthly work responsibilities; G. Adding a new item to highlight community engagement; including meetings with community agencies and residents and Attendance at or planning of community events, and H. Adding a new section to track aging in place statistics. The semi-annual Performance

Reports will be used to gauge program performance and effective use of Federal funds to meet stated program goals. The Department proposes the new changes to obtain more specific, accurate, and relevant data. To complete the form, Housing owners and Service Coordinators will develop and maintain meaningful data that reflect the efficacy of the Service Coordinator program. The Burden Hours per Response remains the same at six hours. (Previous requests had overstated the amount of time required to complete the report.) 5. The Department is proposing a new form to be used by field office staff to perform Service Coordinator program reviews. This proposed form is provided in this Notice to solicit comments from the public, even though the form is designed for use by HUD field office staff. The Department requires a consistent protocol to review and evaluate Service Coordinator programs. The use of this form will allow for consistent and thorough program assessment. It will also inform housing owners, management agents, and Service Coordinators about program requirements and expected performance. 6. SF–425, 7. HUD–96010.

Estimation of the total numbers of hours needed to prepare the information collection including number of respondents, frequency of response, and hours of response: The number of respondents is 10,290; the frequency of responses is quarterly, semi-annually, and annually, with a total of 22,070 total annual responses. The estimated time to prepare collection varies from 15 minutes to 40 hours, with a total of 74,800 annual burden hours.

B. Solicitation of Public Comment

This notice is soliciting comments from members of the public and affected parties concerning the collection of information described in Section A on the following:

(1) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(2) The accuracy of the agency's estimate of the burden of the proposed collection of information;

(3) Ways to enhance the quality, utility, and clarity of the information to be collected; and

(4) Ways to minimize the burden of the collection of information on those who are to respond; including through the use of appropriate automated collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

HUD encourages interested parties to submit comment in response to these questions.

Authority: Section 3507 of the Paperwork Reduction Act of 1995, 44 U.S.C. Chapter 35.

Dated: August 15, 2013.

Colette Pollard,

Department Reports Management Officer, Office of the Chief Information Officer.

[FR Doc. 2013–20295 Filed 8–20–13; 8:45 am]

BILLING CODE 4210–67–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–5683–N–73]

30-Day Notice of Proposed Information Collection: Utility Allowance Adjustments

AGENCY: Office of the Chief Information Officer, HUD.

ACTION: Notice.

SUMMARY: HUD has submitted the proposed information collection requirement described below to the Office of Management and Budget (OMB) for review, in accordance with the Paperwork Reduction Act. The purpose of this notice is to allow for an additional 30 days of public comment.

DATES: *Comments Due Date:* September 20, 2013.

ADDRESSES: Interested persons are invited to submit comments regarding this proposal. Comments should refer to the proposal by name and/or OMB Control Number and should be sent to: HUD Desk Officer, Office of Management and Budget, New Executive Office Building, Washington, DC 20503; fax: 202–395–5806. Email: *OIRA_Submission@omb.eop.gov.*

FOR FURTHER INFORMATION CONTACT: Colette Pollard, Reports Management Officer, QDAM, Department of Housing and Urban Development, 451 7th Street SW., Washington, DC 20410; email Colette Pollard at *Colette.Pollard@hud.gov* or telephone 202–402–3400. Persons with hearing or speech impairments may access this number through TTY by calling the toll-free Federal Relay Service at (800) 877–8339. This is not a toll-free number. Copies of available documents submitted to OMB may be obtained from Ms. Pollard.

SUPPLEMENTARY INFORMATION: This notice informs the public that HUD has submitted to OMB a request for approval of the information collection described in Section A. The **Federal Register** notice that solicited public comment on the information collection for a period of 60 days was published on March 20, 2012.

A. Overview of Information Collection

Title of Information Collection: Utility Allowance Adjustments.

OMB Approval Number: 2502–0352.

Type of Request: Extension of a currently approved collection.

Form Number: None.

Description of the need for the information and proposed use: Multifamily project owners are required to advise the Secretary of the need for and request approval of a new utility allowance for tenants.

Estimation of the total numbers of hours needed to prepare the information collection including number of respondents, frequency of response, and hours of response: The number of burden hours is 2,406. The number of respondents is 4,811, the frequency of response is on occasion, and the burden hour per response is 0.5 hours.

B. Solicitation of Public Comment

This notice is soliciting comments from members of the public and affected parties concerning the collection of information described in Section A on the following:

(1) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(2) The accuracy of the agency's estimate of the burden of the proposed collection of information;

(3) Ways to enhance the quality, utility, and clarity of the information to be collected; and

(4) Ways to minimize the burden of the collection of information on those who are to respond; including through the use of appropriate automated collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

HUD encourages interested parties to submit comment in response to these questions.

Authority: Section 3507 of the Paperwork Reduction Act of 1995, 44 U.S.C. Chapter 35.

Dated: August 15, 2013.

Colette Pollard,

Department Reports Management Officer, Office of the Chief Information Officer.

[FR Doc. 2013–20296 Filed 8–20–13; 8:45 am]

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FEDERAL REGISTER

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Part V

Department of Commerce

National Oceanic and Atmospheric Administration

50 CFR Parts 600 and 635

Highly Migratory Species; 2006 Consolidated Atlantic Highly Migratory Species Fishery Management Plan; Amendments 7 and 8; Final Rule and Proposed Rule

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Parts 600 and 635

[Docket No. 120627194–3657–02]

RIN 0648–BC31

Highly Migratory Species; 2006 Consolidated Atlantic Highly Migratory Species Fishery Management Plan; Amendment 8

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

ACTION: Final rule.

SUMMARY: This final rule implements Amendment 8 to the 2006 Consolidated Atlantic Highly Migratory Species (HMS) Fishery Management Plan (FMP). Amendment 8 to the 2006 Consolidated HMS FMP provides additional opportunities for U.S. fishermen to harvest swordfish using selective gears that are low in bycatch, given their rebuilt status and increased availability. This final rule creates new and modified commercial fishing vessel permits that allow permit holders to retain and sell a limited number of swordfish caught on rod and reel, handline, harpoon, green-stick, or bandit gear. Specific management measures under this final action include the establishment of a new open access commercial swordfish permit, modification of HMS Charter/Headboat permit regulations to allow for the commercial retention of swordfish on non-for-hire trips, regional swordfish retention limits for the new and modified permits, gear authorizations, and reporting requirements.

DATES: This rule is effective on September 20, 2013.

ADDRESSES: Copies of the Final Amendment 8 to the 2006 Consolidated HMS FMP, including the Final Environmental Assessment and other documents relevant to this rule are available from the Highly Migratory Species Management Division Web site at *http://www.nmfs.noaa.gov/sfa/hms/* or upon request from the Atlantic HMS Management Division at 1315 East-West Highway, Silver Spring, MD 20910.

FOR FURTHER INFORMATION CONTACT: Rick Pearson at 727–824–5399 or Jennifer Cudney at 301–427–8503.

SUPPLEMENTARY INFORMATION: Atlantic swordfish are managed under the dual authority of the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act) and the Atlantic Tunas Convention Act (ATCA). The authority to issue regulations under the Magnuson-Stevens Act and ATCA has been delegated from the Secretary of Commerce to the Assistant Administrator for Fisheries, NOAA (AA). On May 28, 1999, NMFS published in the **Federal Register** (64 FR 29090) regulations implementing the Fishery Management Plan for Atlantic Tunas, Swordfish, and Sharks (1999 FMP). On October 2, 2006, NMFS published in the **Federal Register** (71 FR 58058) regulations implementing the 2006 Consolidated Highly Migratory Species (HMS) FMP, which details the management measures for Atlantic HMS fisheries, including the North Atlantic swordfish handgear fishery. The implementing regulations for Atlantic HMS are at 50 CFR part 635.

Background

A brief summary of the background of this final action is provided below. The details of what was proposed and the alternatives considered are described in Draft Amendment 8 to the 2006 Consolidated HMS FMP and its proposed rule (78 FR 12273, February 22, 2013). Those documents are incorporated by reference, and their description of management and conservation measures considered in the Draft Amendment 8 to the 2006 Consolidated HMS FMP and its proposed rule are not repeated here. Additional information regarding Atlantic HMS management can be found in the Final Environmental Assessment (Final EA) for Amendment 8 to the 2006 Consolidated HMS FMP, the 2006 Consolidated HMS FMP and its amendments, the annual HMS Stock Assessment and Fishery Evaluation Reports, and online at *http://www.nmfs.noaa.gov/sfa/hms/*.

The comments received on Draft Amendment 8 and its proposed rule, and our responses to those comments, are summarized below in the section labeled ''Response to Comments.''

This rule finalizes some of the management measures, and modifies others, that were contained in the proposed rule for Amendment 8. The purpose of this final rule is to provide additional opportunities for U.S. fishermen to harvest swordfish using selective gears that result in low bycatch, given their rebuilt status and increased availability.

This rule creates a new open access Swordfish General Commercial permit and modifies regulations for HMS Charter/Headboat vessel permit holders to allow commercial fishing for North Atlantic swordfish in the U.S. Exclusive Economic Zone (EEZ). The new Swordfish General Commercial permit allows fishermen to retain and sell a limited number of swordfish caught using only rod and reel, handline, harpoon, bandit gear, and green-stick gear. HMS Charter/Headboat vessel permit holders are also authorized to fish under open-access swordfish commercial permit regulations with rod and reel and handline only, when fishing commercially on a non-for-hire trip.

The Swordfish General Commercial permit cannot be held on a vessel in combination with any other swordfish permits, an HMS Charter/Headboat permit, an HMS Angling category permit, an HMS Commercial Caribbean Small Boat permit, or any Atlantic Tunas permit except for the Atlantic Tunas General or Harpoon category permits. The Swordfish General Commercial permit can be held on a vessel in combination with a commercial shark permit or an Atlantic Tunas General or Harpoon category permit. All swordfish landed under the new/modified permit(s) must be reported in HMS logbooks, if selected, and all sales of swordfish must only be to federally permitted swordfish dealers. Swordfish General Commercial permit holders may participate in registered HMS tournaments.

This final rule also establishes four separate swordfish management regions for the new and modified permits (Northwest Atlantic, Gulf of Mexico, U.S. Caribbean, and Florida Swordfish Management Area) with a zero to six swordfish retention limit range within each region for the new or modified permit(s). As described in the response to comments below, the Florida Swordfish Management Area and the initial default retention limit for that area have been modified from the proposed rule. Initial default retention limits are set at three swordfish per vessel per trip for Northwest Atlantic and Gulf of Mexico regions; two swordfish per vessel per trip for the U.S. Caribbean; and zero swordfish per vessel per trip limit for the modified Florida Swordfish Management Area. The retention limit within each region may be adjusted in-season based upon pre-established criteria (i.e., dealer reports, landing trends, quota availability, availability of swordfish on fishing grounds, variations in seasonal distribution, abundance, or migration patterns, and other relevant factors) through the framework procedures codified at § 635.34.

Response to Comments

During the proposed rule stage, NMFS received approximately 210 written

comments from the public. NMFS also received comments from the Atlantic HMS Advisory Panel and from constituents who attended the five public hearings held in St. Petersburg, FL; Silver Spring, MD; Gloucester, MA; Ft. Lauderdale, FL; and Manahawkin, NJ. Comments were also received during three conference call/webinars held on March 11, 2013; April 18, 2013; and April 30, 2013. A summary of the comments received on the proposed rule during the public comment period is provided below with NMFS's responses. All written comments submitted during the comment period can be found at *http://www.regulations.gov/* by searching for NOAA–NMFS–2013–0026.

Comment 1: NMFS received comments both in support of, and opposed to, implementing a new open-access Swordfish General Commercial permit that would authorize the use of rod and reel, handline, harpoon, bandit gear, and green-stick (preferred alternative 1.2.4) . Commenters supporting the proposed new permit stated that it would provide additional opportunities to fish for a fully rebuilt species using selective fishing gears which have little bycatch and few dead discards; create new opportunities to catch more of the U.S. swordfish quota; generate economic opportunities for commercial fishermen during difficult economic times; safely increase the number of available handgear permits without threatening the long-term sustainability of the stock; and maintain existing limited access permit valuation by establishing low retention limits.

Opponents of a new commercial swordfish permit said the need to expand harvesting capacity in the U.S. North Atlantic swordfish fishery has steadily diminished and the U.S. swordfish quota is almost fully utilized; a new permit could prompt an early closure of the directed swordfish fishery; swordfish are not sufficiently abundant to open a new fishery or increase catches; commercial swordfish limited access permits are not scarce and the costs of the permits are not a barrier to entering the commercial fishery; a new open access permit would undermine full-time commercial fishermen by allowing quasi-commercial fishermen to harvest swordfish; and an open-access commercial swordfish permit would lower limited access permit values and swordfish ex-vessel prices (due to an increased supply of low quality product). Many of the commenters opposed to the establishment of a new commercial swordfish permit recommended the No Action alternative.

Response: NMFS has determined that establishing and implementing new and modified commercial vessel permits to allow for a limited number (0–6) of swordfish caught on rod and reel, handline, harpoon gear, green-stick, or bandit gear to be retained and sold is warranted. This action will provide additional opportunities for U.S. fishermen to harvest swordfish using selective gears that result in low bycatch, given the rebuilt status of swordfish and their increased availability. The goal of this action is to more fully utilize the U.S. swordfish quota allocation, which is based upon the recommendation of the International Commission for the Conservation of Atlantic Tunas (ICCAT).

Based upon the 2009 ICCAT SCRS swordfish stock assessment, the North Atlantic swordfish stock is fully rebuilt. The United States' annual baseline quota for North Atlantic swordfish is derived from ICCAT Recommendation 10–02, and is published each year through rulemaking in the **Federal Register**. ICCAT Recommendation 10–02 also authorizes the United States to carry forward up to 25 percent of the baseline U.S. quota to determine the annual adjusted U.S. quota. Both domestic landings and estimated dead discards are counted against each year's adjusted quota to determine compliance with the quota. Since 1997, domestic landings and estimated dead discards of North Atlantic swordfish have been below both the baseline and adjusted U.S. quotas. Although the margin between landings and available quota has narrowed in recent years, there remains a large amount of unused North Atlantic swordfish quota. In 2011, the United States was 766.6 mt (dw) below its baseline swordfish quota. Implementing a new open-access swordfish handgear permit with low retention limits will provide additional opportunities to harvest this available quota, without exceeding it. Landings derived from the new permit will be closely monitored through dealer reports, and adjustments to regional retention limits could be implemented if necessary to reduce the likelihood of an early closure to the directed fishery.

Swordfish limited access permits (LAPs), while available, can be difficult or expensive to obtain. Because no new swordfish permits have been issued since 1999, many HMS LAPs have increased in value. The cost of a swordfish handgear LAP ranges from $15,000 to $30,000, either of which amount constitutes a high percentage of an individual vessel owner's profits in a given year. They are also governed by restrictions limiting the size and horsepower of the vessel to which the permits can be transferred. Implementing a new open-access swordfish handgear permit with low retention limits will remove barriers to obtaining a limited access permit, and allow other commercial fishermen to participate in the swordfish fishery on a small-scale, seasonal, or supplemental basis.

Implementing a new open-access swordfish handgear permit is not anticipated to undermine the existing commercial swordfish fishery because landings under the new permit will be governed by low retention limits that could be adjusted in-season to reduce the likelihood of a directed fishery closure. The new permit is substantially different from existing swordfish limited access permits: There are very low retention limits (0–6 swordfish) associated with it, and only handgear usage is authorized. Because of these important differences, the values of existing swordfish limited access permits which have either no retention limits (directed and handgear) or a much higher retention limits (incidental), and which allow the use of pelagic longline gear (directed and incidental) and buoy gear (directed and handgear), are not expected to be greatly impacted.

The new open access Swordfish General Commercial permit could affect swordfish ex-vessel prices in either direction, up or down; however, comments received from fishing industry participants regarding this issue were mixed. Some commenters stated that the additional volume and poor quality of product would result in lower ex-vessel prices. Other commenters indicated that prices would stabilize due to less fluctuation in domestic landings, or potentially increase due to the introduction of reliably high quality product into the U.S. market. NMFS does not anticipate that the projected low level of landings derived from new and modified swordfish permits will be large enough to greatly impact prices, either higher or lower, because ex-vessel prices are impacted by a number of factors, most notably the large volume of fresh and frozen swordfish imported into the U.S. market.

Comment 2: NMFS should create a new limited access permit, not an open access permit. NMFS should require a minimum amount of income from commercial fishing in order to qualify for the new limited access permit. The number of new limited access permits should be very low, and there should be

a sunset date for the new permits where they would be valid only for a pre-specified number of years.

Response: The open access commercial permit being implemented is substantially different from existing swordfish limited access permits. Very low retention limits (0–6 swordfish) are being implemented and only handgear usage is authorized. Pelagic longline gear and buoy gear are not authorized for the new Swordfish General Commercial permit. In contrast, there are no retention limits for current swordfish directed and handgear limited access permit holders, and swordfish incidental limited access permit holders have a 30-fish per trip retention limit. Pelagic longline gear is authorized for swordfish directed and incidental limited access permits, and buoy gear is authorized for swordfish directed and handgear limited access permits. Because of the large potential harvesting capacity associated with these permits, swordfish limited access permits are restricted in number and are also governed by transfer, renewal, training, and vessel upgrading regulations. These regulations have impacted the ability of some vessel owners to participate in the commercial swordfish fishery using handgears only. Because this rule implements a small-scale handgear fishery that is primarily governed by low retention limits and in-season adjustment criteria, a new swordfish limited access permit is not needed.

Comment 3: NMFS should allow HMS Charter/Headboat permit holders to fish commercially for swordfish on non-for-hire trips under the applicable regional retention limit. A charter boat operator is already a commercial fisherman whose income is derived principally from charter and commercial fishing.

Response: NMFS agrees that HMS Charter/Headboat permit holders should be allowed to fish commercially for swordfish under the applicable commercial regional retention limits when they are not on a for-hire trip due to the dual commercial and recreational nature of the charter/headboat fishery. A similar allowance for charter/headboat vessels exists in the commercial Atlantic tunas fishery. This rule also specifies that swordfish captured on a for-hire trip may not be sold. NMFS defines a ''for-hire'' trip as a trip carrying a fee-paying passenger; having more than three persons for a vessel licensed to carry six or fewer; or having more persons aboard than the number of crew specified on the vessel's Certificate of Inspection for U.S. Coast Guard inspected vessels. The number of persons aboard includes the captain and crew.

Comment 4: NMFS should implement a three-fish retention limit in the Florida Swordfish Management Area for HMS Charter/Headboat permit holders only. A percentage of income as a charter boat (□ 50 percent) should be required to qualify for the higher retention limit so that only full-time charter operators could participate as commercial vessels. Part-time charter operators should only be allowed to obtain an HMS Angling category permit.

Response: NMFS is not implementing a separate swordfish commercial permit or a higher retention limit for HMS Charter/Headboat permit holders meeting certain income requirements and operating in the Florida Swordfish Management Area. As described in the response to Comment 2 above, a limited access permit or the establishment of new permit qualification criteria (including an income threshold) are not needed due to the comparatively low swordfish retention limits being established. At this time, in order to facilitate public understanding and enforcement of the new regulations, NMFS is implementing a single regional swordfish retention limit to govern all handgear vessels fishing under the new open-access commercial swordfish regulations.

Comment 5: NMFS should not establish a Florida Swordfish Management Area to include the East Florida Coast Pelagic Longline Closed Area through the northwestern boundary of Monroe County, FL, in the Gulf of Mexico. Instead, NMFS should establish the boundary to only include the Florida counties of St. Lucie, Martin, Palm Beach, Broward, Dade, and Monroe. These counties require specific management due to the limited area for swordfish fishing and the number of fishers using the area. There could be some flexibility for the Florida Swordfish Management Area/Northwest Atlantic area boundary so that there could be more fishing effort in areas north of Palm Beach, FL. Under the proposed alternative, persons fishing beyond the Florida Swordfish Management Area and east of Ft. Pierce, FL, in the Northwest Atlantic region would have to transit to north of the Georgia border to land their three swordfish because they could not come straight into Ft. Pierce, FL, which would create a burden for some fishermen and also pose a potential safety issue.

Response: In response to public comment, NMFS has modified the proposed Florida Swordfish Management Area by removing that portion of the area north of 28°17′10″ N. lat. The new northern boundary line now intersects the U.S. mainland near Rockledge, FL, and the coastline between Cape Canaveral, FL, and Melbourne, FL, near Cocoa Beach, FL. The modified area is smaller in geographic area than the proposed area, but larger than the alternative that only included six counties. As described in the proposed rule and draft environmental assessment, the area off the southeastern coast of Florida, particularly the Florida Straits, contains oceanographic features that make the area biologically unique. It provides important juvenile swordfish habitat, and is essentially a narrow migratory corridor containing high concentrations of swordfish located in close proximity to high concentrations of people who may fish for them. The modified Florida Swordfish Management Area being implemented more closely encompasses the Florida Straits and the oceanographic features that make this area biologically unique, yet is large enough to provide an enforceable buffer area. Public comment indicated a concern about increased catches of juvenile swordfish, the potential for larger numbers of fishermen in the area, and the potential for crowding of fishermen, which could lead to potential fishing gear and user conflicts. Modifying the area to more closely correspond to the actual oceanographic features that make the area unique will improve future conservation and management of swordfish, while minimizing impacts on fishermen operating both in the relatively narrow area of the Florida Straits and fishermen operating north of this area where swordfish are less concentrated, consistent with the objectives of this action. This modification is within the range of alternatives considered for the Florida Swordfish Management Area in Draft Amendment 8 and is a logical outgrowth of further consideration of impacts of the Area boundary and public comment.

Comment 6: NMFS received various comments indicating that the initial default retention limit within the Florida Swordfish Management Area should be set at a number ranging from zero to six fish. Comments in favor of increasing the proposed initial default limit of one swordfish indicated that a one-swordfish limit in the Area would not provide enough revenue to make a commercial fishing trip economically feasible, so there would be little incentive for people to obtain the new permit. Commenters in favor of a lower limit (i.e., zero fish) for the Area stated that there is not enough open water

available in South Florida to handle the added fishing pressure that the new commercial fishing effort would bring; that the very small area is already extremely congested with commercially-permitted vessels and recreational fishermen; that a balance between recreational and commercial fishermen has developed in the Florida Straits where everybody is able to fish together; and that a large number of new entrants commercially targeting swordfish in the area would unsettle that balance and inevitably cause user conflicts that would negatively affect Southeast Florida's recreational and commercial fishing industry. Several commenters also indicated that NMFS should not increase commercial fishing effort in an important swordfish spawning and juvenile habitat area.

Response: Because this final rule establishes a new open-access commercial swordfish permit, NMFS will issue these permits in an orderly and cautious manner from the outset. This is particularly important off the southeast coast of Florida, due to the area's unique oceanographic and biological characteristics that provide important juvenile swordfish habitat and swordfish fishing grounds within easy access to a large number of fishers. In consideration of public comments, including a comment from the Florida Fish and Wildlife Conservation Commission, indicating a high potential for the rapid growth of a commercial fishery in the Florida Swordfish Management Area under the proposed retention limit of one swordfish per vessel per trip, NMFS has determined that an initial default retention limit of zero swordfish is appropriate in the modified Florida Swordfish Management Area for vessel owners issued a Swordfish General Commercial permit. A commercial retention limit of zero swordfish in the Florida Swordfish Management Area will also apply to HMS Charter/Headboat permitted vessels in the Area when they are not on a for-hire trip. Unless this commercial retention limit is modified in the future, HMS Charter/Headboat permitted vessels in the Florida Swordfish Management Area will not be allowed to sell swordfish unless the vessel also has a Swordfish Handgear limited access permit. HMS Charter/Headboat permitted vessels may retain, but not sell swordfish, under recreational retention limits. HMS Charter/Headboat permitted vessels, when not on a for-hire trip and located outside the Florida Swordfish Management Area, may retain and sell swordfish within the applicable regional retention limit. NMFS will continue to collect information to evaluate the appropriateness of this and other regional retention limits in the future using in-season adjustment authority.

Comment 7: NMFS received various comments indicating that the initial default retention limits within the northwest Atlantic region and the Gulf of Mexico should be set at a level that is either higher or lower than the proposed limit of three swordfish per vessel per trip. Comments in favor of increasing the initial default limit indicated that a higher limit is needed to make commercial fishing trips economically feasible because of the long distance to swordfish fishing grounds in these areas. A higher retention limit of six to an unlimited number of fish would provide additional revenue and allow for profits while covering the high costs (fuel, crew, food, bait, etc.) associated with such trips. Comments in favor of decreasing the proposed initial default retention limit indicated that lower limits are needed to preserve the value of existing limited access permits, to conserve swordfish, to ensure that the U.S. swordfish quota is not exceeded, or to prevent an early closure of the directed fishery.

Response: NMFS has determined that most Swordfish General Commercial permit holders will likely participate in the commercial swordfish fishery to supplement their primary fishing activities (i.e., tuna fishing and charter fishing). The three-fish initial default retention limit being implemented for the Northwest Atlantic and Gulf of Mexico areas is in the middle of the range of limits being considered, and is appropriate for the initial establishment of a new supplemental or seasonal open-access swordfish fishery. As additional fishery information becomes available—including the number of new permits issued, changes in landings, and impacts on the attainment of the U.S. North Atlantic swordfish quota—NMFS will continue to evaluate the appropriateness of modifying these limits using in-season adjustment authority.

Comment 8: Establishing in-season adjustment criteria to quickly modify the regional retention limits would effectively control the proposed open-access swordfish fishery, and provide NMFS with the ability to make timely adjustments to restrict or increase harvest as necessary. Conversely, in-season adjustment authority might discourage people from obtaining the proposed permit because they would be unsure of future retention limits.

Response: NMFS agrees that establishing in-season adjustment authority to quickly modify the regional retention limits based upon pre-established criteria, in conjunction with effective monitoring of swordfish landings through the HMS e-Dealer system, provides the ability to effectively control the new open-access swordfish fishery. For example, if swordfish landings from newly permitted vessels are higher than projected, NMFS could reduce the retention limits to minimize the likelihood of an early closure of the directed fishery or to ensure that the U.S. swordfish quota is not exceeded. Conversely, if participation in the new fishery and resultant swordfish landings are low, limits could be increased. NMFS' current projections indicate that adequate swordfish quota is available to accommodate the anticipated level of landings derived from the new permit. NMFS will publish in-season adjustments to retention limits in the **Federal Register**, as needed.

Comment 9: The Gulf of Mexico region should be broken into two regions separated by the 29° N. lat. line (a line slightly north of a latitudinal line extending from Freeport, TX, to Crystal River, FL) because of differing transit times to productive grounds, and the need for differing retention limits to facilitate profitable trips.

Response: Transit times to productive swordfish grounds in the Gulf of Mexico vary not only from the north and south, but also from the east and west. Implementing multiple fishing regions for the swordfish fishery in the Gulf of Mexico may potentially cause confusion among fishermen and complicate quota monitoring and enforcement. In addition, the Gulf of Mexico is managed as one large area for current swordfish limited access permit holders, thus NMFS prefers to implement a single regional commercial swordfish retention limit to govern all Swordfish General Commercial and HMS Charter/Headboat permitted vessels fishing in the Gulf of Mexico. Retention limits within the Gulf of Mexico could be adjusted in the future using in-season authority based upon the attainment of pre-specified criteria (i.e., dealer reports, landing trends, quota availability, availability of swordfish on fishing grounds, variations in seasonal distribution, abundance, or migration patterns, and other relevant factors). NMFS will continue to consider other management measures to increase domestic swordfish landings and revenues, while minimizing bycatch, and may consider separating the Gulf of Mexico region into sub-regions in the future.

Comment 10: The proposed allowance for Swordfish General Commercial permit holders to participate in registered HMS fishing tournaments might increase recreational HMS Angling category permit holder interest in obtaining the proposed permit.

Response: NMFS agrees. NMFS expects that most new permit applicants will be current recreational swordfish fishermen with HMS Angling category permits or current commercial tuna fishermen with Atlantic Tunas General or Harpoon category permits resulting in a shift of effort from these fisheries to the commercial swordfish handgear fishery, but not a large increase in overall fishing effort. The allowance for fishing in registered HMS fishing tournaments is consistent with current Atlantic Tunas General category regulations, which allow permit holders to participate in registered HMS tournaments.

Comment 11: NMFS received contrasting comments regarding the authorization of buoy gear for the proposed Swordfish General Commercial permit. Commenters opposed to the concept indicated that buoy gear should not be authorized for use with the proposed Swordfish General Commercial permit, and should remain authorized only for swordfish directed and handgear limited access permit holders. Other commenters said that NMFS should authorize buoy gear for the proposed Swordfish General Commercial permit and also for the Atlantic Tunas General category permit, except in the Florida Swordfish Management Area.

Response: Authorization of buoy gear for the proposed Swordfish General Commercial permit is not within the range of alternatives analyzed in Amendment 8. Buoy gear is only authorized for persons with valid swordfish directed or handgear limited access permits. Comments from the HMS Advisory Panel in recent years have reflected public concern about user conflicts with buoy gear within the narrow geographic range of the current buoy gear fishery off the southeast coast of Florida. With this in mind, a potentially large number of applicants for a new Swordfish General Commercial permit could represent a potentially large increase in the amount of buoy gear fished, and might increase the potential for gear conflicts. Under Amendment 8, NMFS is authorizing fishing gears under the new Swordfish General Commercial permit that are consistent with the fishing gears authorized for the Atlantic Tunas General category permit. There is very little catch and bycatch information available regarding buoy gear used to target swordfish outside of the Florida Straits, and there is no information available regarding buoy gear used to target tunas in the Atlantic Ocean and Gulf of Mexico. Because of the potential for large increases in the amount of buoy gear fished, the potential for fishing gear conflicts, and the absence of information regarding buoy gear fishing to target tunas which limits the Agency's ability to analyze the impacts of additional buoy gear usage under open access commercial permits on incidentally caught or bycatch species (such as billfish and bluefin tuna), NMFS is not authorizing additional buoy gear usage in this final rule.

Comment 12: NMFS should implement an open-access swordfish harpoon category permit similar to the existing Atlantic Tunas Harpoon category permit and allow at least 15 swordfish per trip to be landed. Swordfish caught with harpoons are generally greater in size than swordfish caught by other methods, and there is no bycatch. A three-fish limit is not economically feasible because swordfish are not abundant in near-shore waters, and it often takes days or weeks to make a full trip.

Response: The open access Swordfish General Commercial permit being implemented is intended to facilitate a small-scale supplemental or seasonal swordfish fishery that includes the harvest of swordfish with harpoons. NMFS anticipates that commercial fishermen may be interested in fishing with this new permit to supplement their primary commercial fishing activities. There is already a commercial Swordfish handgear limited access permit with unlimited swordfish retention that authorizes the use of harpoon gear. Under the new Swordfish General Commercial permit, the initial three-fish retention limit is purposefully conservative for the implementation of a new open-access swordfish permit. In the future, as additional fishery information becomes available, NMFS could consider increasing the retention limit based upon the in-season adjustment criteria.

Comment 13: NMFS did not consider a reasonable range of alternatives in analyzing Amendment 8 to the 2006 Consolidated HMS FMP, and did not provide an explanation of why other reasonable alternatives, such as opening areas currently closed to pelagic longline gear, were not considered.

Response: To provide additional opportunities for U.S. fishermen to harvest swordfish using selective gears that are low in bycatch, given their rebuilt status and increased availability, NMFS prepared a Draft EA that analyzed a wide range of reasonable options. Specifically, the alternatives considered two main issues: (1) The implementation of new and modified commercial swordfish vessel permits and authorized gears to allow for a limited number of swordfish to be retained and sold; and, (2) the establishment of retention limits associated with the new and modified permits.

With respect to vessel permitting and authorized gears, NMFS considered three alternatives and four sub-alternatives. These ranged from a no-action alternative, which maintains the current swordfish limited access permit structure, to creating a new or modified commercial swordfish permit(s) to allow for a limited number of swordfish caught on rod and reel, handline, harpoon gear, green-stick, or bandit gear to be retained and sold. With respect to swordfish retention limits, NMFS considered three main alternatives and five sub-alternatives. These ranged from establishing a fishery-wide zero-to-six fish retention limit range for the new or modified permits(s), and codifying a single limit within that range, to establishing separate regions with regional retention limits that could be adjusted in-season based upon pre-established criteria (i.e., dealer reports, landing trends, quota availability, availability of swordfish on the fishing grounds, variations in seasonal distribution, abundance, or migration patterns, and other relevant factors).

Based upon the analysis in the Draft EA, NMFS determined that the preferred alternatives were unlikely to have any significant adverse environmental impacts, primarily because the authorized handgears are low in bycatch and bycatch mortality of protected and non-target species, and because of the rebuilt status of the North Atlantic swordfish stock.

In the Draft EA, NMFS also considered several alternatives that were not further analyzed, such as implementing a swordfish tagging program to provide a higher level of reporting and to facilitate the enforcement of swordfish regulations. After consulting with the HMS Advisory Panel and other interested constituents, NMFS decided not to further analyze these alternatives due to concerns about the effectiveness of a tagging program to reliably identify swordfish bound for commerce. Furthermore, establishing an open-access commercial swordfish permit is expected to reduce the incentive for recreational anglers to illegally sell or transfer swordfish to commercial fishermen for later sale; the

response to Comment 34 has more information regarding swordfish tagging alternatives. The Draft EA analyzed a reasonable range of alternatives to meet the objectives of the action. Other alternatives such as re-opening pelagic longline closed areas do not meet the purpose of the proposed action due to the relatively higher bycatch of several species that are either overfished and/or subject to overfishing (e.g., bluefin tuna, marlins) or are listed under the Endangered Species Act (e.g., sea turtles); therefore, those alternatives were not considered in this action.

Comment 14: NMFS should consider minor adjustments to the time/area closures of the East Florida Coast and Charleston Bump pelagic longline closures. A slight adjustment to the size, shape and duration of those closures could allow the United States to fill its North Atlantic swordfish quota. Experimental longline fishing conducted there has proven the viability of swordfish landings with minimum bycatch of small swordfish or billfish. NMFS could increase observer coverage on pelagic longline vessels in these areas to better monitor catch and bycatch. Any benefits of the north Atlantic swordfish recovery should be aimed at the current directed fisheries, because the recovery was realized by the sacrifice of these fishermen.

Response: The scope of Amendment 8 is to create additional opportunities for the commercial harvest of swordfish using selective gears (rod and reel, handline, harpoon, bandit gear, and greenstick) that are low in bycatch, based upon the fact that the North Atlantic swordfish stock is fully rebuilt and the U.S. quota has been underutilized for over a decade. Since 2007, NMFS has implemented numerous other management measures to increase domestic swordfish landings, which are almost entirely by pelagic longline gear, and revenues while minimizing bycatch. As part of these regulations, NMFS increased the retention limit for pelagic longline vessels issued incidental swordfish limited access permits from two fish to 30 fish per vessel per trip; streamlined limited access permit issuance; implemented a change to the swordfish minimum size requirements from 29 inches to 25 inches cleithrum to caudal keel; and implemented a new HMS Commercial Caribbean Small Boat permit with a two swordfish per vessel per trip limit.

Other alternatives, such as opening or modifying pelagic longline closed areas, do not meet the objectives of the action. Pelagic longline gear has higher bycatch levels of several species that are either overfished and/or subject to overfishing (e.g., bluefin tuna, marlins) or are listed under the Endangered Species Act (e.g., sea turtles). Therefore, those alternatives were not considered in this action. NMFS will continue to consider additional measures that could be taken to increase swordfish landings and that would benefit the pelagic longline fishery, while also minimizing bycatch and bycatch mortality.

Comment 15: NMFS should allow more buoys to be deployed for permit holders that are authorized to fish with buoy gear. This regulatory change would produce more swordfish.

Response: Currently, vessels fishing with buoy gear are limited to possessing or deploying no more than 35 floatation devices. In the 2006 Consolidated HMS FMP, NMFS determined that 35 buoys was the maximum amount of buoy gear that a vessel could effectively deploy at one time without losing excessive amounts of unattended floating gear and increasing interactions with sea turtles or other protected resources. The authorization of additional buoy gear was not considered in Draft Amendment 8, and therefore is outside the scope of this final rule. NMFS will continue to consider additional measures that could be taken to increase swordfish landings as needed, while minimizing bycatch and bycatch mortality.

Comment 16: NMFS should remove all of the restrictions requiring multiple permits aboard vessels that only intend to fish for swordfish with handgear, or otherwise have no longline gear on board. All directed or incidental swordfish limited access permits should be available for handgear usage, without needing to obtain shark and tuna longline limited access permits. There are many latent limited access permits in these categories that are restricted by an unnecessary link to pelagic longline gear usage.

Response: NMFS recognizes that current HMS permit regulations have impacted the ability of some vessel owners to participate in the commercial swordfish fishery using handgear only. The regulations governing swordfish directed and incidental limited access permits and authorized gears were developed primarily to provide fishing opportunities for multiple fisheries, including tunas, swordfish, and sharks, because of the potential to catch any of these species groups when deploying pelagic longline gear. The possession of pelagic longline gear onboard a vessel also triggers several restrictions and requirements that are unique to that gear because of protected species and other bycatch concerns. Modification of these limited access permit requirements and fishing gear authorizations could indirectly affect HMS directed and incidental fisheries and bycatch species in myriad ways, and were not considered in this rulemaking. The existing regulatory structure of these permits facilitates reporting requirements and data collection, while still providing the flexibility to target several species using a variety of gears. In contrast, the existing Swordfish Handgear limited access permit is available for use without the need to be issued other limited access permits, and there is no swordfish retention limit associated with it. The new open-access Swordfish General Commercial permit will provide additional opportunities for U.S. fishermen to harvest swordfish using handgear as a supplemental or seasonal fishery. NMFS has previously considered modifications to, and streamlining of, the HMS limited access permit structure and will continue to do so; however, this subject was not analyzed in Draft Amendment 8 and is outside the scope of the final rule.

Comment 17: NMFS should reactivate a small number of limited access swordfish permits that have been terminated.

Response: Under current regulations, swordfish and shark limited access permits must be renewed annually, and are terminated if they are not renewed within 1 year of expiration. The purpose of permit termination is to remove unused, latent commercial permits from the swordfish and shark fisheries. In recent years, NMFS has implemented several management measures to increase domestic swordfish landings while minimizing bycatch, and may consider additional management measures in the future. Other alternatives, such as reactivating terminated limited access permits, do not meet the objectives of this action. Swordfish limited access permits authorize the use of pelagic longline gear and/or buoy gear. Pelagic longline gear has higher bycatch levels of several species that are either overfished and/or subject to overfishing (e.g., bluefin tuna, marlins) or are listed under the Endangered Species Act (e.g., sea turtles). With regard to buoy gear, as discussed in the response to comment 11, there is very little catch and bycatch information available to analyze the impacts of additional buoy gear usage outside of the Florida Straits, and there is no information available regarding buoy gear used to target tunas in the Atlantic Ocean and Gulf of Mexico. Because of the potential for large increases in the amount of buoy gear fished, the potential for fishing gear conflicts, and the absence of other

critical catch and bycatch information, NMFS did not analyze any alternatives to authorize additional buoy gear usage. Amendment 8 specifically creates additional opportunities for the commercial harvest of swordfish using selective gears (rod and reel, handline, harpoon, bandit gear, and greenstick) that have minimal bycatch and result in few discards.

Comment 18: NMFS should increase access to the swordfish stock by providing more fishing opportunities for the recreational sector.

Response: Access to the recreational swordfish fishery is currently provided through HMS Angling and HMS Charter/Headboat permits, which are both open-access permits. The retention limit under the HMS Angling permit is one swordfish per person up to four swordfish per vessel per trip. The retention limit for HMS Charter vessels is one swordfish per paying passenger up to six swordfish per vessel per trip. The retention limit for HMS Headboat vessels is one swordfish per paying passenger and up to 15 swordfish per vessel per trip. In this action, NMFS focused on increasing access for commercial handgear fishermen to the rebuilt swordfish stock due to the low bycatch associated with handgear and because the ICCAT-recommended U.S. swordfish quota allocation has been underutilized for over a decade. Therefore, since recreational access is already open access and subject to similar retention levels, Draft Amendment 8 did not analyze alternatives to modify HMS Angling category limits. Since this topic was not considered in Draft Amendment 8, this request is outside the scope of the final rule.

Comment 19: NMFS should require all vessels issued a swordfish General Commercial Permit to abide by all of the same requirements that apply to pelagic longline vessels, including commercial fishing vessel safety requirements, logbook reporting, observers, bycatch mitigation, workshops, and vessel monitoring systems (VMS). The new commercial fishermen should be required to go to protected species workshops and to carry protected species safe handling and release gear. All new permit holders should also be required to comply with the protected species Careful Handling and Release Protocols.

Response: All vessels that obtain the new Swordfish General Commercial permit will be required to comply with U.S. Coast Guard commercial fishing vessel safety requirements. Authorized fishing gears under the new Swordfish General Commercial permit include rod and reel, handline, harpoon, bandit gear, and green-stick gear. On June 14, 2001, NMFS released a Biological Opinion (BiOp) under the Endangered Species Act, which stated that the continued operation of HMS handgear fisheries may adversely affect, but are not likely to jeopardize, the continued existence of any endangered or threatened species under NMFS jurisdiction. This BiOp indicated that the potential for takes in handgear fisheries is low, and anticipated that the continued operation of Atlantic HMS handgear fisheries would result in documented takes of no more than three ESA-listed sea turtles, of any species, in combination, per calendar year. In addition, Atlantic HMS handgear fisheries are classified as Category III under the Marine Mammal Protection Act (MMPA) (76 FR 73912, November 29, 2011), meaning that these fisheries have a remote likelihood of incidental mortality or serious injury to marine mammals.

In June 2004, NMFS released a BiOp for the Atlantic pelagic longline fishery. That BiOp concluded that the pelagic longline fishery was not likely to jeopardize the continued existence of loggerhead, green, hawksbill, Kemp's ridley or olive ridley sea turtles, but was likely to jeopardize the continued existence of leatherback sea turtles. The 2004 BiOp established a reasonable and prudent measure and alternative, which subjected the Atlantic HMS pelagic longline fishery to time/area closures, VMS, observers, hook and bait restrictions, compliance with safe handling and release protocols, and mandatory protected species safe handling and release workshops. Additionally, the pelagic longline fishery has been designated as a Category I fishery under the MMPA because it has frequent incidental mortality and serious injury of marine mammals.

Thus, many of the management measures required under the Endangered Species Act and Marine Mammal Protection Act for the Atlantic HMS pelagic longline fishery do not apply to the new Swordfish General Commercial permit, because the potential for protected species interactions with the gears authorized under this permit is low. The suggested requirements for protected species bycatch mitigation measures, protected species release and disentanglement training workshops and VMS requirements are not warranted for the gears authorized in this final rule. These requirements were not analyzed in the Draft EA because they are outside the scope of this rulemaking.

Comment 20: Any interactions with protected species by new permit holders would be considered ''takes,'' and these would increase. NMFS also needs to consider the interactions with dusky sharks when there could potentially be 4,100 boats deploying J-hooks.

Response: ESA-listed species taken with handgear would be counted against the Incidental Take Statement (ITS) established in the 2001 BiOp. NMFS expects that most new permit applicants will be current recreational swordfish fishermen with HMS Angling category permits or current commercial tuna fishermen with Atlantic Tunas General or Harpoon category permits, resulting in a shift of effort from these fisheries to the commercial swordfish handgear fishery, but not a large increase in overall fishing effort. In addition, the initial implementation of a zero-fish default retention limit in the Florida Swordfish Management Area will not change current fishing effort in an area with high concentrations of recreational anglers and commercial buoy gear fishermen. For these reasons, and because handgear has a remote likelihood of interactions with protected species, NMFS does not anticipate that interactions with protected species will increase in any way that has not been previously analyzed in the 2001 BiOp as a result of implementation of the new permit. Similarly, NMFS does not expect a large increase in interactions with other species, including dusky sharks. NMFS will consider conservation and management measures for dusky sharks separately in Amendment 5b to the 2006 Consolidated Atlantic HMS FMP.

Comment 21: Landings from the proposed new permit should not be deducted from the directed swordfish quota. NMFS should establish a separate quota category (two to five percent of the overall quota) for these landings to protect the pelagic longline fishery quota from a closure of the directed fishery.

Response: The new swordfish general commercial permit is a directed swordfish permit; therefore, it is appropriate for landings from this new permit to be counted against the directed swordfish quota. Under ATCA and the Magnuson-Stevens Act, NMFS is required to provide U.S. fishing vessels with a reasonable opportunity to harvest the U.S. ICCAT quota. However, the directed swordfish quota has been under-harvested for over a decade. NMFS has determined that additional swordfish landings derived from this new permit could be counted against the directed quota without fully reaching the U.S. ICCAT-recommended

quota. The ability to quickly adjust the regional swordfish retention limits using in-season authority and pre-established criteria gives NMFS the flexibility to manage the directed swordfish quota as necessary.

Comment 22: A Finding of No Significant Impact (FONSI) is not justified. NMFS must provide a full Environmental Impact Statement (EIS) on this proposed action, which has the potential to significantly increase the number of permit holders, alter traditional landing patterns, negatively impact current limited access permit holders in this fishery, and have significant economic and social impacts.

Response: NMFS has determined that the new Swordfish General Commercial permit is not expected to result in cumulative effects that could have a significant effect on target species or non-target species or the human environment. The cumulative impacts of ongoing swordfish fishery management actions, including those in this proposed action, are expected to be positive from both an ecological and socio-economic perspective. If the United States is successful at increasing its North Atlantic swordfish landings and maintaining its international swordfish quota, it will realize increased gross revenues to U.S. fishermen who are participating in a well-managed, sustainable fishery. NMFS has determined that there would not be a significant increase in fishing effort under any of the proposed measures because most new Swordfish General Commercial permit holders are likely already participating in the recreational swordfish fishery, the Atlantic Tunas General or Harpoon category fisheries, or the HMS Charter/Headboat fishery. These permit holders would likely participate in the commercial swordfish fishery to supplement their primary fishing activities (i.e., tuna fishing and charter fishing). All new commercial swordfish fishery participants will be restricted to using only authorized handgear (rod and reel, handline, harpoon, bandit gear, and green-stick), and must comply with the applicable regional swordfish retention limits. These traditional handgears are closely tended by fishermen. So while the likelihood of interactions with non-target or bycatch species is low, any incidentally-caught non-target species can usually be quickly and safely released. Under the proposed action, NMFS anticipates that fishermen using handgear will have no adverse impacts on ESA-listed species beyond those analyzed in the 2001 BiOp, which concluded that the HMS handgear fishery will not jeopardize any ESA-listed species.

Having solicited and reviewed public comment on the Draft EA, and in view of the information presented in the Final EA that was prepared to address proposed changes to the U.S. North Atlantic swordfish fishery, particularly the small-scale handgear fishery, NMFS has determined that this action will have no significant impact on the quality of the human environment as described above and in the proposed EA. In addition, all impacts to potentially affected areas, including national, regional, and local, have been mitigated to reach the conclusion of no significant impact. Accordingly, NMFS determined that preparation of an EIS for this action was not necessary.

Comment 23: NMFS has not adequately assessed the potential ecological impacts on protected species and juvenile swordfish. Current guidance from the Council on Environmental Quality (CEQ) requires that agencies consider greenhouse gas emissions associated with any proposed actions and evaluate the carbon footprint associated with this new permit.

Response: NMFS expects that most new permit applicants will be current recreational swordfish fishermen with HMS Angling category permits, current commercial tuna fishermen with Atlantic Tunas General or Harpoon category permits, or current HMS Charter/Headboat permit holders, resulting in a shift of effort from these fisheries to the commercial swordfish handgear fishery, but not a large increase in overall fishing effort. NMFS also determined that the new Swordfish General Commercial permit could cause a minor increase in rod and reel, handline, bandit gear, green-stick, and harpoon commercial fishing effort if previously inactive fishermen obtain the new and modified permit(s) and began fishing. This could result in a minor increase in swordfish discards and discard mortality if fishing effort increases substantially in areas with large concentrations of juvenile swordfish. However, the establishment of a zero-fish retention limit in the Florida Swordfish Management Area, where there are large concentrations of juvenile and adult swordfish, will decrease the likelihood that there are negative impacts to the swordfish stock due to the new permit. Moreover, because NMFS does not expect a large increase in overall fishing effort resulting from the new Swordfish General Commercial permit, a significant increase in greenhouse gas emissions is not anticipated.

Comment 24: NMFS received contrasting comments about potential impacts on swordfish ex-vessel prices resulting from changes in landings volume and product quality due to implementation of the proposed permit. Some commenters stated that the proposed action would greatly increase the number of vessels commercially fishing for swordfish, so the ex-vessel price would decrease due to an increased supply. Also, because newly-permitted handgear fishermen would not be familiar with proper seafood handling methods, commenters stated that swordfish quality and prices would decrease across the entire fishery. Other commenters stated that the proposed permit would help to achieve price stability by introducing a limited amount of high-quality, dayboat swordfish into the domestic market. This is the type of small-scale fishery that the seafood industry is looking to promote.

Response: NMFS determined that establishing the new Swordfish General Commercial permit could have minor costs for U.S. fishermen associated with obtaining the new permit and complying with additional commercial fishing vessel safety requirements and fishery management regulations. NMFS also recognizes that the new and modified permits could affect ex-vessel swordfish prices and the values of existing swordfish limited access permits. However, the projected low level of landings derived from the new and modified swordfish permits is not expected to be large enough to greatly impact swordfish prices, either higher or lower, because ex-vessel prices are impacted by a number of factors, most notably the large volume of fresh and frozen swordfish imported into the U.S. market. Any other negative socio-economic impacts on current swordfish limited access permit holders are expected to be mitigated by the establishment of low swordfish retention limits for the new and modified permits, including a zero-fish retention limit in the modified Florida Swordfish Management Area. A retention limit range of zero to six swordfish is anticipated to provide a seasonal, or supplementary, fishery for most participants. It is not likely to facilitate a full-time, year-round fishery. In contrast, there are no retention limits for swordfish directed and handgear limited access permit holders, and there is a 30-fish limit for incidental swordfish limited access permit holders.

Positive economic benefits are expected if U.S. fishermen obtain this open-access swordfish permit. If a new entrant lands 10 swordfish per year with

the new permit, they could realize an increase in annual gross revenues of approximately $4,320. If all the estimated 4,084 new entrants land 10 swordfish per year, total annual gross revenues from swordfish could increase by $ 17.6 million, but quota limitations would reduce this revenue to approximately $ 15.2 million. Economic benefits are also anticipated for fishing tackle manufacturers and suppliers, bait suppliers, fuel providers and swordfish dealers. In addition, this new permit would have long-term socio-economic benefits if it creates a situation where the U.S. swordfish quota is no longer at risk for being reallocated to other ICCAT Parties due to low U.S. swordfish landings. If the United States maintains its allocation of the total ICCAT-recommended North Atlantic swordfish quota, then socio-economic benefits would be realized by all swordfish fishery participants. For these reasons, NMFS has determined that the net economic benefits of the establishment of the new swordfish general commercial permit outweigh the net economic costs to fishermen.

Comment 25: Commenters stated that NMFS had both underestimated and overestimated the number of new permits that might be issued as a result of the proposed action. Commenters also stated that NMFS had both underestimated and overestimated the amount of additional landings that might occur as a result of the proposed action. Therefore, the potential environmental impacts associated with the proposed permit are misrepresented.

Response: In developing the Final EA and final management measures, NMFS considered public comments received in response to the Draft EA and determined that the socio-economic and environmental analyses contained in the Final EA are based upon the best available information, and appropriately consider the potential impacts of this action. It is not possible to predict the exact number of applicants for a new open-access commercial fishing permit, because there are few eligibility requirements for the new permit. Therefore, NMFS used the total number of Atlantic Tunas General category permit holders (4,084) as a proxy for the total number of new swordfish permit applicants, because the Atlantic Tunas General category permit is most similar to the permit being implemented in this action. NMFS then calculated the number of successful Atlantic Tunas General category vessels (i.e., landed at least one bluefin tuna) in 2011 (583 successful vessels) and multiplied that number by 10 swordfish per vessel/year to derive an estimated catch of 5,830 swordfish a year. The selection of 10 swordfish per year is an estimate and some fishermen could land more swordfish, while others could land less. The selection of 10 swordfish per year is a reasonable proxy, particularly if many new permit holders fish for swordfish on a part-time basis, similar to the practices of many Atlantic Tunas General and Harpoon category permit holders when fishing for bluefin tuna. With an average swordfish weight of 96 lb. dressed weight (dw) in 2011, this is estimated to yield 254 mt dw of additional swordfish landings. NMFS also multiplied the number of Atlantic Tunas Harpoon category vessels (24) by 10 swordfish per vessel/year to produce an estimated 240 additional swordfish caught per year. With an average swordfish weight of 96 lb. dw in 2011, harpoon landings are estimated to yield an additional 10.5 mt dw of U.S. swordfish landings. In total, by combining these two estimates, the new permit is predicted to yield 265 mt dw of additional U.S. swordfish landings. Under the new Swordfish General Commercial permit, NMFS estimated that total U.S. landings plus discards could approach 2,436 mt dw ((2,171 mt dw (2011 total U.S. landings reported to ICCAT) + 265 mt dw = 2, 436 mt dw)) if current fishing practices remain constant.

As described in the response to Comment 24, NMFS recognizes that there may be minor socio-economic impacts to fishermen due to the establishment of the new Swordfish General Commercial permit. However, most negative socio-economic impacts on current swordfish limited access permit holders are expected to be mitigated by the establishment of low retention limits for the new Swordfish General Commercial permit, including a zero retention limit in the Florida Swordfish Management Area. A retention limit range of zero to six swordfish is anticipated to provide a seasonal, or supplemental, fishery for most participants. It is not likely to facilitate a full-time, year-round fishery.

Comment 26: NMFS must consider the potential that ICCAT could reduce the U.S. quota allocation or the overall North Atlantic swordfish Total Allowable Catch (TAC). Recent swordfish landing trends indicate that the United States is moving closer towards full utilization of its swordfish quota by existing permit holders. The proposed new permit could lead to a large increase in landings, fill the quota quickly and, as a result, close the directed swordfish fishery. There is not enough swordfish quota available for the new permit.

Response: While NMFS recognizes that quota changes are possible at ICCAT, the ability to monitor swordfish landings in near real-time with the HMS e-Dealer system and to quickly adjust the regional swordfish retention limits using in-season authority and pre-established criteria gives NMFS the flexibility to manage the directed swordfish quota, regardless of what the U.S. allocation of the ICCAT-recommended quota may be.

NMFS estimates that the new permit will yield approximately 265 mt dw of additional U.S. swordfish landings. Under the new Swordfish General Commercial permit, NMFS estimates that total U.S. landings plus discards could approach 2,436 mt dw ((2,171 mt dw (2011 total U.S. landings reported to ICCAT) + 265 mt dw = 2,436 mt dw)) if current fishing practices remain constant. In terms of available and unutilized swordfish quota, there is a loss of potential income by fishermen that would like to fish commercially for swordfish, but who are not able to obtain limited access permits. Currently, these limited access swordfish handgear permits can cost upwards of $30,000. Because the North Atlantic swordfish stock is fully rebuilt and the United States has not attained its full ICCAT-recommended swordfish quota for over a decade, overall gross revenues are lower than they could be if the U.S quota was fully harvested. For example, the total U.S. adjusted swordfish quota for 2012 was 3,559.2 mt dw (7,846,612 lbs. dw). Assuming an average ex-vessel price of $4.51 per pound dw and 100 percent quota utilization, total possible gross revenue across the domestic fishery could be $35.4 million, versus actual gross revenues of $20.2 million (2011), or a difference of $15.2 million in unrealized gross revenue due to the United States not fully attaining its adjusted North Atlantic swordfish quota. Under ATCA (16 U.S. C. 971 *et. seq.*) and the Magnuson-Stevens Act, NMFS is required to provide U.S. fishing vessels with a reasonable opportunity to harvest the ICCAT-recommended quota. Although there is sufficient quota to allow U.S. fishermen to catch more swordfish and remain within the ICCAT-recommended quota, current difficulties associated with obtaining a limited access permit may be a constraining factor. Therefore, the new Swordfish General Commercial permit with low retention limits and in-season adjustment authority to modify limits as needed is warranted.

Comment 27: When NMFS is considering the impact of this new permit on the swordfish quota, the

Agency should reference the baseline quota.

Response: The baseline quota is the amount of swordfish that is allocated to the United States by ICCAT without adjusting for quota transfers to other countries (if applicable) or previous year under- or over-harvest. The adjusted quota is the baseline quota as adjusted by transfers and previous year over- or under-harvest. If under-harvest of the previous year's adjusted quota occurs, the United States may carry-forward its total under-harvest or 25% of the baseline quota, whichever is less. Both the baseline and adjusted quotas are important when considering the potential effects of swordfish landings under the new Swordfish General Commercial permit and commercial retention by HMS Charter/Headboat permitted vessels when not on a for-hire trip. Both were considered in developing the Draft and Final EA for Amendment 8. The adjusted quota is important because this number is what U.S. fishermen are limited to, on an annual basis, and what the United States must consider for long-term compliance with recommendations from ICCAT and consistency with ATCA. If the U.S. baseline or adjusted quota is repeatedly under-harvested, other countries wanting increased access to the North Atlantic swordfish stock may look to the United States as a source of quota that could be temporarily or permanently transferred. If the adjusted quota is exceeded in one year, the overage must be deducted from the following year's baseline quota.

In 2011, U.S. landings reported to ICCAT were 2,171 mt (dw). NMFS anticipates additional landings from the new permit of 265 mt (dw), which in 2011 would have produced 2,436 mt (dw) total landings plus discards. Therefore in 2011, under the new Swordfish General Commercial permit and modified HMS Charter/Headboat permit, U.S. landings (without discards) would have been 501.6 mt (dw) below the baseline quota of 2,937.6 mt (dw), and 1,970.4 mt (dw) below the adjusted quota of 4,406.4 mt (dw). In the future, potential additional landings under Amendment 8 could result in a directed swordfish semi-annual seasons closure. However, NMFS has the authority and ability to monitor landings and adjust retention limits in-season to slow or close the harvest of swordfish by Swordfish General Commercial and HMS Charter/Headboat permitted vessels, and thereby reduce the need to close the directed swordfish season early.

Comment 28: Green stick and bandit gear should not be authorized because of their potential ability to catch bluefin tuna. These gears are not traditional swordfish fishing gears. Green-stick gear was developed to catch tunas, particularly bluefin tuna, and it does not catch swordfish very well.

Response: Greenstick and bandit gear are authorized under the Swordfish General Commercial permit to be consistent with the Atlantic Tunas General category permit under which these same gears are currently authorized for the harvest of bigeye, albacore, yellowfin and skipjack (BAYS) tunas and bluefin tunas. Under current regulations, swordfish may not be retained if unauthorized fishing gears are onboard the vessel. Atlantic Tunas General category permitted vessels that are fishing for tunas may want to fish for tunas with greenstick or bandit gear and may also have a Swordfish General Commercial permit and want to fish for swordfish on the same trip. NMFS does not anticipate that greenstick will be frequently used to harvest swordfish. However, by allowing the harvest of swordfish with greenstick, NMFS is facilitating the targeting of tunas and swordfish on the same trip. Under current regulations, bandit gear is authorized to harvest swordfish under Swordfish Handgear, Swordfish Directed, or Swordfish Incidental permits.

Comment 29: NMFS must consider bluefin tuna catches by these handgears in the Gulf of Mexico bluefin tuna spawning area. Estimated discards must be deducted from the Atlantic Tunas General category bluefin tuna quota. This reinforces the need for mandatory logbooks and some level of observer coverage to provide statistically valid bluefin tuna estimates in the Gulf of Mexico and the Atlantic Ocean. Bluefin tuna catches are not allowed because directed bluefin tuna fishing in the Gulf of Mexico is not allowed, but there will be catches.

Response: Greenstick and bandit gear are currently authorized for the harvest of BAYS and bluefin tunas under the Atlantic Tunas General category and HMS Charter/Headboat open access permits and the Atlantic Tunas Longline limited access permits. The authorization of these gears under these permits is not affected by Amendment 8. In the Gulf of Mexico, it is illegal to target bluefin tuna. Available greenstick and bandit gear catch and bycatch data indicate that fish released from these gears, including bluefin tuna, have a high likelihood of survival because the gears are tended and fish may be retrieved relatively quickly and released. Bluefin tuna landings must be accounted for under the appropriate bluefin tuna sub-quota and dead discards must be accounted for against the overall U.S. quota. Atlantic Tunas General category and HMS Charter/Headboat permitted vessels must report on logbooks if selected for reporting. At this time, NMFS does not select these vessels for reporting in order to obtain bluefin tuna dead discard data because these authorized fishing gears have a low bluefin tuna mortality rate.

Comment 30: The preferred alternatives in Amendment 8 will make it easier for recreationally-caught swordfish to be illegally sold by increasing the number of commercial permit holders through which fish could be transferred and sold, especially in south Florida. NMFS will have no way to regulate the landings of all these swordfish in south Florida.

Response: The establishment of an open-access commercial swordfish permit that is easy to apply for and obtain is expected to reduce the incentive for recreational anglers to illegally sell or transfer swordfish to commercial fishermen for later sale. Recreational HMS fishermen in Federal waters must possess an HMS Angling permit, may not sell their HMS, and must report all swordfish landings either online or by phone within 24-hours of landing. In addition, commercially-caught swordfish may only be sold to a federally permitted swordfish dealer. In response to public comment and for other reasons explained above, at this time, NMFS is implementing a zero-fish retention limit in the Florida Swordfish Management Area for Swordfish General Commercial permit holders and prohibiting the sale of fish by vessels with HMS Charter/Headboat permits in this area, even when they are not on a for hire trip. In south Florida, this zero-fish retention limit will not provide additional incentive for recreational fishermen to illegally sell or transfer swordfish to commercial fishermen for later sale. The retention limit in south Florida and other regions may be adjusted in-season, based upon the attainment of pre-established criteria contained in the final rule implementing Amendment 8.

Comment 31: NMFS received comments opposed to the proposed regulation, which would allow a person to obtain an Angling category permit, and then relinquish that permit to obtain the Swordfish General Commercial permit during the 2013 fishing year. If a person relinquishes their Angling category permit to obtain the new commercial permit, the commenter stated that they should be prohibited from obtaining another

Atlantic Tunas permit during the same fishing year.

Response: NMFS agrees. A person may not change bluefin tuna quota categories within the same fishing year under current regulations. While this final rule will be effective prior to the issuance of 2014 Atlantic open access HMS and tunas permits, NMFS will not issue Swordfish General Commercial permits prior to the issuance of 2014 permits.

Comment 32: NMFS received contrasting comments regarding the effective date of the final rule implementing Amendment 8 to the 2006 Consolidated HMS FMP. Some commenters requested implementation as quickly as possible so they could benefit from increased commercial fishing opportunities for swordfish. Other commenters requested for NMFS to wait until ICCAT stock assessment results and quota recommendations are publicly available in the fall of 2013 before making any significant changes to current swordfish management measures.

Response: The effective date of this final rule is 30 days after the date of its publication in the **Federal Register**; however, the new Swordfish General Commercial Permit and the allowance for HMS Charter/Headboat permitted vessels to sell swordfish on non-for hire trips will first become effective upon issuance of the 2014 fishing permit. NMFS is implementing this rule as quickly as possible in order to provide additional opportunities to more fully utilize the U.S. swordfish quota, while considering available information about North Atlantic swordfish stock status. Regardless of the U.S. quota allocation issued by ICCAT, NMFS has the ability to monitor swordfish landings in real-time and will also have the ability under Amendment 8 to adjust regional swordfish retention limits according to the in-season adjustment authority criteria established in this final rule.

Comment 33: An open-access commercial swordfish permit will enable many people who have not been able to qualify, based on fishing income, for a Restricted Species Endorsement on the Florida Saltwater Products License to more easily qualify. Therefore, the proposed commercial swordfish permit will also create more fishing pressure on other species, including Spanish mackerel, pompano, and king mackerel.

Response: The Restricted Species Endorsement is a Florida state requirement that may be modified by the State of Florida based on their determination of need. If the State of Florida maintains the status quo regarding the Florida Restricted Species list, which does not currently include swordfish, then some fishermen that obtain the new Swordfish General Commercial permit could potentially land and sell swordfish which could allow them to qualify more easily for entry into restricted entry commercial fisheries in Florida. If the State of Florida adds swordfish to the Restricted Species list, then it would not become any easier for fishermen to qualify for entry into restricted commercial fisheries in Florida.

Comment 34: NMFS should implement a swordfish tagging system to promote more swordfish quota usage. Commenters stated that some swordfish are being unreported and that the United States must ensure that all swordfish that are being caught are accounted for.

Response: In the Draft EA for Amendment 8, NMFS thoroughly considered an alternative that would implement a swordfish tagging program to provide a higher level of reporting and to facilitate the enforcement of swordfish regulations. Four sub-alternatives were considered, including tagging: (1) Only swordfish landed by vessels issued the new or modified permit(s); (2) all swordfish landed by any gear other than PLL (i.e., rod and reel, handline, harpoon, bandit gear, green-stick, trawl gear, and buoy gear; (3) all commercially landed swordfish; and (4) all commercially-landed swordfish within, or from, specified region(s). Additionally, NMFS considered whether to provide tags to dealers and require that vessel operators tag swordfish prior to offloading, or whether to provide tags to swordfish vessel permit holders and require that swordfish be tagged immediately upon being brought onboard a vessel. NMFS extensively investigated different types of tags, program administration and costs, tag manufacturers, reporting requirements, and enforcement considerations.

After consulting with the HMS Advisory Panel and other interested constituents, NMFS decided not to further analyze the alternative to implement a swordfish tagging program due to concerns about the effectiveness of a tagging program to reliably identify swordfish that are bound for commerce. Unless all commercial swordfish (both domestic and imported) are tagged, it would remain difficult to differentiate between legitimate commercial landings that needed to be tagged, commercial landings that did not need to be tagged, imported swordfish, and recreational landings illegally entering commerce. Furthermore, establishing an open-access commercial swordfish permit is expected to significantly reduce the incentive for recreational anglers to illegally sell or transfer swordfish to commercial fishermen for later sale, thereby reducing the need for a tagging program.

Changes From the Proposed Rule (78 FR 12273, February 22, 2013)

In this final rule and in response to public comment, NMFS has modified the definition of the ''Florida Swordfish Management Area'' at § 635.2 by removing that portion of the area north of 28°17′10″ N. lat. The new northern boundary line now intersects the U.S. mainland near Rockledge, FL, and the coastline between Cape Canaveral, FL, and Melbourne, FL, near Cocoa Beach, FL. The modified area is smaller in geographic size than the proposed area. The area off the southeastern coast of Florida, particularly the Florida Straits, contains oceanographic features that make the area biologically unique. It provides important juvenile swordfish habitat, and is essentially a narrow migratory corridor containing high concentrations of swordfish located in close proximity to high concentrations of people who may fish for them. The modified Florida Swordfish Management Area more closely encompasses the Florida Straits and the oceanographic features that make this area biologically unique. Public comment indicated a concern about increased catches of juvenile swordfish, the potential for larger numbers of fishermen in the area, and the potential for crowding of fishermen, which could lead to potential fishing gear and user conflicts. Modifying the area to more closely correspond to the actual oceanographic features that make the area unique will improve future conservation and management of swordfish, while minimizing impacts on fishermen operating both in the relatively narrow area of the Florida Straits and fishermen operating north of this area where swordfish are less concentrated. This modification is within the range of alternatives considered for the Florida Swordfish Management Area in Amendment 8. To account for the reduction in size of the Florida Swordfish Management Area, the Northwest Atlantic region has been increased in size by extending its southern boundary to 28°17′10″ N. lat.

Also in response to public comment, NMFS has modified the initial default retention limit of the Florida Swordfish Management Area. In § 635.24(b)(4)(iii), the initial default swordfish retention limit for the modified Florida Swordfish Management Area has been changed from one swordfish per vessel per trip

to zero swordfish per vessel per trip. An initial default retention limit of zero swordfish per vessel per trip in the modified Florida Swordfish Management Area better corresponds with NMFS' intent to take a precautionary approach during the initial establishment of a new open access commercial swordfish permit in an area that is biologically unique and within the proximity of a large number of fishermen, while still providing increased opportunities for commercial swordfish handgear fisheries in other regions.

Paragraphs § 635.4(f)(1) and (f)(2) have been changed to indicate that the provision allowing HMS Charter/Headboat permitted vessels to commercially fish for swordfish under the new regulations will become effective on January 1, 2014. Similarly, in § 635.4(f)(5), a sentence has been removed that described how the new permit would have been issued during the 2013 fishing year. The new permit will be made available for the 2014 fishing year, so that sentence is no longer needed.

Paragraph § 635.4(m)(2) has been reworded to improve clarity, but no substantive change to this paragraph has been made.

A minor change has been made to § 635.24(b)(4)(i) to improve clarity and to reflect the changes made to the definition of the Florida Swordfish Management Area.

A correction has been made at § 635.34(a) to indicate the proper cross-reference to § 635.24 instead of § 635.23. There is no substantive change as a result of this correction.

Lastly, a change has been made at § 635.71(e)(18) to improve clarity by incorporating a cross-reference to § 635.21(e)(4)(v).

Classification

The NMFS Assistant Administrator (AA) has determined that this final rule is consistent with the 2006 Consolidated Atlantic HMS FMP and its amendments, other provisions of the Magnuson-Stevens Act, ATCA, and other applicable law.

NMFS prepared an environmental assessment for this final rule that discusses the impact on the environment that would result from this rule. In this final action, we provide additional commercial swordfish fishing opportunities using selective fishing gears that have minimal bycatch and few discards to allow the United States to more fully utilize its domestic swordfish quota allocation. A copy of the environmental assessment is available from NMFS (see **ADDRESSES**).

This final rule has been determined to be not significant for purposes of Executive Order 12866.

The Agency has consulted, to the extent practicable, with appropriate state and local officials to address the principles, criteria, and requirements of Executive Order 13132.

A final regulatory flexibility analysis (FRFA) was prepared for this rule. The FRFA incorporates the Initial Regulatory Flexibility Analysis (IRFA), a summary of the significant issues raised by the public comments in response to the IRFA, our responses to those comments, and a summary of the analyses completed to support the action. The full FRFA and analysis of economic and ecological impacts are available from NMFS (see **ADDRESSES**). A summary of the FRFA follows.

The purpose of this final rulemaking, consistent with the Magnuson-Stevens Act, and the 2006 Consolidated HMS FMP and its amendments, is to enact HMS management measures that provide additional opportunities to harvest swordfish using selective gears that have low rates of bycatch, given the rebuilt status of the swordfish stock and resulting increased availability of swordfish and availability of U.S. quota. The goal is for the United States to more fully utilize its domestic swordfish quota allocation, which is based upon the recommendation of ICCAT, and provide economic benefits to U.S. fishermen with minimal adverse environmental impacts.

Section 604(a)(2) of the RFA requires a summary of the significant issues raised by the public comments in response to the IRFA, a summary of the assessment of the Agency of such issues, and a statement of any changes made in the rule as a result of such comments. NMFS received many comments on the proposed rule and IRFA. A summary of these comments and the Agency's responses, including changes as a result of public comment, are included above. In particular, comments 1, 5, 6, and 7 address the rule's economic impacts. For the reasons discussed in the response to comments 5 and 6, NMFS has reduced the size of the Florida Swordfish Management Area in this final rule, increased the size of the Northwest Atlantic region, implemented a zero swordfish per vessel per trip initial default retention limit in the smaller modified Florida Swordfish Management Area, and implemented a three swordfish per vessel per trip initial default retention limit in the area north of Cocoa Beach, FL, to Jekyll Island, GA, that was originally proposed to be subject to a one swordfish per vessel per trip limit. Otherwise, there are no substantive changes from the proposed rule as a result of these economic comments.

Section 604(a)(3) of the RFA requires a description and estimate of the number of small entities to which the final rule would apply. The Small Business Administration (SBA) has established size criteria for all major industry sectors in the United States, including fish harvesters. Previously, a business involved in fish harvesting was classified as a small business if it is independently owned and operated, is not dominant in its field of operation (including its affiliates), and has combined annual receipts not in excess of $4.0 million (NAICS code 114111, finfish fishing) for all its affiliated operations worldwide. In addition, SBA has defined a small charter/party boat entity (NAICS code 713990, recreational industries) as one with average annual receipts of less than $7.0 million. On June 20, 2013, SBA issued a final rule revising the small business size standards for several industries effective July 22, 2013. 78 FR 37398 (June 20, 2013). The rule increased the size standard for Finfish Fishing from $4.0 to 19.0 million, Shellfish Fishing from $4.0 to 5.0 million, and Other Marine Fishing from $4.0 to 7.0 million. Id. at 37400 (Table 1).

NMFS has reviewed the analyses prepared for this action in light of the new size standards. Under the former, lower size standards, all entities subject to this action were considered small entities, thus they all would continue to be considered small under the new standards.

This final rule would apply to small-scale handgear vessel owners that fish in the Atlantic Ocean, including the Gulf of Mexico and the U.S. Caribbean, that do not currently hold a commercial swordfish limited access permit. NMFS estimates that the universe of fishermen who might purchase and fish under a new commercial swordfish permit would be approximately 4,084 individuals, with some potential shift of fishermen currently permitted in the recreational HMS Angling category. This estimate is based upon the number of persons currently issued an Atlantic tunas General category permit, which is the commercial permit most similar to the permit being implemented in this final action. This final action could also indirectly apply to current U.S. North Atlantic commercial swordfish fishery participants and the related industries of seafood dealers and processors, fishing gear manufacturers and distributors, marinas, bait houses, restaurants, and other equipment suppliers. The current U.S. North

Atlantic commercial swordfish fishery is comprised of 334 fishing vessel owners who are issued either a limited access swordfish Handgear permit, or a limited access directed or incidental swordfish permit.

Section 604(a)(4) of the RFA requires a description of the projected reporting, record-keeping, and other compliance requirements of the final rule, including an estimate of the classes of small entities which would be subject to the requirements of the report or record.

This action contains new reporting, recordkeeping, or other compliance requirements. The new Federal open-access Swordfish General Commercial permit allows NMFS to collect additional data regarding participants in the swordfish handgear fishery and landings through Federal dealer reports. The new permit requires an application similar to other current open-access HMS permits. The information collected on the application includes vessel information and owner identification and contact information. A modest fee to process the application and annual renewal fee of approximately $25 may be required. The final rule also adopts standard commercial HMS permit reporting requirements for this permit. Currently, in Atlantic HMS fisheries, all commercial fishing vessels and Charter/Headboat vessels are required to submit logbooks for all HMS trips if they are selected for reporting. Selected permit holders are required to submit logbooks to NMFS postmarked no later than seven days after unloading a trip. If no fishing activity occurred during a calendar month, a ''no fishing'' report must be submitted to NMFS, and be postmarked within seven days after the end of the month. Currently, the permits most similar to the ones being implemented in this final action (HMS Charter/Headboat, Atlantic tunas General category, and Atlantic tunas Harpoon category permit) are not selected for submitting logbooks, although they may be selected in the future.

Section 604(a)(5) of the RFA requires a description of the steps NMFS has taken to minimize the significant economic impact on small entities consistent with the stated objectives of applicable statutes, including a statement of the factual, policy, and legal reasons for selecting the alternative adopted in the final rule and the reason that each one of the other significant alternatives to the rule considered by the Agency which affect small entities was rejected. These impacts are discussed below and in the final environmental assessment for Amendment 8 to the 2006 Consolidated HMS FMP. Additionally, the RFA (5 U.S.C. 603(c)(1)–(4)) lists four general categories of ''significant'' alternatives that could assist an agency in the development of significant alternatives. These categories of alternatives are: (1) Establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) clarification, consolidation, or simplification of compliance and reporting requirements under the rule for such small entities; (3) use of performance rather than design standards; and (4) exemptions from coverage of the rule for small entities.

In order to meet the objectives of this rule, consistent with the Magnuson-Stevens Act and ESA, NMFS cannot exempt small entities or change the reporting requirements only for small entities because all the entities affected are considered small entities. Thus, there are no alternatives discussed that fall under the first and fourth categories described above. We do not know of any performance or design standards that would satisfy the aforementioned objectives of this rulemaking while also complying with the Magnuson-Stevens Act. Thus, there are no alternatives considered under the third category. All of the permit alternatives being considered, except for the no-action alternative, could result in additional reporting requirements (category two above) due to the issuance of new permits if new permit holders are selected for reporting. These are standard reporting requirements required of all HMS commercial permit holders. Thus, there are no alternatives discussed that fall under the second category described above. The action will improve information collection by allowing NMFS to collect important fishery dependent data, if necessary, that could be used for quota monitoring and stock assessments. As described below, NMFS analyzed several different alternatives for this final rulemaking and provides rationale for selecting the alternatives adopted in the final rule and the reason that each one of the other significant alternatives to the rule considered by the Agency which affect small entities was rejected.

In this rulemaking, NMFS considered two different categories of issues to address swordfish management measures where each issue had its own range of alternatives and sub-alternatives that would meet the objectives of the Magnuson-Stevens Act and the 2006 Consolidated HMS FMP. The first category of alternatives (Alternatives 1.1–1.3 and sub-alternatives) addresses swordfish permitting alternatives. The second category of alternatives (Alternatives 2.1–2.3 and sub-alternatives) addresses swordfish retention limits. The expected economic impacts these alternatives and sub-alternatives may have on small entities are summarized below. The full FRFA and all its analyses can be found in the final environmental assessment for Amendment 8. In total, NMFS analyzed 16 different alternatives and sub-alternatives, and provided rationales for identifying the preferred alternatives. The seven permit alternatives range from maintaining the status quo for U.S. North Atlantic swordfish fisheries to creating a new commercial swordfish handgear permit and modifying the HMS Charter/Headboat permit to allow fishing for and sales of swordfish under specific limitations. NMFS analyzed nine alternatives that would allow NMFS to implement swordfish retention limits applicable to the new permit in a range from zero-to-six fish. Eight of these alternatives would allow NMFS to modify daily trip limits using in-season adjustment procedures. NMFS assessed the impacts of the retention limit alternatives on both a fishery-wide basis and utilizing an approach which could be tailored on a regional basis.

Alternative 1.1, the no action alternative, maintains the existing swordfish limited access permit program and would not establish a new swordfish permit. Under Alternative 1.1, NMFS does not anticipate any substantive change in economic impacts as the U.S. swordfish fishery is already operating under the current regulations. Entry into the commercial swordfish fishery would remain difficult due to high limited access permit costs and the current scarcity of available permits. In terms of available and unutilized swordfish quota, this alternative could contribute to a loss of potential income for fishermen who would like to fish commercially for swordfish, but are not able to obtain limited access permits. Under ATCA (16 U.S.C. 971 *et. seq.*) and the Magnuson-Stevens Act, NMFS is required to provide U.S. fishing vessels with a reasonable opportunity to harvest the ICCAT-recommended quota. Although there is sufficient quota to allow U.S. fishermen to catch more swordfish and remain within the ICCAT-recommended quota, current difficulties associated with obtaining a limited access permit may be a constraining factor. For this reason, the ''no action'' alternative is not preferred.

Alternative 1.2, a preferred alternative, would establish a new open-access commercial swordfish permit and modify existing open access HMS

permits to allow for the commercial retention of swordfish using handgears. NMFS anticipates positive economic impacts for some U.S. fishermen under alternative 1.2. It would allow small-scale U.S. fishermen to use handgear (rod and reel, handline, harpoon, bandit gear, and green-stick) to fish for and commercially sell a limited amount of swordfish (zero to six fish per vessel per trip) to permitted swordfish dealers. This alternative would reduce economic barriers to the commercial swordfish fishery, provide more opportunities to fish commercially for swordfish, and potentially provide economic benefits to some fishermen. For example, if a new entrant landed 10 swordfish per year under this alternative, they could realize an increase in annual gross revenues of approximately $4,329.60. One trip landing six swordfish could yield $2,598 in gross revenues.

NMFS received comments from some current swordfish limited access permit holders during public meetings to discuss the 2009 ANPR (74 FR 26174, June 1, 2009) expressing concern that establishing a new swordfish permit could reduce ex-vessel swordfish prices and the value of existing limited access swordfish permits. It is not possible to precisely predict the number of new applicants for open access commercial swordfish permits, but NMFS expects that some current recreational fishermen with HMS Angling permits will remain recreational, rather than shift to commercial fishing. There are numerous commercial fishing vessel safety requirements and management regulations to comply with when operating a commercial fishing business that may discourage some recreational fishermen from obtaining a commercial permit. Under the proposed regulations, similar to the regulations that apply to the Atlantic tunas General category permit, fishermen issued a new Swordfish General Commercial permit would not be able to obtain an HMS Angling category permit. Therefore, a recreational fisherman who obtains a Swordfish General Commercial permit would forfeit the ability to fish for Atlantic billfishes, unless they are fishing in a registered HMS tournament, because fishing for these species is permissible only when issued an HMS Angling or Charter/Headboat permit. Additionally, the ability to fish recreationally for Atlantic tunas and sharks would be forfeited unless they are fishing in a registered HMS tournament or hold appropriate commercial tuna and/or shark permits. Negative impacts on current swordfish limited access permit holders are expected to be mitigated by establishing lower retention limits for the new open access permit than the limits that currently exist for limited access permits. NMFS prefers Alternative 1.2 because it would increase access to the commercial swordfish fishery, would have positive socio-economic impacts for fishermen who are currently unable to obtain a swordfish limited access permit, and would have neutral to minor ecological impacts. Additionally, this alternative would provide increased opportunities to more fully utilize the ICCAT-recommended domestic North Atlantic swordfish quota allocation and thus could have long-term benefits to all swordfish fisherman by improving the United States' position with regard to maintaining its quota share at ICCAT.

Sub-alternative 1.2.1 would modify the existing open-access Atlantic tunas General category permit to allow vessels using handgears (rod and reel, handline, harpoon, bandit gear, and green-stick) to retain swordfish commercially, and rename the modified permit as, potentially, the Atlantic tunas and swordfish General category permit. It would result in many of the same socio-economic impacts as Alternative 1.2. In addition, sub-alternative l.2.1 would minimize the costs associated with obtaining the new swordfish permit for persons that have already been issued the Atlantic Tunas General category permit, because they would only need to obtain one permit rather than two. Sub-Alternative 1.2.1 is not preferred because it would not provide the ability to differentiate between the numbers of commercial fishermen issued an Atlantic Tunas General category permit and those issued an open-access commercial swordfish permit. This distinction helps to analyze the socio-economic impacts of potential management measures for both tunas and swordfish.

Sub-alternative 1.2.2 would modify the existing open-access Atlantic tunas Harpoon category permit to allow for the commercial retention of swordfish using harpoon gear. This alternative would result in many of the same impacts as Alternative 1.2. Additionally, it would minimize the costs associated with obtaining the new permit for persons that have already been issued the Atlantic Tunas Harpoon category permit, because they would only need to obtain one permit rather than two. Specifically, it would provide economic benefits to current Atlantic tunas Harpoon category permit holders that want to both harpoon swordfish and fish for tunas under Atlantic tunas Harpoon category regulations. Sub-Alternative 1.2.2 is not preferred because it would not provide the ability to differentiate between the numbers of commercial fishermen issued an Atlantic Tunas Harpoon category permit and those issued an open-access commercial swordfish permit.

Sub-alternative 1.2.3, a preferred alternative, would allow HMS Charter/Headboat permit holders to fish under open access commercial swordfish regulations, using only rod and reel and handlines, when not on a for-hire trip with paying passengers. It would result in many of the same impacts as Alternative 1.2 and provide economic benefits to CHB permit holders when fishing commercially (i.e., not on a for-hire trip). It would also streamline permit issuance because CHB vessels would not need to obtain another permit. Sub-Alternative 1.2.3 is preferred because it achieves the goal of providing additional opportunities to commercially harvest the U.S. swordfish quota using handgears that are low in bycatch. A similar regulatory provision exists which allows HMS Charter/Headboat permit holders to sell Atlantic tunas under certain conditions because of the quasi-commercial nature of the HMS Charter/Headboat permit.

Sub-alternative 1.2.4, a preferred alternative, would create a separate open access commercial swordfish permit to allow landings using handgear. This alternative would have similar impacts as Alternative 1.2, above. However, it would increase the costs associated with obtaining the permit for persons that have already been issued an Atlantic Tunas General or Harpoon category permit. This alternative would not streamline permit issuance for persons that want to commercially fish for both tunas and swordfish, because they would need to obtain two different permits to conduct these activities. NMFS prefers sub-alternative 1.2.4 because it would increase access to the commercial swordfish fishery, would have positive socio-economic impacts for fishermen who are currently unable to obtain a swordfish limited access permit, and would have only neutral to minor ecological impacts. Additionally, sub-alternative 1.2.4 would better enable NMFS to differentiate between tuna and swordfish handgear fishermen in order to better monitor and assess these fisheries.

Alternative 1.3 would allow for an unspecified number of new swordfish limited access permits to be issued. Depending upon the qualification criteria, this alternative could improve access to the fishery and provide economic benefits to some fishermen that qualify for the new limited access

permit. However, it could also adversely affect some fishermen who do not qualify for a limited access permit. This alternative could limit any negative economic and social impacts on current commercial swordfish limited access permit holders by limiting the number of new swordfish permits issued. Selection of this alternative may require, among other things, establishing qualification criteria, control dates, application deadlines, application procedures, and grievance/appeals procedures for persons who have initially been determined as not eligible to qualify for a limited access permit. These aspects could increase administrative costs for NMFS and increase the reporting burden for the public to demonstrate that they meet qualifying criteria. Alternative 1.3 is not preferred because a new commercial swordfish limited-access permit is not needed at this time. Under the preferred alternatives, fishing effort in the open-access commercial swordfish fishery will be managed using low regional retention limits that can be adjusted using in-season authority to ensure that landings remain within the U.S. quota.

Alternative 2.1 would establish a fishery-wide zero-to-six swordfish retention limit range for the new and modified permits, and codify a specific retention limit within that range. This alternative could provide some fishermen with the ability to commercially land swordfish, thereby resulting in positive economic benefits if the limit were set above zero. Additionally, economic benefits are anticipated for swordfish dealers and processors, fishing tackle manufacturers and suppliers, bait suppliers, restaurants, marinas, and fuel providers. NMFS anticipates a retention limit range of zero-to-six swordfish would provide a seasonal, or secondary, fishery for most participants. This alternative is not expected to facilitate a year-round fishery in most areas, with the possible exception of south Florida, where swordfish can be available year-round. There is a notable difference in the ex-vessel revenue produced by a one swordfish/trip limit versus a six swordfish/trip limit. A single swordfish is estimated to be worth $432.96 ex-vessel, on average, whereas six swordfish would produce $2,597.76 ex-vessel. For a vessel making 10 trips per year and retaining the maximum allowable number of swordfish on each trip, annual gross revenue derived from swordfish would range from $4,329.60 under a one-fish limit to $25,977.60 under a six-fish limit. Codifying a single coast-wide swordfish retention limit would provide certainty to both fishermen and law enforcement regarding the swordfish retention limit for the new open access permit. However, this alternative would not provide in-season adjustment authority to quickly modify the swordfish retention limit regionally by using pre-established criteria and thus would limit NMFS' management flexibility. Alternative 2.1 is not preferred because it does not provide the flexibility to manage the new swordfish open access permit on a regional basis or to adjust regional retention limits using in-season authority.

Alternative 2.2 would establish a coast-wide zero-to-six swordfish retention limit range for the new and modified permits and codify a specific retention limit within that range. In addition, it would provide in-season adjustment authority for NMFS to modify the swordfish retention limit within the range (zero to six) using in-season adjustment procedures similar to those codified at § 635.27(a)(8). This alternative would have the same social and economic impacts as Alternative 2.1, but would provide less certainty to fishermen and law enforcement regarding possible in-season changes to the swordfish retention limit. Positive economic benefits could occur if the retention limit was increased during the fishing season based upon information indicating that sufficient quota was available, or upon other pre-established criteria. Alternative 2.2 is not preferred because it does not provide the flexibility to manage the new swordfish open access permit on a regional basis.

Alternative 2.3, a preferred alternative, would establish swordfish management regions and a zero-to-six swordfish retention limit range within each region for the new and modified permits and codify specific regional limits within that range with authority to adjust the regional limits in-season based on pre-established criteria. This alternative would have similar social and economic impacts as Alternative 2.1. If a regional retention limit is set at zero, NMFS expects no change in socio-economic impacts. If a regional limit is set at any level above zero, this alternative could provide economic benefits to some commercial handgear fishermen if they were previously inactive and obtain the new and modified permits and begin fishing. NMFS prefers Alternative 2.3 at this time, because it would allow swordfish retention limits to be quickly modified using in-season adjustment authority and provide additional flexibility to manage swordfish regionally.

Sub-Alternative 2.3.1 would establish regions based upon existing major U.S. domestic fishing areas as reported to ICCAT (Northeast Distant area, Northeast Coastal area, Mid-Atlantic Bight area, South Atlantic Bight area, Florida East Coast area, Gulf of Mexico area, Caribbean area, and the Sargasso Sea area). Socio-economic impacts would be the same as Alternative 2.3 above. If this sub-alternative were implemented, NMFS considered an initial swordfish retention limit of one swordfish per vessel per trip for the Florida East Coast area, two swordfish per vessel per trip for the Caribbean area, and a limit of three swordfish per vessel per trip for the Northwest Atlantic and Gulf of Mexico regions. If a regional retention limit is set at zero, NMFS expects no change in socio-economic impacts. If a regional limit is set at any level above zero, this alternative could provide economic benefits to some commercial handgear fishermen if they were previously inactive and obtain the new and modified permits and begin fishing. For vessels making 10 trips per year and retaining the maximum allowable limit on each trip, annual gross revenue derived from swordfish would range from $4,329.60 under a one-fish limit, $8,659.20 under a two-fish limit, and $12,988.80 under a three-fish limit. Sub-Alternative 2.3.1 is not preferred because the small-scale handgear fishery is somewhat similar across the entire Northwest Atlantic area and Gulf of Mexico, so establishing several smaller areas is not needed at this time.

Sub-Alternative 2.3.2, a preferred alternative, would establish larger regions than sub-alternative 2.3.1, with the addition of a separate Florida Swordfish Management Area (the Northwest Atlantic, Gulf of Mexico, Caribbean, and a Florida Swordfish Management Area as defined below). Under this sub-alternative, swordfish management measures could still be tailored geographically to the biological factors affecting a particular region; however, the regions would be larger (with the possible exception of the separate Florida Swordfish Management Area). In the draft EA and proposed rule, NMFS considered an initial swordfish retention limit of one swordfish per vessel per trip for the Florida Swordfish Management Area, two swordfish per vessel per trip for the Caribbean area, and a limit of three swordfish per vessel per trip for the Northwest Atlantic and Gulf of Mexico regions. These retention limits fell within the range discussed under Alternative 2.3 above, and could be

modified in the future using in-season adjustment procedures. In this action, NMFS establishes an initial default retention limit of zero swordfish per vessel per trip for the Florida Swordfish Management Area due to concerns about the rapid growth of a commercial fishery in an important swordfish habitat area that is in close proximity to many fishermen. Under a regional retention limit set at zero for the Florida Swordfish Management Area, no change in socio-economic impacts is anticipated. In other regions, vessels making 10 trips per year and retaining the maximum allowable limit on each trip would derive annual gross revenue from swordfish ranging from $4,329.60 under a one-fish limit, $8,659.20 under a two-fish limit, and $12,988.80 under a three-fish limit. Sub-Alternative 2.3.2 is preferred because it establishes larger regions which can be consistently and effectively managed, yet it still provides for the ability to manage the unique swordfish habitat area off southeastern Florida

To estimate the number of entities affected by a special Florida Swordfish Management Area, NMFS first determined the number of Atlantic tunas General category permits issued. In 2011, there were 4,084 Atlantic tunas General category permits issued. This number was used as a proxy to estimate the total number of new Swordfish General Commercial permits that could be issued fishery-wide. In 2011, 44 percent of all Directed and Incidental swordfish limited access permits were issued in Florida. Additionally, in 2011, 63 percent of all swordfish Handgear limited access permits were issued in Florida. Taking the average of these two numbers provided an estimate of 53.5 percent, which NMFS used to estimate the percent of new swordfish permits that could be issued in Florida. Using an estimated rate of 53.5 percent of 4,084 potential new permits provides an estimate of 2,185 potential new commercial swordfish handgear permits that could be issued in Florida. Assuming that two-thirds of these permits are issued to vessels on the east coast of Florida, as is the case currently, then potentially 1,455 new open-access swordfish permits could be issued on the east coast of Florida (0.666 * 2,185 = 1,455).

Sub-Alternative 2.3.2.1 would establish a Florida Swordfish Management Area that includes the East Florida Coast pelagic longline closed area through the northwestern boundary of Monroe County, FL, in the Gulf of Mexico (see § 635.2 for bounding coordinates). Under a regional retention limit set at zero for the Florida Swordfish Management Area, no change in socio-economic impacts is anticipated. Approximately 1,455 new permit holders could derive up to $4,329.60 annually under a one-fish limit, assuming they each took 10 trips per year and landed one fish on each trip. Sub-Alternative 2.3.2.1 was preferred in the draft EA and proposed rule because it corresponded to the well-known boundaries of the existing East Florida Coast pelagic longline closed area, and also provided an enforceable buffer by including areas where there is not as much swordfishing activity. It is no longer preferred because a new hybrid alternative has been developed that better corresponds to the unique biological and oceanographic features that make the area a migratory corridor containing a high concentration of swordfish and providing important juvenile swordfish habitat. The hybrid area also closely corresponds to locations containing large numbers of fishermen, while still providing an enforceable buffer area to the north and south of the prime swordfishing areas off St. Lucie, Martin, Palm Beach, Broward, Dade, and Monroe counties in Florida.

Sub-Alternative 2.3.2.2 would establish a Florida Swordfish Management Area that extends from the Georgia/Florida border to Key West, FL. This area is larger than, and includes, the East Florida Coast pelagic longline closed area. Therefore, the economic impacts described for sub-alternative 2.3.2.1 would also occur within this area. Under a regional retention limit set at zero for the Florida Swordfish Management Area, no change in socio-economic impacts is anticipated. Additionally, because this special management area would be larger than sub-alternative 2.3.2.1, slightly more than 1,455 vessels could potentially be affected by a one-fish retention limit. Sub-Alternative 2.3.2.2 is not preferred because a new hybrid alternative has been developed that better corresponds to the unique biological and oceanographic features that make the area a migratory corridor containing a high concentration of swordfish and providing important juvenile swordfish habitat.

Sub-Alternative 2.3.2.3 would establish a Florida Swordfish Management Area that includes the Florida counties of St. Lucie, Martin, Palm Beach, Broward, Dade, and Monroe. This area is smaller than the previous two sub-alternatives, but specifically includes oceanic areas with concentrations of swordfish that are readily accessible to many anglers. Under a regional retention limit set at zero for the Florida Swordfish Management Area, no change in socio-economic impacts is anticipated. Because this special management area would be smaller than the areas in sub-alternative 2.3.2.1, slightly fewer than 1,455 vessels would potentially be affected by the one-swordfish per vessel per trip retention limit. Sub-Alternative 2.3.2.3 is not preferred because this management area would provide a smaller, and less enforceable, buffer area around the prime swordfishing areas. A new hybrid alternative has been developed that better corresponds to the unique biological and oceanographic features that make the area a migratory corridor containing a high concentration of swordfish and providing important juvenile swordfish habitat.

Sub-Alternative 2.3.2.4, a preferred alternative, would establish a Florida Swordfish Management Area extending shoreward from near Rockledge, FL, and Cocoa Beach, FL, to the outer boundary of the EEZ through the northwestern boundary of Monroe County, FL, in the Gulf of Mexico. This area is geographically smaller than Sub-Alternatives 2.3.2.1 and 2.3.2.2, but larger than Sub-Alternative 2.3.2.3. This sub-alternative, in combination with a zero-fish retention limit, balances the need to prevent the rapid growth of a commercial fishery in a biologically unique area with the objective of providing additional opportunities to harvest swordfish. The preferred alternative in the draft EA (Sub-Alternative 2.3.2.1) would have implemented a one-fish retention limit in a larger area. This alternative would implement a zero-fish retention limit in a smaller area, and a three-fish retention limit in the area north of Cocoa Beach, FL, that was previously proposed to be subject to a one-fish retention limit. Thus, in the smaller, modified Florida Swordfish Management Area (Sub-Alternative 2.3.2.4) with an initial default retention limit of zero, no change in socio-economic impacts is anticipated. In the larger Northwest Atlantic region, annual gross revenue derived from swordfish would be approximately $12,988.80 under a three-fish limit for a vessel making ten trips per year and retaining the maximum allowable limit on each trip. Sub-Alternative 2.3.2.4 is preferred because it more closely corresponds to the unique biological and oceanographic features that make the area a migratory corridor containing a high concentration of swordfish and providing important juvenile swordfish habitat. This area also more closely corresponds to locations containing large numbers of

fishermen with comparatively easy access to the swordfish resource, while still providing an enforceable buffer area to the north and south of the prime swordfishing areas off St. Lucie, Martin, Palm Beach, Broward, Dade, and Monroe counties in Florida.

This final rule does not conflict, duplicate, or overlap with other relevant Federal rules (5 U.S.C. 603(b)(5)). Fishermen, dealers, and managers in these fisheries must comply with a number of international agreements, domestic laws, and other FMPs. These include, but are not limited to, the Magnuson-Stevens Act, the ACTA, the High Seas Fishing Compliance Act, the Marine Mammal Protection Act, the Endangered Species Act, the National Environmental Policy Act, the Paperwork Reduction Act, and the Coastal Zone Management Act. We do not believe that the new regulations duplicate, overlap, or conflict with any relevant regulations, Federal or otherwise.

This final rule contains a collection-of-information requirement subject to the Paperwork Reduction Act (PRA) and which has been approved by OMB under control number 0648–0327. Public reporting burden for a new Swordfish General Commercial permit is estimated to average 30 minutes per application. This burden estimate includes the time for reviewing instructions, gathering and maintaining the data needed, submitting the permit application, and completing and reviewing the collection information. On an annual basis, the new Swordfish General Commercial permit would increase the existing collection by 4,084 respondents/responses, 2,042 hours, and costs by $81,706. In total, 0648–0327 would include 41,261 responses/respondents, 11,843 hours, and cost $738,917 per year. Send comments on these burden estimated or any other aspects of this data collection, including suggestions for reducing the burden or any other aspects of the collection of information to NMFS (see **ADDRESSES**) and by email to *OIRA_submission@omb.eop.gov,* or fax to (202) 395–7285.

Notwithstanding any other provision of the law, no person is required to respond to, and no person shall be subject to penalty for failure to comply with, a collection of information subject to the requirements of the PRA, unless that collection of information displays a currently valid OMB control number.

Section 212 of the Small Business Regulatory Enforcement Fairness Act of 1996 states that, for each rule or group of related rules for which an agency is required to prepare a FRFA, the agency shall publish one or more guides to assist small entities in complying with the rule, and shall designate such publications as ''small entity compliance guides.'' The agency shall explain the actions a small entity is required to take to comply with a rule or group of rules. Copies of this final rule and the compliance guide are available upon request from NMFS (see **ADDRESSES**). Copies of the compliance guide will also be available from the Highly Migratory Species Management Division Web site at *http://www.nmfs.noaa.gov/sfa/hms/.*

List of Subjects

50 CFR Part 600

Administrative practice and procedure, Confidential business information, Fisheries, Fishing, Fishing vessels, Foreign relations, Intergovernmental relations, Penalties, Reporting and recordkeeping requirements, Statistics.

50 CFR Part 635

Fisheries, Fishing, Fishing vessels, Penalties, Reporting and recordkeeping requirements, Retention limits.

Dated: August 13, 2013.

Samuel D. Rauch III,

Deputy Assistant Administrator for Regulatory Programs, performing the functions and duties of the Assistant Administrator for Fisheries, National Marine Fisheries Service.

For the reasons set out in the preamble, 50 CFR parts 600 and 635 are amended as follows:

PART 600—MAGNUSON-STEVENS ACT PROVISIONS

■ 1. The authority citation for part 600 continues to read as follows:

Authority: 5 U.S.C. 561 and 16 U.S.C. 1801 *et seq.*

■ 2. In § 600.725, in the table in paragraph (v), under the heading ''IX. Secretary of Commerce,'' entry 1, revise A to read as follows:

§ 600.725 General prohibitions.

* * * * *

(v) * * *

Fishery	Authorized gear types
* * * * * * *	
A. Swordfish handgear fishery	A. Rod and reel, harpoon, handline, bandit gear, buoy gear, greenstick gear.
* * * * * * *	

* * * * *

PART 635—ATLANTIC HIGHLY MIGRATORY SPECIES

■ 3. The authority citation for part 635 continues to read as follows:

Authority: 16 U.S.C. 971 *et seq.;* 16 U.S.C. 1801 *et seq.*

■ 4. In § 635.2, revise the definition for ''Division Chief'' and add the definition for ''Florida Swordfish Management Area'' in alphabetical order to read as follows:

§ 635.2 Definitions.

* * * * *

Division Chief means the Chief, Highly Migratory Species Management Division, NMFS (F/SF1), 1315 East-West Highway, Silver Spring, MD, 20910; (301) 427–8503.

* * * * *

Florida Swordfish Management Area means the Atlantic Ocean area shoreward of the outer boundary of the U.S. EEZ from a point where latitude 28°17′10″ N. lat. intersects the U.S. mainland near Rockledge, Florida and proceeding due east across the barrier island near Cocoa Beach, Florida to connect by straight lines the following coordinates in the order stated: 28°17′10″ N. lat., 79°11′24″ W. long.; then proceeding along the outer boundary of the EEZ to the intersection of the EEZ with 24°00′ N. lat.; then proceeding due west to 24°00′ N. lat., 82°0′ W. long, then proceeding due north to 25°48'' N. lat., 82°0′ W. long., then proceeding due east to the shore near Chokoloskee, Florida).

* * * * *

■ 5. In § 635.4:

■ a. Revise paragraphs (b)(1), (c)(1), and (c)(2);

■ b. Add paragraph (c)(4);

■ c. Revise paragraphs (f) introductory text, (f)(1), (f)(2), and (f)(4);
■ d. Add paragraph (f)(5); and
■ e. Revise paragraphs (h)(1) introductory text, (j)(3), and (m)(2).

The revisions and additions read as follows:

§ 635.4 Permits and fees.

* * * * *

(b) * * *

(1) The owner of a charter boat or headboat used to fish for, take, retain, or possess any Atlantic HMS must obtain an HMS Charter/Headboat permit. A vessel issued an HMS Charter/Headboat permit for a fishing year shall not be issued an HMS Angling permit, a Swordfish General Commercial permit, or an Atlantic Tunas permit in any category for that same fishing year, regardless of a change in the vessel's ownership.

* * * * *

(c) * * *

(1) The owner of any vessel used to fish recreationally for Atlantic HMS or on which Atlantic HMS are retained or possessed recreationally, must obtain an HMS Angling permit, except as provided in § 635.4(c)(2). Atlantic HMS caught, retained, possessed, or landed by persons on board vessels with an HMS Angling permit may not be sold or transferred to any person for a commercial purpose. A vessel issued an HMS Angling permit for a fishing year shall not be issued an HMS Charter/Headboat permit, a Swordfish General Commercial permit, or an Atlantic Tunas permit in any category for that same fishing year, regardless of a change in the vessel's ownership.

(2) A vessel with a valid Atlantic Tunas General category permit issued under paragraph (d) of this section or with a valid Swordfish General Commercial permit issued under paragraph (f) of this section, may fish in a recreational HMS fishing tournament if the vessel has registered for, paid an entry fee to, and is fishing under the rules of a tournament that has registered with NMFS' HMS Management Division as required under § 635.5(d). When a vessel issued a valid Atlantic Tunas General category permit or a valid Swordfish General Commercial permit is fishing in such a tournament, such vessel must comply with HMS Angling category regulations, except as provided in paragraphs (c)(3) and (c)(4) of this section.

* * * * *

(4) A vessel issued a Swordfish General Commercial permit fishing in a tournament, as authorized under § 635.4(c)(2), shall comply with Swordfish General Commercial permit regulations when fishing for, retaining, possessing, or landing Atlantic swordfish.

* * * * *

(f) *Swordfish vessel permits.* The Swordfish General Commercial permit and the HMS Charter/Headboat permit provisions in paragraphs (f)(1) and (2) of this section will first become effective beginning with issuance of the 2014 fishing permit.

(1) Except as specified in paragraphs (n) and (o) of this section, the owner of a vessel of the United States used to fish for or take swordfish commercially from the management unit, or on which swordfish from the management unit are retained or possessed with an intention to sell, or sold must obtain, an HMS Charter/Headboat permit issued under paragraph (b) of this section, or one of the following swordfish permits: A swordfish directed limited access permit, swordfish incidental limited access permit, swordfish handgear limited access permit, or a Swordfish General Commercial permit. These permits cannot be held in combination with each other on the same vessel, except that an HMS Charter/Headboat permit may be held in combination with a swordfish handgear limited access permit on the same vessel. It is a rebuttable presumption that the owner or operator of a vessel on which swordfish are possessed in excess of the recreational retention limits intends to sell the swordfish.

(2) The only valid commercial Federal vessel permits for swordfish are the HMS Charter/Headboat permit issued under paragraph (b) of this section (and only when on a non for-hire trip), the Swordfish General Commercial permit issued under paragraph (f) of this section, a swordfish limited access permit issued consistent with paragraphs (l) and (m) of this section, or permits issued under paragraphs (n) and (o) of this section.

* * * * *

(4) A directed or incidental limited access permit for swordfish is valid only when the vessel has on board a valid limited access permit for shark and a valid Atlantic Tunas Longline category permit issued for such vessel.

(5) A Swordfish General Commercial permit may not be held on a vessel in conjunction with an HMS Charter/Headboat permit issued under paragraph (b) of this section, an HMS Angling category permit issued under paragraph (c), a swordfish limited access permit issued consistent with paragraphs (l) and (m), an Incidental HMS Squid Trawl permit issued under paragraph (n), or an HMS Commercial Caribbean Small Boat permit issued under paragraph (o). A vessel issued a Swordfish General Commercial open access permit for a fishing year shall not be issued an HMS Angling permit or an HMS Charter/Headboat permit for that same fishing year, regardless of a change in the vessel's ownership.

* * * * *

(h) * * *

(1) Atlantic Tunas, HMS Angling, HMS Charter/Headboat, Swordfish General Commercial, Incidental HMS Squid Trawl, and HMS Commercial Caribbean Small Boat vessel permits.

* * * * *

(j) * * *

(3) A vessel owner issued an Atlantic tunas permit in the General, Harpoon, or Trap category or an Atlantic HMS permit in the Angling or Charter/Headboat category under paragraph (b), (c), or (d) of this section may change the category of the vessel permit once within 10 calendar days of the date of issuance of the permit. After 10 calendar days from the date of issuance of the permit, the vessel owner may not change the permit category until the following fishing season.

* * * * *

(m) * * *

(2) *Shark and swordfish permits.* A vessel owner must obtain the applicable limited access permit(s) issued pursuant to the requirements in paragraphs (e) and (f) of this section or an HMS Commercial Caribbean Small Boat permit issued under paragraph (o) of this section if: the vessel is used to fish for or take sharks commercially from the management unit; sharks from the management unit are retained or possessed on the vessel with an intention to sell; or sharks from the management unit are sold from the vessel. A vessel owner must obtain the applicable limited access permit(s) issued pursuant to the requirements in paragraphs (e) and (f) of this section, a Swordfish General Commercial permit issued under paragraph (f) of this section, an Incidental HMS Squid Trawl permit issued under paragraph (n) of this section, an HMS Commercial Caribbean Small Boat permit issued under paragraph (o) of this section, or an HMS Charter/Headboat permit issued under paragraph (b) of this section which authorizes a Charter/Headboat to fish commercially for swordfish on a non for-hire trip subject to the retention limits at § 635.24(b)(4) if: the vessel is used to fish for or take swordfish commercially from the management unit; swordfish from the management unit are retained or possessed on the

vessel with an intention to sell; or swordfish from the management unit are sold from the vessel. The commercial retention and sale of swordfish from vessels issued an HMS Charter/Headboat permit is permissible only when the vessel is on a non for-hire trip. Only persons holding non-expired shark and swordfish limited access permit(s) in the preceding year are eligible to renew those limited access permit(s). Transferors may not renew limited access permits that have been transferred according to the procedures in paragraph (l) of this section.

* * * * *

■ 6. In § 635.21, revise paragraphs (e)(2)(i) and (ii) and (e)(4)(i) and (iv), add paragraph (e)(4)(v), and revise paragraph (g) to read as follows:

§ 635.21 Gear operation and deployment restrictions.

* * * * *

(e) * * *

(2) * * *

(i) Only persons who have been issued a valid HMS Angling or valid Charter/Headboat permit, or who have been issued a valid Atlantic Tunas General category or Swordfish General Commercial permit and are participating in a tournament as provided in 635.4(c) of this part, may possess a blue marlin, white marlin, or roundscale spearfish in, or take a blue marlin, white marlin, or roundscale spearfish from, its management unit. Blue marlin, white marlin, or roundscale spearfish may only be harvested by rod and reel.

(ii) Only persons who have been issued a valid HMS Angling or valid Charter/Headboat permit, or who have been issued a valid Atlantic Tunas General category or Swordfish General Commercial permit and are participating in a tournament as provided in § 635.4(c) of this part, may possess or take a sailfish shoreward of the outer boundary of the Atlantic EEZ. Sailfish may only be harvested by rod and reel.

* * * * *

(4) * * *

(i) No person may possess north Atlantic swordfish taken from its management unit by any gear other than handgear, green-stick, or longline, except that such swordfish taken incidentally while fishing with a squid trawl may be retained by a vessel issued a valid Incidental HMS squid trawl permit, subject to restrictions specified in § 635.24(b)(2). No person may possess south Atlantic swordfish taken from its management unit by any gear other than longline.

* * * * *

(iv) Except for persons aboard a vessel that has been issued a directed, incidental, or handgear limited access swordfish permit, a Swordfish General Commercial permit, an Incidental HMS squid trawl permit, or an HMS Commercial Caribbean Small Boat permit under § 635.4, no person may fish for North Atlantic swordfish with, or possess a North Atlantic swordfish taken by, any gear other than handline or rod and reel.

(v) A person aboard a vessel issued or required to be issued a valid Swordfish General Commercial permit may only possess North Atlantic swordfish taken from its management unit by rod and reel, handline, bandit gear, green-stick, or harpoon gear.

* * * * *

(g) *Green-stick gear.* Green-stick gear may only be utilized when fishing from vessels issued a valid Atlantic Tunas General, Swordfish General Commercial, HMS Charter/Headboat, or Atlantic Tunas Longline category permit. The gear must be attached to the vessel, actively trolled with the mainline at or above the water's surface, and may not be deployed with more than 10 hooks or gangions attached.

■ 7. In § 635.22, paragraphs (f) introductory text and (f)(1) and (2) are revised to read as follows:

§ 635.22 Recreational retention limits.

* * * * *

(f) *North Atlantic swordfish.* The recreational retention limits for North Atlantic swordfish apply to persons who fish in any manner, except to persons aboard a vessel that has been issued an HMS Charter/Headboat permit under § 635.4(b) and only when on a non for-hire trip, a directed, incidental or handgear limited access swordfish permit under § 635.4(e) and (f), a Swordfish General Commercial permit under § 635.4(f), an Incidental HMS Squid Trawl permit under § 635.4(n), or an HMS Commercial Caribbean Small boat permit under § 635.4(o).

(1) When on a for-hire trip as defined at § 635.2, vessels issued an HMS Charter/Headboat permit under § 635.4(b), that are charter boats as defined under § 600.10 of this chapter, may retain, possess, or land no more than one North Atlantic swordfish per paying passenger and up to six North Atlantic swordfish per vessel per trip. When such vessels are on a non for-hire trip, they must comply with the commercial retention limits for swordfish specified at § 635.24(b)(4).

(2) When on a for-hire trip as defined at § 635.2, vessels issued an HMS Charter/Headboat permit under § 635.4(b), that are headboats as defined under § 600.10 of this chapter, may retain, possess, or land no more than one North Atlantic swordfish per paying passenger and up to 15 North Atlantic swordfish per vessel per trip. When such vessels are on a non for-hire trip, they may land no more than the commercial retention limits for swordfish specified at § 635.24(b)(4).

* * * * *

■ 8. In § 635.24, paragraph (b)(4) is added to read as follows:

§ 635.24 Commercial retention limits for sharks, swordfish, and BAYS tunas.

* * * * *

(b) * * *

(4) Persons aboard a vessel that has been issued a Swordfish General Commercial permit or an HMS Charter/Headboat permit (and only when on a non for-hire trip) are subject to the regional swordfish retention limits specified at paragraph (b)(4)(iii), which may be adjusted during the fishing year based upon the inseason regional retention limit adjustment criteria identified in paragraph (b)(4)(iv) below.

(i) *Regions.* Regional retention limits for swordfish apply in four regions. For purposes of this section, these regions are: the Florida Swordfish Management Area as defined in § 635.2; the Northwest Atlantic region (federal waters along the entire Atlantic coast of the United States north of 28°17′10″ N. latitude); the Gulf of Mexico region (any water located in the EEZ in the entire Gulf of Mexico west of 82° W. longitude); and the Caribbean region (the U.S. territorial waters within the Caribbean as defined in § 622.2 of this chapter).

(ii) *Possession, retention, and landing restrictions.* Vessels that have been issued a Swordfish General Commercial permit or an HMS Charter/Headboat permit (and only when on a non for-hire trip), as a condition of these permits, may not possess, retain, or land any more swordfish than is specified for the region in which the vessel is located.

(iii) *Regional retention limits.* The swordfish regional retention limits for each region will range between zero to six swordfish per vessel per trip. At the start of each fishing year, the default regional retention limits will apply. During the fishing year, NMFS may adjust the default retention limits per the inseason regional retention limit adjustment criteria listed in § 635.24(b)(4)(iv), if necessary. The default retention limits for the regions

set forth under paragraph (b)(4)(i) of this section are:

(A) Zero swordfish per vessel per trip for the Florida Swordfish Management Area.

(B) Two swordfish per vessel per trip for the Caribbean region.

(C) Three swordfish per vessel per trip for the Northwest Atlantic region.

(D) Three swordfish per vessel per trip for the Gulf of Mexico region.

(iv) *Inseason regional retention limit adjustment criteria.* NMFS will file with the Office of the Federal Register for publication notification of any inseason adjustments to the regional retention limits. Before making any inseason adjustments to regional retention limits, NMFS will consider the following criteria and other relevant factors:

(A) The usefulness of information obtained from biological sampling and monitoring of the North Atlantic swordfish stock;

(B) The estimated ability of vessels participating in the fishery to land the amount of swordfish quota available before the end of the fishing year;

(C) The estimated amounts by which quotas for other categories of the fishery might be exceeded;

(D) Effects of the adjustment on accomplishing the objectives of the fishery management plan and its amendments;

(E) Variations in seasonal distribution, abundance, or migration patterns of swordfish;

(F) Effects of catch rates in one region precluding vessels in another region from having a reasonable opportunity to harvest a portion of the overall swordfish quota; and

(G) Review of dealer reports, landing trends, and the availability of swordfish on the fishing grounds.

* * * * *

■ 9. In § 635.27, paragraphs (c)(1)(i)(A) and (B) are revised to read as follows:

§ 635.27 Quotas.

* * * * *

(c) * * *

(1) * * *

(i) * * *

(A) A swordfish from the North Atlantic stock caught prior to the directed fishery closure by a vessel for which a directed swordfish limited access permit, a swordfish handgear limited access permit, a HMS Commercial Caribbean Small Boat permit, a Swordfish General Commercial open access permit, or an HMS Charter/Headboat permit (and only when on a non for-hire trip) has been issued or is required to have been issued is counted against the directed fishery quota. The total baseline annual fishery quota, before any adjustments, is 2,937.6 mt dw for each fishing year. Consistent with applicable ICCAT recommendations, a portion of the total baseline annual fishery quota may be used for transfers to another ICCAT contracting party. The annual directed category quota is calculated by adjusting for over- or under harvests, dead discards, any applicable transfers, the incidental category quota, the reserve quota and other adjustments as needed, and is subdivided into two equal semi-annual periods: one for January 1 through June 30, and the other for July 1 through December 31.

(B) A swordfish from the North Atlantic swordfish stock landed by a vessel for which an incidental swordfish limited access permit, an incidental HMS Squid Trawl permit, an HMS Angling permit, or an HMS Charter/Headboat permit (and only when on a for-hire trip) has been issued, or a swordfish from the North Atlantic stock caught after the effective date of a closure of the directed fishery from a vessel for which a swordfish directed limited access permit, a swordfish handgear limited access permit, a HMS Commercial Caribbean Small Boat permit, a Swordfish General Commercial open access permit, or an HMS Charter/Headboat permit (when on a non for-hire trip) has been issued, is counted against the incidental category quota. The annual incidental category quota is 300 mt dw for each fishing year.

* * * * *

■ 10. In § 635.28, paragraphs (c)(1)(i)(C) and (D) are added to read as follows:

§ 635.28 Fishery closures.

* * * * *

(c) * * *

(1) * * *

(i) * * *

(C) No swordfish may be possessed, landed, or sold by vessels issued a Swordfish General Commercial open access permit.

(D) No swordfish may be sold by vessels issued an HMS Charter/Headboat permit.

■ 11. In § 635.34, paragraph (a) is revised to read as follows:

§ 635.34 Adjustment of management measures.

(a) NMFS may adjust the catch limits for BFT, as specified in § 635.23; the quotas for BFT, shark and swordfish, as specified in § 635.27; the regional retention limits for Swordfish General Commercial permit holders, as specified at § 635.24; the marlin landing limit, as specified in § 635.27(d); and the minimum sizes for Atlantic blue marlin, white marlin, and roundscale spearfish as specified in § 635.20.

* * * * *

■ 12. In § 635.71, paragraphs (e)(8) and (15) are revised and paragraph (e)(18) is added to read as follows:

§ 635.71 Prohibitions.

* * * * *

(e) * * *

(8) Fish for North Atlantic swordfish from, possess North Atlantic swordfish on board, or land North Atlantic swordfish from a vessel using or having on board gear other than pelagic longline, green-stick gear, or handgear, except as specified at § 635.21(e)(4)(i).

* * * * *

(15) As the owner of a vessel permitted, or required to be permitted, in the Atlantic HMS Angling or the Atlantic HMS Charter/Headboat category (and only when on a for-hire trip), fail to report a North Atlantic swordfish, as specified in § 635.5(c)(2) or (c)(3).

* * * * *

(18) As the owner of a vessel permitted, or required to be permitted, in the Swordfish General Commercial permit category, possess North Atlantic swordfish taken from its management unit by any gear other than rod and reel, handline, bandit gear, green-stick, or harpoon gear, as specified in § 635.21(e)(4)(v).

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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 635

[Docket No. 120328229–3656–01]

RIN 0648–BC09

Atlantic Highly Migratory Species; 2006 Consolidated Atlantic Highly Migratory Species Fishery Management Plan; Amendment 7

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

ACTION: Proposed rule; request for comments.

SUMMARY: NMFS proposes regulations to implement management measures in Amendment 7 to the 2006 Consolidated Atlantic Highly Migratory Species Fishery Management Plan (2006 Consolidated HMS FMP) to ensure sustainable management of bluefin tuna consistent with the 2006 HMS FMP addressing ongoing management challenges in the Atlantic bluefin tuna fisheries. Amendment 7 also proposes minor regulatory changes related to the management of Atlantic HMS. Amendment 7 was developed by NMFS under the authority of the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act) and the Atlantic Tunas Convention Act (ATCA). The proposed measures would reallocate the U.S. bluefin tuna quota among domestic fishing categories. The rule would also implement several actions applicable to the pelagic longline fishery, including: Individual Bluefin Quotas (IBQs); two new Gear Restricted Areas, access to current closed areas based on performance criteria; closure of the pelagic longline fishery when annual bluefin tuna quota is reached; elimination of target catch requirements associated with retention of incidental bluefin tuna in the pelagic longline fishery; mandatory retention of legal-sized bluefin tuna caught as bycatch; expanded monitoring requirements, including electronic monitoring via cameras and bluefin tuna catch reporting via Vessel Monitoring System (VMS); and transiting provisions for pelagic and bottom longline vessels. The proposed rule would also require VMS use and reporting by the Purse Seine category; change the start date of the Purse Seine category to June 1; expand Automated Catch Reporting System use to the General and Harpoon categories; provide additional flexibilities for inseason adjustment of the General category quota and Harpoon category retention limits; and allocate a portion of the Angling category Trophy South subquota to the Gulf of Mexico. Finally, it would adopt several measures not directly related to bluefin tuna management, including implementing a U.S. North Atlantic albacore tuna quota; modifying rules regarding permit category changes; and implementing minor changes in the Highly Migratory Species regulations for administrative or clarification purposes.

DATES: Written comments must be received on or before October 23, 2013.

ADDRESSES: You may submit comments on this proposed rule, identified by ''NMFS–NOAA–2013–0101'', by any one of the following methods:

- *Electronic Submissions:* Submit all electronic public comments via the Federal eRulemaking Portal. Go to *www.regulations.gov/#!docket Detail;D=NOAA-NMFS-2013-0101,* click the ''Comment Now!'' icon, complete the required fields, and enter or attach your comments. Do not submit electronic comments to individual NMFS staff.
- *Mail:* Submit written comments to: Thomas Warren, Highly Migratory Species Management Division, NMFS, 55 Great Republic Drive, Gloucester, MA 01930. Please mark the outside of the envelope ''Comments on Amendment 7 to the HMS FMP.''
- *Fax:* 978–281–9347, Attn: Thomas Warren
- *Instructions:* Comments must be submitted by one of the above methods to ensure that the comments 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 and generally will be posted for public viewing on *www.regulations.gov* without change. All Personal Identifying Information (for example, name, address, etc.), confidential business information, or otherwise sensitive information 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 (enter ''N/A'' in the required fields, if you wish to remain anonymous). You may submit attachments to electronic comments in Microsoft Word or Excel, WordPerfect, or Adobe PDF file formats only. NMFS will hold public hearings on this proposed rule and will notify the public through a notice in the **Federal Register.**

Written comments regarding the burden-hour estimates or other aspects of the collection-of-information requirements contained in this proposed rule may be submitted to the Highly Migratory Species (HMS) Management Division of the Office of Sustainable Fisheries, and be emailed to *OIRA_submission@omb.eop.gov* or faxed to 202 395–7285.

Copies of Amendment 7 to the 2006 Consolidated HMS FMP and other relevant documents are available from the HMS Management Division Web site at *www.nmfs.noaa.gov/sfa/hms.*

FOR FURTHER INFORMATION CONTACT: Thomas Warren or Brad McHale at 978–281–9260.

SUPPLEMENTARY INFORMATION: The U.S. Atlantic tuna fisheries are managed under the 2006 Consolidated HMS FMP and regulations at 50 CFR part 635, pursuant to the authority of the Magnuson-Stevens Act, and ATCA. Under ATCA, the Secretary shall promulgate such regulations as may be necessary and appropriate to carry out International Commission for the Conservation of Atlantic Tunas (ICCAT) recommendations. The authority to issue regulations under the Magnuson-Stevens Act and ATCA has been delegated from the Secretary to the Assistant Administrator for Fisheries, NOAA (AA). On October 2, 2006, NMFS published in the **Federal Register** (71 FR 58058) final regulations, effective November 1, 2006, implementing the 2006 Consolidated HMS FMP, which details the management measures for Atlantic HMS fisheries, including the incidental and directed Atlantic bluefin tuna fisheries.

Background

A brief summary of the background of this proposed action is provided below. A complete discussion of the proposed Atlantic HMS management measures and the alternatives can be found in Draft Amendment 7 to the 2006 Consolidated HMS FMP Environmental Impact Statement (Amendment 7 DEIS, July, 2013). Draft Amendment 7, as well as the 2006 Consolidated HMS FMP can be found online at *http://www.nmfs.noaa.gov/sfa/hms/.*

The bluefin tuna fishery is managed principally through a quota. Currently, NMFS implements and codifies the ICCAT-recommended U.S. quota through rulemaking, annually or bi-annually depending on the length of the relevant ICCAT recommendation. Also through rulemaking (the ''quota specifications process'') NMFS annually

adjusts the U.S. baseline bluefin quota to account for any underharvest or overharvest of the adjusted U.S. quota from the prior year; specifies subquotas that result from application of the 2006 Consolidated HMS FMP allocations; and adjusts subquotas as appropriate following consideration of domestic management needs. NMFS must account not only for landings but for bluefin tuna discarded dead. NMFS estimates and accounts for dead discards in the pelagic longline fishery, which cannot target bluefin tuna but catches them while targeting swordfish and other tunas.

National Standard 1 requires that ''conservation and management measures shall prevent overfishing while achieving, on a continuing basis, the optimum yield from each fishery for the United States fishing industry.'' The Magnuson-Stevens Act defines ''optimum yield'' as the amount of fish that, among other things, provides for rebuilding to a level consistent with producing the maximum sustainable yield from the fishery. In ATCA, Congress also directed NMFS to manage the bluefin fishery to ensure that NMFS provides U.S. fishing vessels ''with a reasonable opportunity to harvest such allocation, quota, or at such fishing mortality level. . . .'' This rule builds upon an extensive regulatory framework for management of the domestic bluefin fishery pursuant to the 20-year rebuilding program adopted in the 1999 FMP and continued under the 2006 Consolidated HMS FMP. As described below, the proposed measures were designed to allow fishery participants to fully harvest, but not exceed, the U.S. bluefin quota by refining the existing management tools. NMFS is proposing a detailed, multi-level approach to resolving challenges in administering and carrying out the current quota system, which, if left unaddressed, could result in overharvests of the U.S. quota in the future. These measures would directly support the goals of reducing overfishing, rebuilding the western bluefin stock, and achieving optimum yield by ensuring that the fishery continues to be managed within the ICCAT-approved TAC, and consistent with National Standard 1's requirements.

Recent trends in the bluefin tuna fisheries and public comment and suggestions indicate that substantive changes to the 2006 Consolidated HMS FMP are warranted with regard to bluefin tuna management. Specific relevant events are described below.

On June 1, 2009, NMFS published an Advanced Notice of Proposed Rulemaking (ANPR; 74 FR 26174) requesting specific comments on regulatory changes that would potentially increase opportunities for U.S. bluefin tuna and swordfish fisheries to fully harvest the U.S. quotas recommended by ICCAT while balancing continuing efforts to end BFT overfishing by 2010 and rebuild the stock by 2019 as set out in the 2006 Consolidated HMS FMP. The ANPR was in response to various public suggestions about bluefin tuna management during the previous two years, precipitated by declines in the total volume of bluefin tuna landings, which were well below the available U.S. quota, and a reduction in the overall allowable western Atlantic bluefin TAC recommended by ICCAT. In the ANPR, NMFS also requested public comment regarding the potential implementation of catch shares, limited access privilege programs (LAPPs), and individual bycatch caps (IBCs) in highly migratory species fisheries. In response, NMFS received a wide range of suggestions for changes to the management of the U.S. bluefin tuna fisheries.

In developing the 2011 bluefin tuna quota rule and specifications (2011 Quota Rule) (76 FR 39019; July 5, 2011), three factors made accounting for anticipated discards more challenging than in previous years: (1) Changes in the ICCAT western Atlantic bluefin tuna management recommendations, including reductions in total allowable catch (TAC), the amount of underharvest that can be carried forward from one year to the next, and the previous elimination of a dead discard allowance separate from the landings quota); (2) increases in domestic pelagic longline dead discard estimates due to changes in estimation methodology and possibly due to an increase in bluefin tuna interactions; and (3) increases in domestic bluefin tuna landings, including directed and incidental landings. It became apparent that the adjusted quota for 2011 would be insufficient to account for anticipated 2011 dead discards while also providing full baseline allocations for the directed fishing categories per the percentages outlined in the 2006 Consolidated HMS FMP. In other words, the combined effect of the domestic quota allocation system and ICCAT requirements have resulted in an annual allocation/accounting challenge: Using the limited amount of available quota, how do we optimize fishing opportunity for all categories and account for anticipated dead discards in a way that meets our fishery management obligations?

After extensive public comment on the proposed 2011 Quota Rule, NMFS accounted for half of the estimated dead discards ''up front,'' by deducting half of the expected dead discards directly from the Longline category quota to provide some incentive for fishermen to reduce bluefin tuna interactions that could result in dead discards. Secondly, NMFS applied half of the underharvest that was allowed to be carried forward to the Longline category and maintained the other half in the Reserve category to provide maximum management flexibility in accounting for 2011 landings and dead discards. The underlying premise was that full and final accounting for dead discards would occur at the end of the fishing year and that full accounting would be possible within the available quota due to the likelihood of unharvested overall quota at the end of the fishing year. The range of comments received on the proposed 2011 Quota Rule (March 14, 2011; 76 FR 13583), and discussions at HMS Advisory Panel meetings demonstrated the need for a comprehensive review of bluefin tuna management. Many comments raised issues that were outside of the scope of that particular rulemaking and would require additional analyses because of the potential impacts on the fisheries and fishery participants. Some of the issues raised include: holding each quota category accountable for their own dead discards and revisiting the methodology used for estimating dead discards, the accounting for bluefin tuna landings relative to the 2006 Consolidated HMS FMP percentage allocations, changing domestic allocations among fishing categories, reducing bluefin tuna bycatch, modifying the permit structure for the fisheries, improving monitoring of catch in all bluefin tuna fisheries, providing strong incentives to the Longline category to reduce interactions with bluefin tuna, and reducing dead discards in the pelagic longline fishery.

In May 2011, in response to a petition to list bluefin tuna as threatened or endangered under the Endangered Species Act (ESA), NOAA determined that listing bluefin tuna as threatened or endangered under the ESA was not warranted; however, bluefin tuna was designated as a species of concern. This placed the species on a watch list for concerns about its status and threats to the species. NOAA has committed to revisit this decision in 2013, or when more information is expected to be available about the effects of the Deepwater Horizon oil spill. The western Atlantic bluefin tuna stock was last assessed in 2012 by ICCAT's Standing Committee on Research and

Statistics (SCRS). The results of that assessment and recommendations stemming from the 2012 ICCAT annual meeting did not substantially change from previous assessments and recommendations. The stock assessment included the use of two alternative recruitment scenarios, one assuming low potential recruitment and one assuming high potential recruitment. Therefore, the stock assessment produced two sets of results, and the status of the stock depends upon which recruitment scenario is considered. Under the low recruitment scenario, the stock is not overfished and overfishing is not occurring, while under the high recruitment scenario, the stock is overfished and overfishing is occurring. The SCRS, as stated in the stock assessment, has no strong evidence to favor either scenario over the other and notes that both are reasonable (but not extreme) lower and upper bounds on rebuilding potential.

In the final 2011 Quota Rule, NMFS stated ''however, in light of the issues involving U.S. quotas and domestic allocations, pelagic longline discards, the need to account for dead discards that result from fishing with other gears, and bycatch reduction objectives, as well as public comment, NMFS intends to undertake a comprehensive review of bluefin tuna management in the near future to determine whether existing management measures need to be adjusted to meet the multiple goals for the bluefin tuna fisheries'' (76 FR 39019; July 5, 2011).

NMFS began to address some of the quota accounting issues described above at the September 2011 meeting of the HMS Advisory Panel, by presenting a summary of some of the recent issues as well as a white paper on bluefin tuna bycatch in the fisheries. The HMS Advisory Panel discussed issues related to the Longline category, as well as issues in the bluefin tuna fisheries as a whole, and offered an array of suggested measures for NMFS's consideration as potential solutions. In preparation for the formal process of evaluating potential changes to the 2006 Consolidated HMS FMP, a preliminary version of a Scoping Document (''Preliminary White Paper'') was presented by NMFS to the HMS Advisory Panel meeting at its March 2012 meeting for its consideration as a scoping document to begin the process of reviewing the current management of bluefin tuna (NMFS, March 2012). The HMS Advisory Panel expressed qualified support for further exploring and analyzing the range of measures in the Preliminary White Paper, and suggested several additional measures. Those additional measures were incorporated into a final Scoping Document (NMFS, April 2012). NMFS made the scoping document available to the public, concurrent with the publication of a Notice of Intent (NOI) in the **Federal Register** (78 FR 24161; April 23, 2012), which announced NMFS' intent to hold public scoping meetings to determine the scope of issues to be analyzed in a DEIS, and a potential amendment to the 2006 Consolidated HMS FMP. The NOI stated that NMFS is examining the regulations that affect all bluefin tuna fisheries, both commercial and recreational, to determine if existing measures are the best means of achieving current management objectives, including continued sustainability of the Atlantic bluefin tuna stock consistent with the measures designed to end overfishing and rebuild the stock, and providing additional flexibility to adapt to management needs in the future. The NOI also announced the availability of the scoping document and notified the public of scoping meetings and consultations with Atlantic, Gulf of Mexico, and Caribbean regional fishery management councils. During May and June of 2012, NMFS conducted public meetings to present the scoping document and receive public comments in Toms River, NJ; Gloucester, MA; Belle Chasse, LA; Manteo, NC; and Portland, ME. During June 2012, NMFS consulted with the Mid-Atlantic Fishery Management Council, the New England Fishery Management Council, and the South Atlantic Fishery Management Council, while the scoping document was shared with the Gulf of Mexico Fishery Management Council and the Caribbean Fishery Management Council. NMFS accepted public comment on the scoping document through July 15, 2012. Details regarding the specifics of the scoping hearings and consultations and the public comments are in the Appendix of the Amendment 7 DEIS.

On September 20, 2012, NMFS presented a Predraft document to the HMS Advisory Panel (NMFS, September 2012). A Predraft, which is a precursor to a DEIS, allows NMFS to obtain additional information and input from the HMS Advisory Panel and the public on potential alternatives prior to development of the formal DEIS and proposed rule. The Magnuson-Stevens Act requires NMFS to ''consult with and consider the comments and views of affected Councils, commissioners and advisory groups appointed under Acts implementing relevant international fishery agreements pertaining to HMS (ACTA) and the HMS Advisory Panel in preparing and implementing any FMP or amendment.'' As such, NMFS requested comments from the HMS Advisory Panel, and made the document available to the public through the HMS Web site.

NMFS identified the following objectives with regard to this proposed action: (1) Prevent overfishing and rebuild bluefin tuna, achieve on a continuing basis optimum yield, and minimize bluefin bycatch to the extent practicable by ensuring that domestic bluefin tuna fisheries continue to operate within the overall TAC set by ICCAT consistent with the existing rebuilding plan; (2) optimize the ability for all permit categories to harvest their full bluefin quota allocations, account for mortality associated with discarded bluefin in all categories, maintain flexibility of the regulations to account for the highly variable nature of the bluefin fisheries, and maintain fairness among permit/quota categories; (3) reduce dead discards of bluefin tuna and minimize reductions in target catch in both directed and incidental bluefin fisheries, to the extent practicable; (4) improve the scope and quality of catch data through enhanced reporting and monitoring to ensure that landings and dead discards do not exceed the quota and to improve accounting for all sources of fishing mortality; and (5) adjust other aspects of the 2006 Consolidated HMS FMP as necessary and appropriate. These objectives support the goal of continued sustainability of the Atlantic bluefin tuna stock consistent with the measures designed to end overfishing and rebuild the stock.

Northern Albacore Tuna

Amendment 7 also includes proposals for management of north Atlantic albacore (or ''northern albacore'') tuna. Since 1998, ICCAT has adopted recommendations regarding the northern albacore tuna fishery. A multi-year management measure for northern albacore tuna was first adopted in 2003, setting the TAC at 34,500 mt. ICCAT's Standing Committee on Research and Statistics (SCRS) assessed the northern albacore tuna stock in 2009 and concluded that the stock continues to be overfished with overfishing occurring, recommending a level of catch of no more than 28,000 mt to meet ICCAT management objectives by 2020. In response, in 2009 ICCAT established a North Atlantic albacore tuna rebuilding program via Recommendation 09–05, setting a 28,000-mt TAC and including several provisions to limit catches by individual ICCAT parties (for major and minor harvesters) and reduce the

amount of unharvested quota that could be carried forward from one year to the next, from 50 percent to 25 percent of a party's initial catch quota. The 2009 recommendation expired in 2011.

In 2011, ICCAT Recommendation 11–04 again set a TAC of 28,000 mt for 2012 and for 2013 and contained specific recommendations regarding the North Atlantic albacore tuna rebuilding program, including an annual TAC for 2012 and 2013 allocated among the European Union, Chinese Taipei, the United States, and Venezuela. The U.S. quota for 2012 and 2013 is 527 mt. The recommendation limits Japanese northern albacore tuna catches to 4 percent in weight of its total Atlantic bigeye tuna longline catch, and limits the catches of other ICCAT parties to 200 mt. The recommendation also specifies that quota adjustments for a given year's underharvest or overharvest may be made for either 2 or 3 years from the subject year (i.e., adjustments based on 2013 catches would be made in either 2015 or 2016). Pursuant to ATCA and the Magnuson-Stevens Act, NMFS would implement the ICCAT-recommended U.S. quota and establish provisions to adjust the base quota for over or underharvests via annual quota specifications.

Proposed Measures

The proposed measures reflect the Draft Amendment 7 objectives, the goal of continued sustainability of the Atlantic bluefin tuna stock consistent with the measures designed to end overfishing and rebuild the stock, public input from the prescoping and scoping phases, the predraft document and related comments, and subsequent analysis in the DEIS.

Draft Amendment 7 proposes a variety of management measures designed to balance achievement of its diverse objectives. The Amendment 7 DEIS contains a complete description and analysis of the range of alternatives analyzed. A description of the significant alternatives to the proposed measures is provided later in this preamble in the summary of the Initial Regulatory Flexibility Analysis (IRFA). A description of the proposed management measures follows:

1. Quota Reallocation

Codified Quota Reallocation

This measure would increase the amount of quota allocated to the Longline category to fully and more predictably account for Longline category incidental bluefin tuna catch, including both dead discards and landings. Paired with other proposed measures to reduce and control Longline category interactions with bluefin tuna, NMFS proposes a limited, 62.5 mt quota increase that reflects the historic dead discard allowance the United States had in addition to its landings quota under past ICCAT Recommendation 98–07. Under that recommendation (no longer in effect), ICCAT set aside 79 mt of bluefin tuna quota for dead discards in addition to landings. The United States' share of that set-aside was 85.72 percent or 68 mt. The proposed codified reallocation would address the fact that when the current category allocation percentages were first established in 1999, dead discards were not considered in the allocation percentages but were accounted for by the separate 68 mt dead discard allowance then in effect. These percentages were carried over to the 2006 Consolidated HMS FMP without adjustment for the fact that the 1999 percentage allocations were originally intended to cover landings only. NMFS therefore proposes to annually redistribute a specific amount of quota in weight.

To implement the change, NMFS would calculate the bluefin quota for each of the quota categories through the following process: First, 68 mt would be subtracted from the baseline annual U.S. BFT quota for reallocation to the Longline category quota. Second, the remaining quota would be divided among the categories according to the allocation percentages codified at 50 CFR 635.27, and for the Longline category, the 68 mt (derived from all categories) would then be added to its quota.

Therefore, if the baseline annual U.S. quota was 923.7 mt, 32.0 mt would be deducted from the General category (i.e., 47.1 percent of 68 mt), 2.7 mt from the Harpoon category (3.9 percent), 12.6 mt from the Purse Seine category (18.6 percent), 5.5 mt from the Longline category (8.1 percent), 13.4 mt from the Angling category (19.7 percent), and 1.7 mt from the Reserve category (2.5 percent). This 68 mt would be allocated to the Longline category, resulting in a net increase to the Longline category of 62.5 mt (68 mt minus the Longline category's contribution of 5.5 mt).

This methodology would not modify the category quota allocation percentages themselves, because the amount of quota redistributed would not be equivalent to 68 mt if the total U.S. quota changed. The Longline category's percentage of the baseline U.S. bluefin tuna quota would remain at 8.1 percent, but each year the Longline category quota would be increased by 62.5 mt (based on deductions from the other quota categories).

Annual Quota Reallocation

NMFS would annually adjust the purse seine quota, based on the total catch (landings and dead discards) by purse seine vessels in the previous year. Any quota not allocated to the Purse Seine category would be allocated to the Reserve category for possible redistribution to other quota categories, or to support other objectives of the 2006 Consolidated HMS FMP, as amended.

Three thresholds would be defined to create four possible allocation scenarios for the Purse Seine category. The Purse Seine category would be allocated either 100%, 75%, 50%, or 25% of its allocated quota, according the following allocation criteria: If the purse seine catch is between 0 and 20% of the Purse Seine quota in year one, the Purse Seine category would be allocated 25% of the quota in year two, and 75% of the Purse Seine quota would be reallocated to the Reserve Category for that year. If the purse seine catch is greater than 20% and up to 45% of the Purse Seine quota in year one, the Purse Seine category would be allocated 50% of the quota in year two, and 50% of the Purse Seine quota would be reallocated to the Reserve Category for that year. If the purse seine catch is greater than 45% and up to 74% of the Purse Seine quota in year one, the Purse Seine category would be allocated 75% of the quota in year two, and 25% of the Purse Seine quota would be transferred to the Reserve Category for that year. If the purse seine catch is greater than 75% of the Purse Seine quota in year one, the Purse Seine category would be allocated 100% of the baseline quota in year two, and no quota would be transferred to the Reserve Category for that year. These thresholds would apply following the same pattern in years beyond year two, with each year's quota reflecting the previous year's catch. In summary, if Purse Seine vessels catch a large portion of their allocated quota in one year, they receive a large portion of their quota in the next year. If Purse Seine vessels' catch is low in one year, a larger portion of the Purse Seine quota becomes available for other management purposes. The Purse Seine quota would not be 'locked-in' at a low level because the criteria are structured to enable increases in quota. For example, if the Purse Seine catch in year one is between 0 and 20% of the year one baseline Purse Seine quota, the Purse Seine category would be allocated 25% of their baseline quota in year two. If in year two the Purse Seine catch in year

is greater than 20% of its baseline quota, but still within their annual allocation (i.e., catch is between 20% and 25%), the Purse Seine category would be allocated 50% of their baseline quota in year three. The Purse Seine category catch levels and allocation levels have been staggered to allow for an increase in allocation in the following year, without causing the category to exceed the current year's allocation to do so.

This measure would balance the need to provide the Purse Seine category a reasonable amount of fishing opportunity in a predictable manner, while making use of quota that may otherwise be unused. Overall quota accounting in recent years has been facilitated by underharvests in the Purse Seine category. This measure would enhance certainty in the purse seine fishery, yet also provide a flexible means for strategic use of quota to address multiple objectives, including accounting for dead discards and optimizing fishing opportunity in other fisheries.

As described under ''Modifications to the Reserve Category,'' quota that is reallocated to the Reserve Category may be utilized in a variety of ways to meet multiple objectives. For example, using 2011 quota amounts: If, in year one the Purse Seine category catches 46% of its baseline quota (39.5 mt of 85.9 mt), then, in year two, the Purse Seine category would be allocated 50% of its baseline quota (43.0 mt). If, in year two, the Purse Seine category catches 19% of its baseline quota (16.3 mt of 85.9 mt), then, in year three, the Purse Seine category would be allocated 25% of its baseline quota (21.5 mt). NMFS would annually estimate the Purse Seine category catch for that year and publish a notice in the **Federal Register** regarding the amount of quota that would be allocated to the Purse Seine category, as well as the corresponding amount allocated to the Reserve category and any disposition of the quota from the Reserve category for the subsequent year made at that time. After the initial adjustment, NMFS may make additional modifications to the Purse Seine quota inseason in accordance with the criteria for inseason adjustments specified at § 635.27(a), or make subsequent use of quota from the Reserve category.

Modifications to the Reserve Category

This proposed measure would give NMFS management flexibility to augment the amount of quota in the Reserve category and add to the determination criteria NMFS considers in redistributing quota to or from the Reserve category. The potential sources of quota for the Reserve category on top of its baseline allocation of 2.5 percent would be the following: (1) Available underharvest of the U.S. quota that is allowed to be carried forward and (2) unused Purse Seine category quota, under the proposed codified reallocation measure described below. For example, under the proposed Annual Quota Reallocation, NMFS would estimate the amount of Purse Seine quota that had been caught during that year and adjust the Purse Seine allocation in the subsequent year (as a result). The remaining amount of Purse Seine quota would then be reallocated to the Reserve category for that subsequent year. NMFS could utilize quota from the Reserve category inseason after considering defined criteria and objectives. NMFS proposes to add five criteria to the existing nine criteria considered when making inseason or annual quota adjustments (See § 635.27(a)(8)). The current criteria NMFS considers are: (1) The usefulness of information obtained from catches in the particular category for biological sampling and monitoring of the status of the stock; (2) the catches of the particular category to date and the likelihood of closure of that segment of the fishery if no adjustment is made; (3) the projected ability of the vessels fishing under the particular category quota to harvest the additional amount of BFT before the end of the fishing year; (4) the estimated amounts by which quotas for other gear categories of the fishery might be exceeded; (5) effects of the adjustment on BFT rebuilding and overfishing; (6) effects of the adjustment on accomplishing the objectives of the FMP; (7) variations in seasonal distribution, abundance, or migration patterns of BFT; (8) effects of catch rates in one area precluding vessels in another area from having a reasonable opportunity to harvest a portion of the category's quota; and (9) review of dealer reports, daily landing trends, and the availability of the BFT on the fishing grounds. The additional five criteria would be: (10) optimize fishing opportunity; (11) account for dead discards; (12) facilitate quota accounting; (13) support other fishing monitoring programs through quota allocations and/or generation of revenue; and (14) support research through quota allocations and/or generation of revenue.

For example, Reserve quota could be transferred to the General category if pelagic longline vessels choose to fish under General category rules (see Allow Pelagic Longline Vessels to fish under General Category Rules), or bluefin tuna quota from the Reserve category could be used to augment other quota categories (optimize fishing opportunity and facilitate quota accounting).

These proposed modifications to the Reserve category would increase management flexibility in administering the quota system in a way that takes into account fluctuations in the characteristics of the fishery. Increased flexibility in use of the Reserve category quota would also complement other proposed measures in Draft Amendment 7 that constitute substantial modifications to the current quota system (e.g., the proposed Individual Bluefin Quota system, and Annual Reallocation). A more flexible quota system would be responsive to the current conditions in the fisheries, which are different from those that existed when the quota system was created, and facilitate adaptation to future changes in the fisheries.

2. Gear Restricted Areas

Cape Hatteras Gear Restricted Area, With Conditional Access

This proposed management measure would define an area off Cape Hatteras, NC and would limit access to this area for vessels fishing with pelagic longline gear during the 5-month period from December through April. NMFS would make an annual determination whether vessels would be granted access to the area, based on a formula consisting of the following metrics: ratio of bluefin tuna interactions to designated species catch, compliance with the Pelagic Observer Program requirements, and compliance with HMS logbook reporting requirements. Vessels not qualifying to fish in the area with pelagic longline gear would be those vessels that have not demonstrated their ability to avoid bluefin tuna and/or comply with reporting and monitoring (observer) requirements. Non-qualifying vessels would be allowed to use other gear types authorized for use by pelagic longline vessels, such as buoy gear, green-stick gear, or rod and reel, in the area during the months of the restriction, but they could not fish with pelagic longline gear. Vessel performance would be evaluated annually in order to provide future fishing opportunities and to accommodate changes in fishing or reporting practices.

The principal objective of conditional access would be to balance the objective of reducing dead discards with the objective of providing reasonable fishing opportunity. The second objective would be to provide strong incentives to modify fishing behavior to avoid bluefin

tuna and reduce dead discards, as well as improve compliance with the logbook reporting and observer requirements. This regulatory approach is based on the fact that historically relatively few vessels have consistently been responsible for the majority of the bluefin tuna dead discards within the Longline category. Conditioning access on compliance with reporting and monitoring requirements reflects the critical importance of fishery data to the successful management of the fisheries.

The initial evaluation of performance metrics would be based upon data from 2006 through 2011, and subsequent scores would be based upon the most recent three-consecutive-year period. The three-consecutive-year period may not align precisely with calendar years if data through the end of a calendar year are not available at the time NMFS is making the determination. For example, data through the end of a year may not be available at the time NMFS is compiling such data. Vessels owners would be notified annually of the status of the relevant vessel, and only aggregate information regarding the vessel status would be made public. NMFS would have the authority to revise the conditions for access (via proposed and final rulemaking) in order to ensure that the performance metrics continue to support the objectives of the gear restricted area.

Vessels would be able to appeal their performance scores to NMFS by submitting a written request to appeal, indicating the reason for the appeal and providing supporting documentation for the appeal (e.g., copies of landings records and/or permit ownership, Pelagic Observer Program information, logbook data, etc.). The appeal would be evaluated based upon the following criteria: (1) The accuracy of NMFS records regarding the relevant information; and (2) correct assignment of historical data to the vessel owner/permit holder. The current owner of a permitted vessel may also appeal on the basis of changes in vessel ownership or permit transfers. Appeals based on hardship factors will not be considered.

NMFS would have the authority to terminate access for all pelagic longline vessels or individual pelagic longline vessels to the area via inseason action in order to address issues including: (1) Failure to achieve or effectively balance the objective of reducing dead discards with the objective of providing fishing opportunity; (2) bycatch of bluefin tuna or other HMS species that may be inconsistent with the objectives or regulations or the 2006 Consolidated HMS FMP, or ICCAT recommendations; or (3) bycatch of marine mammals or protected species that is inconsistent with the Marine Mammal Protection Act (MMPA), Pelagic Longline Take Reduction Plan (PLTRP), or the 2004 Biological Opinion (BiOP).

The performance metric formula would enable the majority of vessels to continue to fish in the Cape Hatteras Gear Restricted Area, yet would substantially reduce bluefin tuna dead discards by precluding fishing in the Area by those with a history of high bluefin tuna interaction in relation to other designated species catch. Specifically, NMFS would define three performance metrics to reflect three relevant aspects of vessel performance: (1) The ratio of bluefin tuna interactions to designated species catch; (2) compliance with observer requirements; and (3) compliance with logbook requirements. In order to characterize vessel performance in a manner that is fair, consistent, and feasible to administer, the proposed performance metric formula is based on relatively simple, objective, and quantifiable information. For each of the three performance metrics, a vessel would be scored on a scale of 1 to 5, with 5 reflecting better performance. Vessels with a ratio of bluefin tuna interactions to designated species catch of 1 would not be allowed to fish in the proposed Cape Hatteras Gear Restricted Area using pelagic longline gear. If a vessel's Pelagic Observer Program Compliance score is 2 or less, that vessel would not be allowed to access the area and fish with pelagic longline gear, unless the vessel's logbook compliance score is 4 or 5.

The performance metric formula would reflect bluefin tuna interactions as measured by the ratio of the number of bluefin tuna interactions (landings, dead discards, and live discards, in number of fish) to the weight of designated species landings (in pounds). These designated species would consist of the more common marketable catch harvested by pelagic longline vessels: swordfish; yellowfin, bigeye, albacore, and skipjack tunas; dolphin; wahoo; and porbeagle, shortfin mako, and thresher sharks. The use of a ratio incorporating both designated species landings and bluefin tuna interactions provides a metric that is intended to eliminate bias resulting from the differences among vessels in size or fishing effort.

The Pelagic Observer Program metric would reflect compliance with requirements regarding communications, and timing of communications with the Pelagic Observer Program once selected for observer coverage; requirements regarding observer safety and accommodation (e.g., USCG safety decal, life raft capacity and bunk space); and requirements regarding observer deployment. The scoring system is designed to be neutral with respect to valid reasons that a vessel was selected by the observer program but did not take an observer (e.g., no observer was available, or the vessel did not fish using pelagic longline gear (for a variety of reasons)). The scoring system is also designed to weigh trips that were not observed due to noncompliance with the communication requirements more heavily than those that were not observed due to noncompliance with the safety and accommodation requirements. The system is also designed to consider evidence of fishing activity that may have occurred without required communication or observer coverage.

The logbook reporting metric would reflect compliance with the requirement that the vessel owner/operator must submit the logbook forms postmarked within 7 days of offloading the catch, and, if no fishing occurred during a month, must submit a no-fishing form postmarked no later than 7 days after the end of that month.

Small Gulf of Mexico Gear Restricted Area

This proposed measure would define an irregularly-shaped area in the Gulf of Mexico and would prohibit the use of pelagic longline gear during the 2-month period from April through May. Other gear types authorized for use by pelagic longline vessels such as buoy gear (see ''Increased Flexibility to use Buoy Gear''), green-stick gear, or rod and reel would be allowed, provided the vessel abides by any rules/regulations that apply to those gear types. Based on past patterns of interaction between pelagic longline gear and bluefin tuna, the proposed Small Gulf of Mexico Gear Restricted Area represents a temporal and spatial combination likely to reduce dead discards but also maintain fishing opportunities for pelagic longline vessels. Because bluefin tuna in the Gulf of Mexico are comprised of large fish that may be sexually mature or spawning, reducing dead discards in the Gulf of Mexico may also enhance spawning potential and thus may enhance stock growth.

Pelagic Longline Vessels Fishing Under General Category Rules

This proposed measure would allow vessels with an Atlantic Tunas Longline category permit that are not granted access to fish in the Cape Hatteras Gear Restricted Area using pelagic longline gear to fish under the rules/regulations

applicable to the General category as they pertain to targeting bluefin tuna with handgear (i.e., rod and reel, handline, harpoon, etc.). This capability would only be allowed in the area defined as the Cape Hatteras Gear Restricted Area, during the time of the restriction (December through April) when the General category is open. In other words, if a vessel is not allowed access to the Cape Hatteras Gear Restricted Area due to the performance metric formula, and the General category fishery is open, the vessel may use handgear to fish under the General category rules. The bluefin tuna landed with authorized handgear would be counted against the General category quota. The objective of this measure is to provide additional fishing opportunity for pelagic longline vessels and mitigate the potential negative economic impacts of the Cape Hatteras Gear Restricted Area, particularly for pelagic longline vessels that may not be able to fish in other areas during the time of the restriction. Before each trip, prior to leaving port, vessels would be required to declare through VMS their intent to fish under the General category rules, and report their catch daily through VMS. Specifically, vessels would be required to report through VMS the length of bluefin tuna retained and discarded. Vessels must submit a VMS catch report for each set with bluefin interactions within 12 hours of completion of the haul-back.

Transiting Closed Areas

This proposed measure would allow vessels with an Atlantic Tunas Longline permit, Swordfish Incidental or Directed Limited Access permit, and/or a Shark Limited Access permit fishing with bottom or pelagic longline gear to transit areas that are closed or restricted to such gear, if they remove and stow the gangions, hooks, and buoys from the mainline and drum. No baited hooks would be allowed. The specific areas to which this transiting provision would apply would include those proposed in this rule (Gulf of Mexico Gear Restricted Area and Cape Hatteras Gear restricted area); the current pelagic longline closed areas (DeSoto Canyon, Florida East Coast, Charleston Bump, Northeastern U.S.); the current bottom longline closed areas (the Mid-Atlantic Shark Area; and the Caribbean closed areas). Current regulations do not allow fishermen to stow their longline gear and transit these areas. Instead, fishermen must go around the areas to remain in compliance with the regulations. This proposed measure would reduce the costs associated with indirect routes of travel (more time at sea, increased fuel consumption, etc.), and address the comments expressed by some fishermen that requiring vessels to steam around restricted areas has caused safety-at-sea concerns. Small closed areas such as the Madison-Swanson and Steamboat Lumps are not included because they are small enough to steam around with little associated costs/concerns.

Conditional Access to Pelagic Longline Closed Areas

This proposed measure would allow limited and conditional access to the following closed areas during the times they are in effect: Charleston Bump closed area (February through April), a portion of the East Florida Coast closed area (year-round), the DeSoto Canyon closed area (year-round), and the Northeastern U.S. closed area (June). The portion of the East Florida Coast closed area open to fishing would be north of 28°17′10″ N. lat., east of the 100 fathoms curve, approximately near Melbourne, FL. The area south of 28°17′10″ N. lat, and west of the 100 fathoms curve would remain closed to fishing due to south Florida's unique importance as a swordfish and tuna migratory corridor, and as juvenile swordfish habitat that is easily accessible to a large population center with many fishermen.

There would be two conditions for access to these areas. The first condition would be based upon the performance metrics and scoring system described above in the ''Cape Hatteras Gear Restricted Area with Access.'' As explained previously, NMFS would define three performance metrics to reflect three relevant aspects of vessel performance: (1) The ratio of bluefin tuna interactions to designated species catch; (2) compliance with observer requirements; and (3) compliance with logbook requirements. NMFS would make an annual determination whether vessels would have access to the pelagic longline closed areas, based on a relatively low rate of interactions with bluefin tuna in the recent past, and past compliance with specific reporting and monitoring requirements. Vessels not allowed to fish in the closed areas would be those vessels that have not demonstrated their ability to avoid bluefin tuna and/or comply with reporting and monitoring requirements.

The second condition would be a requirement that any trip into a closed area be observed. To implement the condition of having an observer onboard, current vessel selection procedures would be used to select vessels using the current strata (i.e., the procedures that select vessels to obtain observer coverage each calendar quarter, and in each of various geographic (statistical) areas). If selected, a vessel would be informed of the statistical area for which the vessel was selected, and the vessel would be allowed to fish within the relevant closed area provided it is within that particular statistical area. For example, if the vessel were selected to take an observer for the Mid-Atlantic Bight statistical area, the vessel would be able to fish in the Northeastern U.S. closed area in June as long as an observer is onboard. If the vessel were selected to take an observer for the Gulf of Mexico, the vessel would be able to fish in the DeSoto Canyon closed area during the quarter selected for observer coverage as long as an observer is on board.

Eligible vessels would be required to declare into the area via their VMS unit prior to leaving the dock, and report their catch daily through VMS. Specifically, vessels would be required to report through VMS the length of bluefin tuna retained and discarded. Vessels must submit a VMS catch report for each set with bluefin interactions within 12 hours of completion of the haul-back.

NMFS would have the authority to terminate access to each area inseason in order to address issues, including:

(1) Failure to achieve or effectively balance the objective of reducing discards with the objective of providing fishing opportunity; (2) bycatch of bluefin tuna or other HMS species that may be inconsistent with the objectives or regulations or the 2006 Consolidated HMS FMP, or ICCAT recommendations; or (3) bycatch of marine mammals or protected species that is inconsistent with the MMPA, PLTRP, or the 2004 BiOP.

When considering whether or not to terminate access to a closed area, NMFS would evaluate the following criteria and other relevant factors relating to the three issues listed above: (1) The usefulness of information on catch obtained from observers, logbooks, VMS reporting, and dealer reports; (2) the type of species caught, numbers caught, rate of catch, animal length, weight, condition, and location; (3) variations in the seasonal distribution, abundance, or migration patterns of a bycatch species or target species; (4) condition or status of the stock or species of concern and impacts of continued access to the closed area on all species; (5) catch data on comparable species from outside the closed area (both target species and bycatch); (6) implications on quota management of relevant stocks; (7) relevant data regarding the effectiveness of other closed areas and their individual or cumulative impacts in

relation to the objectives of the closed areas and the 2006 Consolidated HMS FMP; and (8) the bluefin tuna determination criteria listed under § 635.(27)(a)(8)(as revised by this rule). NMFS would consider relevant data and publish a notice in the **Federal Register** notifying the public that access to the area with pelagic longline gear would be prohibited for the duration of the relevant time period (depending upon the closed area). For year-round closures, the area would be closed for the remainder of the fishing year.

In addition to the ability to terminate access to a closed area inseason, NMFS would be able to make an annual determination whether or not to allow access to these areas, based on the above criteria. NMFS would consider relevant data and publish a notice in the **Federal Register** notifying the public whether or not there would be access to the areas in the subsequent year. NMFS may choose to allow access to certain closed areas and not others. In order to adjust or implement new restrictions for access to closed areas, NMFS would conduct proposed and final rulemaking.

The objective of this proposed measure is to provide additional fishing opportunities for pelagic longline vessels, mitigate the potential negative economic impacts of other draft Amendment 7 alternatives that are proposed, and provide fishery dependent data from within the closure areas. Fishery dependent data from within the closed areas may be utilized in the future as part of the information used to evaluate the effectiveness and/or impacts of closed areas as well as for stock assessments or other management measures. The total number of trips into closed areas would be limited by the level of observer coverage.

3. Quota Controls

NMFS Closure of the Pelagic Longline Fishery

This proposed measure would close the pelagic longline fishery (i.e., prohibit the use of pelagic longline gear) when the total Longline category quota is reached, projected to be reached or exceeded, or, when there is high uncertainty regarding the estimated or documented levels of bluefin tuna catch. These steps would be taken in order to prevent overharvest of the Longline category quota and prevent further discards of bluefin tuna. When NMFS projects that the quota will be reached, it will file a closure action with the Office of the Federal Register for publication. Vessels would be required to offload all bluefin tuna prior to the closure date/time. Criteria for NMFS consideration would include those listed under § 635.27(a)(8) as well as: total estimated bluefin tuna catch (landings and dead discards) in relation to the quota; estimated amount by which the bluefin tuna quota might be exceeded; usefulness of data relevant to monitoring the quota; uncertainty in the documented or estimated dead discards or landings of bluefin tuna; amount of bluefin tuna landings or dead discards within a short time; effects of continued fishing on bluefin tuna rebuilding and overfishing; provision of reasonable opportunity for pelagic longline vessels to pursue the target species; variations in seasonal distribution, abundance or migration patterns of bluefin tuna; and other relevant factors.

Alternatively, NMFS could utilize a historical estimate for pelagic longline dead discards as a proxy for anticipated dead discards, and subtract an estimate of dead discards ''off the top'' of the quota. This would result in a substantially lower quota, which would be a landings quota and result in the closure of the fishery when the landings quota is attained.

Individual Bluefin Quotas (IBQs)

The proposed IBQ management system is summarized and then described in detail below.

Summary

NMFS is proposing IBQs pursuant to section 303A of the MSA, which authorizes development of limited access privilege (LAPP) programs. A LAPP is a permit issued for a period of not more than 10 years, to harvest a quantity of fish expressed by a unit(s) representing a portion of the total allowable catch that may be received or held for exclusive use by a person. Section 303A(c) identifies the requirements for such a program (note that the referendum requirements of section 303A(c)(6)(D) are inapplicable to this program for the Atlantic HMS fisheries). This alternative would implement IBQs for vessels permitted in the Atlantic tunas Longline category (provided they also hold necessary limited access swordfish and shark permits) that would result in prohibiting the use of pelagic longline gear if/when the vessel's annual pelagic longline IBQ has been caught. The specific objectives of the IBQ program are to: (1) Limit the amount of bluefin tuna landings and dead discards in the pelagic longline fishery; (2) provide strong incentives for the vessel owner and operator to avoid bluefin tuna interactions, and thus reduce bluefin tuna dead discards; (3) provide flexibility in the quota system to enable pelagic longline vessels to obtain bluefin tuna quota from other vessels with available IBQ in order to enable full accounting for bluefin tuna landings and dead discards, and minimize constraints on fishing for target species; (4) balance the objective of limiting bluefin tuna landings and dead discards with the objective of optimizing fishing opportunities and maintaining profitability; and (5) balance the above objectives with potential impacts on the directed permit categories that target bluefin tuna, and the broader objectives of the 2006 Consolidated HMS FMP and the Magnuson-Stevens Act.

In order to achieve these objectives, NMFS is proposing a suite of management measures intended to work together, which would comprise the IBQ management system. These measures include the definition of important terms: a quota share is the percentage of the Longline category quota that is associated with a permitted vessel, based upon the quota share formula and the relevant vessel history, and a quota allocation is the amount (mt) of bluefin tuna quota that is associated with a permitted vessel, based upon the relevant quota share(s), and the annual Longline category quota. Active vessels would be eligible to receive a 1.0%, 0.54%, or 0.34% share of the Longline baseline quota, which would be used by the individual vessels to account for all their bluefin tuna landings and dead discards. Quota shares would be designated as either Gulf of Mexico or Atlantic, and vessels would be prohibited from using Atlantic shares to account for bluefin tuna catch in the Gulf of Mexico, thereby limiting potential shifts in effort. Quota allocation could be leased annually among Longline or Purse Seine category vessels, and a minimum amount of bluefin tuna quota would be required for a vessel to depart on a trip in the Atlantic (0.125 mt) using pelagic longline gear. A higher minimum amount of quota would be required for vessels fishing in the Gulf of Mexico (0.25 mt). If a vessel catches bluefin tuna in excess of its quota allocation, it would be required to lease additional quota allocation in order to account for the excess catch, and would not be allowed to fish with pelagic longline gear until the balance was accounted for. A vessel's quota allocation would not carry-over from one year to the next, but if a vessel is unable to satisfy its quota 'debt' in a particular fishing year, quota would be deducted from the vessel's allocation during the subsequent year. Although temporary leasing of bluefin tuna quota allocation

could occur, no sale of bluefin tuna quota shares at the onset of the program is being proposed at this time. Measures to allow sale of bluefin tuna quota shares would be implemented in the future through a separate rulemaking. A phased-in approach would reduce risks for vessel owners during the initial stages of the IBQ program, when the market for bluefin tuna quota shares would be new and uncertain. During the first years of the IBQ program, price volatility may be reduced, as well as undesirable outcomes of selling or buying quota shares at the ''wrong'' time or price. NMFS intends to develop a program to allow the sale of quota share in the future because it would provide a means for vessel owners to plan their business and manage their quota according to a longer time scale than a single year, in a manner that would be informed by several years of the temporary leasing market. NMFS may wait until a formal evaluation of the IBQ program before developing this alternative.

NMFS would implement an internet-based system to track leases of quota allocation; VMS would be used to report bluefin tuna catches to increase the timeliness of dead discard data; and electronic monitoring (cameras) would be required on pelagic longline vessels as one element of the monitoring program. The measurement and accounting of bluefin weight and length in the IBQ management program would be in standardized units designated by NMFS (e.g., the minimum increment of weight for example, such as hundredths of a metric ton). The vessel owner would provide length information on all bluefin discarded dead or retained, and NMFS would derive weight information on the bluefin that are discarded dead through the use of length to weight conversions; or vessel operators would be required to submit weight information based upon a standardized length to weight conversion formula supplied by NMFS. The IBQ program would be evaluated after 3 years, and NMFS would develop a cost recovery program.

What vessels would be eligible to receive initial bluefin tuna quota shares?

Vessels that made at least one set using pelagic longline gear between 2006 and 2011 (based on pelagic longline logbook data) would be defined as ''active'' and eligible to receive bluefin tuna quota shares. This range of 6 years provides a reasonable representation of historical fishing activity, including recent years. Six years is long enough to prevent short-term circumstances from disproportionately impacting a vessel, but not so long so that it does not reflect current fishery participation. One hundred and sixty one vessels would qualify as active under this definition. Vessels with valid Longline permits that do not meet the initial eligibility criteria (i.e., vessels that are not defined as ''active'') would be able to obtain bluefin tuna quota allocation through a lease of quota allocation. Permits that are not associated with a vessel, such as a permit characterized as ''No Vessel ID,'' would not be eligible for an initial quota share but would be eligible to receive quota allocation (through a lease) if and when the permit was reassociated with a vessel. Such a vessel would need to lease quota allocation before fishing with pelagic longline gear. New entrants to the fishery would need to either obtain an Atlantic Tunas Longline permit with associated quota share, or if the valid permit did not have quota share, obtain bluefin tuna quota through lease/sale in order to fish.

How much bluefin tuna quota would each eligible vessel get?

A vessel's share of bluefin tuna quota would be based upon two elements: the amount of bluefin tuna catch between 2006 and 2011, and the amount of designated species landings (i.e., swordfish; yellowfin, bigeye, albacore, and skipjack tunas; dolphin; wahoo; and porbeagle, shortfin mako, and thresher sharks). The use of two factors in the quota share allocation formula is intended to reward past bluefin tuna avoidance, ensure a fair initial allocation, and take into consideration the diversity in vessel fishing patterns and harvest characteristics. Past fishing that resulted in minimal bluefin tuna interactions would result in larger future allocations of bluefin tuna. Landings of designated species are an indicator of both the level of fishing effort and activity as well as vessel success at targeting those species. This method of allocation incorporates the rate of historical bluefin tuna interactions but also includes the amount of designated species landings, recognizing that greater levels of fishing activity are likely to be correlated with a greater number of bluefin tuna interactions. NMFS developed the proposed quota shares as follows: the designated species landings were from NMFS's dealer data (weigh-out slips) and logbook information. Historical bluefin tuna catch (from vessel logbook data) was expressed as the ratio of the number of bluefin tuna interactions to 'designated species' landings (ratio). Because the bluefin tuna interactions to designated species landings ratio is very small, landings were multiplied by 10,000 in order to derive a ratio that is more practical (i.e., 0.95 instead of 0.000095). In order to combine the two metrics, scores were assigned to each metric (the bluefin tuna catch to designated species landings ratio and historical designated species landings) as described below. Active vessels were sorted into three categories, using total designated species landings from 2006 through 2011, based on percentiles of landings from lowest to highest (low, medium, and high, 0 to < 33 percent; 33 to < 66 percent and 66 to 100 percent, respectively). Similarly, the active vessels were sorted according to the ratio of bluefin interactions to HMS landings, from lowest to highest. For example, a vessel with a 2006–2011 weight of designated species landings of greater than or equal to 367,609 lb (the 66 to 100th percentile of landings) would be placed in the ''High'' category and assigned a score of 3. In contrast, a vessel with a total designated species landing of only 95,000 pounds for 2006 through 2011 would receive a designated species landings score of 1. A vessel with a bluefin to designated species landings ratio of less than 0.2884 (66 to 100th percentile of bluefin to designated species landings ratios), would place in the top category and receive a bluefin to designated species landings ratio score of 3. A low ratio indicates relatively few bluefin interactions and therefore receives a high score.

Finally, the two scores were combined to form the basis of the allocation. For each vessel, the score for designated species landings was added to the score for bluefin to designated species ratio. For example, if a vessel scored in the ''High'' category for both designated species landings and bluefin to designated species landings its combined score would be 6 (3 + 3). If a vessel scored High for bluefin ratio, but Low for designated landings, it would be scored a 4 (1 + 3) and it would be placed in the Medium rating score category. Vessels assigned to a particular category would be allocated the same percentage share.

Vessels would be allocated shares of 1.0%, 0.54%, or 0.34% of the Longline category quota. Based on a revised baseline Longline category bluefin tuna quota of 137 mt (baseline plus 62.5 mt), vessels would be allocated 1.37 mt, 0.74 mt, or 0.47 mt of bluefin tuna, respectively. All pelagic longline quota shares and allocations would be designated as either ''Gulf of Mexico'' or ''Atlantic'' based upon the geographic location of sets (associated with the

vessel's fishing history used to determine the vessel's quota share). Gulf of Mexico quota allocation could be used in either the Gulf of Mexico or the Atlantic, but Atlantic quota allocation could only be used in the Atlantic (and not the Gulf of Mexico) to prevent a shift of effort to the Gulf of Mexico. All bluefin tuna quota allocated to Atlantic Tunas Purse Seine vessels would also be designated as ''Atlantic,'' subject to the restriction that it may only be used in the Atlantic (by either a Purse Seine vessel or via a lease to a pelagic longline vessel). For a vessel to fish in the Gulf of Mexico, the vessel would be required to have the minimum amount of bluefin tuna quota allocation (0.25 mt) to depart on a trip to fish with pelagic longline gear, but the quota would have to be Gulf of Mexico quota. In contrast, for a vessel to fish in the Atlantic, it would be required to have a lower minimum amount of quota allocation (0.125 mt), which could be either Gulf of Mexico or Atlantic quota.

If a vessel had fishing history in both the Gulf of Mexico and Atlantic, it may receive quota shares of both the Gulf of Mexico and Atlantic, depending upon the amount of quota share and the proportion of fishing history in the two areas. A relatively small percentage of sets in one area would not be reflected in the quota share. If a vessel would be allocated less than a minimum share amount for a particular area (i.e., less than 0.125 mt for the Atlantic or less than 0.25 mt for the Gulf of Mexico), the allocation would instead be designated as the other of the two designations. Owners of vessels with an active Atlantic Tunas Longline category permit will be sent registered letters informing them of their proposed bluefin quota share, in conjunction with this proposed rule.

Appeals of Initial Allocation of Quota Shares

NMFS is proposing procedural regulations at 15 CFR part 906 that would designate the NMFS National Appeals Office (NAO) as adjudicator of appeals arising under MSA section 303A (see 77 FR 33980; June 8, 2012). This action proposes that appeals of initial IBQ share determinations would be handled pursuant to that process when finalized. NMFS is currently developing the final NAO appeals regulations. Specifically, the items subject to appeal would be: (1) Initial eligibility for quota shares based on ownership of an active vessel with a valid Atlantic Tunas Longline permit combined with the required shark and swordfish limited access permits; (2) the accuracy of NMFS records regarding that vessel's amount of designated species landings and/or bluefin tuna interactions; and (3) correct assignment of designated species landings and bluefin tuna interactions to the vessel owner/permit holder. NMFS permit records would be the sole basis for determining permit transfers. As discussed above, quota share formula is based upon historical data associated with a permitted vessel. Because vessels may have changed ownership or transferred permits during the 2006 through 2011 period, the current owner of a permitted vessel may also appeal on the basis of changes in vessel ownership or permit transfers. Appeals based on landings data would be based on NMFS logbook data, weighout slips, and other relevant information. Appeals based on bluefin tuna interactions may be based on logbook, observer, or other NMFS data. Appeals based on hardship factors would not be considered. In order to appeal, the vessel owner would be required to submit a petition of appeal, including information and documentation required by the final NAO regulations.

Quota Leasing

This measure would allow Longline and Purse Seine category vessels to lease quota allocation to or from other vessels in these categories, so that allocations will become better aligned with catch (i.e., vessels that catch bluefin tuna may be able to obtain quota from those that do not interact with bluefin tuna, or have not used their full allocation of bluefin tuna). Leasing of quota allocations would be allowed among all Longline category vessels with valid limited access permits, regardless of whether they have been allocated their own quota share. If a vessel catches bluefin tuna using quota allocation that it has leased from another vessel, the fishing history associated with the catch of bluefin tuna would be associated with the vessel that catches the bluefin tuna (the lessee, not the lessor vessel). In other words, the lessee (vessel catching the fish) gets the 'credit' for the landings and dead discards, and not the lessor (the vessel that leased the quota allocation to the catching vessel). The future catch of bluefin tuna would not affect the quota shares, but would affect the calculation of the performance metric of each vessel. Sub-leasing of quota would be allowed (i.e., quota leased from vessel A to vessel B, then to vessel C). For a particular calendar year, an individual lease transaction would be valid from the time of the lease until December 31.

There would be no limit on the amount of quota allocation an individual vessel (Longline or Purse Seine) could lease annually, except for the sum of the Longline and Purse Seine categories' collective allocations. This would provide flexibility for vessels to purchase quota in a manner that could accommodate various levels of unintended catch of bluefin tuna, and enable the development of an unrestricted quota market. There would likely be a cost for vessels affected by a restriction on leasing, yet the benefits of such a restriction are unknown, given that the leasing program does not currently exist. The risk associated with no limitation on the quota market is minimal due to the temporary nature of IBQ leases, and the fact that leases are voluntary agreements between the lessor and lessee. It is possible that a limit on quota leasing may be deemed necessary in the future to address fishery management objectives. Such a restriction would be developed through future proposed and final rulemaking. Because the duration of a temporary lease would be limited to a single year, the impacts on an unrestricted market for bluefin tuna quota would be limited in duration. Quota shares in the subsequent year would not be affected, and quota allocations would only be affected in the second year if a vessel had caught bluefin in excess of its allocation and was unable to lease additional quota to account for the bluefin (in which case the 'quota debt' must be satisfied in the subsequent year). Information on this unrestricted market could be used to develop future restrictions if necessary.

This proposed rule does not include a measure that would allow the sale of quota shares thus no provisions are needed at this time to address excessive shares. NMFS would consider the development of measures to allow the sale of quota shares, as well as measures to prevent excessive consolidation in the future, after NMFS and fishery participants have multiple years of experience with the IBQ program. This approach would reduce risks for vessel owners during the initial stages of the IBQ program, when the market for bluefin tuna quota shares would be new and uncertain. During the first years of the IBQ program, price volatility may be reduced, as could undesirable outcomes of selling or buying quota shares at the ''wrong'' time or price. NMFS intends to consider a program to allow the sale of quota share in the future because it would provide a means for vessel owners to plan their business and manage their quota according to a longer time scale than a single year, in a manner that would be informed by

several years of the temporary leasing market. NMFS may wait until a formal evaluation of the IBQ program is completed before developing this alternative.

Quota allocation leases would be executed by the eligible vessel owners, or their representatives, through the internet and a NMFS database. For example, the two vessel owners involved in a quota allocation lease could log in to a password protected web-based computer system (i.e., a NMFS database) and execute the lease. Owner-performed leases would provide the quickest execution of leases because any eligibility criteria would be verified automatically based on information loaded into that system, and would not involve the submission or review of a paper application, or any lag time associated with NMFS staff being directly involved in the lease approval process. NMFS would develop the administrative system to implement the leasing of bluefin quota allocation.

Elimination of Target Catch Requirement

This proposed measure would, if the IBQ system is adopted, eliminate the current target catch requirements for pelagic longline vessels, which restricts the number of incidentally caught bluefin tuna a pelagic longline vessel may retain in relation to the amount of target species retained and sold. In the context of an IBQ system, the current target catch requirement would no longer be necessary. This proposed measure would reduce bluefin tuna dead discards and optimize fishing opportunity for target species.

Specifically, this measure would eliminate the regulation that one large medium or giant bluefin tuna (73″ or greater) per vessel per trip may be landed, provided that at least 2,000 lb of species other than bluefin tuna are legally caught, retained, and offloaded from the same trip and are recorded on the dealer weighout slip as sold; two large medium or giant bluefin tuna may be landed incidentally to at least 6,000 lb of species other than bluefin tuna; and three large medium or giant bluefin tuna may be landed incidentally to at least 30,000 lb of species other than bluefin tuna.

Mandatory Retention of Legal-Sized Bluefin Tuna

This proposed measure would, if the IBQ system is adopted, require pelagic longline vessels to retain all legal-sized commercial bluefin tuna that are dead at haul-back, and is intended to function in conjunction with the IBQ system and elimination of the target catch requirements. The IBQ ensures that vessels will not target bluefin due to the scarcity of IBQ and costs associated with leasing additional IBQ or the inability to use PLL once IBQ is attained. Requiring the retention of all legal-sized commercial (i.e., 73″ or greater) dead bluefin tuna is intended to reduce dead discards and make it illegal to discard a legal-sized commercial bluefin tuna, if dead at haul-back. Because these fish would be required to be retained, regulatory discards and the waste of fish would be decreased, and it would be more likely that such fish are accurately accounted for and have a positive use (e.g., marketed, used for scientific information, etc.).

Formal IBQ Program Evaluation

NMFS proposes to formally evaluate the success and performance of the IBQ program in achieving its objectives, after three years of operation and provide the HMS Advisory Panel with a publicly-available written document with its findings. NMFS would utilize its standardized economic performance indicators, developed by its Office of Science and Technology, as part of its review. For example, the standardized economic performance indicators would include catch and landings, effort, revenues, quota accumulation, and cost recovery. Other indicators would include the number of and distribution of bluefin tuna interactions.

Cost Recovery

Section 303A(e) of the Magnuson-Stevens Act provides NMFS with the authority for cost recovery for the costs of management, data collection and analysis, and enforcement activities for a LAPP. Such fees may not exceed 3 percent of the ex-vessel value of fish harvested under the LAPP. As explained above, NMFS proposes not to implement cost recovery until after the IBQ program evaluation (after 3 years). NMFS anticipates that the incremental costs of administering the IBQ program are likely to be low. However, the cost of administering a cost recovery program may be high relative to the amount of money recovered, because some active vessels have very high fishing activity whereas others have relatively low activity. A cost recovery program based on a bycatch species may have inherent limitations or challenges, given the underlying objective of reducing the catch of the bycatch species. Immediate implementation of a cost recovery program, without obtaining further information about the operation of the fishery with IBQs, would be very difficult and would increase costs and uncertainty for fishing vessels during a time period when the fishery would be bearing other new costs and sources of uncertainty. For the above reasons, NMFS proposes not implementing cost recovery until after it conducts the program evaluation.

5. Reporting Measures

Vessel Monitoring System (VMS) Requirements

This alternative would require vessels with an Atlantic Tunas Purse Seine category permit to have an Enhanced Mobile Transmitting Unit (E–MTU) VMS unit installed by a qualified marine electrician in order to remain eligible for the Purse Seine category permit. This alternative would require vessels that intend to fish for Atlantic tunas with purse seine gear or pelagic longline gear to declare through E–MTU VMS their intent to fish with such gear, prior to departing on trip (''hail out''). This alternative would require vessels fishing with pelagic longline gear to report the number of hooks and sets within 12 hours of completion of all pelagic longline haul-backs; and for pelagic longline sets with bluefin tuna interactions to report the length of all bluefin tuna retained or discarded within 12 hours of completion of the pelagic longline haul-back (i.e., reporting of zero bluefin on a set is not required). This alternative would require vessels fishing for Atlantic tunas with Purse Seine gear to report, for each day on which Purse Seine gear is set, the number of sets within 12 hours of the last set; and for Purse Seine sets with bluefin tuna interactions to report the length of all bluefin discarded dead or retained within 12 hours of completion of the set (i.e., reporting of zero bluefin on a set is not required). This measure would support the inseason monitoring of the purse seine and pelagic longline fisheries. Current information on the catch of the purse seine fishery is limited to dealer data on sold fish, and does not include information on discarded bluefin tuna or other species caught and/or discarded, although periodic observer coverage supports the conclusion that catches and discards of bluefin tuna or other species is low. The IBQ program requires the ability to track quota shares and quota allocations, reconcile landings and dead discards against individual quota allocations, and then balance the amounts against the total allowable quota. Although the current pelagic longline reporting requirements and the observer program provide data on pelagic longline landings and discards, and enables inseason monitoring and management based

upon landings, the reporting requirements and monitoring requirements were not designed to support inseason monitoring of dead discards. More timely information on dead discards would be necessary in order to monitor and enforce the proposed IBQ system. Trip declaration requirements would enhance enforcement and quota monitoring.

Electronic Monitoring

This measure would require all vessels issued an Atlantic Tunas Longline permit fishing with pelagic longline gear, to install and maintain video cameras and associated data recording and monitoring equipment in order to record all longline catch and relevant data regarding pelagic longline gear retrieval and deployment. The objective of this alternative is for NMFS to use the recorded data to verify the accuracy of counts and identification of bluefin tuna reported by the vessel owner/operator, as well as observers. Secondly, electronic monitoring would enable the collection of video image and fishing effort data that may be used in conjunction with other sources of information to estimate bluefin tuna dead discards. Lastly, electronic monitoring would augment the ability of an observer to fulfill their duties by providing a record of catch during the time periods the observer may be unable to observe the catch directly.

Specifically, this alternative would require the installation of equipment that may include one to four video cameras, a recording device, video monitor, hydraulic pressure transducer, winch rotation sensor, system control box, or other equipment needed to achieve the objectives. Vessel owner/operators would be required to install and maintain the required equipment, and allow inspection of the equipment by NMFS. There would be a requirement to install the camera(s) to provide a view of the area where the longline gear is retrieved and catch is removed from the hook (prior to placing in the hold or discarding boatside) and a requirement that such a system be connected to the mechanical hauling device so that recording is initiated by gear retrieval. The vessel owner/operator would be required to submit the data to NMFS or a third party, and to store and make the data available to NMFS for at least 120 days from the conclusion of the fishing trip on which the data was recorded. The vessel operator would be responsible for ensuring that all bluefin tuna are handled in a manner that enables the electronic monitoring system to record such fish, and must identify a crew person or employee responsible for ensuring that all handling, retention, and sorting of bluefin tuna occurs in accordance with the regulations.

The requirements associated with this alternative would be phased in over a year due to the complexity, costs, and logistical constraints associated with the implementation of an electronic monitoring program. NMFS would communicate instructional information in writing, via permit holder letters, to the vessel owners during all phases of the program to provide direction and assistance to vessel owners, and facilitate the provision of technical assistance.

NMFS Extrapolation of Observer Data

NMFS solicits public comment on its approach to use of extrapolated observer data for management purposes. Specifically, in order to conduct inseason quota monitoring and to estimate total bluefin tuna dead discards and landings, NMFS may extrapolate observer-generated data (in-season) regarding bluefin tuna discards (rate, number, location, etc.) by pelagic longline vessels, based on reasonable statistical methods and available observer data. NMFS could then use this observer information in conjunction with or in place of vessel-generated estimates of bluefin tuna discards, or electronic monitoring data, in order to develop inseason estimates of total bluefin tuna landings and dead discards. This approach would address the potential for uncertain dead discard data from the pelagic longline fleet that may result from challenges in the implementation of new regulations, technical problems relating to the reporting and monitoring system, or time lags in the availability of data.

Automated Catch Reporting

This proposed measure would require Atlantic Tunas General, Harpoon, and HMS Charter/Headboat categories to report the length of all bluefin tuna retained or dead discards through an automated catch reporting system (for example, via either a web-based, or an interactive voice response telephone system) within 24 hours of the landings or end of each trip. Specifically, vessels would be required to report the number of bluefin tuna retained, and the number of bluefin tuna discarded dead, according to instructions that would be provided by NMFS. NMFS currently operates a similar automated landings reporting system (ALRS) for recreational bluefin tuna catch in the HMS Angling and Charter/Headboat category (when fishing recreationally). Although information on commercial bluefin tuna landings as currently reported by dealers is sufficient for NMFS to monitor the landings (which count toward the relevant sub-quotas), NMFS does not obtain information on bluefin tuna that may be discarded as a result of the capture of fish that are released (either because the fish is less than the required minimum size or for another reason) from all categories. Such discard information would enhance NMFS's ability to more fully and accurately account for all sources of fishing mortality, consistent with ICCAT recommendations. Automated catch information from the diverse participants in the bluefin tuna and HMS fisheries would enhance management of all HMS fisheries. Automated catch reporting would enable NMFS to obtain information about the magnitude of discards. NMFS would be able to share such information, in aggregate, with the bluefin tuna fisheries participants with the objective of reducing regulatory discards. Information on discarding would enable NMFS to consider a wider range of information when making decisions regarding quota management and bluefin tuna management in general. Verification of data through observer coverage of these fisheries would augment the value of this data.

General Category Flexibility for Quota Adjustment

This proposed measure would allow NMFS to proactively transfer General category quota from one or more of the time-periods that follow the January time-period to the January or other preceding sub-quota time periods, either during annual specifications or through inseason action. In other words, under this alternative, NMFS could transfer subquota from one time period to another time period, earlier in the same calendar year. For example, subquota could be transferred from the June 1 through August 31 time period to the January time period, or from the October 1 through November 30 time period to the September time period.

The objective of this alternative is to optimize opportunities for fishery participants, while retaining the current historical structure of the General category quota system. NMFS would add a new objective called ''quota adjustment'' to the current list of criteria and relevant factors NMFS considers when making inseason or annual quota adjustments.

Harpoon Category NMFS Authority to Adjust Retention Limits

This proposed measure would authorize NMFS to increase or decrease

the daily retention limit of large medium bluefin tuna (greater than 73″ CFL and less than 81″ CFL) within a range from two to four fish. This range is based on the former (i.e., two fish) and current (i.e., four fish) daily retention limit of large medium bluefin tuna for the Harpoon category. Any adjustment would be based upon the current regulatory determination criteria under § 635.27(a)(8) (with any adjustments made through Amendment 7) that apply to inseason bluefin tuna adjustments including: the usefulness of information obtained from catches in the particular category for biological sampling and monitoring of the status of the stock; effects of the adjustment on bluefin tuna rebuilding and overfishing; effects of the adjustment on accomplishing the objectives of the fishery management plan; variations in seasonal distribution, abundance, or migration patterns of bluefin tuna; effects of catch rates in one area precluding vessels in another area from having a reasonable opportunity to harvest a portion of the category's quota; and review of dealer reports, daily landing trends, and the availability of the bluefin tuna on the fishing grounds, as well as any other relevant factors.

The default Harpoon category daily retention limit of large medium bluefin tuna would be two fish per vessel (the large medium bluefin tuna daily retention limit that applied prior to the 2011 regulatory change). The retention limit of giant bluefin tuna would remain unlimited. The objective of this proposed measure is to optimize fishing opportunity for the Harpoon category participants within the available quota. NMFS currently cannot adjust this retention limit via inseason action. In contrast, for the General category, NMFS can increase or decrease the daily retention limit for large medium or giant bluefin tuna within a specified range, via inseason action, following consideration of the regulatory determination criteria. This alternative would enhance NMFS's ability to more precisely manage the landing rate of large medium bluefin tuna by the Harpoon category, thereby optimizing opportunities while preventing landings from exceeding the subquota. It would be appropriate that the determination criteria for inseason adjustments would be the same as for the General category because they are both commercial categories, with similar regulatory and fishery conditions.

Angling Category Trophy Subquota Distribution

This proposed measure would allocate a portion of the trophy south subquota specifically for the Gulf of Mexico. The trophy subquota would be divided as follows: 33% to each of the northern area, the southern area outside the Gulf of Mexico, and the Gulf of Mexico. At the current average trophy fish weight, this would allow up to 8 trophy bluefin tuna to be landed annually in each of the three areas. To distinguish bluefin tuna caught in the Gulf of Mexico from those caught in the Atlantic, the Gulf of Mexico region includes all waters of the U.S. EEZ west and north of the boundary stipulated at § 600.105(c), which is essentially west of 83°00′ West longitude but also includes the waters off southwestern Florida and north of the Florida Keys.

The objective of this measure is to provide a reasonable fishing opportunity for recreational vessels in the Atlantic and Gulf of Mexico, reduce discards, and account for incidentally caught bluefin tuna. A separate subquota allocation for the Gulf of Mexico would increase the likelihood that there will be trophy quota available to account for incidental catch of bluefin tuna in that area (while still providing incentives not to target bluefin tuna).

Purse Seine Category Fishing Year Start Date

This proposed measure would change the start date of the Purse Seine category fishery from July 15 to June 1, and provide NMFS the ability to delay the season start date from June 1 to no later than August 15, by publishing a notice in the **Federal Register**. The objective of this measure is to optimize fishing opportunity for Purse Seine category vessels. The opportunity for Purse Seine category vessels to harvest their quota, which consists principally of giant bluefin tuna, may be constrained due to the restriction on the amount of large medium bluefin tuna they may retain. A Purse Seine vessel operator may choose not to fish if bluefin tuna schools are composed of a high proportion of large medium fish in addition to giants in order to avoid sets in which a large portion of the catch would have to be discarded due to fish size. In addition to optimizing fishing opportunity, other considerations with respect to the timing of the start date of the fishery are potential gear conflicts and market considerations.

Rules Regarding Permit Category Changes

This proposed measure would allow a vessel owner to modify the category of an Atlantic Tunas or HMS permit issued for up to 45 days from date of issuance, provided the vessel has not landed bluefin tuna as verified via landings data. The current restriction (10 calendar days) was intended to preclude vessels from fishing in more than one category during a year and to discourage speculative use of fishing permits. However, based on feedback NMFS has received over a number of years from vessel owners affected by the 10 day restriction, NMFS has concluded that limiting the time period during which a vessel may change permit categories to 10 calendar days is overly restrictive, and does not allow the flexibility to resolve the problems of a permit issued by mistake. This proposed measure would achieve a better balance of allowing flexibility for vessel owners, while still preventing fishing in more than one permit category during a fishing year.

Northern Albacore Tuna Quota

This proposed measure would implement the U.S. annual quota of northern albacore tuna recommended by ICCAT and would establish provisions for the accounting of overharvest and underharvest of the quota via annual specifications. Specifically, the codified U.S. northern albacore tuna quota would be adjusted as appropriate for prior year catch (up or down), including delayed adjustment (that would skip a year) or adjustments over several years. Consistent with the ICCAT recommendation, carry-forward of unused quota from one year to the next would be limited to 25 percent of the initial quota. NMFS would adjust and implement the following via regulatory framework adjustments: Actions to implement ICCAT recommendations, as appropriate; allocating and refining domestic allocation of the U.S. quota; establishing retention limits; implementing effort restrictions, etc. Although an FMP amendment is not needed, framework adjustments still go through extensive public and analytical review and must be consistent with the MSA and other applicable law.

Minor Regulatory Changes

Amendment 7 proposes minor regulatory changes (such as minor corrections and clarifications; the removal or modification of obsolete cross-references; and minor changes to definitions and prohibitions) that would improve the administration and enforcement of HMS regulations. Several of these items have been identified by constituents over the past few years or were raised during scoping hearings. The corrections, clarifications, changes in definitions, and modifications to remove obsolete cross-references are consistent with the intent

of previously analyzed and approved management measures. Under § 635.5(c)(1), the relevant internet address would be updated. Under § 635.20(a), the method of determining length of Atlantic tunas currently states that it applies only to swordfish permitted vessels, but it should apply regardless of permit type. Regulations at § 635.21(c)(5)(iii)(B), currently refer to an NED ''closed'' area instead of a ''gear restricted area,'' which needs to be corrected because the reference is not accurate. Under § 635.27(a)(7)(i), the reference to research in this paragraph is too specific. ''Fishery-independent research'' would be changed to ''research'' as Reserve category quota is intended to be made available, as needed, for a broad range of research activities. Under § 635.27(a)(1)(iii), the descriptor ''coastwide'' when referring to the General category fishery, is no longer necessary and would be deleted. Under § 635.71(b)(13), the current prohibition would be corrected to clarify that the relevant amount of bluefin tuna is the ''applicable limit'' instead of ''a'' bluefin tuna. These proposed changes were not analyzed because they would not make substantive changes to the regulations.

Request for Comments

Comments on this proposed rule may be submitted via *http://www.regulations.gov,* mail, or fax. NMFS solicits comments on this proposed rule by October 23, 2013.

Classification

The NMFS Assistant Administrator has determined that the proposed rule is consistent with the 2006 Consolidated HMS FMP, the Magnuson-Stevens Act, ATCA, and other applicable law, subject to further consideration after public comment.

NMFS prepared a draft environmental impact statement that analyzes the impact on the environment of a range of alternatives that would achieve the objectives of Amendment 7, which are described in the background section of the preamble for this action. As further explained in the Background, in this action, NMFS is proposing measures and minimize bycatch to the extent practicable; optimize fishing opportunity and account for dead discards; reduce bluefin tuna dead discards; enhance reporting; and adjust other aspects of the 2006 Consolidated HMS FMP as necessary and appropriate.

This proposed rule has been determined to be not significant for purposes of Executive Order 12866.

An initial regulatory flexibility analysis (IRFA) was prepared, as required by section 603 of the Regulatory Flexibility Act (RFA). The IRFA describes the economic impact this proposed rule, if adopted, would have on small entities. A description of the action, why it is being considered, and the legal basis for this action are contained at the beginning of this section in the preamble and in the **SUMMARY** section of the preamble. A summary of the analysis follows. A copy of the entire analysis is available from NMFS (see **ADDRESSES**).

Description and Estimate of the Number of Small Entities to Which the Proposed Rule Would Apply

This proposed rule is expected to directly affect commercial and for-hire fishing vessels that possess an Atlantic Tunas permit or Atlantic HMS Charter/Headboat permit. In general, the HMS Charter/Headboat category permit holders can be regarded as small businesses, while HMS Angling category permit holders are typically obtained by individuals who are not considered small entities for purposes of the RFA. The Small Business Administration (SBA) has established size criteria for all major industry sectors in the United States, including fish harvesters. Previously, a business involved in fish harvesting was classified as a small business if it is independently owned and operated, is not dominant in its field of operation (including its affiliates), and has combined annual receipts not in excess of $4.0 million (NAICS code 114111, finfish fishing) for all its affiliated operations worldwide. In addition, SBA has defined a small charter/party boat entity (NAICS code 713990, recreational industries) as one with average annual receipts of less than $7.0 million. On June 20, 2013, SBA issued a final rule revising the small business size standards for several industries effective July 22, 2013 (78 Fed.Reg. 37398; June 20, 2013). The rule increased the size standard for Finfish Fishing from $4.0 to 19.0 million, Shellfish Fishing from $4.0 to 5.0 million, and Other Marine Fishing from $4.0 to 7.0 million. Id. at 37400 (Table 1).

NMFS has reviewed the analyses prepared for this action in light of the new size standards. Under the former, lower size standards, all entities subject to this action were considered small entities, thus they all would continue to be considered small under the new standards. NMFS does not believe that the new size standards affect analyses prepared for this action and solicits public comment on the analyses in light of the new size standards. The average annual revenue per active pelagic longline vessel is estimated to be $181,000 based on the 161 active vessels between 2006 and 2011 that produced an estimated $29.2 million in revenue annually. The maximum annual revenue for any pelagic longline vessel during that time period was less than $1.4 million, well below the former SBA size threshold of $4.0 million. Therefore, NMFS considers all Tuna Longline category permit holders to be small entities. NMFS is unaware of any other Atlantic Tunas category permit holders that potentially earn more than $4.0 million in revenue annually. Therefore, NMFS considers all Atlantic Tunas permit holders subject to this rulemaking to be considered small entities. NMFS is also unaware of any charter/headboat businesses that could exceed the SBA thresholds for small entities.

The proposed rule would apply to the 4,361 Atlantic Tunas permit holders based on an analysis of permit holders in October 2012 (NMFS 2012). Of these permit holders, 253 have Longline category permits, 13 have Harpoon category permits, 8 have Trap category permits, 3 have Purse Seine category permits, and 4,084 have General category permits.

The recreational and reporting measures would also impact HMS Angling category and HMS Charter/Headboat category permit holders. In 2012, 4,129 vessel owners obtained HMS Charter/Headboat category permits. It is unknown what portion of these permit holders actively participate in Atlantic HMS fishing or market fishing services for recreational anglers. NMFS has determined that the proposed rule would not likely directly affect any small government jurisdictions.

Description of the Projected Reporting, Record-Keeping, and Other Compliance Requirements of the Proposed Rule, Including an Estimate of the Classes of Small Entities Which Would Be Subject to the Requirements of the Report or Record

Several of the proposed measures would modify existing reporting and record-keeping requirements, and add compliance requirements. NMFS estimates that the number small entities that would be subject to these requirements would include the Longline category (253), Charter/Headboat category (4,129), General category (4,084), Harpoon category (13) and Purse Seine category (3), based on the number of permit holders in commercial bluefin tuna fishing categories in 2012.

The proposed Cape Hatteras Gear Restricted Area with Access, and Access

to Closed Areas with Pelagic Longline Gear measures would require that pelagic longline vessels authorized to fish in the areas also submit daily reports to NMFS via E–MTU VMS summarizing their fishing effort, and bluefin tuna catch and harvest. The additional reporting burden is expected to take 5 minutes per report/day at a cost of $0.12 per report. Pelagic longline vessels granted conditional access to certain currently closed areas would also be required to have an observer onboard for any trips into the closed areas. Such observer coverage would be consistent with the current selection criteria and policies, and would not be an additional compliance burden.

Pelagic longline vessels that are not granted conditional access to the Cape Hatteras Gear Restricted Area could choose to fish in the area with other authorized gear under General category rules, and would be required to declare their intent to fish in this way, hail in and out of port, and report their daily catch of bluefin tuna via E–MTU VMS. This reporting burden is expected to be approximately 5 minutes per report at a cost of $0.12 per report.

Potential appeal requests regarding the performance metrics or quota shares are expected to take approximately 2 hours to compile.

Under the proposed IBQ system, leasing of quota allocation would require vessel owners to execute transfers via an online electronic system supported by NMFS. Participants would be required to have access to computers and the Internet. If a participant does not have current access to computers and the Internet, there would be a one-time cost of approximately $1,500 for computer equipment and a $300 annual cost for Internet access. The record-keeping and reporting burden for vessel owners is expected to be approximately 15 minutes per lease. The electronic system would also require interaction with Federal bluefin tuna dealer permit holders that purchase IBQ bluefin tuna; however, electronic dealer reporting for bluefin tuna purchases was previously analyzed and approved by NMFS in the 2006 Consolidated HMS FMP rulemaking (71 FR 58058, October 2, 2006).

Electronic monitoring (i.e., video cameras, etc.) would require both fixed and variable costs over the service life of each camera installed onboard. The cost of an electronic system bought in 2010, over its five year projected lifespan, is about $3,565 a year. This includes 4% of the purchase price for maintenance costs and a 7% interest rate on the loan to buy a system (National Observer Program, 2013). The variable costs for vessel owners include data retrieval ($45/hour; 2 hr per trip; technician travel ($0.5/mile; 100 miles for each trip); fishing activity interpretation ($47/hour; 0.25 hr/trip); and catch data interpretation ($47/hour; 1.5 hr/trip). The estimated total variable costs would be approximately $225 per trip and the annual fixed costs would be $3,835 for the purchase and installation of the equipment, and six services per year; $45/hour; 1 hr six times per year). The proposed reporting requirements associated with the IBQ program would require pelagic longline vessels to use their E–MTU VMS to submit reports of bluefin tuna catch and harvest and fishing effort. Purse seine vessels would be required to purchase and install E–MTU VMS units, and submit daily reports of catch, and effort as well. This alternative would provide more timely data as required by the IBQ system than the current pelagic longline logbook program and dealer reporting requirements. As noted above, the additional reporting burden for the VMS reports is 5 minutes per report/day and $0.12 per report. The cost of installing E–MTU VMS is $3,300 per vessel and daily position reports cost approximately $1.44 per day.

The proposed mandatory retention of legal-sized bluefin tuna caught by pelagic longline gear, as well as NMFS's closure of the pelagic longline fishery when the quota is reached, would not have any additional reporting associated with them. The proposed elimination of the target catch requirement would represent a decrease in regulatory compliance requirements.

The proposed Formal IBQ Program Evaluation would require NMFS to prepare a report summarizing and evaluating the experiences of the program 3 years after IBQ program implementation.

Several of the proposed measures would enhance reporting of bluefin tuna. Three of these include the VMS requirements and electronic monitoring of the Longline category that were discussed above. The last is the proposed measure to require automated catch reporting for General, Harpoon, and Charter/Headboat permit categories. This would require individuals with those vessel permits to report their dead discards after each trip using an automated system such as a Web site or phone recording system. NMFS estimates that each report will take approximately 5 minutes. Based on previous years' landings, NMFS estimates that the total annual reporting burden will be approximately 607 hours and could affect approximately 8,226 permit holders.

The other proposed measures described above in this preamble would change quota allocations, timeframes for General category subquota allocations, permit category changes, and Purse seine start date, authorized gear types, and other management measures, but would not increase reporting or compliance requirements.

Identification of All Relevant Federal Rules Which May Duplicate, Overlap, or Conflict With the Proposed Rule

Fishermen, dealers, and managers in these fisheries must comply with a number of international agreements, domestic laws, and other FMPs. These include, but are not limited to, the Magnuson-Stevens Act, ATCA, the High Seas Fishing Compliance Act, the Marine Mammal Protection Act, the Endangered Species Act, the National Environmental Policy Act, the Paperwork Reduction Act, and the Coastal Zone Management Act. The proposed rule would not conflict with any relevant regulations, Federal or otherwise.

Description of Any Significant Alternatives to the Proposed Rule That Accomplish the Stated Objectives of the Applicable Statutes and That Minimize Any Significant Economic Impact of the Proposed Rule on Small Entities

One of the requirements of an IRFA is to describe any alternatives to the proposed rule which accomplish the stated objectives and which minimize any significant economic impacts. These impacts are discussed below. Additionally, the Regulatory Flexibility Act (5 U.S.C. 603(c)(1)–(4)) lists four general categories of ''significant'' alternatives that would assist an agency in the development of significant alternatives. These categories of alternatives are: ''Establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities''; ''Clarification, consolidation, or simplification of compliance and reporting requirements under the rule for such small entities''; ''Use of performance rather than design standards''; and, ''Exemptions from coverage of the rule for small entities.''

In order to meet the objectives of this proposed rule, consistent with the Magnuson-Stevens Act and the Endangered Species Act, NMFS cannot exempt small entities or change the reporting requirements only for small entities because all the entities affected are considered small entities. Thus, there are no alternatives discussed that fall under the first and fourth categories described above. Under the third

category, ''use of performance rather than design standards,'' NMFS considers the proposed ''Cape Hatteras Gear Restricted Area with Access based on Performance,'' the IBQ bluefin tuna quota share formula, and the ''Limited Conditional Access to Closed Areas using Pelagic Longline Gear Based on Performance Criteria'' to all be alternatives that use performance standards. As described below, NMFS analyzed several different alternatives in the DEIS for this proposed rulemaking and provides the rationale for identifying the preferred alternatives (proposed measures) to achieve the desired objective.

In this rulemaking, NMFS considered five different categories of issues to address bluefin tuna management measures where each issue had its own range of alternatives that would meet the objectives of the Magnuson-Stevens Act and the 2006 Consolidated HMS FMP. The first category, allocation alternatives, covers four main alternatives that address various quota reallocation strategies. The second category of alternatives, area based alternatives, explores various gear restricted areas, gear measures, and access to closed areas using pelagic longline gear. The third category of alternatives, bluefin tuna quota controls, covers four main alternatives, which include IBQs, regional and group quotas, and closure of the pelagic longline fishery. The fourth category of alternatives, enhanced reporting measures, covers six main alternatives, which include VMS requirements, electronic monitoring of the Longline category, automated catch reporting, deployment of observers, logbook requirements, and expanding the scope of the Large Pelagics Survey. The fifth category of alternatives, other measures, covers seven main alternatives that address other Tunas permit categories besides Longline and other tuna quotas. The expected economic impacts of the different alternatives considered and analyzed are discussed below.

The potential impacts that these alternatives may have on small entities have been analyzed and are discussed in the following sections. The economic impacts that would occur under these preferred alternatives were compared with the other alternatives to determine if economic impacts to small entities could be minimized while still accomplishing the stated objectives of this rule.

The allocation alternatives would modify the current base allocations for bluefin tuna quota categories (i.e., percentages of the U.S. quota), either by codifying them or adjusting them on an annual basis. The No Action alternative would make no changes to the current percentages that each quota category is allocated (General: 47.1 percent; Harpoon: 3.9 percent; Purse Seine: 18.6 percent; Longline: 8.1 percent; Trap: 0.1 percent; Angling: 19.7 percent; Reserve: 2.5 percent). Dead discards would continue to be accounted for separately from the quota allocations through the annual specification process.

In the short-term, minor to moderate direct adverse economic impacts are likely to be limited to the Longline category due to quota shortages. In 2012, NMFS projected that the Longline category was likely to fully harvest their allocated quota before the end of the fishing year, and closed the southern area on May 29, 2012 (77 FR 31546) and the northern area on June 30, 2012 (77 FR 38011, June 26, 2012). In 2013, the Longline category northern and southern areas were closed on June 25, 2013 (78 FR 36685; June 19, 2013) because the adjusted quota had been reached. In the long-term, there could be additional minor to moderate direct adverse economic impacts if other quota categories are closed early in the fishing year.

The codified reallocation alternatives would reallocate quota among categories and result in increased bluefin tuna quota for the Longline category, and would therefore alleviate some of the current challenges associated with the domestic quota system.

The proposed reallocation of 62.5 mt is based on the historical dead discard allowance and would result in 83.56% increase in the Longline category quota and a decrease of a bit over 7% for the following categories: General, Harpoon, Purse Seine, Angling, and Reserve. This measure would increase the potential revenue from bluefin tuna for the Longline category by approximately $11,263 per permit holder per year, if all of the quota were landed (and not used to account for dead discards). The General category would face a potential reduction in the maximum revenue from bluefin tuna of approximately $896 per permit holder per year. The Harpoon category would face a potential reduction in the maximum revenue from bluefin tuna of approximately $2,355 per permit holder per year. The Purse Seine category could face a potential reduction in the maximum revenue from bluefin tuna of approximately $105,275 per permit holder per year. Although on its fact, the magnitude of revenue loss appears to be high for the Purse Seine category, this alternative would likely have minor adverse economic impacts on Purse Seine fishermen because landings in this category been very low for a number of recent years.

Reallocating the quota allocations for all categories based on recent catch data would result in an 83.56% increase in the Longline category quota and an increase in Angling category of 47.1%. However, this reallocation alternative would result in a decrease in the quotas of the General, Harpoon, Purse Seine, Trap, and Reserve categories of 10.85%, 15.56%, 49.01%, 55.56%, and 48.05%, respectively. This alternative would increase the potential revenue from bluefin tuna for the Longline category by approximately $11,299 per permit holder per year. The General category could face a potential reduction in the maximum revenue from bluefin tuna of approximately $1,321 per permit holder per year. The Harpoon category could face a potential reduction in the maximum revenue from bluefin tuna of approximately $4,886 per permit holder per year. The Purse Seine category could face a potential reduction in the maximum revenue from bluefin tuna of approximately $697,965 per permit holder per year.

The alternative that would reallocate two-fifths of the Purse Seine category to the Longline category and would result in a 91.84% increase in the Longline category quota and a 39.99% decrease in the Purse Seine quota. The reallocation of two-fifths of the Purse Seine category to the Longline category would increase the potential revenue from bluefin tuna for the Longline category by approximately $12,380 per permit holder per year. The Purse Seine category could face a potential reduction in the maximum revenue from bluefin tuna of an equivalent $569,480 per permit holder per year. The other bluefin tuna quota categories would not be impacted by this alternative.

This rule would reallocate the Purse Seine category bluefin tuna quota that is projected to be unused (based on the previous year's landings and dead discards), from the Purse Seine category to other quota categories, including the Reserve category, on an annual basis. In recent years, little of the Purse Seine category quota has been landed. If that continues into the future, under this proposed measure, the Purse Seine quota could be reduced by up to a maximum of 75 percent. The 128.8 mt associated with that reduction would reduce the maximum revenue from bluefin tuna that the purse seine vessel could land by $700,000 annually. However, given the recent bluefin tuna landings history of the purse seine fleet, it is unlikely that future bluefin tuna landings would be constrained

substantially by this reduction and allocations would be re-evaluated on an annual basis. Therefore, the proposed annual reallocation measure would likely only result in minor direct adverse short-term economic impacts to the Purse Seine category. Other categories would benefit from the potential of increased revenue, and this alternative may provide a better business planning environment for NMFS and fishermen by alleviating the large reservoir of unused Purse Seine quota and distributing it prior to the start of the fishing and management season.

The economic impacts of the alternative, which would allocate annual quota to the Purse Seine category commensurate with the number of permitted Purse Seine vessels would be similar to those under proposed annual reallocation alternative. It also would likely only result in minor direct adverse short-term economic impacts resulting from the loss of potential revenue if current bluefin tuna fishing levels remain the same.

Under the No Action alternative, there would be no changes to the allocation to the Reserve category or the determination criteria that are considered prior to making any adjustments to/from this category. This alternative would not impact small entities. The proposed measure would increase the amount of quota that may be put into the Reserve category and increase the potential uses of Reserve category quota. Specifically, it would potentially increase the Reserve category quota beyond the current baseline allocation of 2.5 percent and broaden the determination criteria considered in making adjustments to/from the Reserve category. This proposed measure would result in moderate beneficial economic impacts if unused quota from a previous year could be reallocated to the Reserve category to potentially offset any overharvests in another category, consistent with ICCAT recommendations on carry-forward of unharvested quota.

NMFS considered a range of gear restricted area alternatives from maintaining existing pelagic longline closures (the no action alternative) to a year-round gear restricted area of the entire Gulf of Mexico EEZ (west of 82° longitude) in order to reduce interactions with bluefin tuna. The No Action Alternative would result in the status quo regarding gear restricted areas. Although the current pelagic longline closed areas would remain effective, the data indicate that large numbers of interactions of pelagic longline gear with bluefin tuna occur in consistent areas during predictable time periods, which are outside of the current closed areas. The No Action alternative would not reduce dead discards. The magnitude of the discards in the pelagic longline fishery is more likely to stay the same or increase under the No Action alternative, without implementation of a new gear restricted area. This could result in moderate long-term adverse economic impacts when the Longline category exceeds its quota earlier in the fishing year because of dead discards and is required to close.

The Cape Hatteras Gear Restricted Area alternative would define a modified rectangular area in the Atlantic and would prohibit the use of pelagic longline gear during a 5-month period from December through April. The specific time and area of this gear restricted area alternative would have moderate short and long-term direct adverse economic impacts on 43 vessels that have historically fished in the Cape Hatteras Gear Restricted Area during the months of December through April. The average annual revenue per vessel made in the gear restricted area is approximately $27,400 during the restricted months assuming that fishing effort does not move to other areas. However, it is likely that some of the vessels that would be impacted by this gear restricted area would be able to redistribute their effort to other fishing areas. NMFS estimated that if a vessel historically made less than 40% of their sets in the gear restricted area, it would likely redistribute all of its effort. If a vessel made more than 40%, but less than 75% of its sets in the gear restricted area, it would likely redistribute 50% of its effort impacted by the gear restricted area to other areas. Finally, if a vessel made more than 75% of its sets solely within the gear restricted area, NMFS assumed it would not likely shift its effort to other areas. Based on these redistribution assumptions, the net impact of the Cape Hatteras Gear Restricted Area on fishing revenues after redistribution of effort is estimated to be $18,000 per year.

In contrast, the proposed measure (Cape Hatteras Gear Restricted Area with Access) would restrict fishing in the same area off Cape Hatteras, NC as just described, but would also define criteria for access by HMS permitted vessels fishing with pelagic longline gear during the 5-month period from December through April. Vessels that are determined by NMFS to have relatively low rate of interactions with bluefin tuna based on past performance, and that are compliant with reporting and monitoring requirements, would be allowed to fish in the area using pelagic longline gear. Vessels that have demonstrated an inability to avoid bluefin tuna would not be allowed to fish with pelagic longline gear in this area; or if a vessel can avoid bluefin tuna, but has poor compliance with logbook reporting and Pelagic Observer Program observer requirements, it would not be allowed to fish with pelagic longline gear in this area, from December through April. Individual vessel data would be evaluated annually for the purpose of determining access, in order to provide future opportunities and accommodate changes in fishing behavior, both positively and negatively, based on performance. Based on the proposed performance criteria, NMFS determined that, of 161 active vessels in the entire pelagic longline fleet, 43 vessels fished in the Cape Hatteras Gear Restricted Area or buffer region. Of these 43 active vessels, 18 vessels that fished in the Cape Hatteras Gear Restricted Area or buffer region did not meet the criteria for access based on their inability to avoid bluefin tuna, and/or compliance with POP observer and logbook reporting requirements. The average annual revenue made in the gear restricted area by these 18 vessels is approximately $23,000 per vessel during the restricted months. However, it is likely that some of the vessels that would be impacted by this gear restricted area would be able to redistribute their effort to other fishing areas. The net impact of this proposed measure on fishing revenues after redistribution of effort is estimated to be $16,000 per vessel per year for those 18 vessels.

The proposed measure to allow vessels with an Atlantic Tunas Longline permit to fish under the rules/regulations applicable to the General would result in short-term, direct, minor, beneficial economic impacts for Longline category fishermen that otherwise would not be able to fish for bluefin tuna in the Cape Hatteras Gear Restricted Area. It would result in short-term, direct, minor, adverse economic impacts for General category participants to the extent that any Longline category vessel landings of bluefin tuna under General category rules results in the available subquota being met earlier than it would otherwise. A loss or gain of one fish is approximately $3,500. If a Longline category vessel chooses to fish with General category gear in the Cape Hatteras Gear Restricted Area versus outside the area with pelagic longline gear, the ability to land and sell bigeye, albacore, yellowfin, and skipjack tunas

from that area would result in short-term, direct, minor, beneficial economic impacts, although substantially less so than continuing to use longline gear, which accounts for a much larger proportion of catch of bigeye, albacore, and yellowfin tuna than does handgear. Other proposed measures, such as Annual reallocation from the Purse Seine category or the measure that would provide additional flexibility for General category quota adjustment, may reduce adverse economic impacts for General category participants.

The Gulf of Mexico EEZ Pelagic Longline Gear Restricted Area alternative would prohibit the use of pelagic longline gears in the Gulf of Mexico (GOM) for 3 months each year. This alternative would have moderate short and long-term direct adverse economic impacts on 66 vessels that have historically fished in the Gulf of Mexico EEZ during the months of March through May. The average annual revenue from fishing sets made in the gear restricted area is approximately $22,000 per vessel during the closure months. Based on historical fishing patterns of vessels that fish in the Gulf of Mexico, it is unlikely that effort would be redistributed into areas outside of this region.

The proposed Small Gulf of Mexico Gear Restricted Area would define a rectangular area in the Gulf of Mexico and prohibit the use of pelagic longline gear during the 2-month period from April through May. NMFS designed the Small Gulf of Mexico Gear Restricted Area to maximize the reductions in bluefin tuna interactions while minimizing the area where pelagic longline gear use is restricted. This alternative is expected to have moderate short and long-term direct adverse economic impacts on 34 vessels that have historically fished in the Small Gulf of Mexico Gear Restricted Area during the months of April and May. The average annual revenue from fishing sets made in the gear restricted area is approximately $7,000 per vessel during the restricted months. However, it is likely that some of the vessels that would be impacted by this gear restricted area would be able to redistribute their effort to other fishing areas within the Gulf of Mexico. The net impact of the Small Gulf of Mexico Gear Restricted Area on fishing revenues after redistribution of effort is estimated to be $2,700 per vessel per year.

The alternative, which would prohibit the use of pelagic longlines anywhere in the Gulf of Mexico, year-round, would have moderate short and long-term direct adverse economic impacts on 69 vessels that have historically fished in the Gulf of Mexico EEZ. The average annual revenue from fishing in the gear restricted area is approximately $98,000 per vessel.

The No Action alternative that would maintain the current regulatory situation in which HMS permitted vessels that possess longline gear, inclusive of both pelagic longline and bottom longline, are not allowed to enter the existing longline closed areas, even for purposes of transiting the area, would also apply to the proposed Gear Restricted Area areas. As there are a number of time/area closures for vessels possessing pelagic and bottom longline gear and the current regulations do not provide longline vessels the ability to stow their gear and transit the areas, this alternative would result in direct minor adverse economic impacts by potentially requiring vessels to use more fuel and time in taking indirect routes to and from the fishing grounds. This restriction has also raised safety-at-sea concerns due to the increased and indirect transit times.

The proposed measure would allow HMS vessels that possess bottom or pelagic longline gear on board to transit the closed areas and the proposed Gear Restricted Areas, if they remove and stow the gangions, hooks, and buoys from the mainline and drum. The hooks could not be baited. Allowing pelagic and bottom longline vessels to transit closed and gear restricted areas after removing and stowing gear would result in direct short- and long-term beneficial economic impacts by potentially reducing fuel costs and time at sea for vessels that need to transit the closed or restricted areas. Allowing transit through these areas could also potentially improve safety at sea by allowing more direct transit routes and reducing transit time, particularly during inclement weather.

This rule would make no change to current authorized gear requirements (with respect to the use of buoy gear and associated restrictions on possession of bigeye, albacore, yellowfin, and skipjack tunas (BAYS) and bluefin tuna) applicable to those vessels with an Atlantic Tunas Longline category permit and either a Swordfish Directed or Swordfish Incidental permit. Currently, vessels with an Atlantic Tunas Longline category permit must also have both a Swordfish Directed or Incidental permit, and a Shark Directed or Incidental permit. There are no economic impacts associated with this ''no action'' alternative.

In contrast, a gear alternative analyzed, but not being proposed, would authorize vessels with a Swordfish Incidental permit to fish with buoy gear, except vessels fishing in the East Florida Coast Pelagic Longline Closed Area. Under this alternative, vessels would still be limited to 35 buoys. The rationale for this alternative is to provide increased flexibility and encouragement for pelagic longline vessels to utilize gears other than pelagic longline to maintain and enhance fishing opportunities. This would result in short- and long-term direct beneficial economic impacts by providing greater flexibility in the gear type that can be used and also by reducing the need to acquire a different permit to use buoy gear.

Another gear alternative analyzed, but not being proposed, would allow vessels with an Atlantic Tunas Longline category permit and the Swordfish Directed or Incidental permit to retain BAYS and bluefin tuna when fishing with buoy gear. The rationale for this alternative is the same as for the above: to provide increased flexibility and encouragement for pelagic longline vessels to utilize gears other than pelagic longline to maintain and enhance fishing opportunities in the context of new restrictions that may be implemented by Amendment 7. This would result in short- and long-term direct beneficial economic impacts by increasing the potential revenue opportunities by allowing additional species to be landed when using buoy gear, reducing costs associated with discarding, and reducing the costs associated with the potential need to acquire different permits while fishing with buoy gear. This alternative would have no effect on vessels with a Swordfish Incidental permit, unless the alternative that would allow vessels with a Swordfish Incidental permit to fish with buoy gear were adopted. Without the alternative for Swordfish Incidental permit holders, this alternative would provide additional flexibility for vessels with a Swordfish Directed permit and an Atlantic Tunas Longline permit.

The proposed alternative that would allow restricted and conditional access into certain closed areas would result in potential for increased revenue. The scope of the alternative and its effects would depend upon the level of observer coverage. Currently, eight percent of fishing effort is covered and funded wholly by NMFS. Due to the limits on the level of observers, observer coverage would serve as the principal constraint to the amount of access. There would be minor short- and long-term direct beneficial economic and social impacts associated with the added option for vessels to potentially fish in these areas, which could

potentially increase landings revenues and decrease fishing costs by providing access to closer and/or more productive fishing areas.

The performance criteria associated with the proposed measure may lead to beneficial economic incentives for fishery participants to better comply with reporting and monitoring requirements and reduce bluefin tuna interaction rates. The maximum number of potential observed trips into the closed areas was estimated based on historical rates of observer coverage (per quarter) in various statistical areas, and the fact that observer coverage would be a condition of a trip into a closed area. NMFS estimated the maximum number of trips into the pelagic longline closed areas would be 20 trips into the East Florida Coast closed area at an average revenue of $17,575 per trip, 80 trips into the DeSoto Canyons at an average revenue of $17,692 per trip, two trips into the Northeast closure at an average revenue of $40,726 per trip, and five trips into the Charleston Bump at an average revenue of $17,575 per trip. It is import to note that these revenue estimates are an overestimate, with a large amount of uncertainty. The estimates are high because it is very unlikely that all observed trips in a particular statistical area would fish in a closed area. The estimates are uncertain because the average revenue per trip data is from locations outside the closed areas, and may not represent the potential revenue from inside the closed areas.

The No Action alternative would maintain the current regulations that do not allow vessels to enter a closed area with pelagic longline gear during the time of the closure, unless issued an Exempted Fishing Permit. It would not result in any further costs to small entities.

The proposed measure that would implement IBQs for vessels permitted in the Atlantic tunas Longline category (provided they also hold necessary limited access swordfish and shark permits) would result in prohibiting the use of pelagic longline gear when the vessel's annual pelagic longline IBQ has been caught.

NMFS considered two alternatives for vessel eligibility to receive bluefin tuna quota shares. The first alternative considered any permitted Atlantic Tunas Longline category vessel as eligible to receive an initial allocation of IBQ shares. Based on the most recent number of Atlantic Tuna longline limited access permit holders, NMFS estimates that 253 vessels would be eligible to receive IBQs under this alternative. While this alternative might be more inclusive of all members of the fishery, it would reduce the amount of IBQs allocated to each vessel. There would also likely be negative short-term and potentially long-term direct adverse economic impacts associated with reduced initial allocation of IBQs to the most active participants in the fishery. Their initial allocations would likely be insufficient to be able to maintain their current levels of fishing activity and they may not be able to find IBQs to lease or have sufficient capital to lease a sufficient amount of IBQs.

The proposed measure would consider only active permitted Atlantic Tunas longline vessels as eligible to receive an initial share of bluefin tuna quota. Based on HMS Logbook records from 2006–2011, there were 161 active pelagic longline vessels during that period, with active defined as having reported in the HMS Logbook successfully setting pelagic longline gear at least once between 2006 and 2011. Allocation of quota shares to a smaller number of vessels may reduce the likelihood that a permitted vessel without quota shares would fish and increase the likelihood that available quota would be sufficient for active vessels. The drawback to this alternative is that some inactive vessels may have been planning to be active in the future, invested in preparing to become active in the fishery, but either became active after the period of eligibility or had not yet completed preparations for entering the fishery.

In addition to determining vessels eligible to receive IBQs, NMFS considered four alternatives for how IBQs should be initially allocated to eligible vessel owners. One alternative analyzed the initial allocation of IBQs based on an equal share of the quota to eligible vessels. To estimate the potential landings each vessel could make given its initial IBQ under this alternative, NMFS analyzed the ratio of bluefin tuna landings and dead discards to designated species weight. These estimated potential landings were then compared to average annual historical landings to estimate the reduction in designated species landings. Under the 74.8 mt Longline category quota scenario, NMFS estimates that there could be a reduction of 4.3 million pounds of designated species landings per year if an IBQ allocation based on designated species landings is used and no trading of IBQs occurs. This would be a reduction of annual landings of approximately 51 percent and result in a reduction in annual revenues of approximately $110,000 per vessel. Under the 137 mt Longline category quota scenario, NMFS estimates that there could be a reduction of 2.4 million pounds of designated species landing per year if an IBQ allocation based on designated species landings is used and no trading of IBQs occurs. This would be a reduction of annual landings of approximately 24 percent and result in a reduction in annual revenues of approximately $51,000 per vessel. Under the 216.7 mt Longline category quota scenario, NMFS estimates that there could be a reduction of 1.2 million pounds of designated species landing per year if an IBQ allocation based on designated species landings is used and no trading of IBQs occurs. This would be a reduction of annual landings of approximately 14 percent and result in a reduction in annual revenues of approximately $30,000 per vessel.

Under a second alternative analyzed, NMFS based the initial allocation of IBQs on the historical landings of designated species from 2006 through 2011. The designated species include swordfish; yellowfin, bigeye, albacore, and skipjack tunas; dolphin; wahoo; and blue shark, porbeagle, shortfin mako, and thresher shark. These are the main marketable pelagic species landed by pelagic longline vessels in addition to bluefin tuna. Under the 74.8 mt Longline category quota scenario, NMFS estimates that there could be a reduction of 3.5 million pounds of designated species landing per year if an IBQ allocation based on designated species landings is used and no trading of IBQs occurs. This would be a reduction of annual landings of approximately 42 percent and result in a reduction in annual revenues of approximately $91,000 per vessel. Under the 137 mt Longline category quota scenario, NMFS estimates that there could be a reduction of 2.4 million pounds of designated species landing per year if an IBQ allocation based on designated species landings is used and no trading of IBQs occurs. This would be a reduction of annual landings of approximately 28 percent and result in a reduction in annual revenues of approximately $61,000 per vessel. Under the 216.7 mt Longline category quota scenario, NMFS estimates that there could be a reduction of 1.6 million pounds of designated species landing per year if an IBQ allocation based on designated species landings is used and no trading of IBQs occurs. This would be a reduction of annual landings of approximately 18 percent and result in a reduction in annual revenues of approximately $40,000 per vessel.

Under the proposed bluefin tuna quota share formula, NMFS would base the initial allocation of IBQs based on the historical landings of designated

species from 2006 through 2011 and the ratio of bluefin tuna catch to designated species landings. Using the ratio of bluefin tuna landings and dead discards to designated species weight, NMFS estimated the potential landings each vessel could make given its initial IBQ. These estimated potential landings were then compared to average annual historical landings to estimate the reduction in designated species. Under the 74.8 mt Longline category quota scenario, NMFS estimates that there could be a reduction of 3.1 million pounds of designated species landing per year if an IBQ allocation based on designated species landings is used and no trading of IBQs occurs. This would be a reduction of annual landings of approximately 36 percent and result in a reduction in annual revenues or approximately $79,000 per vessel. Under the 137 mt Longline category quota scenario, NMFS estimates that there could be a reduction of 2.2 million pounds of designated species landing per year if an IBQ allocation based on designated species landings is used and no trading of IBQs occurs. This would be a reduction of annual landings of approximately 26 percent and result in a reduction in annual revenues or approximately $56,000 per vessel. Under the 216.7 mt Longline category quota scenario, NMFS estimates that there could be a reduction of 1.5 million pounds of designated species landing per year if an IBQ allocation based on designated species landings is used and no trading of IBQs occurs. This would be a reduction of annual landings of approximately 17 percent and result in a reduction in annual revenues or approximately $37,000 per vessel.

Amendment 7 would also designate all pelagic longline quota shares and allocations as either ''Gulf of Mexico'' or ''Atlantic'' based upon the geographic location of sets associated with the vessel's fishing history used to determine the vessel's quota share. Gulf of Mexico quota allocation could be used in either the Gulf of Mexico or the Atlantic, but Atlantic quota allocation could only be used in the Atlantic and not in the Gulf of Mexico. For a vessel to fish in the Gulf of Mexico, the vessel would be required to have the minimum amount of bluefin tuna quota to depart on a trip to fish with pelagic longline gear, but the quota would have to be Gulf of Mexico quota. The minimum IBQ amount required to fish in the Gulf of Mexico would be 0.25 mt based on the larger average size of bluefin tuna in the Gulf of Mexico. The minimum IBQ amount required to fish in the Atlantic would be 0.125 mt based on the smaller average size of bluefin tuna encountered in the Atlantic. The economic impact of creating these two regional designations would primarily be associated with the larger minimum quota required to fish in the Gulf of Mexico and the restriction from transferring or using Atlantic quota in the Gulf of Mexico. This would reduce the number of potential trading partners for IBQs in the Gulf of Mexico region, thus potentially leading to less available IBQs that could be leased, making it more difficult to find potential trading partners and therefore increasing transaction costs for conducting a lease.

In defining the scope of IBQ transfer, NMFS considered two alternatives because only two Tuna permit categories are under limited access systems. One alternative would allow transfer of bluefin tuna quota shares or quota allocation among permitted Atlantic Tunas Longline category vessels only, and would not include transferring with other limited access quota categories such as the Atlantic Tunas Purse Seine category. This alternative would constrain the amount of bluefin tuna quota available to the Longline category vessels to the Longline category quota, and not make additional quota available. Quota transfers would be allowed among all Longline category vessels with a valid limited access permit, regardless of whether they have been allocated quota shares. While this alternative would have short-term direct minor beneficial economic impacts, those beneficial impacts would be lower than those under the proposed measure.

The proposed measure would allow transfer of bluefin tuna quota shares or quota allocation between those permitted in the limited access Atlantic Tunas Longline and Purse Seine categories. This measure would provide flexibility for pelagic longline vessels to obtain, lease, or sell quota as necessary, so that allocations may be aligned with catch (i.e., vessels that catch bluefin tuna may be able to obtain quota from those that do not interact with bluefin tuna, or have not used their full allocation of bluefin tuna). This measure would not constrain the amount of bluefin tuna quota available to pelagic longline vessels (i.e., through the Longline category quota), but would make additional quota available if purse seine vessels are willing to lease quota. This measure would also modify the Purse Seine category regulations which currently restrict the transfer of Purse Seine quota to vessels with Purse Seine category permits. Purse Seine quota would be transferable to vessels with an Atlantic tunas longline permit. Similarly, Purse Seine vessels would be able to lease quota allocation from pelagic longline vessels. Quota transfer would be allowed among all Longline category vessels with a valid limited access permit, regardless of whether they have been allocated quota share. This alternative would have short-term direct moderate beneficial economic impacts.

NMFS considered both annual leasing and sale of IBQs. This proposed rule would allow temporary leasing of bluefin tuna quota among eligible vessels on an annual basis. Temporary quota transfer would give vessels flexibility to lease quota, but as a separate and distinct type of transaction from the sale of quota share. Vessel owners would be able to obtain quota on an annual basis to facilitate their harvest of target species. Sub-leasing of quota would be allowed (i.e., quota leased from vessel A to vessel B, then to vessel C). The proposed quota leasing measures would have short-term direct moderate beneficial economic impacts to participants in the fishery. However, in the long-term, the annual transaction costs associated with matching lessors and lessees, the costs associated with drafting agreements, and the uncertainty vessel owners would face regarding quota availability would reduce some of the economic benefits associated with leasing.

The alternative to allow sale of quota share among eligible vessels would have long-term direct moderate beneficial economic impacts to participants in the fishery by allowing the ownership of IBQs to shift to where they provide the best economic benefit in the long-term. However, in the short-term, there could be issues associated with the IBQ market. For example the process of the buyers and sellers arriving at a price for IBQ shares may be difficult or highly variable due to uncertainties such as how to value IBQ shares, information availability, and associated risks. Through this sub-alternative, vessel owners would be able to purchase (or sell) quota share and increase (or decrease) their quota share percentage. Sale of quota share provides a means for vessel owners to plan their business and manage their quota based on a time scale longer than a single year. Vessel owners may be able to save money through a single quota share transaction instead of reoccurring annual quota allocation transactions. Transferable quota shares would be limited to the amount of quota an individual entity could transfer in order to prevent the accumulation of an excessive share of quota. Experiences in other catch share programs have shown that fishermen

may not know how to effectively value the IBQs initially and uncertainty in this new market may cause IBQs to be undervalued in the first few years. This could result in both adverse social and economic impacts in the fishing community if participants sell out of the IBQ market in the early years for less than the long-term value of the IBQs.

Amendment 7 would delay consideration of sale of quota shares among eligible vessel owners until after NMFS and fishery participants have multiple years of experience with the IBQ program. Until NMFS develops and implements an IBQ sale program, vessel owners would only be able to conduct temporary (annual) leasing of quota allocation and therefore vessel owners would not be able to purchase (or sell) quota share in order to increase (or decrease) their quota share percentage. This approach would reduce risks for vessel owners during the initial stages of the IBQ program, when the market for bluefin tuna quota shares would be new and uncertain. During the first years of the IBQ program, price volatility may be reduced, as may undesirable outcomes of selling or buying quota shares at the ''wrong'' time or price. NMFS intends to consider a program to allow the sale of quota share in the future because it would provide a means for vessel owners to plan their business and manage their quota according to a longer time scale than a single year, in a manner that would be informed by several years of the temporary leasing market. NMFS may wait until a formal evaluation of the IBQ program is completed before developing this alternative. While this alternative may result in long-term moderate beneficial economic impacts, the uncertainty regarding the timeline may make business planning for vessel owners and IBQ holders more difficult and result in some minor adverse economic impacts.

Under the proposed measures, quota allocation and/or quota share transfers would be executed by the eligible vessel owners or their representatives. For example, the two vessel owners involved in a lease of quota or sale of quota share could log into a password-protected web-based computer system (i.e., a NMFS database), and execute the quota allocation or quota share transfer. Owner-executed transfers would provide the quickest execution of a transfer because any eligibility criteria would be verified automatically via the user log-in and password, and not involve the submission or review of a paper application for a transfer to/by NMFS. This would result in short- and long-term minor beneficial economic impacts resulting from reduced transactions costs.

Under an alternative analyzed but not proposed, quota and quota share transfers would be executed by NMFS. For example, a paper application for a sale of quota share could be submitted by the two vessel owners involved in the quota share transaction, and NMFS would review and approve the transaction based on eligibility criteria (and enter data into a computer database that would track the transfers of quota). This method would not include the use of a web-based system, but would rely upon mail or facsimile submission of applications by the vessel owners to NMFS. In comparison to the proposed measure this alternative may result in some minor adverse economic impacts if delays in NMFS's review of applications results in increased transactions costs and fewer trades.

The proposed measures would not limit the amount of quota allocation an individual vessel (Longline or Purse Seine) could lease annually. This alternative would provide flexibility for vessels to purchase quota in a manner that could accommodate various levels of unintended catch of bluefin tuna, and enable the development of an unrestricted market. Because the duration of a temporary lease would be limited to a single year, the impacts of an unrestricted market for bluefin tuna quota would be limited in duration. Information on this unrestricted market could be used to develop future restrictions, if necessary. This alternative would result in short- and long-term minor beneficial economic impacts by accommodating the various needs of vessel owners for IBQ trades.

Similarly, the proposed measures would set no limit on the total amount of quota that either the Longline or Purse Seine category (in its entirety) could lease annually. This alternative would provide flexibility for vessels to purchase quota in a manner that could accommodate various levels of unintended catch of bluefin tuna, and enable the development of an unrestricted market. Because the duration of a temporary lease would be limited to a single year, the impacts on an unrestricted market for bluefin tuna quota would be limited in duration. There would likely be a cost for vessels affected by a restriction on leasing, yet the benefits of such a restriction are unknown, given the leasing program does not currently exist. The risk associated with no limitation on the quota market is minimal due to the temporary nature of IBQ leases, and the fact that leases are voluntary agreements between the lessor and lessee. Information on this unrestricted market could be used to develop future restrictions (through proposed and final rulemaking) if necessary. This alternative would result in short- and long-term minor beneficial economic impacts by accommodating the various needs of vessel owners for IBQ trades.

As described above, because Amendment 7 would delay consideration of sale of quota shares among eligible vessel owners until the future, after NMFS and fishery participants have multiple years of experience with the IBQ program, and therefore the proposed measures do not include limits on the amount of quota allocation an individual vessel (Longline or Purse Seine), or the Longline or Purse Seine category (in its entirety), could purchase. The proposed measures related to the monitoring and enforcement of the IBQ program are based on the premise that the success of an IBQ program rests upon the ability to track ownership of quota shares and quota allocation holders; allocate the appropriate amount of annual harvest privileges (quota allocation); reconcile landings and dead discards against those privileges; and then balance the amounts against the total allowable quota. The current pelagic longline reporting requirements and the monitoring program that provide data on pelagic longline bluefin tuna landings and dead discards were not designed to support inseason accounting of dead discards. More timely information on catch would be necessary in order to monitor a pelagic longline IBQ, inclusive of dead discards.

The proposed VMS reporting and electronic monitoring requirements are intended to support the implementation of a pelagic longline IBQ. The economic impacts are detailed in the section below.

The approach that NMFS may extrapolate observer-generated data inseason, would potentially have short-term minor or neutral indirect beneficial economic impacts by addressing the potential for fishery disruptions if there are issues in the transition to an IBQ monitoring system.

The proposed measure to formally evaluate the IBQ program after 3 years of operation and provide the HMS Advisory Panel with a publicly-available written document with its findings, would result in neutral economic impacts because it is administrative in nature. Similarly, the alternative to formally evaluate the IBQ program after 5 years of operation would result in neutral economic and social impacts because it is administrative in nature.

The proposed measure for NMFS to develop and implement a cost recovery program of up to 3 percent of the ex-vessel value of fish harvested under the program, for costs associated with the costs of management, data collection and analysis, and enforcement activities, could result in direct long-term moderate adverse economic impacts to the industry. NMFS estimates that a 3 percent cost recovery fee on ex-vessel value of bluefin tuna landings would be an estimated $27,437 annually for the entire Longline category and $3,432 for the Purse Seine category. On a per vessel basis, NMFS estimates that the annual cost recovery fee would be on average $170 per Longline category vessel and $1,144 per Purse Seine category vessel. However, this per vessel estimate would vary greatly from vessel to vessel and from year to year based on the amount of bluefin tuna landings for each vessel. The use of historic bluefin revenues for estimating the amount of cost recovery may overestimate the amount of the cost recovery fee if future bluefin tuna interactions and landings are reduced in response to the IBQ program and other regulatory provisions considered under Amendment 7.

The proposed appeals process for administrative review of NMFS's decisions regarding initial allocation of quota shares for the IBQ program would result in neutral economic impacts because it would utilize the National Appeals Office procedures and ensure a standardized and centralized appeals process that would provide procedural certainty to the participants.

A control date in association with the proposed IBQ program would implement a control date in conjunction with the implementation (effective date) of the IBQ program. The control date would serve as a reference date that could be utilized with future management measures. The implementation of a control date by itself would have no effect, but would provide NMFS with a potential management tool that may be utilized if necessary as part of a future management measure. A control date would likely have neutral economic impacts and would only result in beneficial short-term economic impacts if it actually discouraged speculative fishing behavior that may have occurred without the control date.

The proposed elimination of the target catch requirements would likely have direct short- and long-term minor beneficial economic impacts. Under the IBQ program, elimination of the target catch requirement could reduce dead discards, and enable vessels to fish for target species in a more flexible manner.

Under the No Action Alternative, the current target catch requirements would remain in effect, and would have neutral economic impacts since it would not change what is currently in place.

Under the proposed measure to require retention of all legal-sized commercial bluefin tuna that are dead at haul-back, legal discards and the waste of fish would be decreased, and it would be more likely that such fish are accurately accounted for, and have a positive use (e.g., marketed, used for scientific information, etc.). However, given that current behavior may be to discard some fish in order to optimize landings value of bluefin tuna, there could be minor adverse economic impacts associated with this alternative since vessel operators would no longer have the option to discard legal-sized bluefin tuna.

Sub-alternative C 2l.2a would maintain the status quo regarding retention of bluefin tuna by pelagic longline vessels. There would be no requirement to retain commercial legal-sized bluefin tuna that are dead at haul back. Vessels would continue to be able to discard bluefin tuna even if they are of commercial legal-size (i.e., 73″ or greater) and dead. If the IBQ program is implemented, all dead discards would be accounted for under that program. This alternative would have neutral economic impacts since it does not change what is currently occurring.

The Regional Quota alternative would implement annual bluefin tuna quotas by region for vessels possessing the Atlantic Tunas Longline category permit (combined with the required shark and swordfish limited access permits) and would result in prohibiting the use of pelagic longline gear when a particular region's annual bluefin tuna quota has been caught. Annual bluefin tuna quotas would be associated with defined geographic regions. While regional quotas may be simpler than an IBQ system and have advantages over a single quota allocated for the entire Longline category, some regions may face chronic shortages of bluefin tuna quota if that region experiences increased fishing effort or bluefin tuna interaction rates. It is difficult to predict the total amount of fishing effort that would occur under regional quotas, and the amount of bluefin tuna quota that would be caught. There is likely to be less fishing effort under the Regional Quota control alternative (compared with the No Action alternative) because a few vessels could catch a large number of bluefin tuna, and because the closure of the entire area to the use of pelagic longline gear. The historical data indicate that the majority of bluefin tuna have been caught by relatively few vessels. The amount of target species catch such as swordfish and yellowfin tuna would depend primarily upon the amount of fishing effort and whether the regional quotas or IBQs become constraining. If the regional quotas reduce pelagic longline fishing effort, there may be some minor adverse economic and social impacts on regional fishing communities where effort is reduced.

The Group Quota alternative would implement a quota system for vessels possessing the Atlantic Tunas Longline category permit (combined with the required shark and swordfish limited access permits) that would define three bluefin tuna quota groups and assign vessels with a valid permit to one of the three groups. Each active vessel would be assigned to a quota group based upon the associated permit's historical bluefin tuna interactions to ''designated species'' landings ratio. Active vessels with relatively high numbers of bluefin tuna interactions would be assigned to one quota group, active vessels with a moderate level of bluefin tuna interactions would be assigned to a second group, and the active vessels with a low level of bluefin tuna interactions would be assigned to a third quota group. Using the current quota allocation (8.1%) and the 2012 Longline category quota (74.8 mt) to illustrate, the low avoider quota group would be allocated 24.1 mt and the medium and high avoider quota groups would be allocated 25.1 mt. Although the three quota groups have almost the identical number of vessels assigned to them (53, 54, 54, respectively), as well as similar quota, the average amount of bluefin tuna that they caught historically varies from group to group. The number of bluefin tuna interactions from 2006 through 2011 for the low, medium, and high avoiders was 8,050, 1,348, and 95, respectively. Converted to averages, the average number of bluefin tuna interactions would be 1,342, 225, and 16. Utilizing a rough conversion factor of a .125 mt per fish, 225 fish is equivalent to 28 mt. The high and medium avoider groups are likely to have adequate quota, whereas the low avoider group would have inadequate quota if the future interaction rate of the vessels is similar. The average number of interactions associated with the low avoider group equates to approximately 168 mt. It is likely that the group quota associated with vessels with the highest historical rate of bluefin tuna

interactions would be attained first. This indicates that there would be potentially significant direct short- and long-term adverse economic impacts to the low avoider group. However, there could be moderate to minor positive economic impacts to the high and medium avoider groups.

Under the No Action Quota Control alternative, the current regulatory situation would continue, in which NMFS does not have the authority to prohibit the use of pelagic longline gear when the bluefin tuna quota is attained. When the quota is projected to be reached, pelagic longline vessels may no longer retain bluefin tuna, but may continue to fish for their target species, and must discard any bluefin tuna caught. The economic impacts of this alternative would lead to short- and long-term direct minor economic and social impacts due the loss of revenue from bluefin tuna. In the long-term, if dead discards are not curtailed, the pelagic longline fishery could face reduced allocations and earnings.

The proposed alternative ''NMFS Closure of the Pelagic Longline Fishery'' would close the pelagic longline fishery (i.e., prohibit the use of pelagic longline gear) when the total Longline category bluefin tuna quota is reached, projected to be reached, or exceeded, or when there is high uncertainty regarding the estimated or documented levels of bluefin tuna catch. The economic impacts of this alternative would depend upon when the closure occurred, ranging from January through December. The time the pelagic longline fishery would be closed would depend upon many factors, including the size of the Longline category quota, the type of quota control alternative and other alternatives implemented by Amendment 7, and non-regulatory factors. The range of quotas that would be available to the Longline category would depend upon the combination of alternatives implemented.

Based on the Longline category being closed in late spring and early summer over the past few years and the 2013 closure occurring in June, NMFS estimates that a June closure is a plausible example to examine. A June closure of the pelagic longline fishery would result in a potential loss of revenue of approximately $19.8 million, or $123,000 per vessel per year. This would result in a major short-term adverse direct economic impact to the pelagic longline fishery and this economic impact would continue into the long-term if landings and dead discard rates continue along the current trend.

The proposed enhanced reporting measures include a requirement that vessels with an Atlantic Tunas Purse Seine category permit have an E–MTU VMS unit installed by a qualified marine electrician in order to remain eligible for the Purse Seine permit. Purse seine vessel owners would be required to provide a hail-out declaration using their E–MTU VMS units, indicating target species and gear possessed onboard the vessel before leaving port on every trip. Purse seine vessel owners would also be required to provide a hail-in declaration, using their E–MTU VMS units, providing information on the timing and location of landing before returning to port. The units would be required to send position information to NMFS every hour.

All three vessels that are currently authorized to deploy purse seine gear for Atlantic tunas have already installed E–MTU VMS units in compliance with regulations for other Council-managed fisheries, including Northeast Multispecies and/or Atlantic scallop. If vessels have not already had a type-approved E–MTU VMS unit installed, or if permits were transferred to vessels that have not yet installed E–MTU VMS, they may be eligible for reimbursement (up to $3,100) to offset the costs of procuring a type-approved unit, subject to the availability of funds. This reimbursement would only cover the cost of the E–MTU VMS and could not be applied to offset installation costs by a qualified marine electrician ($400) or monthly communication costs ($44). Initial costs, per vessel, for compliance with E–MTU VMS requirements included in this alternative would be $3,500 if no reimbursement were received and $400 if a reimbursement were received.

On a monthly basis, vessels would be required to establish a communication service plan corresponding to the type-approved E–MTU VMS selected. Costs vary based on the E–MTU VMS unit and communication service provider selected; however, these costs are $44/month for hourly transmission reporting and a limited amount of hail in and hail out declarations. Charges vary by communication service provider for additional messaging or transmission of data in excess of what is required by the Agency. Furthermore, costs will also vary depending on how many trips a vessel makes on a monthly basis as the number of declarations (hail in/hail out) increase proportionately. If a vessel has already installed a type-approved E–MTU VMS unit, this alternative would have neutral direct and indirect socioeconomic impacts in the short and long-term, as the only expense would be monthly communication service fees, which they are already paying for participation in a Council-managed fishery. If vessels do not have an E–MTU VMS unit installed, or an Atlantic tunas purse seine permit is transferred to another vessel lacking VMS, direct, adverse, short-term socioeconomic impacts are expected as a result of having to pay for the E–MTU VMS unit and a qualified marine electrician to install the unit. In the long-term, direct economic impacts would become minor, because monthly communication service provider costs ($44) would be the only expense. No economic impacts to shore-based businesses, including fish dealers, bait and gear suppliers, and other fishing related industries are expected to result from this requirement.

Pelagic longline vessels are already required to use an E–MTU VMS that has been installed by a qualified marine electrician to provide hourly position reports and hail in/out declarations to provide information on target species, gear possessed, and expected time/location of landing. Therefore, this proposed VMS requirement would result in neutral economic impacts in the short and long-term. Economic impacts to shore-based businesses, including fish dealers, bait and gear suppliers, and other fishing related industries are not expected.

Under the No Action alternative, there would be no requirement under HMS regulations for an Atlantic Tunas Purse Seine category vessel to obtain a VMS unit, and there would be no change to the reporting requirements applicable to purse seine vessels. There would also be no additional VMS requirements under HMS regulations for a vessel using pelagic longline gear.

The proposed enhanced reporting measures would also require vessels fishing for Atlantic tunas with pelagic longline gear to report the number of hooks and sets, and for sets with bluefin interactions, the length of all bluefin discarded dead or retained. Vessels fishing with purse seine gear would be required to report the number of sets, and for sets with bluefin interactions, the length of all bluefin discarded dead or retained. This alternative is intended to support the inseason monitoring of the purse seine and pelagic longline fisheries. Current information on the catch of the purse seine fishery is limited to dealer data on sold fish, and does not include information of discarded bluefin tuna or other species caught and/or discarded. Inseason information on catch, including dead discards, would enhance NMFS' ability

to monitor and manage all quota categories.

The proposed measure would result in neutral economic impacts in the short and long-term because of the fact that the vessel owners would already be paying, on average, $44 per month to cover the costs of a communication service provider. The number of additional transmissions necessary to report bluefin tuna retained and discarded dead are not expected to exceed the typical monthly allowance for data sent using the E–MTU VMS. Economic impacts to shore-based businesses, including fish dealers, bait and gear suppliers, and other fishing related industries are not expected.

HMS logbook data (2006–2011) indicate that, on average, pelagic longline vessels have 1.15 (9,493 interactions/8,250 trips = 1.15 interactions/trip) with a bluefin tuna per vessel per trip. This alternative would require all pelagic longline vessel operators to report catch (kept, discarded dead,) and estimate fish size (> or < than 73″ CFL) using their E–MTU VMS within 12 hours. Furthermore, additional information on fishing effort, including the number of hooks deployed on the set that had a bluefin tuna, would also be reported.

The proposed measure is expected to have neutral to minor adverse economic impacts on pelagic longline vessel operators and owners in the short and long-term. Economic impacts to shore-based businesses, including fish dealers, bait and gear suppliers, and other fishing related industries are not expected. Existing regulations require all pelagic longline vessel operators to provide hail out/in declarations and provide location reports on an hourly basis at all times while they are away from port. In order to comply with these regulations, vessel owners must subscribe to a communication service plan that includes an allowance for sending similar declarations (hail out/in) describing target species, fishing gear possessed, and estimated time/location of landing using their E–MTU VMS. This alternative would require, on average, 1.15 additional reports per trip that describe bluefin tuna interactions and fishing effort. Because of the minimal time (approximately 5 minutes) required to submit these reports and the fact that owners would already be enrolled in a communication service plan that would accommodate these additional transmissions, adverse economic impacts are not expected.

The proposed measure to require the use of electronic monitoring, including video cameras, by all vessels issued an Atlantic Tunas Longline permit that intend to fish for highly migratory species, would require both fixed and variable costs over the service life of each camera installed onboard. Specifically, vessels would be required to install and maintain video cameras and associated data recording and monitoring equipment in order to record all longline catch and relevant data regarding pelagic longline gear retrieval and deployment. Only a portion of the recorded information would be utilized to identify bluefin tuna catch. The requirements associated with this alternative would be phased in over a period of time due to the complexity, costs, and logistical constraints associated with the implementation of an electronic monitoring program. NMFS would communicate in writing with the vessel owners during all phases of the program to provide information to assistant vessel owners, and facilitate the provision of technical assistance.

This alternative would require both fixed and variable costs over the service life of each camera installed onboard. The cost of an electronic system bought in 2010, over its 5 year projected lifespan, is about $3,565 a year. This includes 4% of the purchase price for maintenance costs and a 7% interest rate on the loan to buy a system (National Observer Program, 2013). The variable costs for vessel owners include data retrieval ($45/hour; 2 hr per trip; technician travel ($0.5/mile; 100 miles for each trip); fishing activity interpretation ($47/hour; 0.25 hr/trip); and catch data interpretation ($47/hour; 1.5 hr/trip). The estimated total variable costs would be approximately $225 per trip and the annual fixed costs would be $ 3,835 for the purchase and installation of the equipment, and six services per year; ($45/hour; 1 hr six times per year). This alternative would result in direct and indirect adverse economic impacts to pelagic longline vessel owners in the short and long-term.

Under the No Action alternative, NMFS would maintain the status quo and would not implement a requirement for permitted pelagic longline vessels to install electronic devices such as cameras in order to support the monitoring or verification of bluefin tuna catch under an IBQ quota system. This alternative would not result in economic impacts because it would maintain existing requirements.

The proposed enhanced reporting measures would require Atlantic Tunas General, Harpoon and HMS Charter/Headboat permit holders to report their bluefin tuna catch (i.e., landings and discards) using an expanded version of the bluefin tuna recreational automated landings reporting system (ALRS). The automated system includes two reporting options, one that is web-based and an interactive voice response telephone system. The primary impacts of the preferred alternative are the amount of time the new reporting requirement would take, and the reporting costs, respectively. NMFS estimated the potential annual catch for each permit category based on previous years data and multiplied it by the 5 minutes it takes to complete a report (NMFS 2013) for each fish to estimate a total reporting burden of 607 hours affecting a total of potentially 8,226 permit holders as a result of this alternative. Since the data are collected online or via telephone, there are no monetary costs to fishermen or direct economic impacts to fishermen from this alternative.

Adjustments to both the online and IVR systems of the ALRS to implement catch reporting for General, Harpoon, and HMS Charter/Headboat category permit holders are estimated to cost NMFS between $15,000 and $35,000. Annual maintenance would likely cost approximately $8,700 per year, which is the current cost for maintaining the ALRS and the call-in system for reports of other recreational HMS landings (NMFS 2013).

The No Action alternative would not require Atlantic Tunas General, Harpoon and HMS Charter/Headboat permit holders to report their bluefin tuna catch (i.e., landings and discards) using an expanded version of the bluefin tuna recreational automated landings reporting system (ALRS), and would have no social or economic impacts.

Under the No Action alternative regarding observer coverage, there would be no changes to the current observer coverage in the Atlantic Tunas Longline, General, Purse Seine, Harpoon, or HMS Charter/Headboat categories. Therefore, there would be no additional cost to small businesses.

The alternative which would increase the level of NMFS-funded observers on a portion of trips by vessels fishing under the Atlantic Tunas Longline, General, Purse Seine, Harpoon, or HMS Charter/Headboat categories could result in some minor costs to vessel operators if there is an increased chance that they will be selected for observer coverage and will have to accommodate an observer.

One of the alternatives for enhanced reporting (not proposed) would require the reporting of catch by Atlantic Tunas General, Harpoon, and HMS Charter/Headboat category vessels targeting bluefin tuna through submission of an HMS logbook to NMFS. The direct

social and economic impacts of this non-preferred alternative include the amount of time to complete logbook forms and the cost of submission (i.e., mailing) for all fishermen permitted in the affected permit categories. These impacts would be minor, adverse, and long-term. A high-end proxy for the impacts of this alternative is the current reporting burden and cost for the entire HMS logbook program, which have been estimated for all commercial HMS fisheries (28,614 permits, NMFS 2011a). The annual reporting burden for the entire program is estimated at 36,189 hours and costs are $94,779 for postage. A more refined estimate is 6,735, which is the number of fishermen likely to conduct directed fishing trips for bluefin tuna based on the total number of General, Charter/Headboat, and Harpoon category permit holders in the states from Maine through South Carolina. This is likely also an over-estimate, since many General and Charter/Headboat permit holders in these states fish for yellowfin, or other tunas rather than bluefin tuna, or, for Charter/Headboat permit holders, other HMS. NMFS estimates a total annual reporting burden of 16,526 hours and a cost of $8,263.

This rule proposes no action with respect to the current logbook requirements and would make no changes to the current logbook requirements applicable to any of the permit categories. It would have no economic impact on fishing vessel owners.

This rule would make no changes to the scope of the Large Pelagic Survey, and would therefore have no social or economic impacts associated with this alternative.

In contrast, the alternative that would expand the Large Pelagics Survey to include May, November, and December, and add surveys to the states south of VA, including the Gulf of Mexico, would result in minor, adverse, and long-term impacts. The direct economic impact of this alternative is the amount of time that fishermen would expend participating in the survey. There are no financial costs to fishermen since the survey is conducted in person and over the phone, and there would be no direct economic impacts to fishermen for this alternative. NMFS estimates that the dockside survey takes 5 minutes on average, the phone survey takes 8 minutes, and collection of supplemental biological information takes about 1 minute. Previously, NMFS estimated that annual implementation of the Large Pelagics Survey throughout Atlantic and Gulf coastal states using the current target sample-size of 7,870 for the dockside survey, 10,780 for the phone survey and 1,500 for the biological survey would result in a reporting burden of 656 hours, 924 hours, and 25 hours respectively, for a total reporting burden of 1,730 hours (NMFS 2011b). This estimate could be used as a high-end proxy for the reporting burden associated with this alternative. Another method for estimating the reporting burden associated with this alternative is to use a ratio comparing the sample frame (i.e., number of permits) used in the coastwide estimate with the sample frame for the alternative (i.e., number of permits in states south of VA). Using this method, the reporting burden estimate is 559 hours. Because of the sampling design, adding the months of May, November, and December is not expected to add any reporting burden or cost (Ron Salz, pers. comm.).

The alternative to establish 12 equal monthly sub-quotas, was considered in the 2011 Environmental Assessment for a Rule to Adjust the Atlantic Bluefin Tuna General and Harpoon Category Regulations. It would allow the General category to remain open year-round and would revise subquotas so that they are evenly distributed throughout the year (i.e., the base quota of 435.1 mt would be divided into monthly subquotas of 8.3 percent of the General category base quota, or 36.1 mt). NMFS would continue to carry forward unharvested General category quota from one time period to the next time period. This alternative would result in increased harvest in the earlier portions of the General category bluefin tuna season and decreased harvest in the later portions of the season. For early season (January–March) General category participants, an additional 85.2 mt would be available (i.e., 108.3–23.1 mt). At $9.13/lb, this represents potential increased revenue of approximately $1.7 million overall during this time period, nearly five times the current amount. NMFS does not have General category price/lb information for April or May since there is currently no General category fishing during those months, but using $9.13/lb as an estimate, potential revenues for each of those months would be $726,621. Potential revenues for the current June–August and September periods would decrease by approximately $2.2 million (50%) and $1.7 million (69%), given recent average price ($9.13 and $9.61, respectively). For October–November and for December, potential revenues would increase by approximately $317,000 (28%) and $287,000 (60%) at $9.21/lb and $9.65/lb, respectively. Relative to the No Action alternative, under Alternative E 1b, there would generally be substantially increased revenues for January through May and October through December and substantially decreased revenues for June through September, and total annual revenues would decrease by approximately $100,000 (1%).

Under the alternative that would take no action to modify the General category sub-period allocations, economic impacts would be neutral and largely would vary by geographic area, with continued higher potential revenues during the summer months in the northeast and lower amounts to winter fishery participants off the mid- and south Atlantic states. General category participants that fish in the January bluefin tuna fishery may continue to perceive a disadvantage as the available quota for that period is relatively small (5.3% of the General category quota) and that they do not benefit from the rollover of unused quota either inseason, from one time period to the next, nor do they benefit from prior-year underharvest because of the timing of the annual final quota specifications (published in the middle of the year).

The proposed measure would provide NMFS flexibility to transfer General category quota within the year and could result in a shift in the distribution of quota and thus fishing opportunities to the earlier portion of the year. For example, in 2011 and 2012, June through August General category landings totaled 140.3 mt and 192.2 mt, out of an available (base) quota of 217.6 mt. In 2010, June through August General category landings totaled 125.4 mt of an available (adjusted) quota of 269.4 mt. If quota that is anticipated to be unused in the first part of the summer season is made available to January period General category participants and bluefin tuna are landed against the January period subquota, it would potentially result in improved and more complete use of the General category quota. Also, because bluefin tuna's price per lb is often higher in the January period than during the summer, shifting quota to this earlier period would result in beneficial impacts to early season General category participants off the mid- and south Atlantic states. It is possible, however, that an increase of bluefin tuna on the market in the January period could reduce the average price for that time of year. Participants in the summer fishery may perceive such quota transfer to be a shift away from historical participants in the traditional General category bluefin tuna fishing areas off New England and thus adverse. However, because unused quota rolls forward

within a calendar year from one period to the next, any unused quota from the adjusted January period would return to the June through August period and onward if not used completely during that period. Overall, short-term, direct impacts depend on the amount and timing of quota transferred inseason and would be expected to be neutral to minor, beneficial impacts for January fishery participants and neutral to minor, adverse impacts for participants in the June through December General category fishery.

Under the No Action alternative to ''Adjust Harpoon Category Retention Limits Inseason,'' Harpoon category participants would continue to have the ability to retain and land up to four large medium fish per vessel per day, as well as unlimited giants. The economic impact of the No Action alternative is expected to be direct and neutral to slightly beneficial and short-term as participants would continue to be able to retain and land a 3rd and 4th large medium bluefin tuna, if available, and would not have to discard these fish if caught while targeting giant bluefin tuna. In 2012, the first year following implementation of the four-fish limit on large mediums, there were only two trips on which three large mediums were landed and two trips on which four large mediums were landed, or 6% total of successful trips. Harpoon quota revenues in 2012 were 24 percent lower than 2011 and 71 percent higher than in 2010.

In contrast, the proposed measure would implement the daily retention limit of large medium bluefin tuna over a range of two to four bluefin tuna, and the default large medium limit would be set at two fish. On a per-trip basis, there would be minor short-term direct adverse social and economic impacts that would depend on availability of large mediums to Harpoon category vessels on a per trip basis and the actual retention limit that NMFS sets inseason (or that is in place by default). Looking at successful 2012 trips, NMFS can estimate potential impacts of this change by determining the number of trips on which three or four large mediums were landed in 2012 and assuming that those fish may not be able to be landed under this alternative. Using 2012 successful trip data, if the limit was set at two large mediums, the revenue from up to six large mediums would be foregone for the season, and with a three fish limit, the revenue of up to two large mediums would be foregone. At an average 2012 weight of 296 lbs. and an average price of $9.13/lb for the Harpoon category, a loss of one to six fish would be approximately $2,702 to $16,215 for the Harpoon category as a whole for the year.

Potentially beneficial economic impacts are possible if a lower limit at the beginning of the season results in the Harpoon category quota lasting longer into the season, as the average price/lb is generally higher in July and August than it is in June. NMFS has not needed to close the Harpoon category in recent years (i.e., as a result of the quota being met) but, depending on the size of the amount of quota available and the number of Harpoon category participants, this may be a consideration.

Under the No Action alternative regarding the Angling category subquota distribution, Angling category participants fishing south of 39°18′ N. lat. (approximately, Great Egg Inlet, NJ) would continue to have their landings of trophy bluefin tuna count toward a shared 66.7% of the Angling category large medium and giant bluefin tuna subquota. The social impact of the No Action alternative is expected to vary by geographic area and to be dependent on availability of trophy-sized bluefin tuna on the fishing grounds. If the pattern of high activity off Virginia and North Carolina continues, fishermen in the mid-Atlantic may have greater opportunities to land a bluefin tuna and participants in the Gulf of Mexico may have no opportunity to land a bluefin tuna when the fish are in their area as the southern trophy fishery may already be closed for the year. Based on the last 2 years, NMFS would expect direct, beneficial, short-term social impacts for Angling and Charter/Headboat trophy fishery participants in the mid-Atlantic and direct, adverse, short-term impacts for participants south of that area, including the Gulf of Mexico. The issue of economic costs for Angling category participants is not relevant, as there is no sale of tunas by Angling category participants. For charter vessels, which sell fishing trips to recreational fishermen, economic impacts are expected to be neutral to beneficial for those in the mid-Atlantic and neutral to adverse for those south of that area, including the Gulf of Mexico, as the perceived opportunity to land a trophy bluefin tuna may be diminished. This should be tempered in the Gulf of Mexico, where there is no directed fishing for bluefin tuna allowed. Given that the current southern trophy bluefin tuna subquota of 2.8 mt represents approximately 17–30 individual fish, impacts are expected to be minor.

Under the proposed measure, a portion of the trophy south subquota would be allocated specifically for the Gulf of Mexico. Specifically, the trophy subquota would be divided as 33% each to the northern area, the southern area outside the Gulf of Mexico, and the Gulf of Mexico. At the current average trophy fish weight, this would allow annually up to 8 trophy bluefin tuna to be landed in each of the three areas. There would be minor, short-term, direct, beneficial social impacts to a small number of vessels in the Gulf of Mexico given the small amount of fish that would be allowed to be landed (as well as indirect beneficial economic impacts for charter vessels), but the perception of greater fairness among southern area participants may result in indirect, longer-term, beneficial, social impacts. There would be minor, short-term, direct and indirect adverse social impacts (and economic impacts for charter vessels) for those outside the Gulf of Mexico as the perceived opportunity to land a trophy bluefin tuna may be diminished.

Under the No Action alternative to ''Change Start Date of Purse Seine Category to June 1,'' there would be no change to the start date of the Purse Seine category fishery, which is currently set at July 15. Economic impacts would be expected to be direct and neutral to adverse depending on availability of schools of bluefin tuna for purse seine operators to decide to make a set on. That is, currently, if conditions would warrant making a set (e.g., based on information from spotter pilots) before July 15, purse seine operators would not be able to fish and would miss the economic opportunity to land and sell bluefin tuna while the other commercial bluefin tuna fisheries are open. Social impacts would be minor and neutral to adverse for purse seine fishery participants and would be minor and neutral to beneficial for fishermen in other categories due to reduced actual or perceived gear conflict from June 1 through July 14.

Under the proposed measure, the start date of the Purse Seine category fishery would be set at June 1 (unless modified by NMFS) to allow more flexibility for purse seine operators to choose when to fish, based on availability of schools of appropriate-sized bluefin tuna and market price. Economic impacts would be expected to be direct and neutral to moderate and beneficial depending on availability of schools of bluefin tuna for purse seine operators to decide to make a set on and market conditions. Social impacts would be minor and neutral to beneficial for purse seine fishery participants and would be minor and neutral to adverse for fishermen in other categories due to increased actual or perceived gear conflict from June 1 through July 14. In 2012, the average

price per pound was $12.46, although the price likely reflects the relatively small amount of purse seine-caught bluefin tuna on the market that year. In 2009, the last year in which there were Atlantic purse seine bluefin tuna landings, the average price per pound was $5.96.

Under the No Action alternative, regarding the rules pertaining to permit category changes, there would be no changes made to current regulations regarding the ability of an applicant to make a correction to their open-access HMS permit category. The current regulations prohibit a vessel issued an open-access Atlantic Tunas or an HMS permit from changing the category of the permit after 10 calendar days from the date of issuance. This No Action alternative is administrative in nature, and therefore the social and economic impacts associated with it would be neutral for most applicants. However, for those applicants who discover their permit category may not allow the vessel to fish in a manner as intended, they may experience moderate adverse social and economic impacts at an individual level. For example, if a commercial fishermen obtained an Angling category permit (recreational) versus a General category permit (commercial) and did not discover the error until after the 10 calendar day window, their vessel would not be allowed to fish commercially for Atlantic tunas for the remainder of that year. Likewise, if recreational fishermen obtained a General category permit (commercial) versus an Angling category permit (commercial) and did not discover the error until after the 10 calendar day window, their vessel would not be allowed to fish under the recreational rules and regulations for the remainder of the year. These two examples demonstrate the potential in lost fishing opportunities as a result of the No Action alternative.

Under the proposed measures, NMFS would allow category changes to an open-access HMS permit issued for a time period greater than 10 calendar days (e.g., 30, 45, or 60 days), provided the vessel has not fished as verified via landings data. This alternative would result in neutral social and economic impacts for most applicants, as there are approximately 20 requests annually that would fall outside the 10 calendar day window. However, for those applicants who discover their permit category may not allow the vessel to fish in a manner as intended (~20 per year), they would experience moderate beneficial social and economic impacts provided they discover the error in the liberalize window (e.g., 30, 45, or 60 days). Using the two examples illustrated above, and assuming no bluefin tuna were caught in either case, each applicant would be allowed to correct their open-access HMS permit category to match their intended fishing practices for the remainder of that year, thereby mitigating the potential of lost fishing opportunities, as well as potential income.

The No Action ''Northern Albacore Tuna Quota'' alternative would maintain the current northern albacore tuna quota. In the last 10 years, U.S. catches reached or exceeded the current U.S. initial quota (527 mt for 2013) in 2004 with 646 mt and in 2007 with 532 mt. However, catches have been less than the adjusted U.S. quotas (currently about 659 mt) for the last several years. Under the No Action alternative, there is no domestic mechanism to limit annual catches of northern albacore tuna beyond the current requirements for Atlantic tunas or HMS vessel permits, authorized gear, observers/logbooks, and time/area closures. Therefore, expected short-term, direct economic impacts and social impacts under the No Action alternative would be neutral. If future overharvests result in the United States being out of compliance with the ICCAT recommendation, the United States would need to put control measures in place and neutral to adverse longer-term direct economic and social impacts could occur if the resulting annual quota needs to be reduced by the amount of the overharvest.

If, under the proposed measure, NMFS implements a domestic quota for northern albacore tuna and recent catch levels continue, and the U.S. quota (including the adjusted quota) recommended by ICCAT is maintained at the current amount, economic and social impacts would not be expected. However, if either the U.S. quota is reduced as part of a new TAC recommendation or catches increase above the current adjusted U.S. quota, there could be adverse impacts resulting from reduced future fishing opportunities and ex-vessel revenues. At an average price of $1.29/lb for commercially-landed albacore tuna in 2011, a reduction of one mt would represent approximately $2,800 under a full quota use situation. Actual impacts would largely depend on the availability of northern albacore tuna and the ability of fishery participants to harvest the quota. In addition, any adverse social and economic impacts of exceeding the TAC, which was adopted as part of the overall ICCAT northern albacore tuna rebuilding program, would be reduced and, in the long term, may be beneficial for fishermen as the stock grows. There may be slight differences in the level of economic and social impacts experienced by the specific individuals of the northern albacore tuna fishery, as well as by participants within a particular fishery sector.

This proposed rule contains collection-of-information requirements subject to review and approval by the Office of Management and Budget (OMB) under the Paperwork Reduction Act (PRA). These requirements have been submitted to OMB for approval. Public reporting burden for these collections of information are estimated to average, as follows:

1. Purse Seine VMS hail out & in, OMB #0648–0372, (5 min/response);
2. Pelagic Longline VMS declaration in Cape Hatteras Gear Restricted Area, or Closed Areas, OMB #0648–0372, (5 min/response);
3. Pelagic Longline VMS declaration into General Category Rules in Cape Hatteras Gear Restricted Area, OMB #0648–0372, (5 min/response);
4. Pelagic Longline and Purse Seine catch reports, OMB #0648–0372, (5 min/response);
5. Electronic Monitoring of Pelagic Longline Vessels, Installation of Camera,
6. Electronic Monitoring of Pelagic Longline Vessels, Maintenance
7. Electronic Monitoring of Pelagic Longline Vessels, Data Retrieval
8. General, Harpoon, and Charter/Headboat reporting via automated systems, OMB #0648–0328, (5 min/response)
9. Pelagic Longline appeal of Performance Metrics, OMB #XXX–XXX, (2 hr/response)
10. Pelagic Longline appeal of Quota Shares, OMB #XXX–XXX, (2 hr/response)
11. Pelagic Longline IBQ Trade Execution and Tracking, Transfer of Allocation, OMB #XXX–XXX, (5 min/response)
12. Pelagic Longline IBQ Trade Execution and Tracking, Online Account Initial Application, OMB #XXX–XXX, (10 min/response)
13. Pelagic Longline IBQ Trade Execution and Tracking, Online Account Renewal Application, OMB #XXX–XXX, (10 min/response)

Public comment is sought on whether these proposed collections of information are necessary for the proper performance of the functions of NMFS, 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 of information, including through the use

of automated collection techniques or other forms of information technology. Send comments on these or any other aspects of the collection of information to the Highly Migratory Species Division of the Office of Sustainable Fisheries, at the **ADDRESSES** above, and by email to *OIRA-submission@omb.eop.gov* or fax to (202) 395–7285. Notwithstanding any other provision of the law, no person is required to respond to, and no person shall be subject to penalty for failure to comply with, a collection of information subject to the requirements of the PRA, unless that collection of information displays a currently valid OMB control number.

List of Subjects in 50 CFR Part 635

Fisheries, Fishing, Fishing vessels, Foreign relations, Imports, Penalties, Reporting and recordkeeping requirements, Treaties.

Dated: August 13, 2013.

Samuel D. Rauch III,

Deputy Assistant Administrator for Regulatory Programs, performing the functions and duties of the Assistant Administrator for Fisheries, National Marine Fisheries Service.

For the reasons set out in the preamble, 50 CFR part 635 is proposed to be amended as follows:

PART 635—ATLANTIC HIGHLY MIGRATORY SPECIES

■ 1. The authority citation for part 635 continues to read as follows:

Authority: 16 U.S.C. 971 *et seq.;* 16 U.S.C. 1801 *et seq.*

■ 2. In § 635.2:

■ a. Revise the definitions of ''Bottom longline,'' ''Green-stick gear,'' and ''Pelagic longline,'' and

■ b. Add the definitions of ''Cape Hatteras gear restricted area,'' ''In transit,'' ''Lessee,'' ''Lessor,'' ''Small Gulf of Mexico gear restricted area,'' and ''Transiting'' in alphabetical order.

The revisions and additions read as follows:

§ 635.2 Definitions.

* * * * *

Bottom longline means a longline that is deployed with enough weights and/or anchors to maintain contact with the ocean bottom. For the purposes of this part, a vessel is considered to have bottom longline gear on board when a power-operated longline hauler, a mainline, weights and/or anchors capable of maintaining contact between the mainline and the ocean bottom, and leaders (gangions) with hooks are on board. Removal of any of these elements constitutes removal of bottom longline gear. Bottom longline vessels may have a limited number of floats and/or high flyers onboard for the purposes of marking the location of the gear but removal of these floats does not constitute removal of bottom longline gear.

* * * * *

Cape Hatteras gear restricted area means the area within the Atlantic Ocean bounded by straight lines connecting the following coordinates in the order stated: 34°50′ N. lat., 75°10′ W. long.; 35°40′ N. lat., 75°10′ W. long.; 35°40′ N. lat., 75°00′ W. long.; 37°10′ N. lat., 75°00′ W. long.; 37°10′ N. lat., 74°20′ W. long.; 34°50′ N. lat., 74°20′ W. long.; 34°50′ N. lat., 75°10′ W. long.

* * * * *

Green-stick gear means an actively trolled mainline attached to a vessel and elevated or suspended above the surface of the water with no more than 10 hooks or gangions attached to the mainline. The suspended line, attached gangions and/or hooks, and catch may be retrieved collectively by hand or mechanical means. Green-stick does not constitute a pelagic longline or a bottom longline as defined in this section.

* * * * *

In transit means non-stop progression through an area.

* * * * *

Lessee means a vessel owner who receives a temporary lease of individual bluefin tuna quota allocation from another vessel through the Bluefin Quota Allocation Leasing Program specified at § 635.15(c).

Lessor means a vessel owner who temporarily leases individual bluefin tuna quota allocation associated with the vessel owner's vessel to another vessel through the Bluefin Quota Allocation Leasing Program specified at § 635.15(c).

* * * * *

Pelagic longline means a longline that is suspended by floats in the water column and that is not fixed to or in contact with the ocean bottom. For the purposes of this part, a vessel is considered to have pelagic longline gear on board when a power-operated longline hauler, a mainline, floats capable of supporting the mainline, and leaders (gangions) with hooks are on board. Removal of any of these elements constitutes removal of pelagic longline gear.

* * * * *

Small Gulf of Mexico gear restricted area means the area within the Gulf of Mexico bounded by straight lines connecting the following coordinates in the order stated: 26°30′ N. lat., 94°49′ W. long.; 27°40′ N. lat, 94°49′ W. long.; 27°40′ N. lat., 90°40′ W. long.; 26°30′ N. lat., 90°40′ W. long.; 26°30′N. lat., 94°49′ W. long.

* * * * *

Transiting means progressing through an area without stopping.

* * * * *

■ 3. In § 635.4:

■ a. As revised in a final rule published elsewhere in this issue of the **Federal Register**, paragraph (j)(3) is further revised; and

■ b. Paragraph (o)(4) is revised.

The revisions read as follows:

§ 635.4 Permits and fees.

* * * * *

(j) * * *

(3) A vessel owner issued an Atlantic tunas permit in the General, Harpoon, or Trap category or an Atlantic HMS permit in the Angling or Charter/Headboat category under paragraph (b), (c), or (d) of this section may change the category of the vessel permit once within 45 calendar days of the date of issuance of the permit, provided the vessel has not landed bluefin tuna during those 45 calendar days as verified by NMFS via landings data. After 45 calendar days from the date of issuance of the permit, the vessel owner may not change the permit category until the following fishing season.

* * * * *

(o) * * *

(4) The owner of a vessel issued an HMS Commercial Caribbean Small Boat permit may fish for, take, retain, or possess only BAYS tunas, Atlantic swordfish, and Atlantic sharks, subject to the trip limits specified at § 635.24 and may possess unauthorized gears onboard as stated at § 635.19(a).

* * * * *

■ 4. In § 635.5:

■ a. Paragraph (a)(3) is revised;

■ b. Paragraph (a)(4) is redesignated as paragraph (a)(5);

■ c. New paragraph (a)(4) is added; and

■ d. Paragraph (c)(1) is revised.

The revisions and addition read as follows:

§ 635.5 Recordkeeping and reporting.

* * * * *

(a) * * *

(3) *Bluefin tuna landed by a commercial vessel and not sold.* If a person who catches and lands a large medium or giant bluefin tuna from a vessel issued a permit in any of the commercial categories for Atlantic tunas does not sell or otherwise transfer the bluefin tuna to a dealer who has a dealer permit for Atlantic tunas, the person must contact a NMFS enforcement agent, at a number designated by NMFS,

immediately upon landing such bluefin tuna, provide the information needed for the reports required under paragraph (b)(2)(i) of this section, and, if requested, make the tuna available so that a NMFS enforcement agent or authorized officer may inspect the fish and attach a tag to it. Alternatively, such reporting requirement may be fulfilled if a dealer who has a dealer permit for Atlantic tunas affixes a dealer tag as required under paragraph (b)(2)(ii) of this section and reports the bluefin tuna as being landed but not sold on the reports required under paragraph (b)(2)(i) of this section. If a vessel is placed on a trailer, the person must contact a NMFS enforcement agent, or the bluefin tuna must have a dealer tag affixed to it by a permitted Atlantic tunas dealer, immediately upon the vessel being removed from the water. All bluefin tuna landed but not sold will be applied to the quota category according to the permit category of the vessel from which it was landed.

(4) *Bluefin tuna discarded dead, or landed by a commercial vessel and sold.* The owner of a vessel that has been permitted or that should have been permitted in the Atlantic Tunas General or Harpoon categories, or permitted or should have been permitted under the HMS Charter/Headboat category and fishing under the General category quotas and daily limits as specified at § 635.23(c) of this part, must report all discards and/or landings of bluefin tuna through the NMFS automated catch reporting system within 24 hours of the landings or end of trip. Such reports may be made by calling a phone number designated by NMFS or submitting the required information electronically in the method designated by NMFS. The owner of a vessel that has been permitted in a different bluefin tuna category must report as specified elsewhere in this section.

* * * * *

(c) * * *

(1) *Bluefin tuna.* The owner of a vessel permitted, or required to be permitted, in the Atlantic HMS Angling or Atlantic HMS Charter/Headboat category must report the catch of all bluefin tuna discarded dead and/or retained under the Angling category quota designated at § 635.27(a) through the NMFS automated catch reporting system within 24 hours of the landing. Such reports may be made by calling a phone number designated by NMFS or submitting the required information electronically in the method designated by NMFS.

* * * * *

■ 5. Add § 635.9 to subpart A to read as follows:

§ 635.9 Electronic monitoring.

(a) *Applicability.* An owner or operator of a commercial vessel permitted, or required to be permitted, to fish for Atlantic HMS under § 635.4 and that has pelagic longline gear on board must, as specified in this section, install, operate and maintain a video system on the vessel.

(b) *Video System.* The video system, which is comprised of video camera(s), recording equipment, and other related equipment (e.g., video monitor, hydraulic pressure transducer, winch rotation sensor, or system control box), must meet the following requirements:

(1) Video camera(s) must be mounted and placed so as to provide clear, unobstructed views of the area(s) where the pelagic longline gear is retrieved and of catch being removed from hooks prior to being placed in the hold or discarded.

(2) Video camera(s) must be in sufficient numbers, with sufficient resolution for NMFS, the USCG, and their authorized officers and designees, or any individual authorized by NMFS to determine the number and species of fish harvested.

(3) Video recording must be initiated by gear retrieval.

(4) The video system must record all periods of time when the gear is being retrieved and catch is removed from the hooks prior to being placed in the hold or discarded.

(c) *Data maintenance, storage, and viewing.* The video system must have the capacity to allow NMFS, the USCG, and their authorized officers and designees, or any individual authorized by NMFS on board the vessel to monitor the video in real time. The video data must be maintained and made available to the afore-mentioned entities and individuals, upon request. These data must be retained onboard the vessel for no fewer than 120 days after the conclusion of a trip, unless NMFS has notified the vessel operator that the video data may be retained for less than this 120-day period.

(d) *Operation.* The vessel operator must ensure that all bluefin tuna, even those that are released, are handled in a manner than enables the video system to record such fish, and must ensure that all handling and retention of bluefin tuna occurs in accordance with the regulations.

(e) *Failure to adequately monitor the gear and catch.* The video system must be maintained in working condition. If NMFS determines that a video system fails to meet the requirements of paragraphs (b) through (d) of this section, then the vessel owner or operator must ensure that the vessel is in compliance with those requirements before the vessel leaves port. The vessel owner or operator must document changes made to address deficiencies and submit that information to NMFS. The vessel cannot leave port until all changes are approved in writing by NMFS.

(f) *Repair and replacement.* If the vessel owner or operator becomes aware that the video system on the vessel has stopped working at sea, the vessel owner or operator must contact NMFS and follow the instructions given. Such instructions may include but are not limited to returning to port until the video system is repaired. Once in port, the video system must be repaired or reinstalled before the vessel can leave port.

Subpart B—Individual Vessel Measures

■ 6. Revise the subpart B heading to read as set forth above.

■ 7. Add § 635.14 to subpart B to read as follows:

§ 635.14 Performance metrics.

(a) *General.* For purposes of § 635.21(c)(3), NMFS will determine ''qualified'' vessels based on the performance metrics in paragraph (b) of this section. Specifically, NMFS will use fishery dependent and fishery independent data to evaluate vessel performance based on avoidance of bluefin tuna interactions while fishing with a pelagic longline gear and history of compliance with the observer and logbook requirements of §§ 635.7 and 635.5, respectively.

(b) *Calculation of performance metrics.* In year one of implementation, NMFS will analyze the relevant data from the period 2006 to 2011 to determine a vessel's score and qualification status. Subsequently, NMFS will analyze available data from the most recent three consecutive year period to determine a vessel's score and qualification status. NMFS will communicate the results of the annual determination to individual permit holders in writing. NMFS may revise, through a framework action, the scoring system to reflect changes in the fishery or ensure that it provides the desired incentives and meets the goals of this program. The process used to calculate the performance metrics is described fully in Amendment 7 to the 2006 Consolidated HMS FMP. The main metrics are summarized below.

(1) *Bluefin tuna interactions performance metric.* The basis for the

bluefin tuna interactions performance metric is the ratio of the number of bluefin tuna interactions (i.e., the number of fish landed, discarded dead, and discarded alive) to the total weight of designated target species landings (in pounds). For the purposes of this section, the designated target species are: swordfish; yellowfin, bigeye, albacore, and skipjack tunas; dolphin; wahoo; and porbeagle, shortfin mako, and thresher sharks. A relatively low bluefin tuna interaction to designated species ratio ('bluefin tuna ratio') indicates that the vessel has successfully avoided catching bluefin tuna while fishing with pelagic longline gear in the performance metric period.

(2) *Observer compliance performance metric.* NMFS will score vessels based on both the vessel owner's and the operator's compliance with the observer requirements outlined in § 635.7 of this part and § 600.746 of this chapter. In addition, the scoring system will consider the number of trips for which an individual vessel was selected to carry an observer, the number of trips actually observed, the reason why a particular trip was not observed, and other relevant observer information. The scoring system is neutral with respect to valid reasons that a vessel may have been selected by the observer program, but did not take an observer (e.g., no observer was available or the vessel was not fishing with pelagic longline gear). The scoring system is designed to weigh trips that were not observed due to noncompliance with the communication requirements more heavily than those not observed due to noncompliance with the safety and accommodation requirements. The scoring system is also designed to consider evidence of fishing activity that may have occurred without required communication or observer coverage.

(3) *Logbook compliance performance metric.* NMFS will score vessels based on both the vessel owner's and vessel operator's compliance with the logbook reporting requirements outlined in § 635.5 of this part. This metric will reflect the timeliness of the submission of the logbooks (for example, the amount of time elapsed between the offloading of the catch and the logbook submission).

(4) *Combining performance metrics.* The performance metrics described under paragraphs (b)(1) through (3) will be combined through the use of a decision formula described in Amendment 7 to the 2006 Consolidated HMS FMP. The decision formula will result in a designation for each vessel of ''qualified'' or ''not qualified.''

(c) *Annual notification.* NMFS will notify vessel owners annually of the score of their vessel (i.e., ''qualified'' or ''not qualified'') by certified mail. The score applies for only one year. NMFS will make aggregate data regarding access to closed and gear restricted areas available to the general public.

(d) *Appeals.* Vessel owners can appeal performance score determinations through the National Appeals Office pursuant to procedures in 15 CFR part 906. During the appeal, the vessel will be deemed ''not qualified.'' Hardship factors (e.g., illness of vessel owner, divorce of vessel owner, etc.) will not be considered as a basis for an appeal. Appeals will be evaluated based upon the following criteria:

(1) The accuracy of NMFS records regarding the relevant information;

(2) Correct assignment of historical data to the vessel owner/permit holder; and,

(3) The current owner of a permitted vessel may also appeal on the basis of a potential inequity based upon historical changes in vessel ownership or permit transfers (e.g., the current vessel owner is disadvantaged due the history generated by a previous owner of the vessel).

■ 8. Add § 635.15 to subpart B to read as follows:

§ 635.15 Individual bluefin tuna quotas.

(a) *General.* This section establishes an individual bluefin tuna quota (IBQ) program for vessels issued a permit under this part that use pelagic longline gear.

(1) *Overview.* Under the IBQ program, NMFS will assign eligible vessels initial quota shares equivalent to a percentage of the annual Longline category quota.

(2) *Objectives.* The IBQ system is intended to achieve the following objectives:

(i) Limit the amount of bluefin tuna landings and dead discards in the pelagic longline fishery;

(ii) Provide strong incentives for the vessel owner and operator of each individual vessel to avoid bluefin tuna interactions, and thus reduce bluefin tuna dead discards;

(iii) Provide flexibility for pelagic longline vessel owners and operators to obtain bluefin tuna quota from other vessels, if needed, and thus enable a full accounting of bluefin tuna landings and dead discards while also minimizing constraints on fishing for target species;

(iv) Balance the objective of limiting bluefin tuna landings and dead discards with the objective of optimizing fishing opportunities and maintaining profitability; and

(v) Balance the above objectives with potential impacts on the Atlantic Tunas permit categories that target bluefin tuna, and the broader objectives of the 2006 Consolidated HMS FMP and MSA.

(b) *Quota allocation.* A quota allocation is the amount, in metric tons (mt), of quota that is associated with a permitted vessel, based upon the relevant quota share(s) and the annual quota available. Unless otherwise required under paragraph (b)(5) of this section, a vessel's quota allocation for a particular year is derived by multiplying a shareholder's quota share (percentage) by the Longline category quota for that year.

(1) *Annual calculation and notification of individual bluefin quota allocations.* Annually, NMFS will notify IBQ participants of their quota allocation for the next calendar year.

(2) *Regional designations.* All quota shares and allocations are designated as either ''Gulf of Mexico'' or ''Atlantic'' based upon the geographic location of sets as reported to NMFS under the requirements of § 635.5 of this part. Gulf of Mexico quota shares and allocations can be used to fish with pelagic longline gear in either the Gulf of Mexico or the Atlantic regions. Atlantic quota shares and allocations can only be used to fish with pelagic longline gear in the Atlantic region. For the purposes of this section, the Gulf of Mexico region includes all waters of the U.S. EEZ west and north of the boundary stipulated at 50 CFR 600.105(c) and the Atlantic region includes all other waters of the Atlantic Ocean.

(3) *Minimum bluefin tuna quota allocation.* A vessel with an Atlantic Tunas Longline Category permit that fishes with pelagic longline gear, has pelagic longline gear onboard, or intends to fish for, possess, or retain bluefin tuna must have the minimum bluefin tuna quota allocation for either the Gulf of Mexico or Atlantic, depending upon fishing location. The minimum bluefin tuna quota allocation for a vessel fishing in the Gulf of Mexico, or departing for a fishing trip in the Gulf of Mexico, is 0.25 mt ww (551.1 lb ww). The minimum bluefin tuna quota allocation for a vessel fishing in the Atlantic or departing for a fishing trip in the Atlantic is 0.125 mt ww (275.6 lb ww). A vessel owner or operator may not declare into or depart on a fishing trip with a pelagic longline onboard unless it has the relevant required minimum bluefin tuna quota allocation for the region in which the fishing activity will occur.

(4) *Accounting for the bluefin tuna caught.* All bluefin tuna dead discards and landings must be accounted within the quota allocation associated with that vessel. If the amount of bluefin tuna

discarded dead and/or retained on a particular trip exceeds the amount of the vessel's bluefin tuna quota allocation, the vessel may land the bluefin tuna, but must resolve its quota debt, as described in paragraph (b)(5) of this section, prior to declaring into or departing on a fishing trip with pelagic longline gear on board by acquiring additional allocation through leasing, as described in paragraph (c) of this section.

(5) *Exceeding an IBQ.* If a the combined amount of bluefin tuna dead discards and landings for a particular trip (as defined at 600.10) exceeds the amount of bluefin tuna quota allocation associated with the vessel, the vessel is considered to have a quota debt equal to the difference between the catch and the bluefin quota allocation. For example, if a vessel has a quota allocation of 0.40 mt, and catches 0.50 mt bluefin tuna on a trip, that vessel would have a quota debt of 0.10 mt. Vessels with a quota debt cannot fish in any region with pelagic longline gear until the quota debt is settled by leasing quota allocation for the appropriate region (per paragraph (c) of this section) and the vessel has at least the minimum quota allocation required to fish and as specified in paragraph (b)(3) of this section. If, by December 1, the vessel owner is unable to obtain the requisite amount of quota allocation to settle the quota debt, the vessel's quota allocation would be reduced accordingly in the subsequent year, or years, until the quota debt is fully settled.

(6) *Duration.* Bluefin tuna quota allocation issued under this section is valid for the relevant fishing year unless it is revoked, suspended, or modified or unless the bluefin tuna Longline category quota is closed per § 635.28(a) of this part.

(7) *Unused IBQ allocation.* Any quota allocation that is unused at the end of the fishing year may not be carried forward to the following year.

(c) *Bluefin Quota Allocation Leasing Program.* Vessel owners of eligible vessels, as specified in paragraph (c)(1) of this section, may lease bluefin tuna quota allocation to and from other vessel owners of eligible vessels, in accordance with the restrictions and conditions of this section.

(1) *Eligible permit holders.* The vessel owner of a vessel issued a valid Atlantic Tunas Longline permit or a valid Atlantic Tunas Purse Seine permit is eligible to lease bluefin tuna quota allocation to or from another such vessel owner. A person who holds an Atlantic Tunas Longline permit that is not associated with a vessel may not lease bluefin quota allocation.

(2) *Application to lease*—(i) *Application information requirements.* The lessor and lessee of bluefin tuna quota allocation must complete a lease application, including all information required by NMFS, and submit the application following instructions provided by NMFS. Information obtained from the lease application will be treated as confidential as provided under applicable Federal law.

(ii) *Approval of lease application.* Unless an application to lease bluefin tuna quota allocation is denied according to paragraph (c)(2)(iii) of this section, NMFS shall confirm application approval to both lessor and lessee.

(iii) *Denial of lease application.* NMFS may deny an application to lease bluefin quota allocation for any of the following reasons, including, but not limited to: the application is incomplete; the lessor or lessee has not been issued a valid Longline or Purse Seine permit or is otherwise not eligible; the lessor's or lessee's Longline or Purse Seine permit is sanctioned pursuant to an enforcement proceeding; NMFS determines that the lessor or lessee vessel is not in compliance with the conditions, restrictions, and requirements of this part; or the lessor has an insufficient bluefin tuna quota allocation available to lease (i.e., the requested amount of lease may not exceed the amount of quota allocation associated with the lessor). Upon denial of an application to lease bluefin tuna quota allocation, NMFS shall notify the applicants describing the reason(s) for application rejection. The decision by NMFS is the final agency decision.

(3) *Conditions and restrictions of leased bluefin tuna quota allocation*—(i) *Subleasing.* In a fishing year, a lessor or lessee may sub-lease bluefin tuna quota allocation that has already been leased from another vessel by following the process specified in paragraph (c)(2) of this section.

(ii) *Carry-forward of leased bluefin quota allocation.* Leased bluefin tuna quota allocation that remains unused at the end of the fishing year may not be carried forward to the subsequent fishing year.

(iii) *History of leased bluefin quota use.* The history of leased bluefin tuna quota allocation used shall be associated with the lessee vessel, for the purpose of calculation of the performance metrics described under § 635.14(b), or other relevant restrictions based upon bluefin discards or landings.

(iv) *Duration of lease.* A lessee may only use the leased bluefin tuna quota allocation during the fishing year in which the quota allocation is applicable.

(v) *Prohibition of leasing allocation during December of each year.* No bluefin tuna quota allocation may be leased during December of each year. This period is necessary to provide NMFS sufficient time to reconcile IBQ accounts, and update quota shares and allocations for the upcoming fishing year.

(vi) *Owners of multiple vessels.* Owners of multiple eligible vessels, as specified in paragraph (k)(1) of this section, may lease quota allocation from one of their vessels to another vessel irrespective of the regional designation of the quota allocation being leased by following the process described in paragraph (c)(2) of this section, but such quota allocation is still subject to the restrictions on the use described under paragraph (b) of this section.

(d) *Sale of IBQ quota shares.* Sale of quota shares between vessel owners is not permitted. NMFS may develop a program to allow and manage the sale of quota shares through a future action.

(e) *Changes in vessel and permit ownership.* In accordance with the regulations specified under § 635.4(l), a vessel owner that has a bluefin tuna quota share may transfer the Atlantic Tunas Longline category permit to another vessel that he or she owns or transfer the permit to another person. The quota share as described under this section, as well as the bluefin tuna fishing history associated with that permit, would transfer with the permit to the new vessel, and remain associated with that permit permanently. As described under paragraphs (c)(1) and (k)(1) of this section, a person that holds an Atlantic Tunas Longline permit that is not associated with a vessel may not receive or lease bluefin tuna quota shares or allocation.

(f) *Annual notification of shares and allocations.* By the start of each fishing year, NMFS will notify vessel owners of eligible vessels, as specified in paragraph (k)(1) of this section, of the quota share associated with the vessel and the resulting quota allocation, based on the available bluefin tuna Longline category quota and any quota debt existing for the vessel. NMFS will provide this information in writing and will also update the electronic monitoring system. Unless specified otherwise, those quota share and allocations will be available for use starting at the start of each fishing year.

(g) *Evaluation.* NMFS will continually monitor the program in light of the objectives listed in paragraph (a)(2) of this section and make any changes through future rulemakings as deemed necessary to meet those objectives. Three years after implementation,

NMFS will publish a written report describing any findings.

(h) *Property rights.* Quota shares and allocations issued pursuant to this part represent may be revoked, limited, modified or suspended at any time subject to the requirements of the Magnuson-Stevens Act, the Atlantic Tunas Convention Act, or other applicable law. Such quota shares and allocations do not confer any right to compensation and do not create any right, title, or interest in any bluefin tuna until it is landed or discarded dead.

(i) *Enforcement and monitoring.* NMFS will enforce and monitor the IBQ program through the use of the reporting and record keeping requirements described under § 635.5, the monitoring requirements under §§ 635.9 and 635.69, and its authority to close the pelagic longline fishery specified under § 635.28 of this part.

(j) *Cost recovery.* In a future action, NMFS will develop and implement cost recovery for the IBQ program that will cover costs of management, data collection and analysis, and enforcement activities. Fees shall be collected from quota share and/or allocation holders for the IBQ program pursuant to MSA sections 303A(e) and 304(d)(2). Such fees shall not exceed 3 percent of the ex-vessel value of fish harvested under the program.

(k) *Initial quota shares.* During year one of implementation of the IBQ program described in this section, NMFS will issue quota shares to vessel owners of eligible vessels, as specified in paragraph (k)(1) of this section. New vessel owners that have not participated in the pelagic longline fishery or who have recently obtained the limited access permits needed to fish with pelagic longline gear would need to obtain an Atlantic Tunas Longline permit, as described under § 635.4(l) of this part, and lease quota allocations per paragraph (c) of this section.

(1) *Eligible vessels.* Only vessel owners of vessels with a valid Atlantic Tunas Longline category permit as of the date of the proposed rule regarding this action and that are ''active'' would be eligible to receive an initial quota share. ''Active'' vessels are those vessels that have used pelagic longline gear on at least one set between 2006 and 2011 as reported to NMFS on logbooks, per the requirements of § 635.5 of this part. For the purposes of this section, the vessel owner at the time of reporting is not relevant. If the logbook reports indicate that a particular vessel used pelagic longline gear for at least one set between 2006 and 2011, and the vessel is currently issued a valid Atlantic Tunas Longline category permit, the current vessel owner is qualified to receive an initial quota share even if the current vessel owner did not own the vessel between 2006 and 2011. Similarly, if the logbook reports indicate that a particular vessel did not use pelagic longline gear for at least one set between 2006 and 2011, and the vessel is currently issued a valid Atlantic Tunas Longline category permit, the current vessel owner is not qualified to receive an initial quota share even if the current vessel owner fished with pelagic longline gear on a different vessel between 2006 and 2011. Persons that hold an Atlantic Tunas Longline category permit that is not associated with a vessel would not be eligible for an initial quota share or a bluefin tuna quota allocation. Once a valid Atlantic Tunas Longline category permit becomes associated with such a vessel, that vessel owner would need to lease quota allocation per paragraph (c) of this section before the vessel could fish with pelagic longline gear onboard.

(2) *Quota share determination* Vessel owners as described under paragraph (k)(1) of this section will be allocated a quota share based on dealer and logbook information reported to NMFS, associated with trips on which the eligible vessel used pelagic longline gear from 2006 through 2011. NMFS will review each vessel's reported bluefin tuna interactions (all discards and landings) and landings of designated species (swordfish, yellowfin, bigeye, albacore, and skipjack tunas; dolphin; wahoo; and porbeagle, shortfin mako and thresher sharks) and place each vessel into one of three categories: low, medium and high ratio of bluefin tuna interactions. The quota share will be allocated based on the three categories, as set forth in Amendment 7 to the 2006 Consolidated HMS FMP.

(3) *Regional designations* All initial quota shares and allocations are designated as either ''Gulf of Mexico'' or ''Atlantic'' based upon the geographic location of sets as reported to NMFS under the requirements of § 635.5 of this part. Vessel owners may use Gulf of Mexico quota shares and allocations to fish in either the Gulf of Mexico or the Atlantic regions. Vessel owners may use Atlantic quota shares and allocations only to fish in the Atlantic region.

(4) *Notification of initial quota share and allocation.* NMFS will notify vessel owners of eligible vessels of the vessel quota share (percentage) and the resulting quota allocation (mt) for the relevant fishing year, based on the bluefin Longline category quota.

(5) *Appeal of initial quota share and allocation.* Vessel owners can appeal initial quota share and allocation determinations through the National Appeals Office pursuant to procedures in 15 CFR part 906. Hardship factors (e.g., illness of vessel owner, divorce of vessel owner, etc.) will not be considered as a basis for an appeal. Appeals will be evaluated based upon the following criteria:

(i) Initial eligibility for quota shares based on ownership of an active vessel with a valid Atlantic Tunas Longline permit combined with the required shark and swordfish limited access permits;

(ii) The accuracy of NMFS's records regarding that vessel's amount of designated species landings and/or bluefin interactions; and

(iii) The correct assignment of designated species landings and bluefin tuna interactions to the vessel owner/permit holder.

■ 9. Add § 635.19 to subpart C to read as follows:

§ 635.19 Authorized gears.

(a) *General.* No person may fish for, catch, possess, or retain any Atlantic HMS with gears other than the primary gears specifically authorized in this part. Consistent with § 635.21(a) of this part, secondary gears may be used at boat side to aid and assist in subduing, or bringing on board a vessel, Atlantic HMS that have first been caught or captured using primary gears. For purposes of this part, secondary gears include, but are not limited to, dart harpoons, gaffs, flying gaffs, tail ropes, etc. Secondary gears may not be used to capture, or attempt to capture, free-swimming or undersized HMS. Except for vessels permitted under § 635.4(o) or as specified in this section, a vessel using or having onboard in the Atlantic Ocean any unauthorized gear may not possess an Atlantic HMS on board.

(b) *Atlantic tunas.* A person that fishes for, retains, or possesses an Atlantic bluefin tuna may not have on board a vessel or use on board a vessel any primary gear other than those authorized for the category for which the Atlantic tunas or HMS permit has been issued for such vessel. Primary gears are the gears specifically authorized in this section. When fishing for Atlantic tunas other than bluefin tuna, primary gear authorized for any Atlantic Tunas permit category may be used, except that purse seine gear may be used only on board vessels permitted in the Purse Seine category and pelagic longline gear may be used only on board vessels issued an Atlantic Tunas Longline category tuna permit, a LAP other than handgear for swordfish, and a LAP for sharks. A person issued an

HMS Commercial Caribbean Small Boat permit who fishes for, retains, or possesses BAYS tunas in the U.S. Caribbean, as defined at § 622.2, may have on board and use handline, harpoon, rod and reel, bandit gear, green-stick gear, and buoy gear.

(1) *Angling.* Speargun (for BAYS tunas only), and rod and reel (including downriggers) and handline (for all tunas).

(2) *Charter/headboat.* Rod and reel (including downriggers), bandit gear, handline, and green-stick gear are authorized for all recreational and commercial Atlantic tuna fisheries. Speargun is authorized for recreational Atlantic BAYS tuna fisheries only.

(3) *General.* Rod and reel (including downriggers), handline, harpoon, bandit gear, and green-stick.

(4) *Harpoon.* Harpoon.

(5) *Longline.* Longline and green-stick.

(6) *Purse seine.* Purse seine.

(7) *Trap.* Pound net and fish weir.

(c) *Billfish.* (1) Only persons who have been issued a valid HMS Angling or valid Charter/headboat permit, or who have been issued a valid Atlantic Tunas General category or Swordfish General Commercial permit and are participating in a tournament as provided in § 635.4(c) of this part, may possess a blue marlin, white marlin, or roundscale spearfish in, or take a blue marlin, white marlin, or roundscale spearfish from, its management unit. Blue marlin, white marlin, or roundscale spearfish may only be harvested by rod and reel.

(2) Only persons who have been issued a valid HMS Angling or valid Charter/Headboat permit, or who have been issued a valid Atlantic Tunas General category or Swordfish General Commercial permit and are participating in a tournament as provided in § 635.4(c) of this part, may possess or take a sailfish shoreward of the outer boundary of the Atlantic EEZ. Sailfish may only be harvested by rod and reel.

(d) *Sharks.* No person may possess a shark in the EEZ taken from its management unit without a permit issued under § 635.4. No person issued a Federal Atlantic commercial shark permit under § 635.4 may possess a shark taken by any gear other than rod and reel, handline, bandit gear, longline, or gillnet. No person issued an HMS Commercial Caribbean Small Boat permit may possess a shark taken from the U.S. Caribbean, as defined at § 622.2, by any gear other than with rod and reel, handline or bandit gear. No person issued an HMS Angling permit or an HMS Charter/headboat permit under § 635.4 may possess a shark if the shark was taken from its management unit by any gear other than rod and reel or handline, except that persons on a vessel issued both an HMS Charter/headboat permit and a Federal Atlantic commercial shark permit may possess sharks taken with rod and reel, handline, bandit gear, longline, or gillnet if the vessel is not engaged in a for-hire fishing trip.

(e) *Swordfish.* (1) No person may possess north Atlantic swordfish taken from its management unit by any gear other than handgear, green-stick, or longline, except that such swordfish taken incidentally while fishing with a squid trawl may be retained by a vessel issued a valid Incidental HMS squid trawl permit, subject to restrictions specified in § 635.24(b)(2). No person may possess south Atlantic swordfish taken from its management unit by any gear other than longline.

(2) An Atlantic swordfish may not be retained or possessed on board a vessel with a gillnet. A swordfish will be deemed to have been harvested by gillnet when it is onboard, or offloaded from, a vessel fishing with or having on board a gillnet.

(3) A person aboard a vessel issued or required to be issued a valid directed handgear LAP for Atlantic swordfish or an HMS Commercial Caribbean Small Boat permit may not fish for swordfish with any gear other than handgear. A swordfish will be deemed to have been harvested by longline when the fish is on board or offloaded from a vessel fishing with or having on board longline gear. Only vessels that have been issued a valid directed or handgear swordfish LAP or an HMS Commercial Caribbean Small Boat permit under this part may utilize or possess buoy gear.

(4) Except for persons aboard a vessel that has been issued a directed, incidental, or handgear limited access swordfish permit, a Swordfish General Commercial permit, an Incidental HMS squid trawl permit, or an HMS Commercial Caribbean Small Boat permit under § 635.4, no person may fish for North Atlantic swordfish with, or possess a North Atlantic swordfish taken by, any gear other than handline or rod and reel.

(5) A person aboard a vessel issued or required to be issued a valid Swordfish General Commercial permit may only possess North Atlantic swordfish taken from its management unit by rod and reel, handline, bandit gear, green-stick, or harpoon gear.

■ 10. Section 635.21is revised to read as follows:

§ 635.21 Gear operation, restricted areas, and deployment restrictions.

(a) *All Atlantic HMS fishing gears.* (1) An Atlantic HMS harvested from its management unit that is not retained must be released in a manner that will ensure maximum probability of survival, but without removing the fish from the water.

(2) If a billfish is caught by a hook and not retained, the fish must be released by cutting the line near the hook or by using a dehooking device, in either case without removing the fish from the water.

(3) *Restricted gear and closed areas for all Atlantic HMS fishing gears.* (i) No person may fish for, catch, possess, or retain any Atlantic highly migratory species or anchor a fishing vessel that has been issued a permit or is required to be permitted under this part, in the areas and seasons designated at § 622.34(a)(3) of this chapter.

(ii) From November through April of each year, no vessel issued, or required to be issued, a permit under this part may fish or deploy any type of fishing gear in the Madison-Swanson closed area or the Steamboat Lumps closed area, as defined in § 635.2.

(iii) From May through October of each year, no vessel issued, or required to be issued, a permit under this part may fish or deploy any type of fishing gear in the Madison-Swanson or the Steamboat Lumps closed areas except for surface trolling. For the purposes of this section, surface trolling is defined as fishing with lines trailing behind a vessel which is in constant motion at speeds in excess of four knots with a visible wake. Such trolling may not involve the use of down riggers, wire lines, planers, or similar devices.

(iv) From January through April of each year, no vessel issued, or required to be issued, a permit under this part may fish or deploy any type of fishing gear in the Edges 40 Fathom Contour closed area, as defined in § 635.2.

(b) *Longline—general restrictions.* (1) All vessels that have pelagic or bottom longline gear onboard and that have been issued, or are required to have, a limited access swordfish, shark, or tuna longline category permit for use in the Atlantic Ocean including the Caribbean Sea and the Gulf of Mexico must possess inside the wheelhouse the document provided by NMFS entitled ''Careful Release Protocols for Sea Turtle Release with Minimal Injury,'' and must also post inside the wheelhouse the sea turtle handling and release guidelines provided by NMFS.

(2) Transiting and gear stowage: If a vessel issued a permit under this part is in a closed or gear restricted area

described in this section with pelagic or bottom longline gear on board, it is a rebuttable presumption that any fish on board such a vessel were taken with pelagic or bottom longline in the closed or gear restricted area except where such possession is aboard a vessel transiting a closed area with all fishing gear stowed appropriately. Longline gear is stowed appropriately if all gangions and hooks are disconnected from the mainline and are stowed on or below deck, hooks are not baited, and all buoys and weights are disconnected from the mainline and drum (buoys may remain on deck).

(3) When a marine mammal or sea turtle is hooked or entangled by pelagic or bottom longline gear, the operator of the vessel must immediately release the animal, retrieve the pelagic or bottom longline gear, and move at least 1 nm (2 km) from the location of the incident before resuming fishing. Similarly, when a smalltooth sawfish is hooked or entangled by bottom longline gear, the operator of the vessel must immediately release the animal, retrieve the bottom longline gear, and move at least 1 nm (2 km) from the location of the incident before resuming fishing. Reports of marine mammal entanglements must be submitted to NMFS consistent with regulations in § 229.6 of this title.

(4) Vessels that have pelagic or bottom longline gear on board and that have been issued, or are required to have been issued, a permit under this part must have only corrodible hooks on board.

(c) *Pelagic longlines.* (1) If a vessel issued or required to be issued a permit under this part:

(i) Is in a closed area designated under paragraph (c)(2) of this section and has bottom longline gear onboard, the vessel may not, at any time, possess or land any pelagic species listed in table 2 of appendix A to this part in excess of 5 percent, by weight, of the total weight of pelagic and demersal species possessed or landed, that are listed in tables 2 and 3 of appendix A to this part.

(ii) Has pelagic longline gear on board, persons aboard that vessel may not possess, retain, transship, land, sell, or store silky sharks, oceanic whitetip sharks, or scalloped, smooth, or great hammerhead sharks.

(2) Except as noted in paragraph (c)(3) of this section, if pelagic longline gear is on board a vessel issued or required to be issued a permit under this part, persons aboard that vessel may not fish or deploy any type of fishing gear:

(i) In the Northeastern United States closed area from June 1 through June 30 each calendar year;

(ii) In the Charleston Bump closed area from February 1 through April 30 each calendar year;

(iii) In the East Florida Coast closed area at any time;

(iv) In the Desoto Canyon closed area at any time;

(v) In the Cape Hatteras gear restricted area from December 1 through April 30 each year;

(vi) In the Small Gulf of Mexico gear restricted area from April 1 through May 30 each year;

(vii) In the Northeast Distant gear restricted area at any time, unless persons onboard the vessel comply with the following:

(A) The vessel is limited to possessing onboard and/or using only 18/0 or larger circle hooks with an offset not to exceed 10 degrees. The outer diameter of the circle hook at its widest point must be no smaller than 2.16 inches (55 mm) when measured with the eye on the hook on the vertical axis (y-axis) and perpendicular to the horizontal axis (x-axis), and the distance between the circle hook point and the shank (i.e., the gap) must be no larger than 1.13 inches (28.8 mm). The allowable offset is measured from the barbed end of the hook and is relative to the parallel plane of the eyed-end, or shank, of the hook when laid on its side. The only allowable offset circle hooks are those that are offset by the hook manufacturer. If green-stick gear, as defined at § 635.2, is onboard, a vessel may possess up to 20 J-hooks. J-hooks may be used only with green-stick gear, and no more than 10 hooks may be used at one time with each green-stick gear. J-hooks used with green-stick gear may be no smaller than 1.5 inch (38.1 mm) when measured in a straight line over the longest distance from the eye to any other part of the hook; and,

(B) The vessel is limited, at all times, to possessing onboard and/or using only whole Atlantic mackerel and/or squid bait, except that artificial bait may be possessed and used only with green-stick gear, as defined at § 635.2, if green-stick gear is onboard; and,

(C) Vessels must possess, inside the wheelhouse, a document provided by NMFS entitled, ''Careful Release Protocols for Sea Turtle Release with Minimal Injury,'' and must post, inside the wheelhouse, sea turtle handling and release guidelines provided by NMFS; and,

(D) Required sea turtle bycatch mitigation gear, which NMFS has approved under paragraph (c)(5)(iv) of this section, on the initial list of ''NMFS-Approved Models For Equipment Needed For The Careful Release of Sea Turtles Caught In Hook And Line Fisheries,'' must be carried onboard, and must be used in accordance with the handling requirements specified in paragraphs (c)(2)(vii)(E) through(G) of this section; and,

(E) Sea turtle bycatch mitigation gear, specified in paragraph (c)(2)(vii)(D) of this section, must be used to disengage any hooked or entangled sea turtles that cannot be brought on board, and to facilitate access, safe handling, disentanglement, and hook removal or hook cutting from sea turtles that can be brought on board, where feasible. Sea turtles must be handled, and bycatch mitigation gear must be used, in accordance with the careful release protocols and handling/release guidelines specified in paragraph (c)(2)(vii)(C) of this section, and in accordance with the onboard handling and resuscitation requirements specified in § 223.206(d)(1).

(F) Boated turtles: When practicable, active and comatose sea turtles must be brought on board, with a minimum of injury, using a dipnet approved on the initial list specified in paragraph (c)(2)(vii)(D) of this section. All turtles less than 3 ft. (.91 m) carapace length should be boated, if sea conditions permit. A boated turtle should be placed on a standard automobile tire, or cushioned surface, in an upright orientation to immobilize it and facilitate gear removal. Then, it should be determined if the hook can be removed without causing further injury. All externally embedded hooks should be removed, unless hook removal would result in further injury to the turtle. No attempt to remove a hook should be made if the hook has been swallowed and the insertion point is not visible, or if it is determined that removal would result in further injury. If a hook cannot be removed, as much line as possible should be removed from the turtle using approved monofilament line cutters from the initial list specified in paragraph (c)(2)(vii)(D) of this section, and the hook should be cut as close as possible to the insertion point, using bolt cutters from that list, before releasing the turtle. If a hook can be removed, an effective technique may be to cut off either the barb, or the eye, of the hook using bolt cutters, and then to slide the hook out. When the hook is visible in the front of the mouth, an approved mouth-opener from the initial list specified in paragraph (c)(2)(vii)(D) of this section may facilitate opening the turtle's mouth, and an approved gag from that list may facilitate keeping the mouth open. Short-handled dehookers for ingested hooks, long-nose pliers, or needle-nose pliers from the initial list

specified in paragraph (c)(2)(vii)(D) of this section should be used to remove visible hooks that have not been swallowed from the mouth of boated turtles, as appropriate. As much gear as possible must be removed from the turtle without causing further injury prior to its release. Refer to the careful release protocols and handling/release guidelines required in paragraph (c)(2)(vii)(C) of this section, and the handling and resuscitation requirements specified in § 223.206(d)(1) of this title, for additional information.

(G) Non-boated turtles: If a sea turtle is too large, or hooked in a manner that precludes safe boating without causing further damage or injury to the turtle, sea turtle bycatch mitigation gear, specified in paragraph (c)(2)(vii)(D) of this section, must be used to disentangle sea turtles from fishing gear and disengage any hooks, or to clip the line and remove as much line as possible from a hook that cannot be removed, prior to releasing the turtle, in accordance with the protocols specified in paragraph (c)(2)(vii)(C) of this section. Non-boated turtles should be brought close to the boat and provided with time to calm down. Then, it must be determined whether or not the hook can be removed without causing further injury. A front flipper or flippers of the turtle must be secured, if possible, with an approved turtle control device from the list specified in paragraph (c)(2)(vii)(D) of this section. All externally embedded hooks must be removed, unless hook removal would result in further injury to the turtle. No attempt should be made to remove a hook if it has been swallowed, or if it is determined that removal would result in further injury. If the hook cannot be removed and/or if the animal is entangled, as much line as possible must be removed prior to release, using an approved line cutter from the list specified in paragraph (c)(2)(vii)(D) of this section. If the hook can be removed, it must be removed using a long-handled dehooker from the initial list specified in paragraph (c)(2)(vii)(D) of this section. Without causing further injury, as much gear as possible must be removed from the turtle prior to its release. Refer to the careful release protocols and handling/release guidelines required in paragraph (c)(2)(vii)(C) of this section, and the handling and resuscitation requirements specified in § 223.206(d)(1) of this title, for additional information.

(3) *Restricted access to closed and gear restricted areas.* Vessels that have been issued, or are required to have been issued, a limited access permit issued under this part may fish with pelagic longline gear in the closed areas or gear restricted areas described in paragraph (c)(2)(i) through (iv) of this section, under the conditions described in paragraphs (c)(3)(i) through (v) of this section. Vessels that have been issued, or are required to have been issued, a limited access permit issued under this part may fish in the Cape Hatteras gear restricted area under the conditions described in paragraph (c)(3)(vi) of this section.

(i) *Eligible vessels.* Vessels must be determined by NMFS to be ''qualified,'' using the performance metrics described in § 635.14 of this part.

(ii) *Observer requirement.* Vessels must be selected as part of the observer program described in § 635.7 of this part to carry an observer in the statistical area of a closed or gear restricted area, and must have a NMFS approved observer on board.

(iii) *VMS requirement.* Vessels must ''declare in'' to the closed or gear restricted area via VMS prior to leaving the dock and report species caught and fishing effort daily via VMS per the requirements of § 635.69 of this part.

(iv) *East Florida Coast closed area restriction.* Within the East Florida Coast closed area, vessels would have access only to the waters north of 28°17′10″ N. lat. and east of the 100 fathoms curve.

(v) *NMFS authority to terminate access.* On an annual basis or during the fishing season, NMFS may terminate access to each or all of the closed and restricted gear areas for all vessels fishing with pelagic longline gear. NMFS will file any termination action with the Office of the Federal Register for publication and base its action on the following criteria and other relevant factors as needed:

(A) The usefulness of information on catch obtained from observers, logbooks, VMS reporting, and dealer reports;

(B) The species caught; number of animals caught; rate of catch and animal length, weight, condition, and location;

(C) Variations in the seasonal distribution, abundance, or migration patterns of a bycatch or target species;

(D) Condition or status of the stock or species of concern and impacts of continued access to the closed area on all species;

(E) Catch data on comparable species from outside the closed area (both target species and bycatch);

(F) Implications on quota management of relevant stocks;

(G) Relevant data regarding the effectiveness of other closed areas and their individual or cumulative impacts in relation to the objectives of the closed areas, and the 2006 Consolidated HMS FMP; and

(H) The criteria listed under § 635.27(a)(8).

(vi) *Access to the Cape Hatteras gear restricted area.* (A) Vessels that are determined by NMFS to be ''qualified,'' using the performance metrics described in § 635.14 of this part, may fish with pelagic longline gear in the Cape Hatteras gear restricted area during the year for which they are qualified, subject to the restrictions in this paragraph (c)(3).

(B) When the General category is open per § 635.28(a), and provided no pelagic longline gear is on board, vessels determined to be ''not qualified'' using the performance metrics described in § 635.14 may target bluefin tuna with gear authorized under the General category per § 635.19(b)(3) within the Cape Hatteras gear restricted area. Vessels fishing pursuant to this provision are subject to the bluefin tuna retention limits in effect for the General category under § 635.23(a). Bluefin tuna landed with authorized handgear would be counted against the General category quota. Such vessels would be required to ''declare in'' to the area via VMS and report species caught and effort daily via VMS per the requirements of § 635.69 of this part.

(4) In the Gulf of Mexico, pelagic longline gear may not be fished or deployed from a vessel issued or required to have a permit under this part with live bait affixed to the hooks; and, a person aboard a vessel issued or required to have a permit under this part that has pelagic longline gear on board may not possess live baitfish, maintain live baitfish in any tank or well on board the vessel, or set up or attach an aeration or water circulation device in or to any such tank or well. For the purposes of this section, the Gulf of Mexico includes all waters of the U.S. EEZ west and north of the boundary stipulated at 50 CFR 600.105(c).

(5) The operator of a vessel permitted or required to be permitted under this part and that has pelagic longline gear on board must undertake the following sea turtle bycatch mitigation measures:

(i) *Possession and use of required mitigation gear.* Required sea turtle bycatch mitigation gear, which NMFS has approved under paragraph (c)(5)(iv) of this section as meeting the minimum design standards specified in paragraphs (c)(5)(i)(A) through (M) of this section, must be carried onboard, and must be used to disengage any hooked or entangled sea turtles in accordance with the handling

requirements specified in paragraph (c)(5)(ii) of this section.

(A) *Long-handled line clipper or cutter.* Line cutters are intended to cut high test monofilament line as close as possible to the hook, and assist in removing line from entangled sea turtles to minimize any remaining gear upon release. NMFS has established minimum design standards for the line cutters, which may be purchased or fabricated from readily available and low-cost materials. The LaForce line cutter and the Arceneaux line clipper are models that meet these minimum design standards. One long-handled line clipper or cutter meeting the minimum design standards, and a set of replacement blades, are required to be onboard. The minimum design standards for line cutters are as follows:

(*1*) *A protected and secured cutting blade.* The cutting blade(s) must be capable of cutting 2.0–2.1 mm (0.078 in.-0.083 in.) monofilament line (400-lb test) or polypropylene multistrand material, known as braided or tarred mainline, and must be maintained in working order. The cutting blade must be curved, recessed, contained in a holder, or otherwise designed to facilitate its safe use so that direct contact between the cutting surface and the sea turtle or the user is prevented. The cutting instrument must be securely attached to an extended reach handle and be easily replaceable. One extra set of replacement blades meeting these standards must also be carried on board to replace all cutting surfaces on the line cutter or clipper.

(*2*) *An extended reach handle.* The line cutter blade(s) must be securely fastened to an extended reach handle or pole with a minimum length equal to, or greater than, 150 percent of the height of the vessel's freeboard, or 6 feet (1.83 m), whichever is greater. It is recommended, but not required, that the handle break down into sections. There is no restriction on the type of material used to construct this handle as long as it is sturdy and facilitates the secure attachment of the cutting blade.

(B) *Long-handled dehooker for ingested hooks.* A long-handled dehooking device is intended to remove ingested hooks from sea turtles that cannot be boated. It should also be used to engage a loose hook when a turtle is entangled but not hooked, and line is being removed. The design must shield the barb of the hook and prevent it from re-engaging during the removal process. One long-handled device, meeting the minimum design standards, is required onboard to remove ingested hooks. The minimum design standards are as follows:

(*1*) *Hook removal device.* The hook removal device must be constructed of 5/16-inch (7.94 mm) 316 L stainless steel and have a dehooking end no larger than 1–7/8-inches (4.76 cm) outside diameter. The device must securely engage and control the leader while shielding the barb to prevent the hook from re-engaging during removal. It may not have any unprotected terminal points (including blunt ones), as these could cause injury to the esophagus during hook removal. The device must be of a size appropriate to secure the range of hook sizes and styles used in the pelagic longline fishery targeting swordfish and tuna.

(*2*) *Extended reach handle.* The dehooking end must be securely fastened to an extended reach handle or pole with a minimum length equal to or greater than 150 percent of the height of the vessel's freeboard, or 6 ft. (1.83 m), whichever is greater. It is recommended, but not required, that the handle break down into sections. The handle must be sturdy and strong enough to facilitate the secure attachment of the hook removal device.

(C) *Long-handled dehooker for external hooks.* A long-handled dehooker, meeting the minimum design standards, is required onboard for use on externally-hooked sea turtles that cannot be boated. The long-handled dehooker for ingested hooks described in paragraph (c)(5)(i)(B) of this section would meet this requirement. The minimum design standards are as follows:

(*1*) *Construction.* A long-handled dehooker must be constructed of 5/16-inch (7.94 mm) 316 L stainless steel rod. A 5-inch (12.7-cm) tube T-handle of 1-inch (2.54 cm) outside diameter is recommended, but not required. The design should be such that a fish hook can be rotated out, without pulling it out at an angle. The dehooking end must be blunt with all edges rounded. The device must be of a size appropriate to secure the range of hook sizes and styles used in the pelagic longline fishery targeting swordfish and tuna.

(*2*) *Extended reach handle.* The handle must be a minimum length equal to the height of the vessel's freeboard or 6 ft. (1.83 m), whichever is greater.

(D) *Long-handled device to pull an ''inverted V.''* This tool is used to pull a ''V'' in the fishing line when implementing the ''inverted V'' dehooking technique, as described in the document entitled ''Careful Release Protocols for Sea Turtle Release With Minimal Injury,'' required under paragraph (a)(3) of this section, for disentangling and dehooking entangled sea turtles. One long-handled device to pull an ''inverted V'', meeting the minimum design standards, is required onboard. If a 6-ft (1.83 m) J-style dehooker is used to comply with paragraph (c)(5)(i)(C) of this section, it will also satisfy this requirement. Minimum design standards are as follows:

(*1*) *Hook end.* This device, such as a standard boat hook or gaff, must be constructed of stainless steel or aluminum. A sharp point, such as on a gaff hook, is to be used only for holding the monofilament fishing line and should never contact the sea turtle.

(*2*) *Extended reach handle.* The handle must have a minimum length equal to the height of the vessel's freeboard, or 6 ft. (1.83 m), whichever is greater. The handle must be sturdy and strong enough to facilitate the secure attachment of the gaff hook.

(E) *Dipnet.* One dipnet, meeting the minimum design standards, is required onboard. Dipnets are to be used to facilitate safe handling of sea turtles by allowing them to be brought onboard for fishing gear removal, without causing further injury to the animal. Turtles must not be brought onboard without the use of a dipnet. The minimum design standards for dipnets are as follows:

(*1*) *Size of dipnet.* The dipnet must have a sturdy net hoop of at least 31 inches (78.74 cm) inside diameter and a bag depth of at least 38 inches (96.52 cm) to accommodate turtles below 3 ft. (0.914 m) carapace length. The bag mesh openings may not exceed 3 inches (7.62 cm). There must be no sharp edges or burrs on the hoop, or where the hoop is attached to the handle.

(*2*) *Extended reach handle.* The dipnet hoop must be securely fastened to an extended reach handle or pole with a minimum length equal to, or greater than, 150 percent of the height of the vessel's freeboard, or at least 6 ft (1.83 m), whichever is greater. The handle must made of a rigid material strong enough to facilitate the sturdy attachment of the net hoop and able to support a minimum of 100 lbs (34.1 kg) without breaking or significant bending or distortion. It is recommended, but not required, that the extended reach handle break down into sections.

(F) *Tire.* A minimum of one tire is required onboard for supporting a turtle in an upright orientation while it is onboard, although an assortment of sizes is recommended to accommodate a range of turtle sizes. The required tire must be a standard passenger vehicle tire, and must be free of exposed steel belts.

(G) *Short-handled dehooker for ingested hooks.* One short-handled

device, meeting the minimum design standards, is required onboard for removing ingested hooks. This dehooker is designed to remove ingested hooks from boated sea turtles. It can also be used on external hooks or hooks in the front of the mouth. Minimum design standards are as follows:

(*1*) *Hook removal device.* The hook removal device must be constructed of ¼-inch (6.35 mm) 316 L stainless steel, and must allow the hook to be secured and the barb shielded without re-engaging during the removal process. It must be no larger than 15–16 inch (3.33 cm) outside diameter. It may not have any unprotected terminal points (including blunt ones), as this could cause injury to the esophagus during hook removal. A sliding PVC bite block must be used to protect the beak and facilitate hook removal if the turtle bites down on the dehooking device. The bite block should be constructed of a 3–4-inch (1.91 cm) inside diameter high impact plastic cylinder (e.g., Schedule 80 PVC) that is 10 inches (25.4 cm) long to allow for 5 inches (12.7 cm) of slide along the shaft. The device must be of a size appropriate to secure the range of hook sizes and styles used in the pelagic longline fishery targeting swordfish and tuna.

(*2*) *Handle length.* The handle should be approximately 16–24 inches (40.64 cm–60.69 cm) in length, with approximately a 5-inch (12.7 cm) long tube T-handle of approximately 1 inch (2.54 cm) in diameter.

(H) *Short-handled dehooker for external hooks.* One short-handled dehooker for external hooks, meeting the minimum design standards, is required onboard. The short-handled dehooker for ingested hooks required to comply with paragraph (c)(5)(i)(G) of this section will also satisfy this requirement. Minimum design standards are as follows:

(*1*) *Hook removal device.* The dehooker must be constructed of 5/16-inch (7.94 cm) 316 L stainless steel, and the design must be such that a hook can be rotated out without pulling it out at an angle. The dehooking end must be blunt, and all edges rounded. The device must be of a size appropriate to secure the range of hook sizes and styles used in the pelagic longline fishery targeting swordfish and tuna.

(*2*) *Handle length.* The handle should be approximately 16–24 inches (40.64 cm–60.69 cm) long with approximately a 5-inch (12.7 cm) long tube T-handle of approximately 1 inch (2.54 cm) in diameter.

(I) *Long-nose or needle-nose pliers.* One pair of long-nose or needle-nose pliers, meeting the minimum design standards, is required on board. Required long-nose or needle-nose pliers can be used to remove deeply embedded hooks from the turtle's flesh that must be twisted during removal. They can also hold PVC splice couplings, when used as mouth openers, in place. To meet the minimum design standards such pliers must generally be approximately 12 inches (30.48 cm) in length, and should be constructed of stainless steel material.

(J) *Bolt cutters.* One pair of bolt cutters, meeting the minimum design standards, is required on board. Required bolt cutters may be used to cut hooks to facilitate their removal. They should be used to cut off the eye or barb of a hook, so that it can safely be pushed through a sea turtle without causing further injury. They should also be used to cut off as much of the hook as possible, when the remainder of the hook cannot be removed. To meet the minimum design standards such bolt cutters must generally be approximately 17 inches (43.18 cm) in total length, with 4-inch (10.16 cm) long blades that are 2¼ inches (5.72 cm) wide, when closed, and with 13-inch (33.02 cm) long handles. Required bolt cutters must be able to cut hard metals, such as stainless or carbon steel hooks, up to ¼-inch (6.35 mm) diameter.

(K) *Monofilament line cutters.* One pair of monofilament line cutters is required on board. Required monofilament line cutters must be used to remove fishing line as close to the eye of the hook as possible, if the hook is swallowed or cannot be removed. To meet the minimum design standards such monofilament line cutters must generally be approximately 7½ inches (19.05 cm) in length. The blades must be 1 in (4.45 cm) in length and ⅝ in (1.59 cm) wide, when closed, and are recommended to be coated with Teflon (a trademark owned by E.I. DuPont de Nemours and Company Corp.).

(L) *Mouth openers/mouth gags.* Required mouth openers and mouth gags are used to open sea turtle mouths, and to keep them open when removing ingested hooks from boated turtles. They must allow access to the hook or line without causing further injury to the turtle. Design standards are included in the item descriptions. At least two of the seven different types of mouth openers/gags described below are required:

(*1*) *A block of hard wood.* Placed in the corner of the jaw, a block of hard wood may be used to gag open a turtle's mouth. A smooth block of hard wood of a type that does not splinter (e.g. maple) with rounded edges should be sanded smooth, if necessary, and soaked in water to soften the wood. The dimensions should be approximately 11 inches (27.94 cm) 1 inch (2.54 cm) 1 inch (2.54 cm). A long-handled, wire shoe brush with a wooden handle, and with the wires removed, is an inexpensive, effective and practical mouth-opening device that meets these requirements.

(*2*) *A set of three canine mouth gags.* Canine mouth gags are highly recommended to hold a turtle's mouth open, because the gag locks into an open position to allow for hands-free operation after it is in place. A set of canine mouth gags must include one of each of the following sizes: small (5 inches) (12.7 cm), medium (6 inches) (15.24 cm), and large (7 inches) (17.78 cm). They must be constructed of stainless steel. A 1-inch (4.45 cm) piece of vinyl tubing (¾-inch (1.91 cm) outside diameter and ⅝-inch (1.59 cm) inside diameter) must be placed over the ends to protect the turtle's beak.

(*3*) *A set of two sturdy dog chew bones.* Placed in the corner of a turtle's jaw, canine chew bones are used to gag open a sea turtle's mouth. Required canine chews must be constructed of durable nylon, zylene resin, or thermoplastic polymer, and strong enough to withstand biting without splintering. To accommodate a variety of turtle beak sizes, a set must include one large (5½–8 inches (13.97 cm–20.32 cm) in length), and one small (3½–4½ inches (8.89 cm–11.43 cm) in length) canine chew bones.

(*4*) *A set of two rope loops covered with hose.* A set of two rope loops covered with a piece of hose can be used as a mouth opener, and to keep a turtle's mouth open during hook and/or line removal. A required set consists of two 3-foot (0.91 m) lengths of poly braid rope (⅜-inch (9.52 mm) diameter suggested), each covered with an 8-inch (20.32 cm) section of ½ inch (1.27 cm) or ¾ inch (1.91 cm) light-duty garden hose, and each tied into a loop. The upper loop of rope covered with hose is secured on the upper beak to give control with one hand, and the second piece of rope covered with hose is secured on the lower beak to give control with the user's foot.

(*5*) *A hank of rope.* Placed in the corner of a turtle's jaw, a hank of rope can be used to gag open a sea turtle's mouth. A 6-foot (1.83 m) lanyard of approximately 3/16-inch (4.76 mm) braided nylon rope may be folded to create a hank, or looped bundle, of rope. Any size soft-braided nylon rope is allowed, however it must create a hank of approximately 2–4 inches (5.08 cm–10.16 cm) in thickness.

(*6*) *A set of four PVC splice couplings.* PVC splice couplings can be positioned inside a turtle's mouth to allow access to the back of the mouth for hook and line removal. They are to be held in place with the needle-nose pliers. To ensure proper fit and access, a required set must consist of the following Schedule 40 PVC splice coupling sizes: 1 inch (2.54 cm), 1¼ inch (3.18 cm), 1½ inch (3.81 cm), and 2 inches (5.08 cm).

(*7*) *A large avian oral speculum.* A large avian oral speculum provides the ability to hold a turtle's mouth open and to control the head with one hand, while removing a hook with the other hand. The avian oral speculum must be 9-inches (22.86 cm) long, and constructed of 3/16-inch (4.76 mm) wire diameter surgical stainless steel (Type 304). It must be covered with 8 inches (20.32 cm) of clear vinyl tubing (5/16-inch (7.9 mm) outside diameter, 3/16-inch (4.76 mm) inside diameter).

(M) *Turtle control devices.* One turtle control device, as described in paragraph (c)(5)(i)(M)(*1*) or (*2*) of this section, and meeting the minimum design standards, is required onboard and must be used to secure a front flipper of the sea turtle so that the animal can be controlled at the side of the vessel. It is strongly recommended that a pair of turtle control devices be used to secure both front flippers when crew size and conditions allow. Minimum design standards consist of:

(*1*) *Turtle tether and extended reach handle.* Approximately 15–20 feet of ½-inch hard lay negative buoyance line is used to make an approximately 30-inch loop to slip over the flipper. The line is fed through a ¾-inch fair lead, eyelet, or eyebolt at the working end of a pole and through a ¾-inch eyelet or eyebolt in the midsection. A ½-inch quick release cleat holds the line in place near the end of the pole. A final ¾-inch eyelet or eyebolt should be positioned approximately 7-inches behind the cleat to secure the line, while allowing a safe working distance to avoid injury when releasing the line from the cleat. The line must be securely fastened to an extended reach handle or pole with a minimum length equal to, or greater than, 150 percent of the height of the vessel's freeboard, or a minimum of 6 feet (1.83 m), whichever is greater. There is no restriction on the type of material used to construct this handle, as long as it is sturdy. The handle must include a tag line to attach the tether to the vessel to prevent the turtle from breaking away with the tether still attached.

(*2*) *T&G ninja sticks and extended reach handles.* Approximately 30–35 feet of ½-inch to ⅝-inch soft lay polypropylene or nylon line or similar is fed through 2 PVC conduit, fiberglass, or similar sturdy poles and knotted using an overhand (recommended) knot at the end of both poles or otherwise secured. There should be approximately 18–24 inches of exposed rope between the poles to be used as a working surface to capture and secure the flipper. Knot the line at the ends of both poles to prevent line slippage if they are not otherwise secured. The remaining line is used to tether the apparatus to the boat unless an additional tag line is used. Two lengths of sunlight resistant ¾-inch schedule 40 PVC electrical conduit, fiberglass, aluminum, or similar material should be used to construct the apparatus with a minimum length equal to, or greater than, 150 percent of the height of the vessel's freeboard, or 6 feet (1.83 m), whichever is greater.

(ii) *Handling and release requirements.* (A) Sea turtle bycatch mitigation gear, as required by paragraphs (c)(5)(i)(A) through (D) of this section, must be used to disengage any hooked or entangled sea turtles that cannot be brought onboard. Sea turtle bycatch mitigation gear, as required by paragraphs (c)(5)(i)(E) through (M) of this section, must be used to facilitate access, safe handling, disentanglement, and hook removal or hook cutting of sea turtles that can be brought onboard, where feasible. Sea turtles must be handled, and bycatch mitigation gear must be used, in accordance with the careful release protocols and handling/release guidelines specified in paragraph (a)(3) of this section, and in accordance with the onboard handling and resuscitation requirements specified in § 223.206(d)(1) of this title.

(B) *Boated turtles.* When practicable, active and comatose sea turtles must be brought on board, with a minimum of injury, using a dipnet as required by paragraph (c)(5)(i)(E) of this section. All turtles less than 3 ft. (.91 m) carapace length should be boated, if sea conditions permit.

(*1*) A boated turtle should be placed on a standard automobile tire, or cushioned surface, in an upright orientation to immobilize it and facilitate gear removal. Then, it should be determined if the hook can be removed without causing further injury.

(*2*) All externally embedded hooks should be removed, unless hook removal would result in further injury to the turtle. No attempt to remove a hook should be made if it has been swallowed and the insertion point is not visible, or if it is determined that removal would result in further injury.

(*3*) If a hook cannot be removed, as much line as possible should be removed from the turtle using monofilament cutters as required by paragraph (c)(5)(i) of this section, and the hook should be cut as close as possible to the insertion point before releasing the turtle, using boltcutters as required by paragraph (c)(5)(i) of this section.

(*4*) If a hook can be removed, an effective technique may be to cut off either the barb, or the eye, of the hook using bolt cutters, and then to slide the hook out. When the hook is visible in the front of the mouth, a mouth-opener, as required by paragraph (c)(5)(i) of this section, may facilitate opening the turtle's mouth and a gag may facilitate keeping the mouth open. Short-handled dehookers for ingested hooks, long-nose pliers, or needle-nose pliers, as required by paragraph (c)(5)(i) of this section, should be used to remove visible hooks from the mouth that have not been swallowed on boated turtles, as appropriate.

(*5*) As much gear as possible must be removed from the turtle without causing further injury prior to its release. Refer to the careful release protocols and handling/release guidelines required in paragraph (a)(3) of this section, and the handling and resuscitation requirements specified in § 223.206(d)(1) of this title, for additional information.

(C) *Non-boated turtles.* If a sea turtle is too large, or hooked in a manner that precludes safe boating without causing further damage or injury to the turtle, sea turtle bycatch mitigation gear required by paragraphs (c)(5)(i)(A) through (D) of this section must be used to disentangle sea turtles from fishing gear and disengage any hooks, or to clip the line and remove as much line as possible from a hook that cannot be removed, prior to releasing the turtle, in accordance with the protocols specified in paragraph (a)(3) of this section.

(*1*) Non-boated turtles should be brought close to the boat and provided with time to calm down. Then, it must be determined whether or not the hook can be removed without causing further injury. A front flipper or flippers of the turtle must be secured with an approved turtle control device from the list specified in paragraph (c)(2)(v)(D) of this section.

(*2*) All externally embedded hooks must be removed, unless hook removal would result in further injury to the turtle. No attempt should be made to remove a hook if it has been swallowed, or if it is determined that removal would result in further injury. If the hook cannot be removed and/or if the animal is entangled, as much line as

possible must be removed prior to release, using a line cutter as required by paragraph (c)(5)(i) of this section. If the hook can be removed, it must be removed using a long-handled dehooker as required by paragraph (c)(5)(i) of this section.

(*3*) Without causing further injury, as much gear as possible must be removed from the turtle prior to its release. Refer to the careful release protocols and handling/release guidelines required in paragraph (a)(3) of this section, and the handling and resuscitation requirements specified in § 223.206(d)(1) for additional information.

(iii) *Gear modifications.* The following measures are required of vessel operators to reduce the incidental capture and mortality of sea turtles:

(A) *Gangion length.* The length of any gangion on vessels that have pelagic longline gear on board and that have been issued, or are required to have, a limited access swordfish, shark, or tuna longline category permit for use in the Atlantic Ocean including the Caribbean Sea and the Gulf of Mexico must be at least 10 percent longer than any floatline length if the total length of any gangion plus the total length of any floatline is less than 100 meters.

(B) *Hook size, type, and bait.* Vessels fishing outside of the NED gear restricted area, as defined at § 635.2, that have pelagic longline gear on board, and that have been issued, or are required to have, a limited access swordfish, shark, or tuna longline category permit for use in the Atlantic Ocean, including the Caribbean Sea and the Gulf of Mexico, are limited, at all times, to possessing on board and/or using only whole finfish and/or squid bait, and the following types and sizes of fishing hooks:

(*1*) 18/0 or larger circle hooks with an offset not to exceed 10°; and/or,

(*2*) 16/0 or larger non-offset circle hooks.

(*i*) For purposes of paragraphs (c)(5)(iii)(C)(*1*) and (*2*) of this section, the outer diameter of an 18/0 circle hook at its widest point must be no smaller than 2.16 inches (55 mm), and the outer diameter of a 16/0 circle hook at its widest point must be no smaller than 1.74 inches (44.3 mm), when measured with the eye of the hook on the vertical axis (y-axis) and perpendicular to the horizontal axis (x-axis). The distance between the hook point and the shank (i.e., the gap) on an 18/0 circle hook must be no larger than 1.13 inches (28.8 mm), and the gap on a 16/0 circle hook must be no larger than 1.01 inches (25.8 mm). The allowable offset is measured from the barbed end of the hook, and is relative to the parallel plane of the eyed-end, or shank, of the hook when laid on its side. The only allowable offset circle hooks are those that are offset by the hook manufacturer. In the Gulf of Mexico, as described at § 600.105(c), circle hooks also must be constructed of corrodible round wire stock that is no larger than 3.65 mm in diameter.

(*ii*) [Reserved]

(*3*) If green-stick gear, as defined at § 635.2, is onboard, a vessel may possess up to 20 J-hooks. J-hooks may be used only with green-stick gear, and no more than 10 hooks may be used at one time with each green-stick gear. J-hooks used with green-stick gear may be no smaller than 1.5 inch (38.1 mm) when measured in a straight line over the longest distance from the eye to any other part of the hook. If green-stick gear is onboard, artificial bait may be possessed, but may be used only with green-stick gear.

(iv) *Approval of sea turtle bycatch mitigation gear.* NMFS will file with the Office of the Federal Register for publication an initial list of required sea turtle bycatch mitigation gear that NMFS has approved as meeting the minimum design standards specified under paragraph (c)(5)(i) of this section. Other devices proposed for use as line clippers or cutters or dehookers, as specified under paragraphs (c)(5)(i)(A), (B), (C), (G), (H), and (K) of this section, must be approved as meeting the minimum design standards before being used. NMFS will examine new devices, as they become available, to determine if they meet the minimum design standards, and will file with the Office of the Federal Register for publication notification of any new devices that are approved as meeting the standards.

(d) *Bottom longlines.* (1) If bottom longline gear is onboard a vessel issued a permit under this part, persons aboard that vessel may not fish or deploy any type of fishing gear in the following areas:

(i) The mid-Atlantic shark closed area from January 1 through July 31 each calendar year;

(ii) The areas designated at § 622.33(a)(1) through (3) of this chapter, year-round; and

(iii) The areas described in paragraphs (d)(1)(iii)(A) through (H) of this section, year-round.

(A) *Snowy Grouper Wreck.* Bounded by rhumb lines connecting, in order, the following points: 33°25′ N. lat., 77°04.75′ W. long.; 33°34.75′ N. lat., 76°51.3′ W. long.; 33°25.5′ N. lat., 76°46.5′ W. long.; 33°15.75′ N. lat., 77°00.0′ W. long.; 33°25′ N. lat., 77°04.75′ W. long.

(B) *Northern South Carolina.* Bounded on the north by 32°53.5′ N. lat.; on the south by 32°48.5′ N. lat.; on the east by 78°04.75′ W. long.; and on the west by 78°16.75′ W. long.

(C) *Edisto.* Bounded on the north by 32°24′ N. lat.; on the south by 32°18.5′ N. lat.; on the east by 78°54.0′ W. long.; and on the west by 79°06.0′ W. long.

(D) *Charleston Deep Artificial Reef.* Bounded by rhumb lines connecting, in order, the following points: 32°04′ N. lat., 79°12′ W. long.; 32°08.5′ N. lat., 79°07.5′ W. long.; 32°06′ N. lat., 79°05′ W. long.; 32°01.5′ N. lat., 79°09.3′ W. long.; 32°04′ N. lat., 79°12′ W. long.

(E) *Georgia.* Bounded by rhumb lines connecting, in order, the following points: 31°43′ N. lat., 79°31′ W. long.; 31°43′ N. lat., 79°21′ W. long.; 31°34′ N. lat., 79°29′ W. long.; 31°34′ N. lat., 79°39′ W. long; 31°43′ N. lat., 79°31′ W. long.

(F) *North Florida.* Bounded on the north by 30°29′ N. lat.; on the south by 30°19′ N. lat.; on the east by 80°02′ W. long.; and on the west by 80°14′ W. long.

(G) *St. Lucie Hump.* Bounded on the north by 27°08′ N. lat.; on the south by 27°04′ N. lat.; on the east by 79°58′ W. long.; and on the west by 80°00′ W. long.

(H) *East Hump.* Bounded by rhumb lines connecting, in order, the following points: 24°36.5′ N. lat., 80°45.5′ W. long.; 24°32′ N. lat., 80°36′ W. long; 24°27.5′ N. lat., 80°38.5′ W. long; 24°32.5′ N. lat., 80°48′ W. long.; 24°36.5′ N. lat., 80°45.5′ W. long.

(2) The operator of a vessel required to be permitted under this part and that has bottom longline gear on board must undertake the following bycatch mitigation measures to release sea turtles, prohibited sharks, or smalltooth sawfish, as appropriate.

(i) *Possession and use of required mitigation gear.* The equipment listed in paragraph (c)(5)(i) of this section must be carried on board and must be used to handle, release, and disentangle hooked or entangled sea turtles, prohibited sharks, or smalltooth sawfish in accordance with requirements specified in paragraph (d)(2)(ii) of this section.

(ii) *Handling and release requirements.* Sea turtle bycatch mitigation gear, as required by paragraph (d)(2)(i) of this section, must be used to disengage any hooked or entangled sea turtle as stated in paragraph (c)(5)(ii) of this section. This mitigation gear should also be employed to disengage any hooked or entangled species of prohibited sharks as listed under heading D of Table 1 of appendix A of this part, any hooked or entangled

species of sharks that exceed the retention limits as specified in § 635.24(a), and any hooked or entangled smalltooth sawfish. In addition, if a smalltooth sawfish is caught, the fish should be kept in the water while maintaining water flow over the gills and the fish should be examined for research tags. All smalltooth sawfish must be released in a manner that will ensure maximum probability of survival, but without removing the fish from the water or any research tags from the fish.

(3) If a vessel issued or required to be issued a permit under this part is in a closed area designated under paragraph (d)(1) of this section and has pelagic longline gear onboard, the vessel may not, at any time, possess or land any demersal species listed in Table 3 of Appendix A to this part in excess of 5 percent, by weight, of the total weight of pelagic and demersal species possessed or landed, that are listed in Tables 2 and 3 of Appendix A to this part.

(e) *Purse seine*—(1) *Mesh size.* A purse seine used in directed fishing for bluefin tuna must have a mesh size equal to or smaller than 4.5 inches (11.4 cm) in the main body (stretched when wet) and must have at least 24-count thread throughout the net.

(2) *Inspection of purse seine vessels.* Persons that own or operate an Atlantic Tunas purse seine vessel must have their fishing gear inspected for mesh size by an enforcement agent of NMFS prior to commencing fishing for the season in any fishery that may result in the harvest of Atlantic tunas. Such persons must request such inspection at least 24 hours before commencement of the first fishing trip of the season. If NMFS does not inspect the vessel within 24 hours of such notification, the inspection requirement is waived. In addition, at least 24 hours before commencement of offloading any bluefin tuna after a fishing trip, such persons must request an inspection of the vessel and catch by notifying NMFS. If, after notification by the vessel, NMFS does not arrange to inspect the vessel and catch at offloading, the inspection requirement is waived.

(f) *Rod and reel.* Persons who have been issued or are required to be issued a permit under this part and who are participating in a ''tournament'', as defined in § 635.2, that bestows points, prizes, or awards for Atlantic billfish must deploy only non-offset circle hooks when using natural bait or natural bait/artificial lure combinations, and may not deploy a J-hook or an offset circle hook in combination with natural bait or a natural bait/artificial lure combination.

(g) *Gillnet.* (1) Persons fishing with gillnet gear must comply with the provisions implementing the Atlantic Large Whale Take Reduction Plan, the Bottlenose Dolphin Take Reduction Plan, the Harbor Porpoise Take Reduction Plan, and any other relevant Take Reduction Plan set forth in §§ 229.32 through 229.35 of this title. If a listed whale is taken, the vessel operator must cease fishing operations immediately and contact NOAA Fisheries as required under part 229 of this title.

(2) While fishing with a gillnet for or in possession of any of the large coastal, small coastal, and pelagic sharks listed in section A, B, and/or C of table 1 of appendix A of this part, the gillnet must remain attached to at least one vessel at one end, except during net checks.

(3) Vessel operators fishing with gillnet for, or in possession of, any of the large coastal, small coastal, and pelagic sharks listed in sections A, B, and/or C of table 1 of appendix A of this part are required to conduct net checks every 0.5 to 2 hours to look for and remove any sea turtles, marine mammals, or smalltooth sawfish. Smalltooth sawfish should not be removed from the water while being removed from the net.

(h) *Buoy gear.* Vessels utilizing buoy gear may not possess or deploy more than 35 floatation devices, and may not deploy more than 35 individual buoy gears per vessel. Buoy gear must be constructed and deployed so that the hooks and/or gangions are attached to the vertical portion of the mainline. Floatation devices may be attached to one but not both ends of the mainline, and no hooks or gangions may be attached to any floatation device or horizontal portion of the mainline. If more than one floatation device is attached to a buoy gear, no hook or gangion may be attached to the mainline between them. Individual buoy gears may not be linked, clipped, or connected together in any way. Buoy gears must be released and retrieved by hand. All deployed buoy gear must have some type of monitoring equipment affixed to it including, but not limited to, radar reflectors, beeper devices, lights, or reflective tape. If only reflective tape is affixed, the vessel deploying the buoy gear must possess on board an operable spotlight capable of illuminating deployed floatation devices. If a gear monitoring device is positively buoyant, and rigged to be attached to a fishing gear, it is included in the 35 floatation device vessel limit and must be marked appropriately.

(i) *Speargun fishing gear.* Speargun fishing gear may only be utilized when recreational fishing for Atlantic BAYS tunas and only from vessels issued either a valid HMS Angling or valid HMS Charter/Headboat permit. Persons fishing for Atlantic BAYS tunas using speargun gear, as specified in § 635.19 of this part, must be physically in the water when the speargun is fired or discharged, and may freedive, use SCUBA, or other underwater breathing devices. Only free-swimming BAYS tunas, not those restricted by fishing lines or other means, may be taken by speargun fishing gear. ''Powerheads'', as defined at § 600.10 of this chapter, or any other explosive devices, may not be used to harvest or fish for BAYS tunas with speargun fishing gear.

(j) *Green-stick gea*r. Green-stick gear may only be utilized when fishing from vessels issued a valid Atlantic Tunas General, Swordfish General Commercial, HMS Charter/Headboat, or Atlantic Tunas Longline category permit. The gear must be attached to the vessel, actively trolled with the mainline at or above the water's surface, and may not be deployed with more than 10 hooks or gangions attached.

■ 11. In § 635.23, the section heading and paragraphs (d) and (f) are revised to read as follows:

§ 635.23 Retention limits for bluefin tuna.

* * * * *

(d) *Harpoon category.* Persons aboard a vessel permitted in the Atlantic Tunas Harpoon category may retain, possess, or land an unlimited number of giant bluefin tuna per day. An incidental catch of two large medium bluefin tuna per vessel per day may be retained, possessed, or landed, unless the retention limits is increased by NMFS through an inseason adjustment to three, or a maximum of four, large medium bluefin tuna per vessel per day, based upon the criteria under § 635.27(a)(8). NMFS will implement an adjustment via publication in the **Federal Register**. If adjusted upwards to three or four large medium bluefin tuna per vessel per day, NMFS may subsequently decrease the retention limit down to the default level of two, based on the criteria under § 635.27(a)(8).

* * * * *

(f) *Longline category.* Persons aboard a vessel permitted in the Atlantic Tunas Longline category are subject to the bluefin tuna retention restrictions in this paragraph.

(1) *Fishing with pelagic longline gear.* (i) A vessel fishing with pelagic longline gear may retain, possess, land and sell large medium and giant bluefin tuna

taken incidentally when fishing for other species if in compliance with all the IBQ requirements of section § 635.15 of this part, including the requirement that a vessel may not declare into or depart on a fishing trip with pelagic longline onboard unless it has the required minimum bluefin tuna quota allocation required for the region where fishing activity will occur.

(ii) A vessel with pelagic longline gear onboard must retain all dead bluefin tuna that are 73 inches or greater CFL.

(2) *Fishing with gear other than pelagic longline.* A vessel issued an Atlantic Tunas Longline category permit that does not have pelagic longline gear onboard may not retain, land or sell bluefin tuna, unless fishing under the provisions of § 635.21(c)(3)(vi)(B).

* * * * *

■ 12. In § 635.27:

■ a. Paragraphs (a) introductory text, (a)(1) through (3), (a)(4)(i) and (iii), (a)(5) and (6), (a)(7) heading, and (a)(7)(i) are revised; and

■ b. Paragraphs (a)(4)(v), (a)(8)(x) through (xiv), and (e) are added.

The revisions and additions read as follows:

§ 635.27 Quotas.

(a) *Bluefin tuna.* Consistent with ICCAT recommendations, and with paragraph (a)(10)(iv) of this section, NMFS may subtract the most recent, complete, and available estimate of dead discards from the annual U.S. bluefin tuna quota, and make the remainder available to be retained, possessed, or landed by persons and vessels subject to U.S. jurisdiction. The remaining baseline annual U.S. bluefin tuna quota will be allocated among the General, Angling, Harpoon, Purse Seine, Longline, Trap, and Reserve categories, as described in this section. The baseline annual U.S. bluefin tuna quota is 923.7 mt ww, not including an additional annual 25 mt ww allocation provided in paragraph (a)(3) of this section. The bluefin quota for the quota categories is calculated through the following process. First, 68 mt ww is subtracted from the baseline annual U.S. bluefin tuna quota and allocated to the Longline category quota. Second, the remaining quota is divided among the categories according to the following percentages: General—47.1 percent (403 mt ww); Angling—19.7 percent (168.6 mt ww), which includes the school bluefin tuna held in reserve as described under paragraph (a)(7)(ii) of this section; Harpoon—3.9 percent (33.4 mt ww); Purse Seine—18.6 percent (159.1 mt ww); Longline—8.1 percent (69.3 mt ww) plus the 68 mt ww allocation (137.3 mt ww total not including 25 mt ww allocation from paragraph (a)(3)); Trap—0.1 percent (0.9 mt ww); and Reserve—2.5 percent (21.4 mt ww). NMFS may make inseason and annual adjustments to quotas as specified in paragraphs (a)(9) and (10) of this section, including quota adjustments as a result of the Annual reallocation of Purse Seine quota described under paragraph (a)(4)(v). Bluefin tuna quotas are specified in whole weight.

(1) *General category quota.* (i) Catches from vessels for which General category Atlantic Tunas permits have been issued, catches from vessels issued an Atlantic Tunas Longline permit fishing under the provisions of § 635.21(c)(3)(vi)(B) and certain catches from vessels for which an HMS Charter/headboat permit has been issued are counted against the General category quota in accordance with § 635.23(c)(3). The amount of large medium and giant bluefin tuna that may be caught, retained, possessed, landed, or sold under the General category quota is 403 mt ww, and is apportioned as follows, unless modified as described under paragraph (a)(1)(ii):

(A) January 1 through the effective date of a closure notice filed by NMFS announcing that the January subquota is reached, or projected to be reached under § 635.28(a)(1), or until March 31, whichever comes first—5.3 percent (21.4 mt ww);

(B) June 1 through August 31—50 percent (201.5 mt ww);

(C) September 1 through September 30—26.5 percent (106.8 mt ww);

(D) October 1 through November 30—13 percent (52.4 mt ww); and

(E) December 1 through December 31—5.2 percent (21 mt ww).

(ii) NMFS may adjust each period's apportionment based on overharvest or underharvest in the prior period, and may transfer subquota from one time period to another time period, earlier in the year, through inseason action or annual specifications. For example, subquota could be transferred from the June 1 through August 31 time period to the January time period; or from the October 1 through November 30 time period to the September time period.

(iii) When the General category fishery has been closed in any quota period specified under paragraph (a)(1)(i) of this section, NMFS will publish a closure action as specified in § 635.28. The subsequent time-period subquota will automatically open in accordance with the dates specified under paragraph (a)(1)(i) of this section.

(2) *Angling category quota.* In accordance with the framework procedures of the Consolidated HMS FMP, prior to each fishing year, or as early as feasible, NMFS will establish the Angling category daily retention limits. The total amount of bluefin tuna that may be caught, retained, possessed, and landed by anglers aboard vessels for which an HMS Angling permit or an HMS Charter/Headboat permit has been issued is 168.6 mt ww. No more than 2.3 percent (3.9 mt ww) of the annual Angling category quota may be large medium or giant bluefin tuna. In addition, over each 2-consecutive-year period (starting in 2011, inclusive), no more than 10 percent of the annual U.S. bluefin tuna quota, inclusive of the allocation specified in paragraph (a)(3) of this section, may be school bluefin tuna (i.e., 94.9 mt ww). The Angling category quota includes the amount of school bluefin tuna held in reserve under paragraph (a)(7)(ii) of this section. The size class subquotas for bluefin tuna are further subdivided as follows:

(i) After adjustment for the school bluefin tuna quota held in reserve (under paragraph (a)(7)(ii) of this section), 52.8 percent (40.8 mt ww) of the school bluefin tuna Angling category quota may be caught, retained, possessed, or landed south of 39°18′ N. lat. The remaining school bluefin tuna Angling category quota (36.5 mt ww) may be caught, retained, possessed or landed north of 39°18′ N. lat.

(ii) An amount equal to 52.8 percent (36.9 mt ww) of the large school/small medium bluefin tuna Angling category quota may be caught, retained, possessed, or landed south of 39°18′ N. lat. The remaining large school/small medium bluefin tuna Angling category quota (32.9 mt ww) may be caught, retained, possessed or landed north of 39°18′ N. lat.

(iii) One third (1.3 mt ww) of the large medium and giant bluefin tuna angling category quota may be caught retained, possessed, or landed, in each of the three following geographic areas: (1) North of 39° 18′ N. lat.; (2) south of 39° 18′ N. lat., and outside of the Gulf of Mexico; and (3) in the Gulf of Mexico. For the purposes of this section, the Gulf of Mexico region includes all waters of the U.S. EEZ west and north of the boundary stipulated at 50 CFR § 600.105(c).

(3) *Longline category quota.* The total amount of large medium and giant bluefin tuna that may be caught discarded dead, or retained, possessed, or landed by vessels that possess Longline category Atlantic Tunas permits is 137.3 mt ww. In addition, 25 mt ww shall be allocated for incidental catch by pelagic longline vessels fishing in the Northeast Distant gear restricted area.

(4) * * *

(i) The total amount of large medium and giant bluefin tuna that may be caught, retained, possessed, or landed by vessels that possess Purse Seine category Atlantic Tunas permits is 159.1 mt ww, unless changed pursuant to the provisions of paragraph (4)(v). The directed purse seine fishery for bluefin tuna commences on June 1 of each year, unless NMFS takes action to delay the season start date. Based on cumulative and projected landings in other commercial fishing categories, and the potential for gear conflicts on the fishing grounds or market impacts due to oversupply, NMFS may delay the bluefin tuna purse seine season start date from June 1 to no later than August 15, by filing an adjustment action with the Office of the Federal Register for publication. The Purse Seine category fishery closes on December 31 of each year.

* * * * *

(iii) Annually, NMFS will make equal allocations of the available size classes of bluefin tuna among purse seine vessel owners so requesting, adjusted as necessary to account for underharvest or overharvest by each participating vessel or the vessel it replaces from the previous fishing year, consistent with paragraphs (a) introductory text, (a)(4)(v), and (a)(10)(i) of this section. Such allocations are freely transferable, in whole or in part, among vessels that have Purse Seine category Atlantic Tunas permits. Any purse seine vessel owner intending to land bluefin tuna under a bluefin tuna quota allocation transferred from another purse seine vessel owner must lease that allocation through the Individual Bluefin Quota Allocation Leasing Program procedures at § 635.15(c)(3). Trip or seasonal catch limits otherwise applicable under § 635.23(e) are not affected by transfers of bluefin tuna allocation. Purse seine vessel owners who, through landing and/or transfer, have no remaining bluefin tuna quota allocation may not use their permitted vessels in any fishery in which Atlantic bluefin tuna might be caught, regardless of whether bluefin tuna are retained, unless such vessel owners lease additional allocation through the Individual Bluefin Quota Allocation Leasing Program.

* * * * *

(v) *Annual reallocation of Purse Seine quota.* Annually, by the end of the year, NMFS will determine the amount of quota available to be allocated to the Purse Seine category for the upcoming fishing year. NMFS will allocate the Purse Seine category either 100%, 75%, 50%, or 25% of its annual baseline quota, described in paragraph (a)(4)(i) of this section, according the allocation criteria in this paragraph. Any quota not allocated to the Purse Seine category would be allocated to the Reserve category. If the purse seine catch (landings and dead discards) in year one is between 0 and 20% of the year one baseline Purse Seine quota, the Purse Seine category would be allocated 25% of their baseline quota in year two, and 75% of the Purse Seine quota would be reallocated to the Reserve Category for that year. If the purse seine catch in year one is greater than 20% and up to 45% of the year one baseline Purse Seine quota, the Purse Seine category would be allocated 50% of their baseline quota in year two, and 50% of the Purse Seine quota would be reallocated to the Reserve Category for that year. If the purse seine catch in year one is greater than 45% and up to 74% of the year one baseline Purse Seine quota, the Purse Seine category would be allocated 75% of their baseline quota in year two, and 25% of the Purse Seine quota would be transferred to the Reserve Category for that year. If the purse seine catch in year one is greater than 75% of the year one baseline Purse Seine quota, the Purse Seine category would be allocated 100% of their baseline quota in year two, and no quota would be transferred to the Reserve Category for that year. These criteria would apply following the same pattern in years beyond year two. NMFS will inform the owners of vessels with Purse Seine permits of its determination regarding the amount of quota that will be available to be allocated to the Purse Seine category for the subsequent year, based upon the information available at the time. Thereafter, NMFS may modify the quota allocated to Purse Seine category based on revisions to the total bluefin tuna quota, or other new information.

(5) *Harpoon category quota.* The total amount of large medium and giant bluefin tuna that may be caught, retained, possessed, landed, or sold by vessels that possess Harpoon category Atlantic Tunas permits is 33.4 mt ww. The Harpoon category fishery commences on June 1 of each year, and closes on November 15 of each year.

(6) *Trap category quota.* The total amount of large medium and giant bluefin tuna that may be caught, retained, possessed, or landed by vessels that possess Trap category Atlantic Tunas permits is 0.9 mt ww.

(7) *Reserve category quota.* (i) The total amount of bluefin tuna that is held in reserve for inseason or annual adjustments and research using quota or subquotas is 21.4 mt ww, and may be augmented by underharvest from the previous year, or annual reallocation of Purse Seine quota as described under paragraph (4)(v) of this section. Consistent with paragraphs (a)(8), (a)(9), and (a)(10) of this section, NMFS may allocate any portion of this quota for inseason or annual adjustments to any category quota in the fishery.

* * * * *

(8) * * *

(x) Optimize fishing opportunity.

(xi) Account for dead discards.

(xii) Facilitate quota accounting.

(xiii) Support other fishing monitoring programs through quota allocations and/or generation of revenue.

(xiv) Support research through quota allocations and/or generation of revenue.

* * * * *

(e) *Northern albacore tuna*—(1) *Annual quota.* Consistent with ICCAT recommendations and domestic management objectives, the total baseline annual fishery quota is 527 mt ww. The total quota, after any adjustments made per paragraph (e)(2) of this section, is the fishing year's total amount of northern albacore tuna that may be landed by persons and vessels subject to U.S. jurisdiction.

(2) *Annual adjustments.* Consistent with ICCAT recommendations and domestic management objectives, and based on landings statistics and other information as appropriate, if for a particular year, the total landings are above or below the annual quota for that year, the difference between the annual quota and the landings will be subtracted from, or added to, the following year's quota, respectively, or subtracted or added through a delayed, or multi-year adjustment. Carryover adjustments shall be limited to 25 percent of the baseline quota allocation for that year. NMFS will file with the Office of the Federal Register for publication any adjustment or apportionment made under this paragraph (e)(2).

■ 13. In § 635.28, paragraphs (a)(1) and (2) and (b)(1) are revised, and (a)(4), (c)(3), and (d) are added to read as follows:

§ 635.28 Fishery closures.

(a) *Bluefin tuna.* (1) When a bluefin tuna quota, other than the Purse Seine category or Longline category quota specified in § 635.27(a), is reached, or is projected to be reached, NMFS will file a closure action with the Office of the Federal Register for publication. On and after the effective date and time of such action, for the remainder of the fishing year or for a specified period as

indicated in the notice, fishing for, retaining, possessing, or landing bluefin tuna under that quota is prohibited until the opening of the subsequent quota period or until such date as specified in the notice.

(2) From the commencement date of the directed purse seine fishery, as provided under § 635.27(a)(4)(i), through December 31, the owner or operator of a vessel that has been allocated a portion of the Purse Seine category quota under § 635.27(a)(4), or leased bluefin tuna quota allocation under § 635.15(c), may fish for bluefin tuna. Such vessel may be used to fish for yellowfin, bigeye, albacore, or skipjack tuna at any time, however, landings of bluefin tuna taken incidental to fisheries targeting other Atlantic tunas or in any fishery in which bluefin tuna might be caught will be deducted from the individual vessel's quota for the following bluefin tuna fishing season. Upon reaching its individual vessel allocation of bluefin tuna, the vessel may not participate in a directed purse seine fishery for Atlantic tunas or in any fishery in which bluefin tuna might be caught for the remainder of the fishing year.

* * * * *

(4) When the bluefin tuna Longline category quota is reached, projected to be reached, or exceeded, or when there is high uncertainty regarding the estimated or documented levels of bluefin tuna catch, NMFS will file a closure action with the Office of the Federal Register for publication. On and after the effective date and time of such action, for the remainder of the fishing year or for a specified period as indicated in the closure action, vessels that have been issued or are required to have a limited access permit under § 635.4 of this part and that have pelagic longline gear onboard are prohibited from leaving port, regardless of the amount of bluefin tuna quota allocation remaining to each vessel or the amount of fishery quota remaining for other species. In addition to providing notice in the **Federal Register**, NMFS will also notify vessels of any closures and their timing via VMS and may use other electronic methods, such as email. Vessels would be required to return to port prior to the closure date/time. When considering whether to close or reopen the Longline category quota, NMFS may consider the following factors:

(i) Total estimated bluefin tuna catch (landings and dead discards) in relation to the quota;

(ii) The estimated amount by which the bluefin tuna quota might be exceeded;

(iii) The usefulness of data relevant to monitoring the quota;

(iv) The uncertainty in the documented or estimated dead discards or landings of bluefin tuna;

(v) The amount of bluefin tuna landings or dead discards within a short time;

(vi) The effects of continued fishing on bluefin tuna rebuilding and overfishing;

(vii) The provision of reasonable opportunity for pelagic longline vessels to pursue the target species;

(viii) The variations in seasonal distribution, abundance or migration patterns of bluefin tuna; and

(viii) Other relevant factors.

(b) *Sharks.* (1) If quota is available as specified by a publication in the **Federal Register**, the commercial fishery for the shark species or complexes specified in § 635.27(b)(1) will remain open. If the bluefin tuna Longline category quota is closed as specified in paragraph (a)(4) of this section, vessels that have pelagic longline gear on board cannot possess or land sharks.

* * * * *

(c) * * *

(3) *Bluefin tuna longline category closure.* If the bluefin tuna Longline category quota is closed as specified in paragraph (a)(4) of this section, vessels that have pelagic longline gear on board cannot possess or land any North Atlantic swordfish.

(d) *Northern albacore tuna*—When the annual fishery quota specified in § 635.27(e) is reached, or is projected to be reached, NMFS will file a closure action with the Office of the Federal Register for publication. When the fishery for northern albacore tuna is closed, northern albacore tuna may not be retained. If the bluefin tuna Longline category quota is closed as specified in paragraph (a)(4) of this section, vessels that have pelagic longline gear on board cannot possess or land any northern albacore tuna.

■ 14. In § 635.31, paragraphs (a)(1) and (2), (c)(1) and (4), and (d)(1) and (2) are revised to read as follows:

§ 635.31 Restrictions on sale and purchase.

(a) * * *

(1) A person that owns or operates a vessel from which an Atlantic tuna is landed or offloaded may sell such Atlantic tuna only if that vessel has a valid HMS Charter/Headboat permit; a valid General, Harpoon, Longline, Purse Seine, or Trap category permit for Atlantic tunas; or a valid HMS Commercial Caribbean Small Boat permit issued under this part and the appropriate category has not been closed, as specified at § 635.28(a). However, no person may sell a bluefin tuna smaller than the large medium size class. Also, no large medium or giant bluefin tuna taken by a person aboard a vessel with an Atlantic HMS Charter/Headboat permit fishing in the Gulf of Mexico at any time, or fishing outside the Gulf of Mexico when the fishery under the General category has been closed, may be sold (see § 635.23(c)). A person may sell Atlantic bluefin tuna only to a dealer that has a valid permit for purchasing Atlantic bluefin tuna issued under this part. A person may not sell or purchase Atlantic tunas harvested with speargun fishing gear.

(2) Dealers may purchase Atlantic tunas only from a vessel that has a valid commercial permit for Atlantic tunas issued under this part in the appropriate category and the appropriate category has not been closed, as specified at § 635.28(a).

(i) Dealers may purchase Atlantic bluefin tuna only from a vessel that has a valid Federal commercial permit for Atlantic tunas issued under this part in the appropriate category. Vessel owners and operators of vessels that have been issued an Atlantic Tunas Longline category permit can sell bluefin tuna and dealers can purchase bluefin tuna from such vessels only if the Longline category is open, per § 635.28(a)(4) and if:

(A) The vessel has met the minimum quota allocation and accounting requirements at § 635.15 for vessels departing on a trip with pelagic longline gear onboard; or

(B) The vessel has removed pelagic longline gear from the vessel and fished in the Cape Hatteras gear restricted area under General Category rules, as specified at §§ 635.15 and 635.69.

(ii) Dealers may first receive BAYS tunas only if they have submitted reports to NMFS according to reporting requirements at § 635.5(b)(1)(ii) and only from a vessel that has a valid Federal commercial permit for Atlantic tunas issued under this part in the appropriate category. Vessel owners and operators of vessels that have been issued an Atlantic Tunas Longline category permit can sell BAYS tunas and dealers can purchase BAYS tunas from such vessels only if the Longline category is open per § 635.28(a)(4). Individuals issued a valid HMS Commercial Caribbean Small Boat permit, and operating in the U.S. Caribbean as defined at § 622.2, may sell their trip limits of BAYS tunas, codified at § 635.24(c), to dealers and non-

dealers. Persons may only sell albacore tuna and dealers may only first receive albacore tuna if the northern albacore tuna fishery has not been closed as specified at § 635.28 (d).

* * * * *

(c) * * *

(1) Persons that own or operate a vessel that possesses a shark from the management unit may sell such shark only if the vessel has a valid commercial shark permit issued under this part. Persons may possess and sell a shark only to a federally-permitted dealer and only when the fishery for that species group and/or region has not been closed, as specified in § 635.28(b). Persons that own or operate a vessel that has pelagic longline gear onboard can only possess and sell a shark if the bluefin tuna Longline category has not been closed, as specified in § 635.28(a)(4).

* * * * *

(4) Only dealers that have a valid a Federal Atlantic shark dealer permit and who have submitted reports to NMFS according to reporting requirements at § 635.5(b)(1)(ii) may first receive a shark from an owner or operator of a vessel that has, or is required to have, a valid federal Atlantic commercial shark permit issued under this part. Atlantic shark dealers may purchase, trade for, barter for, or receive a shark from an owner or operator of a vessel that does not have a federal Atlantic commercial shark permit if that vessel fishes exclusively in state waters. Atlantic shark dealers may first receive a sandbar shark only from an owner or operator of a vessel who has a valid shark research permit and who had a NMFS-approved observer on board the vessel for the trip in which the sandbar shark was collected. Atlantic shark dealers may first receive a shark from an owner or operator of a fishing vessel that has a permit issued under this part only when the fishery for that species group and/or region has not been closed, as specified in § 635.28(b). Atlantic shark dealers may first receive a shark from a vessel that has pelagic longline gear onboard only if the bluefin tuna Longline category has not been closed, as specified in § 635.28(a)(4).

* * * * *

(d) * * *

(1) Persons that own or operate a vessel on which a swordfish in or from the Atlantic Ocean is possessed may sell such swordfish only if the vessel has a valid commercial permit for swordfish issued under this part. Persons may offload such swordfish only to a dealer who has a valid permit for swordfish issued under this part; except that individuals issued a valid HMS Commercial Caribbean Small Boat permit, and operating in the U.S. Caribbean as defined at § 622.2, may sell swordfish, as specified at § 635.24(b)(3), to non-dealers. Persons that own or operate a vessel that has pelagic longline gear onboard, can only possess and sell a swordfish if the bluefin tuna Longline category has not been closed, as specified in § 635.28(a)(4).

(2) Atlantic swordfish dealers may first receive a swordfish harvested from the Atlantic Ocean only from an owner or operator of a fishing vessel that has a valid commercial permit for swordfish issued under this part and only if the dealer has submitted reports to NMFS according to reporting requirements of § 635.5(b)(1)(ii). Atlantic swordfish dealers may first receive a swordfish from a vessel that has pelagic longline gear onboard only if the bluefin tuna Longline category has not been closed, as specified in § 635.28(a)(4).

* * * * *

■ 15. In § 635.34:

■ a. As revised by a final rule published elsewhere in this issue of the **Federal Register**, paragraph (a) is further revised;, and

■ b. Paragraphs (b) and (d) are revised. The revisions read as follows:

§ 635.34 Adjustment of management measures.

(a) NMFS may adjust the quota shares or allocations for bluefin tuna, as specified in § 635.15; catch limits for bluefin tuna, as specified in § 635.23; the quotas for bluefin tuna, shark, swordfish, and northern albacore tuna as specified in § 635.27; the regional retention limits for Swordfish General Commercial permit holders, as specified at § 635.24; the marlin landing limit, as specified in § 635.27(d); and the minimum sizes for Atlantic blue marlin, white marlin, and roundscale spearfish as specified in § 635.20.

(b) In accordance with the framework procedures in the Highly Migratory Species Fishery Management Plan, NMFS may establish or modify for species or species groups of Atlantic HMS the following management measures: maximum sustainable yield or optimum yield based on the latest stock assessment or updates in the SAFE report; domestic quotas; recreational and commercial retention limits, including target catch requirements; size limits; fishing years or fishing seasons; shark fishing regions or regional quotas; species in the management unit and the specification of the species groups to which they belong; species in the prohibited shark species group; classification system within shark species groups; permitting and reporting requirements; workshop requirements; Atlantic tunas Purse Seine category cap on bluefin tuna quota; the quota shares or allocations for bluefin tuna; administration of the IBQ program (e.g. requirements pertaining to leasing of quota allocations, regional or minimum quota share requirements, etc.); time/area restrictions; allocations among user groups; gear prohibitions, modifications, or use restriction; effort restrictions; observer coverage requirements; essential fish habitat; and actions to implement ICCAT recommendations, as appropriate.

* * * * *

(d) When considering a framework adjustment to add, change, or modify time/area closures, gear restricted areas, or access to a closed area, NMFS will consider, consistent with the FMP, the Magnuson-Stevens Act, and other applicable law, but is not limited to, the following criteria: any Endangered Species Act related issues, concerns, or requirements, including applicable BiOps; bycatch rates of protected species, prohibited HMS, or non-target species both within the specified or potential closure area(s) and throughout the fishery; bycatch rates and post-release mortality rates of bycatch species associated with different gear types; new or updated landings, bycatch, and fishing effort data; evidence or research indicating that changes to fishing gear and/or fishing practices can significantly reduce bycatch; social and economic impacts; and the practicability of implementing new or modified closures compared to other bycatch reduction options. If the species is an ICCAT managed species, NMFS will also consider the overall effect of the U.S.'s catch on that species before implementing time/area closures, gear restricted areas, or access to closed areas.

■ 16. In § 635.69, paragraph (a) introductory text and (a)(1) and (4) are revised and paragraph (e)(4) is added to read as follows:

§ 635.69 Vessel monitoring systems.

(a) *Applicability.* To facilitate enforcement of time/area and fishery closures, enhance reporting and support the Individual Bluefin Quota program (§ 635.15), an owner or operator of a commercial vessel permitted, or required to be permitted, to fish for Atlantic HMS under § 635.4 and that fishes with pelagic or bottom longline, gillnet, or purse seine gear, is required to install a NMFS-approved enhanced mobile transmitting unit (E–MTU) vessel monitoring system (VMS) on board the vessel comply with the

requirements listed in paragraphs (a)(1) through (a)(4) of this section. For purposes of this section, a NMFS-approved E–MTU VMS is one that has been approved by NMFS as satisfying its type approval listing for E–MTU VMS units. Those requirements are published in the **Federal Register** and may be updated periodically.

(1) Whenever the vessel is away from port with pelagic longline or purse seine gear on board;

* * * * *

(4) A vessel is considered to have pelagic or bottom longline gear on board, for the purposes of this section, when the gear components as specified at § 635.2 are on board. A vessel is considered to have gillnet gear on board, for the purposes of this section, when gillnet, as defined in § 600.10, is on board a vessel that has been issued a shark LAP. A vessel is considered to have purse seine gear on board, for the purposes of this section, when the gear as defined at § 600.10 is onboard a vessel that has been issued an Atlantic tunas Purse Seine Category permit.

* * * * *

(e) * * *

(4) *Reporting Requirements for vessels issued either an Atlantic Tunas Longline or Purse seine category permit*—(i) *Bluefin tuna and fishing effort reporting.* Unless otherwise required under paragraphs (e)(4)(ii) or (iii) of this section, the vessel owner or operator of a vessel that has pelagic longline gear on board must report to NMFS using the attached VMS terminal, or using an alternative method specified by NMFS as follows: The number of hooks and sets must be reported within 12 hours of the completion of all pelagic longline haul-backs; and for pelagic longline sets with bluefin interactions, the length of all bluefin discarded dead must be reported within 12 hours of the completion of the haul-back. Reporting of zero bluefin possessed or discarded dead is not required. Unless otherwise required under paragraphs (e)(4)(ii) or (iii) of this section, the vessel owner or operator of a vessel that has Purse Seine gear on board must report to NMFS using the attached VMS terminal, or using an alternative method specified by NMFS as follows: For each day on which Purse Seine gear is set, the number of sets must be reported within 12 hours of the last set. For Purse Seine sets with bluefin interactions, the length of all bluefin discarded dead or retained within 12 hours of completion of the set, must be reported. Reporting of zero bluefin possessed or discarded dead is not required.

(ii) *Atlantic Tunas Longline category fishing under General category rules.* Before leaving port, a vessel operator of a vessel that has been issued or is required to be issued an Atlantic Tunas Longline category permit and that no longer has pelagic longline gear on board, and who intends to fish within the Cape Hatteras gear restricted area, under the General Category rules must, as specified at § 635.21(c)(3)(vi)(B) of this part, declare to NMFS using the attached VMS terminal or alternative method specified by NMFS that the vessel is fishing under General Category rules. Once the declaration is made, at least once every 24 hours while away from port or before returning to port for a one day trip, the vessel operator must report using the attached VMS terminal or alternative method specified by NMFS the total amount of bluefin tuna retained, the total amount of bluefin tuna discarded, and total fishing effort (e.g., number of hooks).

(iii) *Vessels fishing in a closed area.* A vessel operator of a vessel with pelagic longline gear and a NMFS-approved observer on board that fishing within a closed area, as specified at § 635.21(c)(3) of this part, must declare to NMFS using the attached VMS terminal or alternative method specified by NMFS that the vessel operator intends to fish with pelagic longline gear within a closed or restricted gear area. Once the declaration is made, at least once every 24 hours while away from port, the vessel operator must report using the attached VMS terminal or alternative method specified by NMFS the species caught and total fishing effort.

* * * * *

■ 17. In § 635.71:

■ a. Paragraphs (a)(14), (a)(19), (a)(23), (a)(31), (a)(33), (a)(34), and (a)(40) are revised;

■ b. Paragraphs (a)(57) through (60) are added;

■ c. Paragraphs (b)(5), (b)(7), (b)(8), (b)(13), (b)(23), (b)(36), and (b)(38) are revised;

■ d. Paragraphs (b)(41) through (54) are added;

■ e. Paragraphs (c)(1) and (7) and (d)(12) and (13) are revised;

■ f. As revised by a final rule published elsewhere in this issue of the **Federal Register**, paragraph (e)(8) is further revised;

■ g. Paragraphs (e)(11) and (16) are revised; and

■ h. As added by a final rule published elsewhere in this issue of the **Federal Register**, paragraph (e)(18) is revised.

The revisions and additions read as follows:

§ 635.71 Prohibitions

(a) * * *

(14) Fail to install, activate, repair, or replace a NMFS-approved E–MTU vessel monitoring system prior to leaving port with pelagic longline gear, bottom longline gear, gillnet gear, or purse seine gear on board the vessel as specified in § 635.69.

* * * * *

(19) Utilize secondary gears as specified in § 635.19(a) to capture, or attempt to capture, any undersized or free swimming Atlantic HMS, or fail to release a captured Atlantic HMS in the manner specified in § 635.21(a).

* * * * *

(23) Fail to comply with the restrictions on use of pelagic longline, bottom longline, gillnet, buoy gear, speargun gear, or green-stick gear as specified in § 635.21.

* * * * *

(31) Deploy or fish with any fishing gear from a vessel with a pelagic longline on board in any closed or gear restricted areas during the time period specified at § 635.21(c) except under the conditions listed at § 635.21 (c)(3).

* * * * *

(33) Deploy or fish with any fishing gear from a vessel with pelagic or bottom longline gear on board without carrying the required sea turtle bycatch mitigation gear, as specified at § 635.21(c)(5)(i) for pelagic longline gear and § 635.21(d)(2) for bottom longline gear. This equipment must be utilized in accordance with § 635.21(c)(5)(ii) and (d)(2) for pelagic and bottom longline gear, respectively.

(34) Fail to disengage any hooked or entangled sea turtle with the least harm possible to the sea turtle as specified at § 635.21 (c)(5) or (d)(2).

* * * * *

(40) Deploy or fish with any fishing gear, from a vessel with bottom longline gear on board, without carrying a dipnet, line clipper, and dehooking device as specified at § 635.21(d)(2).

* * * * *

(57) Fail to appropriately stow longline gear when transiting a closed or gear restricted area, as specified in § 635.21(b)(2).

(58) Depart on a fishing trip or deploy or fish with any fishing gear from a vessel with a pelagic longline on board in a closed or gear restricted area per the exemptions at § 635.21(c)(3) without an observer on board, as specified at § 635.21(c)(3)(ii), or without following the VMS requirements, as specified at §§ 635.21(c)(3)(iii) and 635.69(e).

(59) Fish for, retain, possess, or land any HMS from a vessel with a pelagic

longline on board when the Atlantic Tunas Longline category fishery is closed, as specified in § 635.28(a)(4), (b)(1), (c)(3), and (d).

(60) Buy, trade, or barter for any HMS from a vessel with a pelagic longline on board when the Atlantic Tunas Longline category fishery is closed, as specified in § 635.31(a)(2), (c), and (d).

(b) * * *

(5) Fail to report a large medium or giant bluefin tuna that is not sold, as specified in § 635.5(a)(3), or fail to report a bluefin tuna that is sold, as specified in § 635.5(a)(4).

* * * * *

(7) Fish for, catch, retain, or possess a bluefin tuna with gear not authorized for the category permit issued to the vessel or to have such gear on board when in possession of a bluefin tuna, as specified in § 635.19(b).

(8) Fail to request an inspection of a purse seine vessel, as specified in § 635.21(e)(2).

* * * * *

(13) As a vessel with a General category Atlantic tuna permit, fail to immediately cease fishing and immediately return to port after catching the applicable limit of large medium or giant bluefin tuna on a commercial fishing day, as specified in § 635.23(a)(3).

* * * * *

(23) Fish for, catch, possess, or retain a bluefin tuna except as specified under § 635.23(f), or if taken incidental to recreational fishing for other species and retained in accordance with § 635.23(b) and (c).

* * * * *

(36) Possess J-hooks onboard a vessel that has pelagic longline gear onboard, and that has been issued, or is required to have, a limited access swordfish, shark, or tuna longline category permit for use in the Atlantic Ocean, including the Caribbean Sea and the Gulf of Mexico, except when green-stick gear is onboard, as specified at § 635.21(c)(2)(vii)(A) and (c)(5)(iii)(C)(*3*).

* * * * *

(38) Possess more than 20 J-hooks onboard a vessel that has been issued, or is required to have, a limited access swordfish, shark, or tuna longline category permit for use in the Atlantic Ocean, including the Caribbean Sea and the Gulf of Mexico, when possessing onboard both pelagic longline gear and green-stick gear as defined at § 635.2.

* * * * *

(41) Fish within the Cape Hatteras gear restricted area under General category rules with a pelagic longline on board, as specified in § 635.21(c)(3)(vi)(B), or fail to abide by all applicable General category rules including those specified under § 635.23(a).

(42) As the owner or operator of a vessel issued a limited access permit that has removed pelagic longline gear from the vessel, depart on a fishing trip or fish within Cape Hatteras gear restricted area under General Category rules without following the VMS requirements, as specified in § 635.69(e)(5).

(43) Fish for, retain, possess, or land albacore tuna when the fishery is closed, as specified in § 635.28(d).

(44) Buy, purchase, trade, or barter for albacore tuna when the fishery is closed, as specified in § 635.31(a)(2)(ii).

(45) Fail to report bluefin tuna retained, bluefin tuna discarded, and total fishing effort via a vessel monitoring system while away from port when pelagic longline gear is on board or when a vessel issued an Atlantic tunas Longline category permit is in the Cape Hatteras gear restricted area fishing under the General category rules without pelagic longline gear on board, as specified in § 635.69(e).

(46) Deploy or fish with any fishing gear from a vessel with a pelagic longline on board that does not have an approved and working electronic monitoring system as specified in § 635.9; tamper with, or fail to install, operate or maintain one or more components of the electronic monitoring system; obstruct the view of the camera(s); or fail to handle bluefin tuna in a manner that allows the camera to record the fish; as specified in § 635.9.

(47) Depart on a fishing trip or deploy or fish with any fishing gear from a vessel with a pelagic longline on board without a minimum amount of bluefin tuna quota allocation available for that vessel, as specified in § 635.15(b)(3).

(48) Depart on a fishing trip or deploy or fish with any fishing gear from a vessel with a pelagic longline on board without accounting for bluefin caught on a previous trip as specified in § 635.15(b)(4), or accounting for bluefin caught during a previous fishing year, as specified in as specified in § 635.15(b)(5), as applicable.

(49) Lease bluefin quota allocation to or from the owner of a vessel not issued a valid Atlantic Tunas Longline permit or a valid Atlantic Tunas Purse Seine permit as specified under § 635.15(c)(1).

(50) Fish in the Gulf of Mexico with pelagic longline gear on board if the vessel has only IBQ designated as Atlantic quota allocation, as specified under § 635.15(b)(2).

(51) Depart on a fishing trip or deploy or fish with any fishing gear from a vessel with a pelagic longline on board in the Gulf of Mexico, without a minimum amount of GOM designated bluefin tuna quota allocation available for that vessel, as specified in § 635.15(b)(3).

(52) If leasing bluefin quota allocation, fail to provide all required information on the application, as specified under § 635.15(c)(2).

(53) Lease bluefin quota allocation in an amount that exceeds the amount of bluefin allocation associated with the lessor, as specified under § 635.15(c)(2).

(54) Sell quota share, as specified under § 635.15(d).

(c) * * *

(1) As specified in § 635.19(c), retain a billfish harvested by gear other than rod and reel, or retain a billfish on board a vessel unless that vessel has been issued an Atlantic HMS Angling or Charter/Headboat permit or has been issued an Atlantic Tunas General category permit and is participating in a tournament in compliance with § 635.4(c).

* * * * *

(7) Deploy a J-hook or an offset circle hook in combination with natural bait or a natural bait/artificial lure combination when participating in a tournament for, or including, Atlantic billfish, as specified in § 635.21(f).

* * * * *

(d) * * *

(12) Fish for Atlantic sharks with unauthorized gear or possess Atlantic sharks on board a vessel with unauthorized gear on board as specified in § 635.19(d).

(13) Fish for Atlantic sharks with a gillnet or possess Atlantic sharks on board a vessel with a gillnet on board, except as specified in § 635.21(g).

* * * * *

(e) * * *

(8) Fish for North Atlantic swordfish from, possess North Atlantic swordfish on board, or land North Atlantic swordfish from a vessel using or having on board gear other than pelagic longline, green-stick gear, or handgear, except as specified at § 635.19(e).

* * * * *

(11) As the owner of a vessel permitted, or required to be permitted, in the swordfish directed, swordfish handgear limited access permit category, or issued a valid HMS Commercial Caribbean Small Boat permit and utilizing buoy gear, to possess or deploy more than 35 individual floatation devices, to deploy more than 35 individual buoy gears per vessel, or to deploy buoy gear without

affixed monitoring equipment, as specified at § 635.21(h).

* * * * *

(16) Possess any HMS, other than Atlantic swordfish, harvested with buoy gear as specified at § 635.19 unless issued a valid HMS Commercial Caribbean Small Boat permit and operating within the U.S. Caribbean as defined at § 622.2.

* * * * *

(18) As the owner of a vessel permitted, or required to be permitted, in the Swordfish General Commercial permit category, possess North Atlantic swordfish taken from its management unit by any gear other than rod and reel, handline, bandit gear, green-stick, or harpoon gear, as specified in § 635.19 (e).

* * * * *

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