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Contents

Federal Register

Vol. 78, No. 204

Tuesday, October 22, 2013

Agriculture Department
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals, 62583

Centers for Disease Control and Prevention
NOTICES
Meetings:
Advisory Committee to the Director, Health Disparities Subcommittee, 62635–62636
Disease, Disability, and Injury Prevention and Control Special Emphasis Panel, 62636
Healthcare Infection Control Practices Advisory Committee, 62636
Subcommittee on Procedures Review, Advisory Board on Radiation and Worker Health, 62635

Centers for Medicare & Medicaid Services
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals, 62636–62637

Children and Families Administration
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals:
Low Income Home Energy Assistance Program Grantee Needs Assessment, 62638
Personal Responsibility Education Program Multi-Component Evaluation, etc., 62637–62638

Coast Guard
RULES
Drawbridge Operations:
Inner Harbor Navigational Canal, New Orleans, LA, 62439–62441

Commerce Department
See Foreign-Trade Zones Board
See International Trade Administration
See National Oceanic and Atmospheric Administration

Comptroller of the Currency
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals:
Company-Run Annual Stress Test Reporting Template and Documentation for Covered Institutions, etc., 62942–62946

Consumer Product Safety Commission
NOTICES
Meetings; Sunshine Act, 62588

Defense Department
See Navy Department
RULES
Defense Industrial Base Voluntary Cyber Security and Information Assurance Activities, 62430–62438
Tricare:
Removal of the Prohibition to Use Addictive Drugs in the Maintenance Treatment of Substance Dependence in TRICARE Beneficiaries, 62427–62430
PROPOSED RULES
Tricare:
Coverage of Care Related to Non-Covered Initial Surgery or Treatment, 62506–62508
NOTICES
Arms Sales, 62588–62602
Meetings:
Board of Regents, Uniformed Services University of the Health Sciences; Correction, 62602

Drug Enforcement Administration
PROPOSED RULES
Schedules of Controlled Substances:
Placement of Perampanel into Schedule III, 62500–62506
NOTICES
Decisions and Orders:
Anthony E. Wicks, M.D., 62676–62678
Hoi Y. Kam, M.D., 62694–62698
Kenneth Harold Bull, M.D., 62666–62676
Mark G. Medinnus, D.D.S., 62683–62694
Morris W. Cochran, M.D., 62678–62683
Ronald F. Lambert, D.D.S., 62662–62666
Importers of Controlled Substances; Registrations:
Lannett Co., Inc., 62698–62708

Education Department
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals:
Federal Student Aid Application, 2014–2015, 62603–62605
Foreign Schools Eligibility Criteria Apply to Participate in Title IV HEA Programs; Correction, 62603
Targeted Teacher Shortage Areas Nationwide Listing, 62602–62603
Privacy Act; Systems of Records, 62605–62609

Employee Benefits Security Administration
NOTICES
Meetings:
Advisory Council on Employee Welfare and Pension Benefit Plans, 62708–62709

Energy Department
See Federal Energy Regulatory Commission
See Southwestern Power Administration
PROPOSED RULES
Energy Conservation Program:
Alternative Efficiency Determination Methods, Basic Model Definition, and Compliance for Commercial HVAC, Refrigeration, and WH Equipment, 62472–62488
Compliance Date for the Dehumidifier Test Procedure, 62488–62494
Energy Conservation Standards for Ceiling Fans, 62494–62495
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals, 62609
Charter Renewals:
DOE/NSF Nuclear Science Advisory Committee, 62609–62610

Environmental Protection Agency
RULES
Air Quality State Implementation Plans; Approvals and Promulgations:
District of Columbia; Infrastructure Requirements for the 2008 Lead National Ambient Air Quality Standards and State Board Requirements, 62455–62459
Ohio; Redesignation of Canton–Massillon Area to Attainment of 1997 Annual Standard and 2006 24-Hour Standard for Fine Particulate Matter, 62459–62462
Air Quality; Revision to Definition of Volatile Organic Compounds:
Exclusion of 2,3,3,3–tetrafluoropropene, 62451–62455
Regulation of Fuels and Fuel Additives:
Modifications to Renewable Fuel Standard Program, 62462–62471
Significant New Uses:
Perfluoroalkyl Sulfonates and Long-Chain Perfluoroalkyl Carboxylate Chemical Substances, 62443–62451
PROPOSED RULES
Air Quality State Implementation Plans; Approvals and Promulgations:
District of Columbia; Infrastructure Requirements for the 2008 Lead National Ambient Air Quality Standards and State Board Requirements, 62523
Navajo Nation; Regional Haze Requirements for Navajo Generating Station; Supplemental Proposal, 62509–62523
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals:
Clean Water Act Section 404 State-Assumed Programs, 62629–62630
NSPS for Magnetic Tape Coating Facilities, 62630
Settlements:
Vantran Electric Corp. Site, Louisville, Jefferson County, GA, 62630–62631

Executive Office of the President
See Management and Budget Office
See Presidential Documents

Federal Aviation Administration
PROPOSED RULES
Establishment of Class E Airspace, Amendment of Class D and Class E Airspace, and Revocation of Class E Airspace:
Salinas, CA, 62498–62500
Special Conditions:
Learjet Model 35, 35A, 36, and 36A Airplanes; Rechargeable Lithium–Ion Batteries and Battery Systems, 62495–62498

Federal Deposit Insurance Corporation
RULES
Regulatory Capital Rules:
Regulatory Capital, Implementation of Basel III, Capital Adequacy, Transition Provisions, Prompt Corrective Action, Standardized Approach for Risk-weighted Assets, Market Discipline and Disclosure Requirements, etc., 62417
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals, 62631–62632
Agency Information Collection Activities; Proposals, Submissions, and Approvals:
Guidance on Sound Incentive Compensation Practices, 62632–62633
Designated Reserve Ratio for 2014, 62633

Federal Emergency Management Agency
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals:
Disaster Assistance Registration, 62643–62644
Federal Assistance to Individuals and Households Program, 62642–62643

Federal Energy Regulatory Commission
NOTICES
Applications:
North Baja Pipeline, LLC, 62610
Combined Filings, 62610–62614
Complaints:
CalWind Resources, Inc. v. California Independent System Operator Corp., 62614–62615
Guttman Energy, Inc.; PBF Holding Co., LLC v. Buckeye Pipe Line Company, LP; Laurel Pipe Line Co., LP, 62614
Initial Market-Based Rate Filings Including Requests for Blanket Section 204 Authorization:
Healthy Planet Partners Energy Co., LLC, 62615–62616
RE Rosamond One LLC, 62616
RE Rosamond Two LLC, 62615
Initiation of Proceedings and Refund Effective Dates:
Duke Energy Progress, Inc., 62616
Transfers of Exemptions:
Salmon Creek Hydroelectric Co.; Salmon Creek Hydroelectric Co., LLC, 62616

Federal Motor Carrier Safety Administration
NOTICES
Qualification of Drivers; Exemption Applications:
Vision, 62935–62940

Federal Reserve System
NOTICES
Changes in Bank Control:
Formations of, Acquisitions by, and Mergers of Bank Holding Companies; Correction, 62633
Formations of, Acquisitions by, and Mergers of Bank Holding Companies, 62633–62634
Formations of, Acquisitions by, and Mergers of Savings and Loan Holding Companies, 62634

Fish and Wildlife Service
PROPOSED RULES
Endangered and Threatened Wildlife and Plants:
12-Month Finding on a Petition To List Ashy Storm-Petrel as an Endangered or Threatened Species, 62523–62529
Designation of Critical Habitat for Agave eggersiana, Gonocalyx concolor, and Varronia rupicola, 62529–62560
Endangered Status for Agave eggersiana and Gonocalyx concolor and Threatened Status for Varronia rupicola, 62560–62579
NOTICES
Endangered and Threatened Wildlife and Plants; Permits:
Low-Effect Habitat Conservation Plan for the Utah Prairie Dog in Garfield County, UT, 62646–62647
Endangered Species Permit Applications, 62647
Environmental Assessments; Availability, etc.:
Cat Island National Wildlife Refuge; West Feliciana Parish, LA, 62648
Permits:
Endangered Species; Marine Mammals, 62648–62649

Foreign Assets Control Office
NOTICES
Blocking or Unblocking of Persons and Property, 62946–62948

Foreign-Trade Zones Board
NOTICES
Authorizations of Production Activities:
Lasko Products, Inc., Foreign-Trade Zone 39, Dallas–Fort Worth, TX, 62583

Health and Human Services Department
See Centers for Disease Control and Prevention
See Centers for Medicare & Medicaid Services
See Children and Families Administration
See National Institutes of Health
See Substance Abuse and Mental Health Services Administration
NOTICES
Meetings:
National Biodefense Science Board, 62634–62635

Homeland Security Department
See Coast Guard
See Federal Emergency Management Agency
See U.S. Citizenship and Immigration Services
See U.S. Customs and Border Protection

Indian Affairs Bureau
NOTICES
Indian Gaming, 62649–62650
Requests for Nominations:
Bureau of Indian Education Advisory Board for Exceptional Children, 62650–62656

Interior Department
See Fish and Wildlife Service
See Indian Affairs Bureau
See Land Management Bureau
See National Park Service
See Ocean Energy Management Bureau

Internal Revenue Service
RULES
Application of the Segregation Rules to Small Shareholders, 62418–62426
Use of Differential Income Stream as an Application of the Income Method, etc.; Correction, 62426
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals, 62948–62949

International Trade Administration
RULES
Import Administration; Change of Agency Name, 62417–62418
NOTICES
Antidumping and Countervailing Duty Investigations; Results, Extensions, Amendments, etc.:
Welded Stainless Pressure Pipe from Malaysia, Thailand, and the Socialist Republic of Vietnam, 62583–62584
Antidumping Duty Administrative Reviews; Results, Extensions, Amendments, etc.:
Certain Lined Paper Products from India, 62584–62585
Export Trade Certificates of Review:
Outdoor Power Equipment Institute, Inc., 62585–62586

International Trade Commission
NOTICES
Antidumping and Countervailing Duty Investigations; Results, Extensions, Amendments, etc.:
Non-oriented Electrical Steel from China, Germany, Japan, Korea, Sweden, and Taiwan, 62660–62661

Justice Department
See Drug Enforcement Administration
NOTICES
Consent Decrees under the Clean Air Act, 62661–62662

Labor Department
See Employee Benefits Security Administration

Land Management Bureau
NOTICES
Alaska Native Claims Selections, 62656–62657
Meetings:
Southwest Colorado Resource Advisory Council, 62657

Management and Budget Office
NOTICES
Cost of Outpatient Medical, Dental, and Cosmetic Surgery Services Furnished by Department of Defense Medical Treatment Facilities, Calendary Year 2013; etc., 62709

National Institutes of Health
NOTICES
Meetings:
Center for Scientific Review, 62641
National Eye Institute, 62639–62640
National Institute of Allergy and Infectious Diseases, 62640–62641
National Institute of Diabetes and Digestive and Kidney Diseases, 62639
National Institute on Aging, 62639–62640
National Institute on Minority Health and Health Disparities, 62638–62639
Office of the Director, 62640

National Oceanic and Atmospheric Administration
RULES
Fisheries of the Northeastern United States:
Atlantic Herring Fishery; Framework Adjustment 2 and Specifications, 62471
PROPOSED RULES
Fisheries of the Caribbean, Gulf of Mexico, and South Atlantic:
Shrimp Fishery of the Gulf of Mexico; Establish Funding Responsibilities for the Electronic Logbook Program, 62579–62582
NOTICES
Meetings:
Fisheries of the Gulf of Mexico and South Atlantic; Southeast Data, Assessment, and Review, 62586–62587
Gulf of Mexico Fishery Management Council, 62587–62588
New England Fishery Management Council, 62587
South Atlantic Fishery Management Council, 62587

National Park Service
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals:
Interagency Access Pass and Senior Pass Application Processes, 62657–62658

National Park Service Leasing Program, 62658–62660

Navy Department
RULES
Certifications and Exemptions under the International Regulations for Preventing Collisions at Sea, 62438–62439

Nuclear Regulatory Commission
NOTICES
Environmental Assessments; Availability, etc.:
Watts Bar Nuclear Plant, Unit 2, 62709–62711
Meetings; Sunshine Act, 62711–62712

Ocean Energy Management Bureau
NOTICES
Environmental Impact Statements; Availability, etc.:
Outer Continental Shelf, Gulf of Mexico, Oil and Gas Lease Sales Eastern Planning Area Lease Sales 225 and 226, 62660

Office of Management and Budget
See Management and Budget Office

Pension Benefit Guaranty Corporation
RULES
Terminated Single-Employer Plans:
Interest Assumptions for Paying Benefits, 62426–62427

Postal Regulatory Commission
NOTICES
Rate Adjustments, 62712–62714

Postal Service
NOTICES
Product Changes:
Priority Mail Negotiated Service Agreement, 62714

Presidential Documents
ADMINISTRATIVE ORDERS
Brazil; Drug Interdiction Assistance (Presidential Determination)
No. 2014–02 of October 10, 2013, 62951–62953

Securities and Exchange Commission
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals, 62715–62716
Applications:
Pacific Life Insurance Co., et al., 62716–62719
Meetings; Sunshine Act, 62719
Self-Regulatory Organizations; Proposed Rule Changes:
BATS Exchange, Inc., 62791–62798, 62804–62807, 62828–62831, 62921–62922
BATS Y-Exchange, Inc., 62777–62778, 62896–62899, 62907–62909, 62926–62928
BOX Options Exchange, LLC, 62765–62766, 62771–62774, 62860–62862
C2 Options Exchange, Inc., 62849–62852, 62885–62887
CBOE Futures Exchange, LLC, 62817–62820
Chicago Board Options Exchange, Inc., 62775–62777, 62798–62802, 62858–62860, 62887–62889, 62909–62911
Chicago Mercantile Exchange Inc., 62787–62788
Chicago Stock Exchange, Inc., 62728–62736
Depository Trust Co., 62827–62828
EDGA Exchange, Inc., 62842–62846, 62854–62855
EDGX Exchange, Inc., 62778–62780, 62855–62858, 62903–62907
Financial Industry Regulatory Authority, Inc., 62722–62726, 62784–62785, 62788–62791, 62831–62834, 62862–62867
ICE Clear Credit LLC, 62762–62763
International Securities Exchange, LLC, 62899–62903
Municipal Securities Rulemaking Board, 62736–62745, 62780, 62867–62881
NASDAQ OMX BX, Inc., 62841–62842, 62884–62885
NASDAQ OMX PHLX LLC, 62774–62775, 62780–62782, 62809–62814, 62852–62853, 62891–62893
NASDAQ Stock Market LLC, 62726–62728, 62761–62762, 62807–62809, 62814–62815, 62820–62825, 62834–62838
National Securities Clearing Corp., 62846–62848, 62893–62896
National Stock Exchange, Inc., 62782–62784
New York Stock Exchange LLC, 62825–62827, 62889–62891, 62915–62917
NYSE Arca, Inc., 62745–62760, 62911–62915, 62923–62926
NYSE MKT LLC, 62766–62771, 62802–62804, 62881–62884, 62917–62921, 62928–62930
Options Clearing Corp., 62719–62722
Topaz Exchange, LLC, 62764–62765, 62785–62787, 62815–62817, 62838–62841
Temporary Exemptions:
Financial Responsibility Rules for Broker–Dealers under the Securities Exchange Act, 62930–62931
Trading Suspension Orders:
China Ritar Power Corp., 62931
Pacific Clean Water Technologies, Inc., 62931

Small Business Administration
NOTICES
Conflicts of Interest Exemptions:
Emergence Capital Partners SBIC, LP, 62931–62932
Interest Rates, 62932

Social Security Administration
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals, 62932–62935

Southwestern Power Administration
NOTICES
Integrated System Power Rates, 62616–62627
Sam Rayburn Dam Rate, 62627–62629

State Department
NOTICES
Culturally Significant Objects Imported for Exhibition:
Loan from the Vatican Museums; Madonna and Child with Saint John the Baptist and Saint Mary Magdalene, 62935

Substance Abuse and Mental Health Services Administration
NOTICES
Funding Opportunities:
Link2Health Solutions, Inc.; Fiscal Year 2013; Single Source Grant, 62641–62642

Surface Transportation Board
NOTICES
Railroad Revenue Adequacy; 2012 Determination, 62940

Transportation Department
See Federal Aviation Administration

See Federal Motor Carrier Safety Administration
See Surface Transportation Board

Treasury Department
See Comptroller of the Currency
See Foreign Assets Control Office
See Internal Revenue Service
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals, 62940–62941
Meetings:
Debt Management Advisory Committee, 62941–62942

U.S. Citizenship and Immigration Services
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals:
Application for Permission to Reapply for Admission into the United States after Deportation or Removal, 62645
Application for Temporary Protected Status, 62644

U.S. Customs and Border Protection
NOTICES
Commercial Gaugers and Laboratories; Accreditations and Approvals:
Camin Cargo Control, Inc., 62645–62646

Veterans Affairs Department
RULES
VA Dental Insurance Program—Federalism, 62441–62443

Separate Parts In This Issue

Part II
Presidential Documents, 62951–62953

Reader Aids

Consult the Reader Aids section at the end of this page for phone numbers, online resources, finding aids, reminders, and notice of recently enacted public laws.

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CFR PARTS AFFECTED IN THIS ISSUE

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

3 CFR

Administrative Orders:

Presidential Determinations:

No. 2014–02 of October 10, 2013 62953

10 CFR

Proposed Rules:

429 62472

430 (2 documents) 62488, 62494

431 62472

12 CFR

324 62417

14 CFR

Proposed Rules:

25 62495

71 62498

19 CFR

351 62417

354 62417

356 62417

21 CFR

Proposed Rules:

1308 62500

26 CFR

1 (2 documents) 62418, 62426

29 CFR

4022 62426

32 CFR

199 62427

236 62430

706 62438

Proposed Rules:

199 62506

33 CFR

117 62439

38 CFR

17 62441

40 CFR

9 62443

51 62451

52 (2 documents) 62455, 62459

80 62462

81 62459

721 62443

Proposed Rules:

49 62509

52 62523

50 CFR

648 62471

Proposed Rules:

17 (3 documents) 62523, 62529, 62560

622 62579

Rules and Regulations

Federal Register

Vol. 78, No. 204

Tuesday, October 22, 2013

This section of the FEDERAL REGISTER contains regulatory documents having general applicability and legal effect, most of which are keyed to and codified in the Code of Federal Regulations, which is published under 50 titles pursuant to 44 U.S.C. 1510.

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FEDERAL DEPOSIT INSURANCE CORPORATION

12 CFR Part 324

RIN 3064–AD95

Regulatory Capital Rules: Regulatory Capital, Implementation of Basel III, Capital Adequacy, Transition Provisions, Prompt Corrective Action, Standardized Approach for Risk-Weighted Assets, Market Discipline and Disclosure Requirements, Advanced Approaches Risk-Based Capital Rule, and Market Risk Capital Rule

AGENCY: Federal Deposit Insurance Corporation.

ACTION: Interim final rule with request for comments; correction.

SUMMARY: The FDIC is correcting an interim final rule with request for comments that appeared in the **Federal Register** of September 10, 2013 (78 FR 55340), regarding Regulatory Capital Rules: Regulatory Capital, Implementation of Basel III, Capital Adequacy, Transition Provisions, Prompt Corrective Action, Standardized Approach for Risk-weighted Assets, Market Discipline and Disclosure Requirements, Advanced Approaches Risk-Based Capital Rule, and Market Risk Capital Rule.

DATES: The correction is effective January 1, 2014.

FOR FURTHER INFORMATION CONTACT: Mark Handzlik, Counsel, *mhandzlik@fdic.gov;* Michael Phillips, Counsel, *mphillips@fdic.gov;* or Rachel Jones, Attorney, *racjones@fdic.gov,* Supervision Branch, Legal Division, Federal Deposit Insurance Corporation, 550 17th Street NW., Washington, DC 20429.

SUPPLEMENTARY INFORMATION: In FR Doc. 2013–21357, appearing on page 55518 in the **Federal Register** of Tuesday, September 10, 2013, in the third column, under § 324.63, revise paragraph (a) to read as follows:

''(a) Except as provided in § 324.62, an FDIC-supervised institution described in § 324.61 must make the disclosures described in Tables 1 through 10 of this section. The FDIC-supervised institution must make these disclosures publicly available for each of the last three years (that is, twelve quarters) or such shorter period beginning on January 1, 2015.''

Dated: October 1, 2013.

Federal Deposit Insurance Corporation.

Robert E. Feldman,

Executive Secretary.

[FR Doc. 2013–24532 Filed 10–21–13; 8:45 am]

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DEPARTMENT OF COMMERCE

International Trade Administration

19 CFR Parts 351, 354, and 356

RIN 0625–AA97

[Docket No. 130927845–3845–01]

Import Administration; Change of Agency Name

AGENCY: Import Administration, International Trade Administration, Commerce.

ACTION: Final rule; nomenclature change.

SUMMARY: Effective October 1, 2013, the Department of Commerce (Department), through internal department organizational orders, changed the name of ''Import Administration'' to ''Enforcement and Compliance.'' Consistent with this action, this rule makes appropriate conforming changes in the Code of Federal Regulations. The rule also sets forth a Savings Provision that preserves, under the new name, all actions taken under the name of Import Administration and provides that any references to Import Administration in any document or other communication shall be deemed to be references to Enforcement and Compliance.

DATES: This rule is effective October 21, 2013.

FOR FURTHER INFORMATION CONTACT: Robert Goodyear, Director, Office of Operations Support Enforcement & Compliance, Telephone: (202) 482–5194; Michele D. Lynch, Senior Counsel, Office of Chief Counsel for Trade Enforcement and Compliance, Telephone: (202) 482–2879.

SUPPLEMENTARY INFORMATION:

Background

This rule implements the decision by the Department, through internal Department Organizational Orders 10–3 (effective September 18, 2013) and Department Organizational Order 40–1, (effective September 19, 2013), to consolidate and reorganize certain department organizational functions and revise the name of ''Import Administration'' to ''Enforcement and Compliance.'' The revision more accurately reflects the breadth of the agency's activities with respect to the enforcement of, and compliance with, U.S. trade laws and agreements. Consistent with the consolidation and name change, this rule makes a number of changes in parts 351, 354, and 356 of title 19 of the Code of Federal Regulations. Specifically, this rule changes all references to ''Import Administration'' wherever they appear in parts 351, 354, and 356 of title 19, to ''Enforcement and Compliance'' with the exception of references to the ''Chief Counsel for Import Administration,'' which shall be changed to the ''Chief Counsel for Trade Enforcement and Compliance.''

Savings Provision

This rule shall constitute notice that all references to Import Administration in any documents, statements, or other communications, in any form or media, and whether made before, on, or after the effective date of this rule, shall be deemed to be references to Enforcement and Compliance. Any actions undertaken in the name of or on behalf of Import Administration, whether taken before, on, or after the effective date of this rule, shall be deemed to have been taken in the name of or on behalf of Enforcement and Compliance.

Rulemaking Requirements

1. This final rule has been determined to be exempt from review for purposes of Executive Order 12866.

2. This rule does not impose information collection and recordkeeping requirements. Consequently, it need not be reviewed by the Office of Management and Budget under the provisions of the Paperwork Reduction Act of 1995.

3. This rule does not contain policies with Federalism implications as this term is defined in Executive Order 13132.

4. The provisions of the Administrative Procedure Act (5 U.S.C. 553) requiring notice of proposed rulemaking, the opportunity for public participation, and a delay in effective date, are inapplicable because this rule involves a rule of agency organization, procedure, or practice. 5 U.S.C. 553(b)(B). Further, no other law requires that a notice of proposed rulemaking and an opportunity for public comment be given for this final rule. Because a notice of proposed rulemaking and an opportunity for public comment are not required to be given for this rule under 5 U.S.C. or by any other law, the analytical requirements of the Regulatory Flexibility Act (5 U.S.C. 601, et seq.) are not applicable. Accordingly, this rule is issued in final form.

List of Subjects

19 CFR Part 351

Antidumping and countervailing duties.

19 CFR Part 354

Procedures for imposing sanctions for violations of an antidumping or countervailing duty administrative protective order.

19 CFR Part 356

Procedures and rules for implementing Article 1904 of the North American Free Trade Agreement.

PART 351—[AMENDED]

■ 1. The authority citation for part 351 continues to read as follows:

Authority: 5 U.S.C. 301; 19 U.S.C. 1202 note; 19 U.S.C. 1303 note; 19 U.S.C. 1671 et seq.; and 19 U.S.C. 3538.

■ 2. In 19 CFR part 351:
■ a. Revise all references to ''Import Administration'' to read ''Enforcement and Compliance'';
■ b. Revise all references to ''Import Administration's'' to read ''Enforcement and Compliance's''; and
■ c. Revise all references to the ''Assistant Secretary for Import Administration'' to read ''Assistant Secretary for Enforcement and Compliance''.

PART 354—[AMENDED]

■ 3. The authority citation for part 354 continues to read as follows:

Authority: 5 U.S.C. 301, and 19 U.S.C. 1677.

■ 4. In 19 CFR part 354:
■ a. Revise all references to ''Chief Counsel for Import Administration'' to read ''Chief Counsel for Trade Enforcement and Compliance'';
■ b. Revise all references to ''Import Administration's'' to read ''Enforcement and Compliance's''; and
■ c. Revise all references to the ''Assistant Secretary for Import Administration'' to read ''Assistant Secretary for Enforcement and Compliance''.

PART 356—[AMENDED]

■ 5. The authority citation for part 356 continues to read as follows:

Authority: 19 U.S.C. 1515a and 1677f(f).

■ 6. In 19 CFR part 356:
■ a. Revise all references to ''Chief Counsel for Import Administration'' to read ''Chief Counsel for Trade Enforcement and Compliance'';
■ b. Revise all references to ''Import Administration'' to read ''Enforcement and Compliance''; and
■ c. Revise all references to the ''Assistant Secretary for Import Administration'' to read ''Assistant Secretary for Enforcement and Compliance''.

Dated: September 30, 2013.

Paul Piquado,

Assistant Secretary for Import Administration.

[FR Doc. 2013–24710 Filed 10–21–13; 8:45 am]

BILLING CODE P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 1

[TD 9638]

RIN 1545–BK03

Application of the Segregation Rules to Small Shareholders

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Final regulations.

SUMMARY: This document contains final regulations under section 382 of the Internal Revenue Code (Code). These regulations provide guidance regarding the application of the segregation rules to public groups of shareholders in determining owner shifts and ownership changes under section 382 of the Code. These regulations affect corporations.

DATES: *Effective date:* These regulations are effective on October 22, 2013.

Applicability date: For dates of applicability, see § 1.382–3(j)(17).

FOR FURTHER INFORMATION CONTACT: Stephen R. Cleary, (202) 622–7750, or Marie C. Milnes-Vasquez, (202) 622–7530 (not toll-free numbers).

SUPPLEMENTARY INFORMATION:

Background

Section 382 imposes a limitation on a corporation's use of net operating loss carryovers and certain other attributes following a change in ownership of the corporation (loss corporation). A loss corporation has an ownership change if the percentage of stock of a loss corporation that is owned by one or more 5-percent shareholders has increased by more than 50 percentage points over the lowest percentage of stock of the loss corporation owned by such shareholders at any time during the testing period (generally, a three-year period). Pursuant to section 382(g)(4)(A), individual shareholders who own less than five percent of a loss corporation are aggregated and treated as a single 5-percent shareholder (a public group).

The regulations extend the public group concept to situations in which a loss corporation is owned by one or more entities, as defined in § 1.382–3(a) (generally, partnerships, corporations, estates, and trusts). If an entity directly or indirectly owns five percent or more of the loss corporation, that entity has its own public group if its owners who are not 5-percent shareholders own, in the aggregate, five percent or more of the loss corporation. An entity that owns a five-percent or more direct interest in a loss corporation at any time during a testing period is a ''first tier entity,'' and a ''higher-tier entity'' is any entity owning a five-percent or more direct interest in a first tier entity or any other higher tier entity at any time during a testing period. (Such entities are referred to as 5-Percent Entities in this preamble.)

The application of the segregation rules results in the creation of a new public group in addition to the one (or more) that existed previously. That new group is treated as a new 5-percent shareholder that increases its ownership interest in the loss corporation.

The segregation rules apply to transfers of loss corporation stock by an individual 5-percent shareholder to public shareholders and a 5-Percent Entity's transfer of loss corporation stock to public shareholders. In addition, the current segregation rules, subject to the cash issuance and small issuance exceptions (described in this preamble), treat issuances of stock under section 1032, redemptions, and redemption-like transactions as segregation events.

Generally, the small issuance exception exempts the total amount of stock issued during a taxable year to the extent it does not exceed 10 percent of the total value of the corporation's outstanding stock at the beginning of the taxable year or 10 percent of the class of stock issued and outstanding at the beginning of the taxable year (the 10-percent limitation). However, the small issuance exception does not apply to any issuance of stock that, by itself, exceeds the 10-percent limitation. If stock is issued solely for cash, the cash issuance exception exempts a percentage of the total stock issued equal to 50 percent of the aggregate percentage ownership interest of the public groups of the corporation immediately before the issuance. If the small issuance exception excludes only a portion of a stock issuance, the cash issuance exception may apply to the portion not excluded under the small issuance exception.

Notice 2010–49, 2010–27 IRB. 10, invited public comment relating to possible modifications to the regulations under section 382 regarding the treatment of shareholders who are not 5-percent shareholders (Small Shareholders). See § 601.601(d)(2)(ii)(*b*). On November 23, 2011, the IRS and the Treasury Department published a notice of proposed rulemaking in the **Federal Register** (REG–149625–10, 2012–2 IRB 279;76 FR 72362–01) containing proposed regulations (proposed regulations) that, if finalized, would provide relief in certain cases from the segregation rules of the current regulations under section 382.

Summary of Proposed Regulations

The proposed regulations provide exceptions, in addition to those in the current regulations, that would exempt from the segregation rules certain transactions involving the stock of loss corporations and 5-Percent Entities. The preamble to the proposed regulations explains that these additional exceptions are intended to reduce tax administration and compliance burdens with respect to transactions that do not bear indicia of loss trafficking, and thus do not implicate the policies underlying section 382.

A. Secondary Transfer Exception

The proposed regulations generally would render the segregation rules inoperative with respect to transfers of loss corporation stock to Small Shareholders by 5-Percent Entities or individuals who are 5-percent shareholders. In these cases, the stock transferred will be treated as being acquired proportionately by the public groups existing at the time of the transfer. This rule also applies to transfers of ownership interests in 5-Percent Entities to public owners and to 5-percent owners who are not 5-percent shareholders.

B. Small Redemption Exception

The proposed regulations provide an exception that would exempt small redemptions of the stock of a loss corporation from the segregation rules (small redemption exception) that is based upon the 10-percent limitation of the small issuance exception in the current regulations. The small redemption exception would annually exempt from the segregation rules, at the loss corporation's option, either redemptions of loss corporation stock equal to 10 percent of the total value of the loss corporation's stock at the beginning of the taxable year, or redemptions of loss corporation stock of up to 10 percent of the number of shares of the redeemed class of loss corporation stock outstanding at the beginning of the taxable year. Pursuant to this exception, each public group existing immediately before the redemption would be treated as redeeming its proportionate share of exempted stock.

C. General Exception to Segregation Rules for 5-Percent Entities

Under the proposed regulations, the segregation rules would not apply to certain transactions involving a 5-Percent Entity (general exception). Under the general exception, the segregation rules would not apply if, on the date of the transaction at issue, (i) the 5-Percent Entity owns 10 percent or less (by value) of all the outstanding stock of the loss corporation (ownership limitation), and (ii) the direct or indirect investment in the stock of the loss corporation does not exceed 25 percent of the 5-Percent Entity's gross assets (asset threshold). For purposes of the asset threshold, the 5-Percent Entity's cash and cash items within the meaning of section 382(h)(3)(B)(ii) would not be taken into account.

The preamble to the proposed regulations describes the purpose of the general exception:

> The IRS and the Treasury Department believe that the proposal strikes an appropriate balance between reducing complexity and safeguarding section 382 policies. The proposal will enable loss corporations to disregard indirect changes in its ownership that may, under the current regulations, require burdensome information gathering and may unnecessarily impede the loss corporation's ability to reorganize its affairs. At the same time, however, the proposal imposes criteria that protect the government's interests. The asset threshold makes it unlikely that the loss corporation's attributes motivate transactions in the equity of 5-Percent Entities. Additionally, like the small issuance exception and the relief for redemptions that appears elsewhere in this proposal, the ownership limitation makes it unlikely that transactions among Small Shareholders one or more tiers removed from the loss corporation implicate loss trafficking concerns. * * *

Summary of Comments and Explanation of Provisions

Comments were received in response to the proposed regulations. A public hearing was not requested, and none was held. The comments generally supported the provisions of the proposed regulations, but requested a number of revisions. After consideration of all the comments, the proposed regulations are adopted as amended by this Treasury decision. In general, the final regulations follow the approach of the proposed regulations, with some revisions. The more significant comments and revisions are discussed in this section.

A. Secondary Transfer Segregation Rule

The proposed regulations contain a clarification of the application of § 1.382–2T(j)(3) of the current regulations (secondary transfer segregation rule). Under the secondary transfer segregation rule, in general, the segregation rules apply to secondary public transfers of loss corporation stock (that is, transfers of loss corporation stock from 5-percent shareholders or first tier entities to public shareholders). Section 1.382–2T(j)(3) of the current regulations further provides that the ''principles'' of the foregoing rule apply to ''transactions in which an ownership interest in a higher tier entity that owns five percent or more of the loss corporation (determined without regard to [§ 1.382–2T(h)(i)(A)]) or a first tier entity is transferred to a public owner or a 5-percent owner who is not a 5-percent shareholder.'' The IRS and the Treasury Department became aware that it is unclear whether the secondary transfer segregation rule applies to transfers of higher tier entity stock by a transferor that does not indirectly own five percent or more in the relevant loss corporation. New § 1.382–3(i) of the proposed regulations would clarify that the secondary transfer segregation rule applies to a transfer of higher tier entity stock only if the seller indirectly owns five percent or more of the loss corporation.

After further considering the interaction between § 1.382–3(i) and the secondary transfer exception of § 1.382–3(j)(13) of the proposed regulations, the

IRS and the Treasury Department have concluded that it is not necessary to retain a stand-alone rule clarifying the operation of the secondary transfer segregation rule in the final regulations because the secondary transfer exception eliminates all of the segregation rules of § 1.382–2T(j)(3) with respect to all secondary transfers occurring after the regulations are published as final regulations. However, the substance of the clarification contained in § 1.382–3(i) of the proposed regulations has been incorporated into the final version of the secondary transfer exception of § 1.382–3(j)(13) to confirm that the segregation rules, and therefore the secondary transfer exception, apply to secondary transfers of stock of a loss corporation or 5-Percent Entity only if the transferor indirectly owns 5-percent of the loss corporation. In addition, the IRS will not challenge application of the clarification contained in § 1.382–3(i) of the proposed regulations to transfers occurring on dates before October 22, 2013.

B. Small Redemption Exception

Two commenters requested that the small redemption exception be expanded to exempt redemptions of up to 25 percent of the total value of stock or number of shares of a class of stock. The commenters argued that, because redemptions do not inject new capital into a loss corporation but rather contract the corporation's capital, the regulations should allow a more generous exemption from the segregation rules for redemptions than for stock issuances.

After consideration of the comments, the IRS and the Treasury Department have determined that the ceiling on the small redemption exception should remain at 10 percent. As discussed in greater detail in the preamble to the proposed regulations, the provisions of the proposed regulations were intended to reduce tax administration and compliance burdens with respect to transactions that do not implicate the policies of section 382. To that end, occasional redemptions of stock, which, in the aggregate, represent a small percentage of the issuer's equity, are unlikely to be used as a device to shift the ownership of a loss corporation. Accordingly, relief from application of the segregation rules is appropriate. Raising the ceiling on the size of redemptions to which the small redemption exception applies to 25 percent could be used to effectuate significant shifts in ownership contrary to the policies of section 382.

C. Application of Small Issuance and Small Redemption Exceptions to 5-Percent Entities

Commenters requested that the small redemption exception be extended to exempt redemptions of the stock of 5-Percent Entities from the segregation rules. These commenters noted that the secondary transfer exception provided in the proposed regulations exempts certain transfers of the stock of 5-Percent Entities from the segregation rules, as does the small issuance exception in the current regulations. Additionally, one commenter noted that if the small redemption exception were extended to redemptions by 5-Percent Entities, guidance should be provided to supply the baseline against which to measure the 10-percent limitation of the small redemption exception in such cases. Specifically, the commenter asked for clarification regarding whether the limitation would be calculated by reference to the stock of the redeeming corporation, or, alternatively, by reference to the stock of the loss corporation.

In response to these comments, the final regulations extend the small redemption exception to exempt redemptions of the stock of 5-Percent Entities from the segregation rules. Further, the IRS and the Treasury Department have concluded that the 10-percent limitation of the small redemption exception should be measured by reference to the stock of the entity engaging in the redemption. Calculating the 10-percent limitation by reference to the stock of the redeeming entity will ensure that this exception, consistent with its intended purpose, applies only to redemptions that are ''small.'' For example, assume that a first tier entity, the stock of which has a value of $150, owns an 8 percent stake in a loss corporation, the stock of which has an aggregate value of $750. If the 10-percent limitation were applied by reference to the value of the loss corporation's stock, then the first tier entity would be permitted to redeem an amount of stock equal to 50 percent of its pre-existing stock (that is, 10 percent of $750 ($75)/$150) without application of the segregation rules. This result is inappropriate. Accordingly, these final regulations provide that the 10-percent limitation of the small redemption exception applies by reference to the value of the entity (or to the classes of stock of the entity, as the case may be) that is engaging in the redemption.

In the preamble to the proposed regulations, the IRS and the Treasury Department requested comments as to whether further refinement of the small issuance exception in the current regulations might be warranted in the context of any potential expansion of the additional exceptions proposed therein. As discussed, these final regulations expand the small redemption exception to apply to redemptions of the stock of 5-Percent Entities, and provide that the stock of the 5-Percent Entity engaging in the redemption is the appropriate baseline for computing the 10-percent limitation for the small redemption exception in such cases. In comments received in response to the proposed regulations, one commenter noted that the small issuance exception in the current regulations applies to issuances of stock of 5-Percent Entities and contains a parallel 10-percent limitation on the amount of stock issued that qualifies for this exception. Further, the commenter pointed out that the same question of the appropriate baseline for applying the 10-percent limitation exists with regard to the small issuance redemption. The commenter requested that these final regulations supply clarification with regard to the appropriate baseline for applying the small issuance exception to issuances of stock of 5-Percent Entities.

After consideration of this comment, the IRS and the Treasury Department have determined that the same policy considerations discussed with regard to the application of the small redemption exception to 5-Percent Entities exist with regard to the application of the small issuance exception to 5-Percent Entities. Thus, these final regulations provide that the 10-percent limitation of the small issuance exception in the current regulations is calculated by reference to the same baseline used for the small redemption exception. Accordingly, these final regulations provide that the 10-percent limitation for the application of the small issuance exception to issuances of stock by a 5-Percent Entity is calculated by reference to the value of the stock of the issuing entity (or to the classes of stock of that entity, as the case may be).

D. General Exception to Segregation Rules for 5-Percent Entities

Some commenters proposed increasing the ownership limitation for the general exception from 10 percent to a higher percentage (between 15 and 30 percent) to increase the number of 5-Percent Entities that would qualify for the general exception to the segregation rules. After consideration of these comments, the IRS and the Treasury Department have concluded that it is appropriate for the ownership limitation of the general exception to remain at 10

percent in the final regulations. The IRS and the Treasury Department believe that maintaining the ownership limitation at 10 percent represents an appropriate balance between reducing administrative and compliance burdens while protecting against transactions that may raise loss trafficking concerns. Accordingly, the final regulations retain the 10-percent ownership limitation.

Several commenters expressed concern that loss corporations would not be able to verify that a 5-Percent Entity's ownership of loss corporation stock does not exceed the 25-percent asset threshold. Although the loss corporation could request such information from the 5-Percent Entity, there is no requirement that the 5-Percent Entity provide it (and it may be legally obliged not to provide such information). In response to that concern, some commenters suggested that a loss corporation should be able to apply the general exception if it determines in good faith that it has satisfied a duty of inquiry with regard to satisfaction of the asset threshold by a particular 5-Percent Entity. In addition, questions were raised whether the asset threshold could be replaced with an anti-avoidance rule designed to frustrate abuses that could arise in the absence of the asset threshold.

The preamble to the proposed regulations explains that the asset threshold was created to ensure that the segregation rules would continue to apply to transactions in the stock of 5-Percent Entities that were motivated by attempts to exploit the attributes of the loss corporation. In effect, the IRS and the Treasury Department imposed the combination of the ownership limitation and the asset threshold as the equivalent of an anti-avoidance rule, though formulated as an objective test. However, the comments received indicate that the asset threshold, as presented in the proposed regulations, would prevent the general exception to the segregation rules from achieving the goal of reducing complexity while safeguarding section 382 policies.

After consideration of the comments, the IRS and the Treasury Department have decided to replace the asset threshold test with an anti-avoidance rule. The anti-avoidance rule provides that the general exception to the segregation rules does not apply to a transaction involving an ownership interest in a 5-Percent Entity if the loss corporation, directly or through one or more persons, has participated in planning or structuring the transaction with a view to avoid the application of the segregation rules. This anti-avoidance rule will more directly address the tax avoidance concerns underlying the asset threshold included in the proposed regulations while reducing tax compliance burdens with regard to transactions with low tax avoidance potential. The existence of the 10-percent ownership limitation will ensure that the general exception applies only with regard to transactions involving holders who have relatively small ownership interests in the loss corporation and, therefore, are unlikely to be vehicles for avoidance planning. In addition, this anti-avoidance rule would not be violated in the common situation in which the loss corporation seeks and obtains (or seeks and cannot obtain) information about a proposed transaction that would change the ownership of a 5-Percent Entity, but the loss corporation does not take part in planning or structuring the transaction.

E. Correction of General Exception Example

Commenters pointed out a technical error in one general exception example (Example 11 in § 1.382–3(j)(16) of the proposed regulations) and requested its correction. The commenters pointed out that the example mistakenly treats an entity as a first tier entity although its only interest in the loss corporation is preferred stock meeting the requirements of section 1504(a)(4). The IRS and the Treasury Department agree that the example is technically flawed because section 1504(a)(4) stock is disregarded for purposes of determining ownership shifts. We note that Example 11 assumes a modified version of the facts of Example 10. Therefore, in order to correct the illustration of the general exception by Example 11, these final regulations contain modifications to Examples 10 and 11, which provide that, in addition to the preferred stock, the shareholder entity owns sufficient common stock at the outset of the example to be tracked as a first tier entity.

F. Effective Dates

The proposed regulations provide that the proposed exceptions to the segregation rules would apply to testing dates occurring on or after the date the regulations are published as final regulations in the **Federal Register** (the Publication Date). Commenters have requested that the regulations should allow taxpayers to apply the proposed regulations retroactively. One commenter suggested that taxpayers should be permitted to apply the proposed regulations retroactively, regardless of whether such application would reverse a prior ownership change either in a closed or an open year, provided that taxpayers were required to revise carryforward schedules consistently with any such change. (For example, if application of the proposed regulations in a closed year would reverse an ownership change, the taxpayer would be required to adjust its carryforward schedule to the extent net operating losses would have been absorbed in one or more closed years.) This commenter pointed to the small issuance and cash issuance exceptions as provisions with a similar effective date. Another commenter pointed out that the proposed effective date would create inconsistencies in the treatment of Small Shareholders on testing dates within a single testing period when the Publication Date occurs during the testing period. This comment proposed three alternatives that would allow a loss corporation to consistently apply the new rules to (a) testing dates on or after the Publication Date; (b) all testing dates within a testing period that includes the Publication Date; or (c) testing periods for which all of the testing dates occur after the Publication Date.

After consideration of the comments, the final regulations do not permit taxpayers to apply the final regulations to a testing date before October 22, 2013 if the application of the final regulations would result in an ownership change that did not occur, or would reverse an ownership change that did occur, on a date before October 22, 2013 under the regulations then in effect. The IRS and the Treasury Department believe that, in general, ownership change determinations from prior periods should remain fixed, and that the interests of tax administration are not served by permitting taxpayers to choose whether it is more advantageous to retain an ownership change result from a prior period or to reverse that result through the application of new regulations. For this reason, the final regulations retain the general effective date of the proposed regulations. The final regulations do, however, permit taxpayers to apply the provisions of the final regulations in their entirety to all testing dates that are included in a testing period beginning before and ending on or after October 22, 2013, subject to the limitations that (1) the final regulations may not be applied to any date on or before the date of any ownership change that occurred on a date before October 22, 2013 under the regulations in effect before October 22, 2013, and (2) they may not be applied if their application would result in an ownership change occurring on a date before October 22, 2013 that did not

occur under the regulations in effect before October 22, 2013.

For example, assume that a loss corporation experienced an ownership change on October 1, 2012, and the current testing period began on October 2, 2012. Following the publication of the final regulations on October 22, 2013, the loss corporation wishes to permissively apply the regulations to all dates of its testing period that begins before and ends on or after October 22, 2013. The regulations may be permissively applied beginning on October 2, 2012, but only if such application does not result in an ownership change occurring on a date before October 22, 2013 that did not occur under the regulations in effect during the period before October 22, 2013. Because the final regulations may not be applied to any date on or before the date of any ownership change that occurred before October 22, 2013 under the regulations in effect before that date, the final regulations may not be permissively applied to October 1, 2012, or any earlier date.

G. Revisions to the Small Issuance and Cash Issuance Exceptions

The preamble to the proposed regulations requested comments as to whether further refinement of either or both of the small issuance or cash issuance exceptions might be warranted in the context of any potential expansion of the exceptions contained in the proposed regulations. After consideration of the comments received, the IRS and the Treasury Department believe that no changes to the small issuance or cash issuance exceptions should be made, other than the clarification regarding the calculation of the 10-percent limitation for the small issuance exception.

Comments generally requested increasing the 10-percent limitation of the small issuance exception. Because the final regulations do not increase the 10-percent limitation for the small redemption exception, the IRS and the Treasury Department have determined that the 10-percent limitation of the small issuance exception should also not be increased in order to maintain parity with the small redemption exception. Furthermore, as discussed in the preamble to the proposed regulations, the IRS and the Treasury Department remain concerned that transactions infusing new capital into a loss corporation implicate section 382 policies because the capital infusion can accelerate the use of tax attributes. This is the case even if the new investors are Small Shareholders, especially in light of the dilutive effect of the cash issuance exception on owner shifts attributable to capital-raising transactions. Accordingly, the final regulations do not expand the 10-percent limitation of the small issuance exception.

Comments also suggested that the cash issuance exception should apply to issuances of stock for non-cash property, including debt. One commenter requested that the IRS and the Treasury Department consider expanding the definition of a ''cash issuance'' to include loss corporation stock issued in connection with the conversion of a convertible debt instrument issued by the loss corporation in exchange for cash. The commenter asserted that no meaningful distinction existed between loss corporation stock acquired by a Small Shareholder directly from the loss corporation in exchange for cash and loss corporation stock acquired as a result of the conversion of a debt instrument that was issued by the loss corporation in exchange for cash.

In general, the cash issuance exception is based upon an assumption that there is overlapping ownership between existing public shareholders and those shareholders who purchase additional stock of a loss corporation. In recognition of the fact that a loss corporation cannot establish this overlapping ownership in many cases, the cash issuance exception mitigates the owner shift that otherwise would result if the segregation rules were to apply in a manner that disregards the overlapping ownership that likely exists.

The IRS and the Treasury Department believe that the assumption of overlapping ownership does not necessarily extend to existing public shareholders and purchasers of convertible debt or transferors of non-cash property for stock. Stated differently, persons who lend money to a loss corporation or persons who transfer non-cash property for stock in many cases may be different from public shareholders of the loss corporation. Furthermore, because infusions of capital into the loss corporation directly implicate the policies of section 382, the IRS and the Treasury Department believe that the cash issuance exception should retain its current scope. Accordingly, these final regulations do not adopt the commenter's proposal.

H. Coordinated Acquisition Rule

The preamble to the proposed regulations requested comments as to the scope of § 1.382–3(a), which provides, in part, that a group of persons making a coordinated acquisition of stock can constitute an entity for purposes of section 382.

Comments were received requesting guidance that would identify specific situations in which stock purchases would not be treated as a coordinated acquisition. For example, one commenter asked for guidance to provide that a loss corporation may rely on the presence or absence of a filing with the Securities and Exchange Commission as a ''group'' to establish the presence or absence of a coordinated acquisition. After considering these comments, the IRS and the Treasury Department believe that further study of this issue is required, and that the development of a companion notice of proposed rulemaking to address this issue would significantly delay issuance of these final regulations. Accordingly, the coordinated acquisition rule is not addressed contemporaneously with these final regulations, but may be addressed in future guidance.

Special Analyses

It has been determined that this Treasury decision is not a significant regulatory action as defined in Executive Order 12866, as supplemented by Executive Order 13563. Therefore, a regulatory assessment is not required. It is hereby certified that these regulations will not have a significant economic impact on a substantial number of small entities. The certification is based on the fact that this rule would not impose new burdens on small entities and, in fact, may reduce the recordkeeping burden on small entities. Therefore, a Regulatory Flexibility Analysis under the Regulatory Flexibility Act (5 U.S.C. chapter 6) is not required. Pursuant to section 7805(f) of the Code, the notice of proposed rulemaking that preceded this final regulation was submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on its impact on small business, and no comments were received.

Drafting Information

The principal author of these regulations is Stephen R. Cleary of the Office of Associate Chief Counsel (Corporate). However, other personnel from the IRS and the Treasury Department participated in their development.

List of Subjects in 26 CFR Part 1

Income taxes, Reporting and recordkeeping requirements.

Adoptions of Amendments to the Regulations

Accordingly, 26 CFR part 1 is amended as follows:

PART 1—INCOME TAXES

■ **Paragraph 1.** The authority citation for part 1 continues to read in part as follows:

Authority: 26 U.S.C. 7805 * * *

Section 1.382–3 also issued under 26 U.S.C. 382(g)(4)(C) and 26 U.S.C. 382(m). * * *

■ **Par. 2.** Section 1.382–3 is amended as follows:

■ 1. Revising paragraph (j) heading and paragraph (j)(1).

■ 2. Revising paragraph (j)(11).

■ 3. Redesignating paragraph (j)(13) and (14) as (j)(16) and (17).

■ 4. Adding new paragraphs (j)(13) through (15).

■ 5. Adding new *Examples 5, 6, 7, 8, 9, 10, 11, 12, and 13* to newly redesignated paragraph (j)(16).

■ 6. Revising newly redesignated paragraph (j)(17).

The revisions and additions read as follows:

§ 1.382–3 Definitions and rules relating to a 5-percent shareholder.

* * * * *

(j) *Modification of the segregation rules of § 1.382–2T(j)(2)(iii) and (3)*—(1) *Introduction.* This paragraph (j) exempts, in whole or in part, certain transfers of stock from the segregation rules of § 1.382–2T(j)(2)(iii) and (3). Terms and nomenclature used in this paragraph (j), and not otherwise defined herein, have the same meanings as in section 382 and the regulations issued under section 382.

* * * * *

(11) *Application to first tier and higher tier entities*—(i) *In general.* The principles of paragraphs (j)(1) through (10) and paragraph (j)(12) apply to issuances of stock by a first tier entity or a higher tier entity that owns 5 percent or more of the loss corporation's stock (determined without regard to § 1.382–2T(h)(2)(1)(A)).

(ii) *Small issuance limitation.* In applying paragraph (j)(2) of this section to any issuance of stock by a first tier or higher tier entity, the small issuance limitations of paragraph (j)(2)(iii)(A) and (B) of this section are computed by reference to the stock value and the stock classes of the issuing corporation.

* * * * *

(13) *Secondary transfer exception.* The segregation rules of § 1.382–2T(j)(3)(i) will not apply to the transfer of a direct ownership interest in the loss corporation by a first tier entity or an individual that owns five percent or more of the loss corporation to public shareholders. Instead, each public group existing at the time of the transfer will be treated under § 1.382–2T(j)(3)(i) as acquiring its proportionate share of the stock exempted from the application of § 1.382–2T(j)(3)(i). The segregation rules also will not apply if an ownership interest in an entity that owns five percent or more of the loss corporation (determined without regard to the application of § 1.382–2T(h)(2)(i)(A)) is transferred to a public owner or a 5-percent owner who is not a 5-percent shareholder of the loss corporation. Instead, provided that the transferor is either a 5-percent owner that is a 5-percent shareholder of the loss corporation or a higher tier entity owning five percent or more of the loss corporation (determined without regard to the application of section 1.382–2T(h)(2)(i)(A)), each public group of the entity existing at the time of the transfer is treated under § 1.382–2T(j)(3)(i) as acquiring its proportionate share of the transferred ownership interest. With regard to a transferor that is neither a 5-percent shareholder of the loss corporation nor a higher tier entity owning five percent or more of the loss corporation (determined without regard to the application of § 1.382–2T(h)(2)(i)(A)), see generally § 1.382–2T(e)(1)(ii) (disregarding these transactions if the transferee is not a 5-percent shareholder).

(14) *Small redemption exception*—(i) *In general.* Section 1.382–2T(j)(2)(iii)(C) does not apply to a small redemption (as defined in paragraph (j)(14)(ii) of this section), except to the extent that the total amount of stock redeemed in that redemption and all other small redemptions previously made in the same taxable year (determined in each case on redemption) exceeds the small redemption limitation. This paragraph (j)(14) does not apply to a redemption of stock that, by itself, exceeds the small redemption limitation.

(ii) *Small redemption defined. Small redemption* means a redemption of public shareholders by the loss corporation of an amount of stock not exceeding the small redemption limitation.

(iii) *Small redemption limitation*—(A) *In general.* For each taxable year, the loss corporation may, at its option, apply this paragraph (j)(14)—

(*1*) On a corporation-wide basis, in which case the small redemption limitation is 10 percent of the total value of the loss corporation's stock outstanding at the beginning of the taxable year (excluding the value of stock described in section 1504(a)(4)); or

(*2*) On a class-by-class basis, in which case the small redemption limitation is 10 percent of the number of shares of the class redeemed that are outstanding at the beginning of the taxable year.

(B) *Class of stock defined.* For purposes of this paragraph (j)(14)(iii), a class of stock includes all stock with the same material terms.

(C) *Adjustments for stock splits and similar transactions.* Appropriate adjustments to the number of shares of a class outstanding at the beginning of a taxable year must be made to take into account any stock split, reverse stock split, stock dividend to which section 305(a) applies, recapitalization, or similar transaction occurring during the taxable year.

(D) *Exception.* The loss corporation may not apply this paragraph (j)(14)(iii) on a class-by-class basis if, during the taxable year, more than one class of stock is redeemed in a single redemption (or in two or more redemptions that are treated as a single redemption under paragraph (j)(14)(v) of this section).

(E) *Short taxable years.* In the case of a taxable year that is less than 365 days, the small redemption limitation is reduced by multiplying it by a fraction, the numerator of which is the number of days in the taxable year, and the denominator of which is 365.

(iv) *Proportionate redemption of exempted stock*—(A) *In general.* Each direct public group that exists immediately before a redemption to which this paragraph (j)(14) applies is treated as having been redeemed of its proportionate share of the amount of stock exempted from the application of § 1.382–2T(j)(2)(iii)(C) under this paragraph (j)(14).

(B) *Actual knowledge of greater redemption.* Under the last sentence of § 1.382–2T(k)(2), the loss corporation may treat direct public groups existing immediately before a redemption to which this paragraph (j)(14) applies as having been redeemed of more stock than the amount determined under paragraph (j)(14)(iv)(A) of this section, but only if the loss corporation actually knows that the amount redeemed from those groups in the redemption exceeds the amount so determined.

(v) *Certain related redemptions.* For purposes of this paragraph (j)(14), two or more redemptions (including redemptions of stock by first tier or higher tier entities) are treated as a single redemption if—

(A) The redemptions occur at approximately the same time pursuant to the same plan or arrangement; or

(B) A principal purpose of redeeming the stock in separate redemptions rather than in a single redemption is to minimize or avoid an owner shift under the rules of this paragraph (j)(14).

(vi) *Certain non-stock ownership interests.* As the context may require, a non-stock ownership interest in an entity other than a corporation is treated as stock for purposes of this paragraph (j)(14).

(vii) *Application to first tier and higher tier entities*—(A) *In general.* The principles of this paragraph (j)(14) apply to redemptions of stock by a first tier entity or a higher tier entity that owns 5 percent of the loss corporation stock (determined without regard to § 1.382–2T(h)(2)(i)(A)).

(B) *Small redemption limitation.* In applying this paragraph (j)(14) to any redemption of stock by a first tier or a higher tier entity, the small redemption limitations of paragraph (j)(14)(iii)(A) of this section are computed by reference to the stock value and the stock classes of the redeeming corporation.

(15) *Exception for first tier and higher tier entities*—(i) *In general.* The segregation rules of § 1.382–2T(j)(3)(iii) will not apply to a transaction involving stock in a first tier or a higher tier entity if, after taking into account the results of such transaction and all other transactions occurring on that date, the first tier or higher tier entity owns 10 percent or less (by value) of all the outstanding stock (without regard to § 1.382–2(a)(3)) of the loss corporation.

(ii) *Anti-avoidance rule.* The rules of paragraph (j)(15)(i) of this section do not apply to a transaction involving an ownership interest in a first tier or higher tier entity if the loss corporation, directly or through one or more persons, has participated in planning or structuring the transaction with a view to avoiding the application of the segregation rules. For this purpose, a transaction includes any event that would result in segregation under § 1.382–2T(j)(3)(iii), absent the application of this paragraph (j)(15), and any event (for example, the formation of a holding company) occurring as part of the same plan that includes the event that would result in segregation (without the application of this paragraph (j)(15)). Other anti-avoidance rules continue to be applicable. See, for example, §§ 1.382–2T(k)(4) and 1.382–3(a)(1).

(iii) *Special rules.* If application of paragraph (j)(15)(i) of this section results in the combination of public groups, then—

(A) The amount of increase in the percentage of stock ownership of the continuing public group will be the sum of its increase and a proportionate amount of any increase by any public group that is combined with the continuing public group (the former public group); and

(B) The continuing public group's lowest percentage ownership will be the sum of its lowest percentage ownership and a proportionate amount of the former public group's lowest percentage ownership.

(iv) *Ownership of the loss corporation.* In making the determination under paragraph (j)(15)(i) of this section—

(A) The rules of § 1.382–2T(h)(2) will not apply;

(B) The entity will be treated as owning the loss corporation stock that it actually owns, and any other loss corporation stock if that other stock would be attributed to the entity under section 318(a) (without regard to paragraph (4) thereof) unless an option is treated as exercised under § 1.382–4(d)); and

(C) The operating rules of paragraph (j)(15)(v) of this section will apply.

(v) *Operating rules.* Subject to the principles of § 1.382–2T(k)(4), a loss corporation may establish the ownership limitation of paragraph (j)(15)(i) of this section through either—

(A) Actual knowledge; or

(B) Absent actual knowledge to the contrary, the presumptions regarding stock ownership in § 1.382–2T(k)(1).

(16) *Examples.* * * *

Example 5. Secondary transfer exception to segregation rules—no new public group. (i) *Facts.* L is owned 60 percent by one public group (Public L_1) and 40 percent by another public group (Public L_2). On July 1, 2014, individual A acquires 10 percent of L's stock over a public stock exchange. On December 31, 2014, A sells all of his L stock over a public stock exchange. No individual or entity acquires as much as five percent of L's stock as a result of A's disposition of his L stock. On January 3, 2015, individual B acquires 10 percent of L's stock over a public stock exchange. On June 30, 2015, B sells all of her L stock over a public stock exchange. No individual or entity acquires as much as five percent of L's stock as a result of B's disposition of her L stock.

(ii) *Analysis.* The dispositions of the L stock by A and B are not transactions that cause the segregation of L's direct public groups that exist immediately before the transaction (Public L_1 and Public L_2). When A and B sell their shares to public shareholders over the public stock exchange, the shares are treated as being reacquired by Public L_1 and Public L_2. As a result, Public L_1's ownership interest is treated as increasing from 54 percent to 60 percent during the testing period, and Public L_2's ownership interest is treated as increasing from 36 percent to 40 percent during the testing period.

Example 6. Secondary transfer exception—first tier entity. (i) *Facts.* L has a single class of common stock outstanding that is owned 60 percent by a direct public group (Public L) and 40 percent by P. P is owned 20 percent by individual A and 80 percent by a direct public group (Public P). On October 6, 2014, A sells 50 percent of his interest in P to B, an individual who is, and remains, a member of Public P.

(ii) *Analysis.* P is an entity that owns five percent or more of L. A is a 5-percent owner of P that is a 5-percent shareholder of L. Because A's sale of the P stock is to a member of Public P, the disposition of the P stock by A is not a transaction that causes the segregation of P's direct public group that exists immediately before the transaction (Public P). See paragraph (j)(13) of this section. When A sells his shares to B, the shares are treated as being acquired by Public P. As a result, Public P's ownership interest in L is treated as increasing from 32 percent to 36 percent during the testing period.

Example 7. Small redemption exception. (i) *Facts.* L is a calendar year taxpayer. On January 1, 2014, L has 1,060 shares of a single class of common stock outstanding, all of which are owned by a single direct public group (Public L). On July 1, 2014, L acquires 60 shares of its stock for cash. On December 31, 2014, in an unrelated redemption, L acquires 90 more shares of its stock for cash. Following each redemption, L's stock is owned entirely by public shareholders. No other changes in the ownership of L's stock occur prior to December 31, 2014.

(ii) *Analysis—(A) July redemption.* The July redemption is a small redemption because the number of shares redeemed (60) does not exceed 106, the small redemption limitation (10 percent of the number of common shares outstanding on January 1, 2014). Under paragraph (j)(14) of this section, the segregation rules of § 1.382–2T(j)(2)(iii)(C) do not apply to the July redemption. Under paragraph (j)(14)(iv) of this section, Public L is treated as having all 60 shares redeemed.

(B) December redemption. The December redemption is a small redemption because the number of shares redeemed (90) does not exceed 106, the small redemption limitation (10 percent of the number of common shares outstanding on January 1, 2014). However, under paragraph (j)(14)(i) of this section, only 46 of the 90 shares redeemed are exempted from the segregation rules of § 1.382–2T(j)(2)(iii)(C) because the total number of shares of common stock redeemed in the July and December redemptions exceeds 106, the small redemption limitation, by 44. Accordingly, under paragraph (j)(14)(iv) of this section, Public L is treated as having 46 shares redeemed in the December redemption. Section 1.382–2T(j)(2)(iii)(C) applies to the remaining 44 shares redeemed. Accordingly, Public L is segregated into two different public groups immediately before the transaction (and thereafter) so

that the redeemed interests (Public RL) are treated as part of a public group that is separate from the ownership interests that are not redeemed (Public CL). Therefore, as a result of the December redemption, Public CL's interest in L increases by 4.4 percentage points (from 95.6 percent (956/1,000) to 100 percent (910/910)) on the December 31, 2014 testing date. For purposes of determining whether an ownership change occurs on any subsequent testing date having a testing period that includes the December redemption, Public CL is treated as a 5-percent shareholder whose percentage ownership interests in L increased by 4.4 percentage points as a result of such redemption.

Example 8. Segregation rules inapplicable—proportionate amount. (i) *Facts.* P_1 is a corporation that owns 8 percent of the stock of L. The remaining L stock (92 percent) is owned by Public L. P_1 is entirely owned by Public P_1. P_2 is a corporation owned 90 percent by individual A and 10 percent by a public group (Public P_2). On May 22, 2014, P_1 merges into P_2 with the shareholders of P_1 receiving an amount of P_2 stock equal to 25 percent of the value of P_2 immediately after the reorganization. L was owned 92 percent by Public L and 8 percent by P_1 throughout the testing period ending on the date of the merger.

(ii) *Analysis.* Assuming L can establish that P_2 owns 10 percent or less (by value) of L on May 22, 2014 pursuant to the operating rules of paragraph (j)(15)(v) of this section, the segregation rules of § 1.382–2T(j)(3)(iii) will not apply to segregate P_1's direct public group (Public P_1) immediately before the merger from P_2's direct public group (Public P_2). Thus, following the merger, P_2 is owned 67.5 percent (90 percent × 75 percent) by A and 32.5 percent (25 percent + (10 percent × 75 percent)) by Public P_2. Pursuant to paragraph (j)(15)(iii)(B) of this section, Public P_2's lowest percentage of ownership is the sum of its lowest percentage of ownership (zero) and a proportionate amount of former Public P_1's lowest ownership percentage of L of 2.6 percent (32.5 percent × 8 percent). P_2 will be treated as having one public group whose ownership interest in L was 2.6 percent before the merger and remains 2.6 percent after the merger. Because Public P_2 owns less than 5 percent of L, Public P_2 is treated as part of Public L. See § 1.382–2T(j)(1)(iv). Thus, pursuant to paragraph (j)(15)(iii)(B) of this section, Public L's lowest ownership percentage of L during the testing period is 94.6 percent.

Example 9. Segregation rules inapplicable—prior increase in ownership by former public group during testing period. (i) *Facts.* The facts are the same as *Example 8,* except that P_1 acquired its 8 percent interest in L during the testing period that includes the merger.

(ii) *Analysis.* Pursuant to the rules of paragraph (j)(15)(iii)(A) of this section, the amount of increase in the percentage of stock ownership by Public P_2 is the sum of its increase (zero) and a proportionate amount of the increase by former Public P_1 of 2.6 percent (32.5 percent × 8 percent). Pursuant to paragraph (j)(15)(iii)(B) of this section, Public P_2's lowest percentage of ownership is zero, because both former Public P_1 and Public P_2 owned no L stock at the beginning of the testing period. Accordingly, Public P_2, the continuing public group, is treated as having increased its ownership interest by 2.6 percent. Because Public P_2 is treated as part of Public L, Public L is treated as increasing its ownership interest by 2.6 percent.

Example 10. Ownership limitation based upon fair market value. (i) *Facts.* L has one class of common stock and one class of preferred stock outstanding. The preferred stock is stock within the meaning of § 1.382–2(a)(3). Before December 23, 2014, a direct public group (Public L) owns all of the common stock of L. On December 23, 2014, P purchases all of the preferred stock of L and a portion of the common stock of L. On the date of purchase, the value of the L common stock held by P was greater than 5 percent of the value of L, and the total value of L common and L preferred stock held by P was less than 10 percent of the value of all stock of L. P has one class of common stock outstanding, all of which is owned by a direct public group (Public P). On October 7, 2015, P redeems 30 percent of its single outstanding class of common stock. On the redemption date of the P stock, due to a decline in the relative value of the common stock of L, the preferred stock of L owned by P represents 40 percent of the value of all the outstanding stock of L. No ownership change of L occurs between December 23, 2014, and October 7, 2015.

(ii) *Analysis.* The rules of paragraph (j)(15) of this section do not apply to the redemption because P owns more than 10 percent of L (by value) on that date.

Example 11. Ownership limitation—fair market value includes preferred stock. The facts are the same as in *Example 10,* except that the preferred stock is not stock within the meaning of § 1.382–2(a)(3). Although the preferred stock is not stock for the purpose of determining owner shifts, the value of that stock is taken into account in computing the 10-percent limitation of paragraph (j)(15)(i) of this section. Therefore, the results are the same as in *Example 10.*

Example 12. Ownership limitation—application of attribution rules. (i) *Facts.* Individual A owns all the outstanding stock of X. A also owns preferred stock in Y that is not stock within the meaning § 1.382–2(a)(3), which represents 50 percent of the value of Y. All the Y common stock is owned by public owners. Each of X and Y own 6 percent of the single class of L stock outstanding. On October 6, 2014, Y redeems 15 percent of its common stock.

(ii) *Analysis.* In determining satisfaction of the ownership limitation of paragraph (j)(15)(i) of this section, the attribution rules of section 318(a) apply. Pursuant to section 318(a)(2), A is treated as owning the L stock owned by X. Pursuant to section 318(a)(3), Y is treated as owning the L stock that A indirectly owns. Because Y's ownership of L exceeds the 10 percent ownership limitation of paragraph (j)(15)(i) of this section, the rules of paragraph (j)(15) of this section do not apply.

Example 13. Anti-avoidance rule. (i) *Facts.* P_1 is a corporation that owns 10 percent of the stock of L. P_1 is owned entirely by a direct public group (Public P). L has had owner shifts of 45 percentage points in its current testing period. P_1 is planning to merge into P_2, a corporation which has a public group. Advisers to L, upon learning of the proposed merger, asked the management of P_1 for details of the proposed merger, including the stock ownership of P_2 after P_1 merges into P_2. After finding out that information, L or L's advisers did not request any changes in the planned transaction.

(ii) *Analysis.* The anti-avoidance rule of paragraph (j)(15)(ii) of this section does not apply because L did not participate in planning or structuring the transaction. Pursuant to paragraph (j)(15)(i) of this section, § 1.382–2T(j)(3)(iii) does not apply to cause the segregation of P_1's public group from P_2's public group.

(17) *Effective/applicability date.* This paragraph (j) generally applies to issuances or deemed issuances of stock in taxable years beginning on or after November 4, 1992. However, paragraphs (j)(11)(ii) and (j)(13) through (15) of this section and Examples 5 through 13 of paragraph (j)(16) of this section apply to testing dates occurring on or after October 22, 2013. Taxpayers may apply paragraphs (j)(11)(ii) and (j)(13) through (15) of this section and Examples 5 through 13 of paragraph (j)(16) of this section in their entirety to all testing dates that are included in a testing period beginning before and ending on or after October 22, 2013. However, the provisions described in the preceding sentence may not be applied to any date on or before the date of any ownership change that occurred before October 22, 2013 under the regulations in effect before October 22, 2013, and they may not be applied as described in the preceding sentence if such application would result in an ownership change occurring on a date before October 22, 2013 that did not occur under the regulations in effect before October 22, 2013. See § 1.382–3(j)(14)(ii) and (iii), as contained in 26 CFR part 1 revised as of April 1, 1994, for the application of paragraph (j)(10) to stock issued on the exercise of certain options exercised on or after November 4, 1992 and for an election to apply paragraphs (j)(1) through (12) retroactively to certain issuances and deemed issuances of

stock occurring in taxable years prior to November 4, 1992.

Beth Tucker,

Deputy Commissioner for Operations Support.

Approved: August 19, 2013.

Mark J. Mazur,

Assistant Secretary of the Treasury (Tax Policy).

[FR Doc. 2013–24538 Filed 10–21–13; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 1

[TD 9630]

RIN 1545–BK71

Use of Differential Income Stream as an Application of the Income Method and as a Consideration in Assessing the Best Method; Correction

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Correcting amendment.

SUMMARY: This document contains corrections to final regulations and removal of temporary regulations (TD 9630) that were published in the **Federal Register** on Tuesday, August 27, 2013 (78 FR 52854). The final regulations implement the use of the differential income stream as a consideration in assessing the best method in connection with a cost sharing arrangement and as a specified application of the income method.

DATES: This correction is effective October 22, 2013, and is applicable beginning on or after December 19, 2011.

FOR FURTHER INFORMATION CONTACT: Mumal R. Hemrajani, at (202) 622–3800 (not a toll free number).

SUPPLEMENTARY INFORMATION:

Background

The final regulations and removal of temporary regulations (TD 9630) that are the subject of this correction are under section 482 of the Internal Revenue Code.

Need for Correction

As published, the final regulations and removal of temporary regulations (TD 9630) contains an error that may prove to be misleading and is in need of clarification.

List of Subjects in 26 CFR Part 1

Income taxes, Reporting and recordkeeping requirements.

Correction of Publication

Accordingly, 26 CFR part 1 is corrected by making the following correcting amendment:

PART 1—INCOME TAXES

■ **Paragraph 1.** The authority citation for part 1 continues to read in part as follows:

Authority: 26 U.S.C. 7805 * * *

■ **Par. 2.** Section 1.482–7 is amended by revising the last sentence of paragraph (g)(4)(vi)(F)(*2*) to read as follows:

§ 1.482–7 Methods to determine taxable income in connection with a cost sharing arrangement.

* * * * *

(g) * * *

(4) * * *

(vi) * * *

(F) * * *

(*2*) * * * See *Example 8* of paragraph (g)(4)(viii) of this section.

* * * * *

Martin V. Franks,

Chief, Publications and Regulations Branch, Legal Processing Division, Associate Chief Counsel (Procedure and Administration).

[FR Doc. 2013–24537 Filed 10–21–13; 8:45 am]

BILLING CODE 4830–01–P

PENSION BENEFIT GUARANTY CORPORATION

29 CFR Part 4022

Benefits Payable in Terminated Single-Employer Plans; Interest Assumptions for Paying Benefits

AGENCY: Pension Benefit Guaranty Corporation.

ACTION: Final rule.

SUMMARY: This final rule amends the Pension Benefit Guaranty Corporation's regulation on Benefits Payable in Terminated Single-Employer Plans to prescribe interest assumptions under the regulation for valuation dates in November 2013. The interest assumptions are used for paying benefits under terminating single-employer plans covered by the pension insurance system administered by PBGC.

DATES: Effective November 1, 2013.

FOR FURTHER INFORMATION CONTACT: Catherine B. Klion (*Klion.Catherine@pbgc.gov*), Assistant General Counsel for Regulatory Affairs, Pension Benefit Guaranty Corporation, 1200 K Street NW., Washington, DC 20005, 202–326–4024. (TTY/TDD users may call the Federal relay service toll-free at 1–800–877–8339 and ask to be connected to 202–326–4024.)

SUPPLEMENTARY INFORMATION: PBGC's regulation on Benefits Payable in Terminated Single-Employer Plans (29 CFR Part 4022) prescribes actuarial assumptions—including interest assumptions—for paying plan benefits under terminating single-employer plans covered by title IV of the Employee Retirement Income Security Act of 1974. The interest assumptions in the regulation are also published on PBGC's Web site (*http://www.pbgc.gov*).

PBGC uses the interest assumptions in Appendix B to Part 4022 to determine whether a benefit is payable as a lump sum and to determine the amount to pay. Appendix C to Part 4022 contains interest assumptions for private-sector pension practitioners to refer to if they wish to use lump-sum interest rates determined using PBGC's historical methodology. Currently, the rates in Appendices B and C of the benefit payment regulation are the same.

The interest assumptions are intended to reflect current conditions in the financial and annuity markets. Assumptions under the benefit payments regulation are updated monthly. This final rule updates the benefit payments interest assumptions for November 2013.[1]

The November 2013 interest assumptions under the benefit payments regulation will be 1.75 percent for the period during which a benefit is in pay status and 4.00 percent during any years preceding the benefit's placement in pay status. In comparison with the interest assumptions in effect for October 2013, these interest assumptions are unchanged.

PBGC has determined that notice and public comment on this amendment are impracticable and contrary to the public interest. This finding is based on the need to determine and issue new interest assumptions promptly so that the assumptions can reflect current market conditions as accurately as possible.

Because of the need to provide immediate guidance for the payment of benefits under plans with valuation dates during November 2013, PBGC finds that good cause exists for making the assumptions set forth in this amendment effective less than 30 days after publication.

[1] Appendix B to PBGC's regulation on Allocation of Assets in Single-Employer Plans (29 CFR Part 4044) prescribes interest assumptions for valuing benefits under terminating covered single-employer plans for purposes of allocation of assets under ERISA section 4044. Those assumptions are updated quarterly.

PBGC has determined that this action is not a ''significant regulatory action'' under the criteria set forth in Executive Order 12866.

Because no general notice of proposed rulemaking is required for this amendment, the Regulatory Flexibility Act of 1980 does not apply. See 5 U.S.C. 601(2).

List of Subjects in 29 CFR Part 4022

Employee benefit plans, Pension insurance, Pensions, Reporting and recordkeeping requirements.

In consideration of the foregoing, 29 CFR part 4022 is amended as follows:

PART 4022—BENEFITS PAYABLE IN TERMINATED SINGLE-EMPLOYER PLANS

■ 1. The authority citation for part 4022 continues to read as follows:

Authority: 29 U.S.C. 1302, 1322, 1322b, 1341(c)(3)(D), and 1344.

■ 2. In appendix B to part 4022, Rate Set 241, as set forth below, is added to the table.

Appendix B to Part 4022—Lump Sum Interest Rates for PBGC Payments

* * * * *

Rate set	For plans with a valuation date		Immediate annuity rate (percent)	Deferred annuities (percent)				
	On or after	Before		i_1	i_2	i_3	n_1	n_2
*	*		*	*	*	*		*
241	11–1–13	12–1–13	1.75	4.00	4.00	4.00	7	8

■ 3. In appendix C to part 4022, Rate Set 241, as set forth below, is added to the table.

Appendix C to Part 4022—Lump Sum Interest Rates for Private-Sector Payments

* * * * *

Rate set	For plans with a valuation date		Immediate annuity rate (percent)	Deferred annuities (percent)				
	On or after	Before		i_1	i_2	i_3	n_1	n_2
*	*		*	*	*	*		*
241	11–1–13	12–1–13	1.75	4.00	4.00	4.00	7	8

Issued in Washington, DC, on this 9th day of October 2013.

Judith Starr,

General Counsel, Pension Benefit Guaranty Corporation.

[FR Doc. 2013–24592 Filed 10–21–13; 8:45 am]

BILLING CODE 7709–02–P

DEPARTMENT OF DEFENSE

Office of the Secretary

32 CFR Part 199

[DOD–2011–HA–0085]

RIN–0720–AB54

TRICARE; Removal of the Prohibition To Use Addictive Drugs in the Maintenance Treatment of Substance Dependence in TRICARE Beneficiaries

AGENCY: Office of the Secretary, Department of Defense.

ACTION: Final rule.

SUMMARY: The Department of Defense (DoD) is publishing this final rule to remove the exclusion of drug maintenance programs and allow TRICARE coverage of the substitution of a therapeutic drug, with addictive potential, for a drug of addiction when medically necessary and appropriate as part of a comprehensive treatment plan for an individual with substance use dependence. The current regulation prohibits coverage of drug maintenance programs where one addictive substance is substituted for another. The final rule allows TRICARE to cover, as part of otherwise authorized treatment of substance use disorder, utilization of a specific category of psychoactive agent when medically necessary and appropriate. Removal of the exclusion is based on recognition of the accumulated medical evidence supporting the use of certain pharmacotherapies as one component in the continuum of opioid treatment services. Medication assisted treatment, to include drug maintenance involving substitution of a therapeutic drug with addiction potential, for a drug of addiction, is now generally accepted by qualified professionals to be reasonable and adequate as a component in the safe and effective treatment of substance use disorders treatment services, and thus appropriate for inclusion as a component in the TRICARE authorized substance use disorder treatment for beneficiaries.

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

FOR FURTHER INFORMATION CONTACT: John Davison, Ph.D., TRICARE Management Activity, Office of the Chief Medical Officer, telephone (703) 681–0086.

SUPPLEMENTARY INFORMATION:

I. Executive Summary

A. Purpose of the Final Rule

1. Need for the Regulatory Action

The original implementing regulations for the Civilian Health and Medical Program of the Uniformed Services (CHAMPUS), first issued in 1977, excluded drug maintenance programs from coverage. The DoD, consistent with chapter 55 of title 10, United States Code and other third party payors, covered medical services and supplies which were medically or psychologically necessary to prevent, diagnose, or treat a mental or physical illness, injury or bodily malfunction. At that time, drug maintenance programs were not the standard of care and were

not generally accepted by qualified professionals to be medically necessary and appropriate for the diagnosis and treatment of an illness, injury, or mental disorder. The regulatory language has remained unchanged for over 35 years. This final rule changes TRICARE's coverage policy based on the acceptance of drug maintenance as an integral part of opioid treatment services, when medically necessary and as part of a comprehensive treatment plan for an individual with substance use disorder.

2. Legal Authority for the Regulatory Action

This regulation is proposed under the authorities of 10 U.S.C. section 1073, which authorizes the Secretary of Defense to administer the medical and dental benefits provided in chapter 55 of title 10, United States Code. The Department is authorized to provide medically necessary and appropriate medical care for mental and physical illnesses, injuries and bodily malfunctions, including hospitalization, outpatient care and drugs under 10 U.S.C. 1077(a)(1)–(3). Although section 1077 defines benefits to be provided in the military treatment facilities (MTFs), these benefits are incorporated by reference for the benefits provided in the civilian health care sector to active duty family members and retirees and their dependents through section 1079 and 1086 respectively.

B. Summary of the Major Provisions of the Final Rule

In this rule, the proposed regulatory language eliminates the specific regulatory exclusion of drug maintenance programs found at 32 CFR 199.4(e)(11)(ii). Further, this rule also revises both 32 CFR 199.4(e)(4)(ii) and (e)(11) to affirmatively include substitution of a therapeutic drug with addictive potential, for a drug of addiction as a component in an otherwise authorized substance use disorder treatment benefit, when medically necessary and appropriate medical care for a beneficiary undergoing medically supervised treatment for a substance use disorder.

C. Costs and Benefits

This rule is not anticipated to have a significant impact on TRICARE costs. All services and supplies authorized under the TRICARE Basic Program must be determined to be medically necessary in the treatment of an illness, injury or bodily malfunction before the care can be cost shared by TRICARE. For this reason, DoD anticipates that TRICARE will have a marginal increase in cost associated with the inclusion of drug maintenance programs within the TRICARE substance use disorder treatment benefit. The benefit of this rule is to improve substance use disorder treatment under TRICARE.

II. Discussion of the Final Rule

The practice of medicine is constantly evolving, including in the area of substance use disorder treatment. At the implementation of the original CHAMPUS regulation, the Department of Defense, consistent with other third party payors, provided coverage based on what was generally accepted by qualified professionals to be reasonable and adequate in the treatment of substance use disorders. Based on current medical evidence, this exclusion of medication assisted treatment of substance use dependence utilizing a specific category of psychoactive agent is outdated and fails to recognize that the current standard of practice supports the medical necessity and appropriate medical care of certain drug maintenance programs as one component of the continuum of opioid treatment services that are medically or psychologically necessary for the effective treatment of substance dependence.

The Institute of Medicine (IOM) of the National Academies of Science completed a report in September 2012, entitled ''Substance Use Disorders in the U.S. Armed Forces,'' *http://www.iom.edu/Reports/2012/Substance-Use-Disorders-in-the-US-Armed-Forces.aspx.* The IOM found that the standards of care for substance use disorders are changing to reflect the inclusion of research-based pharmacological therapies. This final rule to permit the use of evidence-based pharmacological therapies is consistent with the recommendations of the IOM as well as the 2007 National Quality Forum's National Voluntary Consensus Standards for the Treatment of Substance Use Conditions. TRICARE currently limits pharmaceutical therapy to acute detoxification but does not cover medications like buprenorphine and naloxone when used for either prolonged ambulatory detoxification (greater than 30 days) or maintenance therapy. Evidence-based modalities of care in the treatment of substance use disorders include the use of agonist and antagonist medications that help to reduce cravings, maintain functioning and support long-term recovery. This type of pharmacological therapy has been described by a number of different terms including ''drug maintenance programs,'' ''substitution therapy,'' ''medication assisted treatment,'' ''prolonged detoxification,'' ''prolonged withdrawal management,'' ''short-term maintenance,'' ''long term maintenance,'' and ''pharmacological therapy.''

Documented increases in the prescription of opioid pain medications throughout the United States have resulted in subsequent increases in opioid dependence and abuse in both the civilian and military populations. Service members are returning home from the wars in Iraq and Afghanistan with severe and painful injuries that require opioid pain management using medications that have the potential for addiction. The advances in battlefield injury protection and medicine have drastically reduced the number of battlefield deaths and have returned some of our Service members home, injured, but prepared to recover. For many, pain related to injuries must be treated for many months, and such long-term use of pain medications has put some of our Service members using those medicines at risk for opioid dependence. Many of the medical conditions that prevail in a heavily deployed force have also led to frequent prescriptions for controlled substances, which are high risk for addiction or misuse. Additionally, for our broader beneficiary population, the unintended consequence of compassionate pain management includes an escalation in the use of prescription opioid analgesics for medical purposes which can result in dependency and other adverse effects. This reality makes it ever more important to ensure that all medically or psychologically necessary and appropriate medical care for substance use disorder are available to our TRICARE beneficiaries; consistent with the authority to provide treatment for mental or physical illness.

III. Public Comments

The proposed rule was published in the **Federal Register** (76 FR 81899–80901) on December 29, 2011, for a 60 day public comment period. We received comments from 35 respondents. A large majority of commenters, 33 of 35 in total, expressed support for the rule change. Two comments opposed the rule change. We thank those who provided comments. Specific matters raised by commenters and the Department's responses are summarized below.

Comment: Two commenters who expressed strong support for the rule objected to use of the term ''addictive drugs.'' One respondent was concerned that the terminology conveys stigma. Another objected to categorizing substitution medications like buprenorphine as addictive drugs

because once a patient is stabilized on these medications, the patient no long meets DSM–IV criteria for substance dependence.

Response: We appreciate the comments and are mindful that terms conveying stigma create barriers to care. The exact language used in the proposed rule was derived from the existing regulatory language prohibiting coverage ''when one addictive drug is substituted for another.'' We have carefully considered terminology as a result of these comments and conclude it would be appropriate to replace ''addictive drugs'' in 32 CFR 199.4(e)(11) with ''the substitution of a therapeutic drug with addictive potential for a drug of addiction'' as a more neutral term that accurately describes substitution medications. To clarify the comment about DSM–IV diagnostic criteria for substance dependence, six treatment specifiers addressing the treatment recovery process are listed under the ''Substance Dependence'' section in the DSM–IV, including ''On Agonist Therapy.'' This specifier accurately describes the status of one whose substance use disorder is in a state of remission while on the agent during a specific phase of treatment recovery.

Comment: Eight respondents who support the rule emphasized that substitution medications should only be used within the context of a comprehensive addiction treatment program.

Response: We agree that the substitution of a therapeutic drug with addiction potential for a drug of addiction, when medically or psychologically necessary and appropriate medical care, should not be used in isolation but rather utilized as one component of a comprehensive treatment plan for an individual with a substance use disorder. To clarify this point, we have added language in the amended provision at 32 CFR 199.4(e)(11) specifically limiting coverage to otherwise authorized substance use disorder treatment under 32 CFR 199.4(e)(4)(ii).

We also recognize that treatment must meet the specific patient's medical needs and is not necessarily amenable to a one-size-fits-all approach. Medication assisted treatment will not be medically necessary or appropriate in all cases. To clarify this, paragraph 32 CFR 199.4(e)(4)(ii) has been revised specifically to include, as a TRICARE covered service, the substitution of a therapeutic drug with addictive potential, for a drug addiction when medically or psychologically necessary and appropriate medical care for a beneficiary undergoing medically supervised treatment for a substance use disorder.

Several of the comments also made reference to approval for office-based practitioners as well. To the extent any of these comments were intended to seek to expand TRICARE authorized providers for substance use disorder inpatient and outpatient care, these comments fall outside the scope of the provisions of the proposed rule. We appreciate the comments and will take them into consideration in developing future rulemaking.

Comment: One commenter requests that TRICARE not impose treatment limits on the duration of opioid treatment.

Response: We concur that treatment limits should be guided by the patient's clinical condition and treatment needs. Studies have shown that good outcomes from substance abuse treatment are unequivocally contingent on adequate length of treatment. Although the current substance use disorder benefits contain treatment limitations, see specifically 32 CFR 199.4(e)(4)(ii), the existing regulation at 32 CFR 199.4(e)(4)(v) allows for waiver of limits based on individual treatment needs. This type of provision helps to ensure TRICARE beneficiaries have access to medically or psychologically necessary and appropriate medical care for substance use disorders. We appreciate this comment and will also take it into consideration in developing any future rulemaking regarding TRICARE substance use disorder treatment.

Comment: Two commenters request that TRICARE not impose high deductibles and co-payments on individual visits to decrease the likelihood that high costs become a barrier to care.

Response: We concur that access to care is important for beneficiaries seeking opioid addiction treatment. In general, TRICARE provides beneficiaries with a robust health care benefit with limited out-of-pocket costs. TRICARE deductibles and cost shares are set by Congress in statute. Beneficiaries are further protected by statutorily imposed catastrophic caps that limit the maximum out-of-pocket amounts beneficiaries will have to pay each fiscal year, with a few exceptions. The cap applies to annual deductibles, pharmacy copayments, TRICARE Prime enrollment fees and all other copayments or cost shares beneficiaries pay for TRICARE-covered services. Active duty family members and beneficiaries enrolled in TRICARE Reserve Select have a $1,000 per family, per fiscal year catastrophic cap. The catastrophic cap for other beneficiaries is $3,000 per family, per fiscal year.

Comment: One of two respondents who objected to the proposed rule change, indicated that opioid maintenance treatment on a long term basis has not been proven to improve function or reduce mortality or relapse in opioid addicted individuals and that research is based on short term studies. The respondent also expressed concern that the provision of medication assisted treatment is actually enabling substance abuse.

Response: We do not agree. Standards of care and best practices in the prevention, diagnosis, treatment, and management of substance use disorders have changed considerably over the course of the past decade to reflect developments in the evidence base. The use of evidence-based practices in substance use dependence care is integral to ensuring that individuals receive medically necessary and appropriate medical care that is effective, high-quality care. The September 2012, IOM report discusses in greater detail the evidence base, including randomized controlled trials, that support the use of pharmacotherapies in substance use dependence treatment.

Comment: The second objector asks why tax dollars should go to help those who made a decision to partake in illegal activity.

Response: By law, TRICARE beneficiaries are entitled to medically or psychologically necessary and appropriate medical care in the treatment of mental or physical illness unless otherwise excluded by law and regulation.

Regulatory Procedures

Executive Order 12866, ''Regulatory Planning and Review'' and EO 13563, ''Improving Regulation and Regulatory Review''

Section 801 of title 5, United States Code, and Executive Orders (EOs) 12866 and 13563 require certain regulatory assessments and procedures for any major rule or significant regulatory action, defined as one that would result in an annual effect of $100 million or more on the national economy or which would have other substantial impacts. It has been certified that this rule is not an economically significant rule, but it has been designated a significant regulatory action.

Public Law 104–4, Section 202, ''Unfunded Mandates Reform Act''

Section 202 of Public Law 104–4, ''Unfunded Mandates Reform Act,''

requires that an analysis be performed to determine whether any federal mandate may result in the expenditure by State, local and tribal governments, in the aggregate, or by the private sector of $100 million in any one year. It has been certified that this rule does not contain a Federal mandate that may result in the expenditure by State, local and tribal governments, in aggregate, or by the private sector, of $100 million or more in any one year, and thus this rule is not subject to this requirement.

Public Law 96–354, ''Regulatory Flexibility Act'' (RFA) (5 U.S.C. 601)

Public Law 96–354, ''Regulatory Flexibility Act'' (RFA) (5 U.S.C. 601), requires that each Federal agency prepare a regulatory flexibility analysis when the agency issues a regulation which would have a significant impact on a substantial number of small entities. This rule is not an economically significant regulatory action, and it has been certified that it will not have a significant impact on a substantial number of small entities. Therefore, this rule is not subject to the requirements of the RFA.

Public Law 96–511, ''Paperwork Reduction Act'' (44 U.S.C. Chapter 35)

This rule does not contain a ''collection of information'' requirement, and will not impose additional information collection requirements on the public under Public Law 96–511, ''Paperwork Reduction Act'' (44 U.S.C. Chapter 35).

Executive Order 13132, ''Federalism''

E.O. 13132, ''Federalism,'' requires that an impact analysis be performed to determine whether the rule has federalism implications that would have substantial direct effects 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. It has been certified that this rule does not have federalism implications, as set forth in E.O. 13132.

List of Subjects in 32 CFR Part 199

Claims, Dental health, Health care, Health insurance, Individuals with disabilities, Military personnel.

Accordingly, 32 CFR Part 199 is amended as follows:

PART 199—[AMENDED]

■ 1. The authority citation for Part 199 continues to read as follows:

Authority: 5 U.S.C. 301; 10 U.S.C. chapter 55.

■ 2. Section 199.4 is amended by revising paragraphs (e)(4)(ii) introductory text and (e)(11) introductory text, and removing and reserving paragraph (e)(11)(ii), to read as follows:

§ 199.4 Basic program benefits.

* * * * *

(e) * * *

(4) * * *

(ii) *Authorized substance use disorder treatment.* Only those services provided by TRICARE-authorized institutional providers are covered. Such a provider must be either an authorized hospital, or an organized substance use disorder treatment program in an authorized free-standing or hospital-based substance use disorder rehabilitation facility. Covered services consist of any or all of the services listed below, including the substitution of a therapeutic drug, with addictive potential, for a drug addiction when medically or psychologically necessary and appropriate medical care for a beneficiary undergoing medically supervised treatment for a substance use disorder. A qualified mental health provider (physicians, clinical psychologists, clinical social workers, psychiatric nurse specialists) (see paragraph (c)(3)(ix) of this section) shall prescribe the particular level of treatment. Each TRICARE beneficiary is entitled to three substance use disorder treatment benefit periods in his or her lifetime, unless this limit is waived pursuant to paragraph (e)(4)(v) of this section. (A benefit period begins with the first date of covered treatment and ends 365 days later, regardless of the total services actually used within the benefit period. Unused benefits cannot be carried over to subsequent benefit periods. Emergency and inpatient hospital services (as described in paragraph (e)(4)(i) of this section) do not constitute substance abuse treatment for purposes of establishing the beginning of a benefit period.)

* * * * *

(11) *Drug abuse.* Under the Basic Program, benefits may be extended for medically necessary prescription drugs required in the treatment of an illness or injury or in connection with maternity care (refer to paragraph (d) of this section). However, TRICARE benefits cannot be authorized to support or maintain an existing or potential drug abuse situation whether or not the drugs (under other circumstances) are eligible for benefit consideration and whether or not obtained by legal means. Drugs, including the substitution of a therapeutic drug with addictive potential for a drug of addiction, prescribed to beneficiaries undergoing medically supervised treatment for a substance use disorder as authorized under paragraph (e)(4)(ii) of this section are not considered to be in support of, or to maintain, an existing or potential drug abuse situation and are allowed. The Director, TRICARE Management Activity, may prescribe appropriate policies to implement this prescription drug benefit for those undergoing medically supervised treatment for a substance use disorder.

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(ii) [Reserved]

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Dated: September 26, 2013.

Patricia L. Toppings,

OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 2013–24232 Filed 10–21–13; 8:45 am]

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DEPARTMENT OF DEFENSE

Office of the Secretary

32 CFR Part 236

[DOD–2009–OS–0183]

RIN 0790–AI60

Department of Defense (DoD)—Defense Industrial Base (DIB) Voluntary Cyber Security and Information Assurance (CS/IA) Activities

AGENCY: Office of the DoD Chief Information Officer, DoD.

ACTION: Final rule.

SUMMARY: This final rule responds to public comments regarding the establishment of the DIB CS/IA program, a voluntary cyber security information sharing program between DoD and eligible DIB companies. The program enhances and supplements DIB participants' capabilities to safeguard DoD information that resides on, or transits, DIB unclassified information systems.

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

FOR FURTHER INFORMATION CONTACT: Mr. Dan Prieto at 703–571–5911, or the DIB Cyber Security and Information Assurance Program Office: (703) 604–3167, toll free (855) 363–4227, email *osd.ncr.dod-cio.mbx.dib-cs-ia-program-registration@mail.mil.*

SUPPLEMENTARY INFORMATION:

Executive Summary

This final rule responds to public comments regarding the establishment of the DIB CS/IA program, a voluntary

cyber security information sharing activity between DoD and eligible DIB companies to enhance and supplement DIB participants' capabilities to safeguard DoD information that resides on, or transits, DIB unclassified information systems. The program is codified at 32 CFR Part 236 and implements DoD statutory authorities to establish programs and activities to protect DoD information and DoD information systems, including information and information systems operated and maintained by contractors or others in support of DoD activities (see 10 U.S.C. 2224 and the Federal Information Security Management Act (FISMA), codified at 44 U.S.C. 3541 et seq.). It also fulfills important elements of DoD's critical infrastructure protection responsibilities, as the sector specific agency for the DIB sector see (Presidential Policy Directive 21 (PPD–21), ''Critical Infrastructure Security and Resilience''). This program allows eligible DIB companies to receive U.S. Government (USG) threat information and to share information about network intrusions that could compromise DoD programs and missions. In addition, the program permits DIB companies and DoD to assess and reduce damage to DoD programs and missions when DoD information is potentially compromised. Furthermore, the information sharing arrangements between the DoD and each participating DIB company that implement the requirements of this are memorialized in a standardized bilateral agreement, known as a Framework Agreement (FA), signed by the participating DIB company and the Government.

The rule also provides the eligibility requirements for a company to participate in the DIB CS/IA program.

Costs for DIB participants include obtaining access to DoD's secure voice and data transmission systems supporting the DIB CS/IA program and acquiring DoD approved medium assurance certificates. There also are costs associated with the collection requirements for providing point of contact information and cyber incident reporting. Government costs include onboarding new companies and collecting and analyzing cyber incidents from DIB participants.

A foundational element of this bilateral information sharing model is the recognition that the information being shared between the parties includes extremely sensitive nonpublic information, which must be protected against unauthorized uses and disclosures in order to preserve the integrity of the program.

For additional information regarding the Government's safeguarding of information received from the DIB companies, with specific focus on PII, see the Privacy Impact Assessment (PIA) for the DIB CS/IA Program (*http://dodcio.defense.gov/Portals/0/Documents/DIB%20CS-IA%20PIA_FINAL_signed_30jun2011_VMSS_GGMR_RC.pdf*).

In addition, this rule and program are intended to be consistent and coordinated with, and updated as necessary to ensure consistency with and support for, other federal activities related to the handling and safeguarding of controlled unclassified information, such as those that are being led by the National Archives and Records Administration pursuant to Executive Order 13556 ''Controlled Unclassified Information'' (November 4, 2010) (see *http://www.archives.gov/cui/*).

This rule is not intended to implement the new requirements from section 941 of the National Defense Authorization Act for Fiscal Year 2013.

Comments

DoD published an interim final rule on May 11, 2012 (77 FR 27615). Fifty comments from twelve respondents were received and reviewed by the USG.

Comment: Four comments questioned the eligibility and scope of the program, to include recommending that the program remain voluntary, and questioning whether the program was ''under inclusive or overly restrictive because the program is only available to companies that have a Facility Security Clearance and a Communications Security account.''

Response: The DIB CS/IA program will remain a voluntary program to enhance and supplement DIB participants' capabilities to safeguard DoD information that resides on, or transits, DIB unclassified information systems. The eligibility requirements for the program (§ 236.7) are based on security requirements to ensure the protection of Government furnished information (GFI) at DIB companies in possession of DoD information, as described in the definition for ''covered defense information,'' (§ 236.2(c)). No change is made to the rule.

Comment: One comment asserted that the rule should not have been published as an interim rule.

Response: In light of the growing cyber threat activity against DoD information and DIB information systems and the associated risk to U.S. national security, the Government determined it appropriate to issue an interim rule. This allowed eligible DIB companies to receive cyber threat information, without delay in order to enhance their capability to defend against ongoing and continuous cyber threats and to safeguard DoD information. No change is made to the rule.

Comment: One comment asserted that the Framework Agreement (FA) should be available for public review to evaluate the estimates of projected paperwork for participants.

Response: The Framework Agreement is a representation of the federal rule converted into an agreement format for implementation of the program. In addition, all information required to evaluate the projected cost and time for the information collection requirements is available in the rule. No change is made to the rule.

Comment: One comment asserted that transparency into public-private cyber security programs is crucial to ensure that federal agencies respect privacy rights and comply with their obligations.

Response: Extensive coordination across the Government has ensured that the privacy rights of U.S. citizens are protected under the DIB CS/IA voluntary program, including developing a comprehensive Privacy Impact Assessment (PIA) for the DIB CS/IA program. The PIA is publically available at: *http://dodcio.defense.gov/Portals/0/Documents/DIB%20CS-IA%20PIA_FINAL_signed_30jun2011_VMSS_GGMR_RC.pdf.* No change is made to the rule.

Comment: One comment asserted that the Defense Department opted to issue a rule even though no law has been passed by Congress regarding Government-industry cyber security activities and that rulemaking should come after Congress concludes its legislative efforts.

Response: The rule implements DoD statutory authorities and responsibilities to establish a program to protect DoD information and information systems, including information systems operated and maintained by contractors or others in support of DoD activities (see 10 U.S.C. 2224; and the Federal Information Security Management Act (FISMA), codified at 44 U.S.C. 3541 et seq.). No change is made to the rule.

Comment: Three comments asserted the rule should create an oversight and accountability structure that includes public, congressional, and executive branch reporting. One comment recommended using DHS oversight procedures as a model to ensure the program's compliance with regulations and relevant guidelines.

Response: The DIB CS/IA program is subject to numerous procedures,

requirements, and oversight to ensure compliance with DoD and national policies for collecting, handling, safeguarding, and sharing sensitive information with non-Government organizations in accordance with DoD Directive 5500.1, DoD Privacy Program and 5400.11—Regulation, Department of Defense Privacy Program, which proscribes uniform procedures for the DoD Privacy Program. For additional information regarding the Government's safeguarding of information received from the DIB companies, with specific focus on PII, see the Privacy Impact Assessment (PIA) for the DIB CS/IA Program (*http://DoDcio.defense.gov/Portals/0/Documents/DIB%20CS-IA%20PIA_FINAL_signed_30jun2011_VMSS_GGMR_RC.pdf*). In addition, DoD annually reports to Congress on the progress of DoD in defending the DoD and the Defense Industrial Base from cyber events. No additional oversight is warranted at this time. No change is made to the rule.

Comment: One comment recommended distinguishing between classified and unclassified GFI, and that classified GFI should be handled per the NISPOM.

Response: As stated in § 236.4(f) of the rule, GFI will be issued via both unclassified and classified means, and that handling and safeguarding of classified GFI shall be in compliance with the National Industrial Security Program Operating Manual (NISPOM) (DoD 5220.22–M). No change is made to the rule.

Comment: One comment recommended not to apply sharing limitations under the rule to non-sensitive GFI.

Response: As defined in the rule at § 236.2(j), *Government Furnished Information (GFI)* means ''information provided by the Government under the voluntary DIB CS/IA program, including but not limited to cyber threat information and information assurance practices.'' GFI is typically nonpublic information that is sensitive based either on the content of the information itself or the context in which the information is relevant (e.g., cyber threat information). Accordingly, the handling requirements applicable to GFI are designed to protect sensitive information. No change is made to the rule.

Comment: Three comments requested a narrow interpretation of the Freedom of Information Act (FOIA) exemptions, and one asked that the records not be exempted under Privacy Act provisions.

Response: As recognized in the Background section of the Interim Rule (77 FR 27615, at 27616), a foundational element of this program is the recognition that the information being shared includes extremely sensitive nonpublic information. This includes the GFI shared by the Government, as well as the information regarding cyber incidents that is shared by the DIB participants, which they typically treat as extremely sensitive proprietary, commercial, or operational information for which release and dissemination is tightly controlled. Accordingly, as stated in § 236.6 of the rule, confidentiality of such sensitive information exchanged under this program will be protected to the maximum extent authorized by law, regulation, and policy. This includes taking appropriate measures, including the use of any applicable exemptions under FOIA or the Privacy Act, to safeguard against unauthorized public disclosure and in full compliance with applicable laws, regulations, policies, and procedures (see § 236.2(c)(2)(vii) and § 236.5(h)). No change is made to the rule.

Comment: Four comments addressed DoD working with private contractors without appropriate safeguards for privacy rights, maintaining a database on law abiding Americans and subverting due process and gathering information about an unsuspecting populace.

Response: The DIB CS/IA program focuses on sharing cyber security related information and minimizes the collection of information from participating DIB companies, seeking only the information that is necessary to support this cyber security program. The PIA for the DIB CS/IA program details the comprehensive processes to safeguard PII. The operational implementation of the DIB CS/IA program receives PII from DIB Companies in two ways: (i) For program administration and management purposes, the DIB companies share with DoD the typical business contact information for its personnel that are serving as company points of contact for the program activities or specific cyber incidents; and (ii) for cyber incident response and analysis purposes, DIB companies may share PII as a necessary part of the information that they have determined is relevant to cyber incident response, analysis, or damage assessment. In addition, DIB companies are prohibited from sharing any information unless they have determined that the information has been lawfully collected and is authorized to be shared with DoD. The DIB CS/IA Program restricts access to such PII and attribution information only to those authorized personnel who have a need-to-know such information for duties in support of the DIB CS/IA Program and are subject to strict nondisclosure obligations. The PII is only maintained as long as necessary for DIB CS/IA Program activities, and is managed and disposed of in accordance with applicable records management requirements. No change is made to the rule.

Comment: One comment stated that the rule allows a number of private companies to sell and share private citizens' data including to other Governments, including ''any data that 'transits' any government system.''

Response: The voluntary DIB CS/IA program does not authorize participating companies to sell any information, to anyone, in any context whatsoever. The program also does not authorize DIB companies to share any information with anyone other than program participants. The program does not permit the sharing of information with any governments other than authorized U.S. Government participants. No change is made to the rule.

Comment: One comment stated that the rule does not properly ensure implementation of the new Controlled Unclassified Information (CUI) framework from Executive Order 13556 into its treatment of covered defense information.

Response: As stated in the Background Section above, the program is designed to ensure consistency with and support for, federal activities related to the handling and safeguarding of controlled unclassified information that are being led by the National Archives and Records Administration pursuant to Executive Order 13556. As CUI implementation evolves in the Government, the rule will be modified as necessary to ensure compliance. No change is made to the rule.

Comment: Two comments stated that the interim final rule lacks sufficient safeguards to limit the sharing and use of personally identifiable information and content of private communications.

Response: The program utilizes significant handling and sharing restrictions to ensure appropriate protections for any and all sensitive information managed by the program, including but not limited to PII. These safeguards are addressed in more detail in the PIA, which will be updated appropriately as the program evolves. No change is made to the rule.

Comment: Three comments recommended that the rule should require companies to remove sensitive information (e.g., PII), and to anonymize as much information as possible

without hindering cyber security efforts, and that the Government should immediately dispose of inadvertently collected PII that is not directly relevant to the ''cyber incident.''

Response: DoD agrees with the underlying premise of the comment, and the DIB CS/IA program uses procedures to minimize the collection and sharing of PII. The DIB participants remove unnecessary sensitive information (e.g., PII), and only share information if it is relevant to a cyber incident (e.g., for forensics or cyber intrusion damage assessment). All PII received by DoD is provided voluntarily by authorized DIB company representatives and is subject to mutually agreed upon restrictions for cyber security purposes. In addition, the DIB participants are required, prior to sharing any information with the Government under this program, to review and determine that their activities under the program are in compliance with all applicable laws and regulations, including restrictions on the interception, monitoring, access, use, and disclosure of electronic communications (see § 236.6(b) and (c)). Information determined to be relevant is maintained, controlled, and disposed of when no longer reasonably necessary for forensics analysis, and damage assessment activities (or other legal, audit or operational purposes). Companies are required to abide by all sharing restrictions. The PIA for the DIB CS/IA program addresses the handling safeguards in more detail. No change is made to the rule.

Comment: Two comments stated that the PII the Government obtains through the DIB CS/IA program should be used only for cyber security operations and not general law enforcement or intelligence fact gathering. The rule should also limit Government use of information shared for cyber security purposes.

Response: The primary purpose of the DIB CS/IA program is to share cyber security information to promote more effective cyber security, not only for the DIB, but also for the DoD and U.S. Government. The program contains numerous information handling and sharing restrictions, applicable to both the Government and DIB participants, to safeguard against any unauthorized collection, use, or dissemination of such information. However, the program does not limit the Government's ability to conduct lawful activities, including law enforcement, counterintelligence activities, or other activities in the interest of U.S. national security (§ 236.6(d)). No change is made to the rule.

Comment: One comment recommended that the rule incorporate privacy protections of the National Cyber Security Division's Joint Cybersecurity Services Pilot (JCSP).

Response: The detailed processes summarized in the PIA for the DIB CS/IA program are comprehensive and ensure appropriate safeguards for PII provided by DIB participants in a similar manner as described in the PIA prepared for the Department of Homeland Security's JSCP. No change is made to the rule.

Comment: One comment stated the interim rule should be amended to impose fines on private companies that intentionally or negligently disclose ''excessive PII.''

Response: It is not clear what the commenter meant by the term ''excessive PII.'' As discussed above, the DIB CS/IA program only receives PII in two ways: (i) For program administration and management purposes; and (ii) for cyber incident response and analysis purposes. In both cases, DIB companies share information only when it is relevant for those authorized purposes. In addition, DIB companies are prohibited from sharing any information, including PII, unless they have determined that it has been lawfully collected and is authorized to be shared with the Government. If it were to appear that a company is reporting excessive information not relevant to the program, the Government would seek to work with the company to clarify the sharing guidelines and support the company's efforts to refine its processes to implement more effective limits on sharing unnecessary information. If, despite these efforts, a company continued to share information that the Government deemed inappropriate within the scope of the program, the Government would take appropriate actions on a case by case basis, including potentially terminating the information sharing relationship with that participant. This is a voluntary program and fines are not part of the program. No change is made to the rule.

Comment: Two comments recommended changes to the definitions of cyber incident, compromise and threat.

Response: The rule leverages established definitions to the maximum extent possible. The source for the definition of ''compromise'', ''cyber incident'' and ''threat'' are from the Committee on National Security Systems Instruction No. 4009, ''National Information Assurance Glossary,'' (*http://www.cnss.gov/Assets/pdf/cnssi_4009.pdf*). These definitions are established and widely accepted Government definitions. No change is made to the rule.

Comment: One comment stated that U.S. based systems are not adequately defined.

Response: To further clarify terms, the term ''U.S. based'' has been added to the definitions section (§ 236.2(n)).

Comment: One comment recommended changing the definition of U.S. citizen to eliminate the phrase ''holding a U.S. passport,'' and adding text on ''Green Cards.''

Response: The recommendation to add ''U.S. citizen'' to the definitions section is accepted and is added to § 236.2(o). For the purpose of the rule, a U.S. citizen includes a person born in the U.S. or naturalized. The recommendation to eliminate ''holding a U.S. passport'' as part of the U.S. citizen definition is also accepted in the definition of ''U.S. citizen,'' (see § 236.2(o)).

Comment: One comment recommended changing the definition of GFI to a more descriptive term so as not to tie it to Government procurement.

Response: The definition of GFI in the rule is applicable only to the DIB CS/IA program (see § 236.2(j)), and does not relate to any specific procurement activities. There is no indication that the use of this term has led to any confusion amongst the DIB participants. No change is made to the rule.

Comment: Two comments dealt with aspects of sharing information that could ward against threats and improve Operational Security (OPSEC).

Response: The purpose of the DIB CS/IA program is to enable cyber threat information sharing with DIB participants to improve operational security of DIB networks and information systems. No change is made to the rule.

Comment: One comment suggested replacing the phrase ''to use the GFI on non-U.S. based covered DIB systems,'' with ''to reside on non-U.S. based covered DIB'' in § 236.4(g).

Response: After evaluation, the recommended change in terminology from ''use'' to ''reside'' does not provide additional technical clarity. No change is made to the rule.

Comment: Two comments recommended the language be amended to include the words ''or as soon as practicable thereafter'' following the word ''discovery'' and expressed caution that less knowledgeable participants will be prone to over report which consumes scarce Government and industry resources and obscures the significant incidents (§ 236.5(b)).

Response: Timeliness in reporting cyber incidents involving covered defense information is an integral component of the DIB CS/IA program. The rule makes provisions for initial and follow-up reporting (§ 236.5(b) and (c)). While the DIB CS/IA program is voluntary, cyber security encourages sharing information as quickly as possible to provide the clearest understanding of the cyber threat targeting DoD program information. This enables cyber threat information provided by DIB participants to be shared with other DIB participants and Government stakeholders on a timely basis. No change is made to the rule.

Comment: Two comments recommended the draft ''DFARS regulatory initiative on Safeguarding Unclassified DoD Information (Safeguarding Rule) being addressed under DFARS Case 2011–D039'' be written to avoid conflicting and duplicative requirements for participants in the DIB CS/IA program.

Response: The DoD is committed to using both internal coordination processes, and public review and comment procedures such as those used in rulemaking for this program and for proposed DFARS revisions, to ensure that its cyber security activities are evaluated to avoid conflicting or duplicative elements. No change is made to the rule.

Comment: Two comments recommended specific word changes to the program requirements relating to each party conducting a legal review of its policies and practices that support the program, including deletion of the requirement for a ''determination'' of compliance with law because it may be interpreted as requiring the company to retain outside counsel for such a determination, limiting the compliance only to ''U.S'' law, and deleting the second sentence of § 236.6(c) to avoid threatening the attorney-client privilege.

Response: The requirement at § 236.6(c) for a determination of legal compliance is expressly stated as a requirement that ''the DIB participant shall perform a legal review . . . and shall make a determination'' that it is compliant. There is neither an express nor implied requirement that the DIB participant retain outside counsel for such a determination, and thus no change to that language is warranted. In § 236.6, the rule retains ''applicable laws and regulations'' as an accurate description of the requirement. Finally, the second sentence of § 236.6(c) was intended merely to provide notice that the Government may request additional information from the DIB company, and was not intended to imply that there was a requirement to provide such information as a condition of the program, regardless of whether such information were protected by the attorney-client privilege. To avoid any unnecessary confusion or unintended implications, the second sentence is deleted.

Comment: One comment expressed full support for the Defense Industrial Base Voluntary Cyber Security and Information Assurance Activities.

Response: Government evaluation of the program concurs that the voluntary DIB CS/IA program contributes to the safeguarding of DoD information. No change is made to the rule.

Comment: One comment urged a renewed look at how classification schemes are balanced with disclosure schemes.

Response: In accordance with the rule (§ 236.4(f)), handling and safeguarding of classified GFI shall be in compliance with the National Industrial Security Program Operating Manual (NISPOM) (DoD 5220.22–M). No change is made to the rule.

Comment: One comment recommended that the DIB CS/IA program have a more robust role in industry engagement.

Response: The DIB CS/IA program will continue to evaluate outreach opportunities to enhance engagement with industry, to include industry associations. No change is made to the rule.

Comment: Two comments recommended that the infrastructure of the internet be upgraded and that the rule should incorporate ''technology neutral terms.''

Response: Other activities within the Government are examining the infrastructure of the internet. The rule focuses on cyber threat sharing and the risk of compromise of DoD information that resides on, or transits, DIB unclassified information systems. No change is made to the rule.

Regulatory Procedures

Executive Orders 12866, ''Regulatory Planning and Review'' and 13563, ''Improving Regulation and Regulatory Review''

It has been certified that 32 CFR part 236 does not:

(a) Have an annual effect on the economy of $100 million or more, or adversely affect in a material way, the economy; a section of the economy; productivity; competition; jobs; the environment; public health or safety; or State, local, or tribal Governments or communities;

(b) Create a serious inconsistency, or otherwise interfere with, an action taken or planned by another Agency;

(c) Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs, or the rights and obligations of recipients thereof; or

(d) Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles as set forth in these Executive Orders.

Public Law 104–121, ''Congressional Review Act'' (5 U.S.C. 801)

It has been determined that 32 CFR part 236 is not a ''major'' rule under 5 U.S.C. 801, enacted by Public Law 104–121, because it will not result in an annual effect on the economy of $100 million or more; a major increase in costs or prices for consumers, individual industries, Federal, State, or local Government agencies, or geographic regions; or significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic and export markets.

Sec. 202, Public Law 104–4, ''Unfunded Mandates Reform Act''

It has been certified that 32 CFR part 236 does not contain a Federal mandate that may result in expenditure by State, local and tribal Governments, in aggregate, or by the private sector, of $100 million or more in any one year.

Public Law 96–354, ''Regulatory Flexibility Act'' (5 U.S.C. 601)

It has been certified that 32 CFR part 236 is not subject to the Regulatory Flexibility Act (5 U.S.C. 601) because it would not, if promulgated, have a significant economic impact on a substantial number of small entities. DIB participation in the DIB CS/IA Program is voluntary.

Public Law 96–511, ''Paperwork Reduction Act'' (44 U.S.C. Chapter 35)

Sections 236.4 and 236.5 and 236.7 of this final rule contain information collection requirements. These collection requirements were published in the preamble of the interim final rule that published on May 11, 2012 (77 FR 27617) for public comment. No comments were received on the collection requirements. OMB preapproved the collection requirements and assigned them OMB Controls Numbers 0704–0489 and 0704–0490.

Executive Order 13132, ''Federalism''

It has been certified that 32 CFR part 236 does not have federalism implications, as set forth in Executive Order 13132. This rule does not have substantial direct effects on:

(a) The States;

(b) The relationship between the National Government and the States; or

(c) The distribution of power and responsibilities among the various levels of Government.

List of Subjects in 32 CFR Part 236

Contracts, Security measures.

Accordingly 32 CFR part 236 is revised to read as follows:

PART 236—DEPARTMENT OF DEFENSE (DoD)—DEFENSE INDUSTRIAL BASE (DIB) VOLUNTARY CYBER SECURITY AND INFORMATION ASSURANCE (CS/IA) ACTIVITIES

Sec.
236.1 Purpose.
236.2 Definitions.
236.3 Policy.
236.4 Procedures.
236.5 Cyber security information sharing.
236.6 General provisions.
236.7 DIB participant eligibility requirements.

Authority: 10 U.S.C. 2224; 44 U.S.C. 3506; 44 U.S.C. 3544.

§ 236.1 Purpose.

Cyber threats to DIB unclassified information systems represent an unacceptable risk of compromise of DoD information and pose an imminent threat to U.S. national security and economic security interests. DoD's voluntary DIB CS/IA program enhances and supplements DIB participants' capabilities to safeguard DoD information that resides on, or transits, DIB unclassified information systems.

§ 236.2 Definitions.

As used in this part:

(a) *Attribution information* means information that identifies the DIB participant, whether directly or indirectly, by the grouping of information that can be traced back to the DIB participant (e.g., program description, facility locations).

(b) *Compromise* means disclosure of information to unauthorized persons or a violation of the security policy of a system in which unauthorized intentional, or unintentional, disclosure, modification, destruction, loss of an object, or the copying of information to unauthorized media may have occurred.

(c) *Covered defense information* means unclassified information that:

(1) Is:

(i) Provided by or on behalf of the DoD to the DIB participant in connection with an official DoD activity; or

(ii) Collected, developed, received, transmitted, used, or stored by the DIB participant in support of an official DoD activity; and

(2) Is:

(i) Controlled Technical Information means technical information with military or space application (see 10 U.S.C. 130(c)) that is subject to controls on the access, use, reproduction, modification, performance, display, release, disclosure, or dissemination. Controlled technical information is to be marked with one of the distribution statements B through F, in accordance with Department of Defense Instruction 5230.24, ''Distribution Statements of Technical Documents.'' The term does not include information that is lawfully publicly available without restrictions. ''Technical Information'' means technical data or computer software, as those terms are defined in Defense Federal Acquisition Regulation Supplement clause 252.227–7013, ''Rights in Technical Data—Noncommercial Items'' (48 CFR 252.227–7013). Examples of technical information include research and engineering data, engineering drawings, and associated lists, specifications, standards, process sheets, manuals, technical reports, technical orders, catalog-item identifications, data sets, studies and analyses and related information, and computer software executable code and source code;

(ii) Information subject to export control under the International Traffic in Arms Regulations (ITAR) (*http://pmddtc.state.gov/regulations_laws/itar_official.html*), or the Export Administration Regulations (EAR). (15 CFR part 730);

(iii) Information designated as Critical Program Information (CPI) in accordance with DoD Instruction 5200.39, ''Critical Program Information (CPI) Protection within the Department of Defense'';

(iv) Critical Information (Operations Security) includes specific facts identified through the Operations Security process about friendly intentions, capabilities, and activities vitally needed by adversaries for them to plan and act effectively so as to guarantee failure or unacceptable consequences for friendly mission accomplishment (part of Operations Security process as described in 5205.02–M, ''DoD Operations Security (OPSEC Program Manual)'';

(v) Personally Identifiable Information (PII) that can be used to distinguish or trace an individual's identity in accordance with DoD Directive 5400.11, ''DoD Privacy Program'';

(vi) Information bearing current and prior designations indicating controlled unclassified information (e.g., For Official Use Only, Sensitive But Unclassified, and Limited Official Use, DoD Unclassified Controlled Nuclear Information, Sensitive Information) that has not been cleared for public release in accordance with DoD Directive 5230.29, ''Clearance of DoD Information for Public Release'' (see also DoD 5200.01 M Volume 4, ''DoD Information Security Program: Controlled Unclassified Information (CUI)''), ; or

(vii) Any other information that is exempt from mandatory public disclosure under DoD Directive 5400.07, ''DoD Freedom of Information Act (FOIA) Program'', and DoD Regulation 5400.7–R, ''DoD Freedom of Information Program''.

(d) *Covered DIB systems* means an information system that is owned or operated by or for a DIB participant and that processes, stores, or transmits covered defense information.

(e) *Cyber incident* means actions taken through the use of computer networks that result in an actual or potentially adverse effect on an information system and/or the information residing therein.

(f) *Cyber intrusion damage assessment* means a managed, coordinated process to determine the effect on defense programs, defense scientific and research projects, or defense warfighting capabilities resulting from compromise of a DIB participant's unclassified computer system or network.

(g) *Defense Industrial Base (DIB)* means the Department of Defense, Government, and private sector worldwide industrial complex with capabilities to perform research and development, design, produce, and maintain military weapon systems, subsystems, components, or parts to satisfy military requirements.

(h) *DIB participant* means a DIB company that has met all of the eligibility requirements to participate in the voluntary DIB CS/IA information sharing program as set forth in this part (see § 236.7).

(i) *Government* means the United States Government.

(j) *Government Furnished Information (GFI)* means information provided by the Government under the voluntary DIB CS/IA program, including but not limited to cyber threat information and information assurance practices.

(k) *Information* means any communication or representation of knowledge such as facts, data, or

opinions in any medium or form, including textual, numerical, graphic, cartographic, narrative, or audiovisual.

(l) *Information system* means a discrete set of information resources organized for the collection, processing, maintenance, use, sharing, dissemination, or disposition of information.

(m) *Threat* means any circumstance or event with the potential to adversely impact organization operations (including mission, functions, image, or reputation), organization assets, individuals, other organizations, or the Nation through an information system via unauthorized access, destruction, disclosure, modification of information and/or denial of service.

(n) *U.S. based* means provisioned, maintained, or operated within the physical boundaries of the United States.

(o) *U.S. citizen* means a person born in the United States or naturalized.

§ 236.3 Policy.

It is DoD policy to:

(a) Establish a comprehensive approach for enhancing and supplementing DIB information assurance capabilities to safeguard covered defense information on covered DIB systems.

(b) Increase the Government and DIB situational awareness of the extent and severity of cyber threats to DoD information.

§ 236.4 Procedures.

(a) The Government and each DIB participant will execute a voluntary standardized agreement, referred to as a Framework Agreement (FA), to share, in a timely and secure manner, on a recurring basis, and to the greatest extent possible, cyber security information relating to information assurance for covered defense information on covered DIB systems.

(b) Each such FA between the Government and a DIB participant must comply with and implement the requirements of this part, and will include additional terms and conditions as necessary to effectively implement the voluntary information sharing activities described in this part with individual DIB participants.

(c) DoD's DIB CS/IA Program Office is the overall point of contact for the program. The DoD Cyber Crime Center's DoD-DIB Collaborative Information Sharing Environment (DC3/DCISE) is the operational focal point for cyber threat information sharing and incident reporting under the DIB CS/IA program.

(d) The Government will maintain a Web site or other Internet-based capability to provide potential DIB participants with information about eligibility and participation in the program, to enable the online application or registration for participation, and to support the execution of necessary agreements with the Government. *http://dibnet.dod.mil/.*

(e) Prior to receiving GFI from the Government, each DIB participant shall provide the requisite points of contact information, to include security clearance and citizenship information, for the designated personnel within their company (e.g., typically 3–10 company designated points of contact) in order to facilitate the DoD–DIB interaction in the DIB CS/IA program. The Government will confirm the accuracy of the information provided as a condition of that point of contact being authorized to act on behalf of the DIB participant for this program.

(f) GFI will be issued via both unclassified and classified means. DIB participant handling and safeguarding of classified information shall be in compliance with the National Industrial Security Program Operating Manual (NISPOM) (DoD 5220.22–M). The Government shall specify transmission and distribution procedures for all GFI, and shall inform DIB participants of any revisions to previously specified transmission or procedures.

(g) Except as authorized in this part or in writing by the Government, DIB participants may use GFI to safeguard covered defense information only on covered DIB systems that are U.S. based; and share GFI only within their company or organization, on a need to know basis, with distribution restricted to U.S. citizens. However, in individual cases, upon request of a DIB participant that has determined that it requires the ability to share the information with a non U.S. citizen, or to use the GFI on a non-U.S. based covered DIB system, and can demonstrate that appropriate information handling and protection mechanisms are in place, the Government may authorize such disclosure or use under appropriate terms and conditions.

(h) DIB participants shall maintain the capability to electronically disseminate GFI within the Company in an encrypted fashion (e.g., using Secure/Multipurpose Internet Mail Extensions (S/MIME), secure socket layer (SSL), Transport Layer Security (TLS) protocol version 1.2, DoD-approved medium assurance certificates).

(i) The DIB participants shall not share GFI outside of their company or organization, regardless of personnel clearance level, except as authorized in this part or otherwise authorized in writing by the Government.

(j) If the DIB participant utilizes a third-party service provider (SP) for information system security services, the DIB participant may share GFI with that SP under the following conditions and as authorized in writing by the Government:

(1) The DIB participant must identify the SP to the Government and request permission to share or disclose any GFI with that SP (which may include a request that the Government share information directly with the SP on behalf of the DIB participant) solely for the authorized purposes of this program;

(2) The SP must provide the Government with sufficient information to enable the Government to determine whether the SP is eligible to receive such information, and possesses the capability to provide appropriate protections for the GFI;

(3) Upon approval by the Government, the SP must enter into a legally binding agreement with the DIB participant (and also an appropriate agreement with the Government in any case in which the SP will receive or share information directly with the Government on behalf of the DIB participant) under which the SP is subject to all applicable requirements of this part and of any supplemental terms and conditions in the DIB participant's FA with the Government, and which authorizes the SP to use the GFI only as authorized by the Government.

(k) The DIB participant may not sell, lease, license, or otherwise incorporate the GFI into its products or services, except that this does not prohibit a DIB participant from being appropriately designated an SP in accordance with paragraph (j) of this section.

§ 236.5 Cyber security information sharing.

(a) *GFI.* The Government shall share GFI with DIB participants or designated SPs in accordance with this part.

(b) *Initial incident reporting.* The DIB participant shall report to DC3/DCISE cyber incidents involving covered defense information on a covered DIB system. These initial reports will be provided within 72 hours of discovery. DIB participants also may report other cyber incidents to the Government if the DIB participant determines the incident may be relevant to information assurance for covered defense information or covered DIB systems or other information assurance activities of the Government.

(c) *Follow-up reporting.* After an initial incident report, the Government and the DIB participant may voluntarily

share additional information that is determined to be relevant to a reported incident, including information regarding forensic analyses, mitigation and remediation, and cyber intrusion damage assessments.

(d) *Cyber intrusion damage assessment.* Following analysis of a cyber incident, DC3/DCISE may provide information relevant to the potential or known compromise of DoD acquisition program information to the Office of the Secretary of Defense's Damage Assessment Management Office (OSD DAMO) for a cyber intrusion damage assessment. The Government may provide DIB participants with information regarding the damage assessment.

(e) *DIB participant attribution information.* The Government acknowledges that information shared by the DIB participants under this program may include extremely sensitive proprietary, commercial, or operational information that is not customarily shared outside of the company, and that the unauthorized use or disclosure of such information could cause substantial competitive harm to the DIB participant that reported that information. The Government shall take reasonable steps to protect against the unauthorized use or release of such information (e.g., attribution information and other nonpublic information) received from a DIB participant or derived from such information provided by a DIB participant, including applicable procedures (see § 236.5(h)). The Government will restrict its internal use and disclosure of attribution information to only Government personnel and Government support contractors that are bound by appropriate confidentiality obligations and restrictions relating to the handling of this sensitive information and are engaged in lawfully authorized activities.

(f) *Non-attribution information.* The Government may share non-attribution information that was provided by a DIB participant (or derived from information provided by a DIB participant) with other DIB participants in the DIB CS/IA program, and may share such information throughout the Government (including with Government support contractors that are bound by appropriate confidentiality obligations) for cyber security and information assurance purposes for the protection of Government information or information systems.

(g) *Electronic media.* Electronic media/files provided by DIB participants to DC3 under paragraphs (b), (c) and (d) of this section are maintained by the digital and multimedia forensics laboratory at DC3, which implements specialized handling procedures to maintain its accreditation as a digital and multimedia forensics laboratory. DC3 will maintain, control, and dispose of all electronic media/files provided by DIB participants to DC3 in accordance with established DoD policies and procedures.

(h) *Freedom of Information Act (FOIA).* Agency records, which may include qualifying information received from non-federal entities, are subject to request under the Freedom of Information Act (5 U.S.C. 552) (FOIA), which is implemented in the Department of Defense by DoD Directive 5400.07 and DoD Regulation 5400.7–R (see 32 CFR Parts 285 and 286, respectively). Pursuant to established procedures and applicable regulations, the Government will protect sensitive nonpublic information under this Program against unauthorized public disclosure by asserting applicable FOIA exemptions, and will inform the non-Government source or submitter (e.g., DIB participants) of any such information that may be subject to release in response to a FOIA request, to permit the source or submitter to support the withholding of such information or pursue any other available legal remedies.

§ 236.6 General provisions.

(a) Confidentiality of information that is exchanged under this program will be protected to the maximum extent authorized by law, regulation, and policy.

(b) The Government and DIB participants will conduct their respective activities under this program in accordance with applicable laws and regulations, including restrictions on the interception, monitoring, access, use, and disclosure of electronic communications or data. The Government and the DIB participant each bear responsibility for their own actions under this program.

(c) Prior to sharing any information with the Government under this program pursuant to the FA, the DIB participant shall perform a legal review of its policies and practices that support its activities under this program, and shall make a determination that such policies, practices, and activities comply with applicable legal requirements.

(d) This voluntary DIB CS/IA program is intended to safeguard covered defense information. None of the restrictions on the Government's use or sharing of information under the DIB CS/IA program shall limit the Government's ability to conduct law enforcement, counterintelligence activities, or other activities in the interest of national security; and participation does not supersede other regulatory or statutory requirements.

(e) Participation in the DIB CS/IA program is voluntary and does not obligate the DIB participant to utilize the GFI in, or otherwise to implement any changes to, its information systems. Any action taken by the DIB participant based on the GFI or other participation in this program is taken on the DIB participant's own volition and at its own risk and expense.

(f) A DIB participant's voluntary participation in this program is not intended to create any unfair competitive advantage or disadvantage in DoD source selections or competitions, or to provide any other form of unfair preferential treatment, and shall not in any way be represented or interpreted as a Government endorsement or approval of the DIB participant, its information systems, or its products or services.

(g) The DIB participant and the Government may each unilaterally limit or discontinue participation in this program at any time. Termination shall not relieve the DIB participant or the Government from obligations to continue to protect against the unauthorized use or disclosure of GFI, attribution information, contractor proprietary information, third-party proprietary information, or any other information exchanged under this program, as required by law, regulation, contract, or the FA.

(h) Upon termination of the FA, and/or change of Facility Security Clearance status below Secret, GFI must be returned to the Government or destroyed pursuant to direction of, and at the discretion of, the Government.

(i) Participation in this program does not abrogate the Government's or the DIB participants' rights or obligations regarding the handling, safeguarding, sharing, or reporting of information, or regarding any physical, personnel, or other security requirements, as required by law, regulation, policy, or a valid legal contractual obligation.

§ 236.7 DIB participant eligibility requirements.

To be eligible to participate in this program, a DIB company must:

(a) Have or acquire DoD-approved medium assurance certificates to enable encrypted unclassified information sharing between the Government and DIB participants;

(b) Have an existing active Facility Security Clearance (FCL) granted under the National Industrial Security Program Operating Manual (NISPOM) (DoD 5220.22–M) with approved safeguarding for at least Secret information, and continue to qualify under the NISPOM for retention of its FCL and approved safeguarding (*http://www.dtic.mil/whs/directives/corres/pdf/522022m.pdf*);

(c) Have or acquire a Communication Security (COMSEC) account in accordance with the NISPOM Chapter 9, Section 4 (DoD 5220.22–M), which provides procedures and requirements for COMSEC activities;

(d) Obtain access to DoD's secure voice and data transmission systems supporting the DIB CS/IA program,

(e) Own or operate covered DIB system(s), and

(f) Execute the standardized FA with the Government (available during the application process), which implements the requirements set forth in §§ 236.4 through 236.6.

Dated: September 30, 2013.

Patricia L. Toppings,

OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 2013–24256 Filed 10–21–13; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Department of the Navy

32 CFR Part 706

Certifications and Exemptions Under the International Regulations for Preventing Collisions at Sea, 1972

AGENCY: Department of the Navy, DoD.

ACTION: Final rule.

SUMMARY: The Department of the Navy (DoN) is amending its certifications and exemptions under the International Regulations for Preventing Collisions at Sea, 1972 (72 COLREGS), to reflect that the Deputy Assistant Judge Advocate General (DAJAG) (Admiralty and Maritime Law) has determined that USS AMERICA (LHA 6) is a vessel of the Navy which, due to its special construction and purpose, cannot fully comply with certain provisions of the 72 COLREGS without interfering with its special function as a naval ship. The intended effect of this rule is to warn mariners in waters where 72 COLREGS apply.

DATES: This rule is effective October 22, 2013 and is applicable beginning September 19, 2013.

FOR FURTHER INFORMATION CONTACT: Lieutenant Jocelyn Loftus-Williams, JAGC, U.S. Navy, Admiralty Attorney, (Admiralty and Maritime Law), Office of the Judge Advocate General, Department of the Navy, 1322 Patterson Ave. SE., Suite 3000, Washington Navy Yard, DC 20374–5066, telephone 202–685–5040.

SUPPLEMENTARY INFORMATION: Pursuant to the authority granted in 33 U.S.C. 1605, the DoN amends 32 CFR Part 706.

This amendment provides notice that the DAJAG (Admiralty and Maritime Law), under authority delegated by the Secretary of the Navy, has certified that USS AMERICA (LHA 6) is a vessel of the Navy which, due to its special construction and purpose, cannot fully comply with the following specific provisions of 72 COLREGS without interfering with its special function as a naval ship: Annex I, paragraph 3(a) pertaining to the horizontal distance between the forward and aft masthead lights; Rule 21(a) pertaining to placement of masthead lights over the fore and aft centerline of the vessel; Annex I, paragraph 2(g) pertaining to the placement of sidelights above the hull of the vessel; and Annex I paragraph 3(b) pertaining to the location of fixture of side lights. The DAJAG (Admiralty and Maritime Law) has also certified that the lights involved are located in closest possible compliance with the applicable 72 COLREGS requirements.

Moreover, it has been determined, in accordance with 32 CFR Parts 296 and 701, that publication of this amendment for public comment prior to adoption is impracticable, unnecessary, and contrary to public interest since it is based on technical findings that the placement of lights on this vessel in a manner differently from that prescribed herein will adversely affect the vessel's ability to perform its military functions.

List of Subjects in 32 CFR Part 706

Marine safety, Navigation (water), and Vessels.

For the reasons set forth in the preamble, amend part 706 of title 32 of the CFR as follows:

PART 706—CERTIFICATIONS AND EXEMPTIONS UNDER THE INTERNATIONAL REGULATIONS FOR PREVENTING COLLISIONS AT SEA, 1972

■ 1. The authority citation for part 706 continues to read as follows:

Authority: 33 U.S.C. 1605.

■ 2. Section 706.2 is amended as follows:

■ A. In Table Two by adding, in alpha numerical order, by vessel number, an entry for USS AMERICA (LHA 6); and

■ B. In Table Five by adding, in alpha numerical order, by vessel number, an entry for USS AMERICA (LHA 6).

§ 706.2 Certifications of the Secretary of the Navy under Executive Order 11964 and 33 U.S.C. 1605.

* * * * *

TABLE TWO

Vessel	Number	Masthead lights, distance to stbd of keel in meters; Rule 21(a)	Forward anchor light, distance below flight dk in meters; § 2(K), Annex I	Forward anchor light, number of; Rule 30(a)(i)	AFT anchor light, distance below flight dk in meters; Rule 21(e), Rule 30(a)(ii)	AFT anchor light, number of; Rule 30(a)(ii)	Side lights, distance below flight dk in meters; § 2(g), Annex I	Side lights, distance forward of forward masthead light in meters; § 3(b), Annex I	Side lights, distance inboard of ship's sides in meters; § 3(b), Annex I
	*	*		*	*	*	*		*
USS AMERICA.	LHA 6 ..	9.00	.....	.....	.....	.....	2.8	89.3	.....
	*	*		*	*	*	*		*

* * * * *

TABLE FIVE

Vessel	Number	Masthead lights not over all other lights and obstructions. annex I, sec. 2(f)	Forward masthead light not in forward quarter of ship. annex I, sec. 3(a)	After masthead light less than ½ ship's length aft of forward masthead light. annex I, sec. 3(a)	Percentage horizontal separation attained
*	*	*	*	*	*
USS AMERICA	LHA 6	.....	X	X	31.6
*	*	*	*	*	*

Approved: September 19, 2013.

A.B. Fischer,

Captain, JAGC, U.S. Navy, Deputy Assistant Judge Advocate, General (Admiralty and Maritime Law).

Dated: September 25, 2013.

P.A. Richelmi,

Lieutenant, Office of the Judge Advocate General, U.S. Navy, Alternate Federal Register Liaison Officer.

[FR Doc. 2013–24221 Filed 10–21–13; 8:45 am]

BILLING CODE 3810–FF–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 117

[Docket No. USCG–2013–0562]

Drawbridge Operation Regulation; Inner Harbor Navigational Canal, New Orleans, LA

AGENCY: Coast Guard, DHS.

ACTION: Notice of temporary deviation from regulations; request for comments.

SUMMARY: The Coast Guard has issued a temporary deviation from the operating schedules that govern the US 90 (Danzinger) Bridge across the Inner Harbor Navigational Canal (IHNC), mile 3.1, and the Senator Ted Hickey (Leon C. Simon Blvd./Seabrook) bridge across the IHNC, mile 4.6, both at New Orleans, LA. This deviation will test changes to the drawbridge operation schedule to determine whether a permanent change to the schedule is needed. These changes would allow for the safe navigation of vessels while reflecting the low volume of vessel traffic through the bridges thereby increasing efficiency of operations. The changes will allow the bridges to operate in a manner that will align the two operating schedules so the bridge owner will be able to use the same bridge crew personnel to operate both bridges with little to no affect on navigation through the bridges.

DATES: This deviation is effective from 12:01 a.m. on November 6, 2013 through 11:59 p.m. on December 6, 2013.

Comments and related material must be received by the Coast Guard on December 23, 2013.

ADDRESSES: You may submit comments identified by docket number USCG–2013–0562 using any one of the following methods:

(1) *Federal eRulemaking Portal: http://www.regulations.gov.*

(2) *Fax:* 202–493–2251.

(3) *Mail or Delivery:* 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. Deliveries accepted between 9 a.m. and 5 p.m., Monday through Friday, except federal holidays. The telephone number is 202–366–9329.

See the ''Public Participation and Request for Comments'' portion of the **SUPPLEMENTARY INFORMATION** section below for instructions on submitting comments. To avoid duplication, please use only one of these four methods.

FOR FURTHER INFORMATION CONTACT: If you have questions on this test deviation, call or email the Coast Guard;

Mr. Jim Wetherington, telephone 504–671–2128, emails *james.r.wetherington@uscg.mil.* If you have questions on viewing or submitting material to the docket, call Barbara Hairston, Program Manager, Docket Operations, telephone 202–366–9826.

SUPPLEMENTARY INFORMATION:

A. Public Participation and Request for Comments

We encourage you to participate in this rulemaking by submitting comments and related materials. All comments received will be posted, without change, to *http://www.regulations.gov* and will include any personal information you have provided.

1. Submitting comments

If you submit a comment, please include the docket number for this rulemaking (USCG–2013–0562), indicate the specific section of this document to which each comment applies, and provide a reason for each suggestion or recommendation. You may submit your comments and material online (*http://www.regulations.gov*), or by fax, mail or hand delivery, but please use only one of these means. If you submit a comment online via *http://www.regulations.gov,* it will be considered received by the Coast Guard when you successfully transmit the comment. If you fax, hand deliver, or mail your comment, it will be considered as having been received by the Coast Guard when it is received at the Docket Management Facility. We recommend that you include your name and a mailing address, an email address, or a phone number in the body of your document so that we can contact you if we have questions regarding your submission.

To submit your comment online, type the docket number [USCG–2013–0562] in the ''SEARCH'' box and click ''SEARCH.'' Click on ''Submit a Comment'' on the line associated with this rulemaking. If you submit your comments by mail or hand delivery, submit them in an unbound format, no larger than 8½ by 11 inches, suitable for copying and electronic filing. If you submit them by mail and would like to know that they reached the Facility, please enclose a stamped, self-addressed postcard or envelope. We will consider all comments and material received during the comment period and may change the rule based on your comments.

2. Viewing comments and documents

To view comments, as well as documents mentioned in this preamble as being available in the docket, go to *http://www.regulations.gov,* type the docket number (USCG–2013–0562) in the ''SEARCH'' box and click ''SEARCH.'' Click on Open Docket Folder on the line associated with this rulemaking. You may also visit the Docket Management Facility in Room W12–140 on the ground floor of the Department of Transportation West Building, 1200 New Jersey Avenue SE., Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

3. Privacy Act

Anyone can search the electronic form of comments received into any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review a Privacy Act notice regarding our public dockets in the January 17, 2008, issue of the **Federal Register** (73 FR 3316).

4. Public Meeting

We do not now plan to hold a public meeting. But you may submit a request for one using one of the four methods specified under **ADDRESSES**. Please explain why one would be beneficial. If we determine that one would aid this rulemaking, we will hold one at a time and place announced by a later notice in the **Federal Register**.

B. Basis and Purpose

On June 05, 2013 the Coast Guard District Eight Commander received a request from Louisiana Department of Transportation and Development (LDOTD), on behalf of the Orleans Levee District, to modify the operating regulations of the U.S. 90 (Danziger) and the Senator Ted Hickey (Leon c. Simon Blvd./Seabrook) bridges on the Inner Harbor Navigational Canal (IHNC) past the Gulf Intra-Costal Waterway (GIWW).

The US 90 (Danzinger) Bridge across the IHNC, mile 3.1, at New Orleans, Orleans Parish, Louisiana is a Vertical lift bridge with a vertical clearance of 50 feet above Mean High Water (MHW), elevation 5.0 Mean Sea Level (MSL), in the closed-to-navigation position and 120 feet MHW, elevation 5.0 MSL, in the open-to-navigation position. The Senator Ted Hickey (Leon C. Simon Blvd./Seabrook) Bridge across the IHNC, mile 4.6, at New Orleans, Orleans Parish, Louisiana is a Bascule bridge with a vertical clearance of 46 feet above Mean High Water (MHW), elevation 5.0 Mean Sea Level (MSL), in the closed-to-navigation position and unlimited in the open-to-navigation position.

Under 33 CFR 117.458(b), the draw of the US 90 (Danzinger) Bridge, mile 3.1, shall open on signal; except that from 8 p.m. to 7 a.m. the draw shall open on signal if at least four hours notice is given, and the draw need not be opened from 7 a.m. to 8:30 a.m. and 5 p.m. to 6:30 p.m. Monday through Friday. Under 33 CFR 117.458(c), the draw of the Senator Ted Hickey (Leon C. Simon Blvd./Seabrook) Bridge, mile 4.6, shall open on signal; except that from 7 a.m. to 8:30 a.m. and 5 p.m. to 6:30 p.m. Monday through Friday, the draw need not be opened. This operating regulation has been in effect since 2003.

This regulation would allow LDOTD to improve the systematic efficiency of bridge operations for vessels using the portions of the IHNC that are not associated with the GIWW. The changes will do this by allowing bridge operations to be accomplished with the same personnel and allowing the regulations to work with one another thereby allowing for faster response times for openings and more efficient use of the waterway and ultimately more fiscal responsibility on behalf of the owner. This test will allow for comments on a current notice of proposed rule making (NPRM) that is being run in conjunction with this test. Comments on this test and the NPRM with the same docket number will be evaluated at the same time. The bridges will return to normal operations upon completion of the test to allow for evaluation of any and all comments.

Currently, there is minimal vessel traffic (nine per month and 32 per month, respectively) in this area and land traffic would not be adversely impacted by this test as the opening times would be minimized.

The test deviation will begin at 12:01 a.m. on the date 15 days after publication in the **Federal Register**. It will end at 11:59 p.m. 30 days later. During this 30 day period, the US 90 (Danzinger) Bridge will open if two hours notice is given 24 hours a day; except the bridge need not open from 7 a.m. to 8:30 a.m. and 5 p.m. to 6:30 p.m. Monday through Friday. The Senator Ted Hickey (Leon C. Simon Blvd./Seabrook) Bridge will open on signal from 8 a.m. to 8 p.m. and from 8 p.m. to 8 a.m. if two hours notice is given; except the bridge need not open from 7 a.m. to 8:30 a.m. and 5 p.m. to 6:30 p.m. Monday through Friday. During this time, vessels that do not require an opening can still pass through the bridges. There are no alternate routes available. Waterway users are encouraged to comment on the test

deviation and the NPRM as described above.

In accordance with 33 CFR 117.35(e), the drawbridges must return to their regular operating schedules immediately at the end of the effective period of this temporary deviation. This deviation from the operating regulations is authorized under 33 CFR 117.35.

Dated: September 23, 2013.

David M. Frank,

Bridge Administrator.

[FR Doc. 2013–24318 Filed 10–21–13; 8:45 am]

BILLING CODE 9110–04–P

DEPARTMENT OF VETERANS AFFAIRS

38 CFR Part 17

RIN 2900–AO85

VA Dental Insurance Program—Federalism

AGENCY: Department of Veterans Affairs.

ACTION: Direct final rule.

SUMMARY: The Department of Veterans Affairs (VA) is taking direct final action to amend its regulations related to the VA Dental Insurance Program (VADIP), a pilot program to offer premium-based dental insurance to enrolled veterans and certain survivors and dependents of veterans. Specifically, this rule will add language to clarify the limited preemptive effect of certain criteria in the VADIP regulations.

DATES: This rule is effective on December 23, 2013, without further notice, unless VA receives a significant adverse comment by November 21, 2013.

ADDRESSES: Written comments may be submitted through *http://www.regulations.gov;* by mail or hand delivery to the Director, Regulation Policy and Management (02REG), Department of Veterans Affairs, 810 Vermont Avenue NW., Room 1068, Washington, DC 20420; or by fax to (202) 273–9026. Comments should indicate that they are submitted in response to ''RIN 2900–AO85–VA Dental Insurance Program—Federalism.'' Copies of comments received will be available for public inspection in the Office of Regulation Policy and Management, Room 1068, between the hours of 8:00 a.m. and 4:30 p.m., Monday through Friday (except holidays). Please call (202) 461–4902 (this is not a toll-free number) for an appointment. In addition, during the comment period, comments may be viewed online through the Federal Docket Management System at *http://www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: Kristin Cunningham, Director, Business Policy, Chief Business Office (10NB), Veterans Health Administration, Department of Veterans Affairs, 810 Vermont Avenue NW., Washington, DC 20420; (202) 461–1599. (This is not a toll-free number.)

SUPPLEMENTARY INFORMATION: This rule amends 38 CFR 17.169 to add language to clarify the limited preemptive effect of certain criteria in the VA Dental Insurance Program (VADIP), a pilot program to offer premium-based dental insurance to enrolled veterans and certain survivors and dependents of veterans. Under VADIP, VA contracts with private insurers through the Federal contracting process to offer dental insurance, and the private insurer is then responsible for the administration of the dental insurance plan. VA's role under VADIP is primarily to form the contract with the private insurer and verify the eligibility of veterans, survivors, and dependents. VADIP is authorized, and its implementing regulations are required, by section 510 of the Caregivers and Veterans Omnibus Health Services Act of 2010, Public Law 111–163 (2010) (section 510).

''Preemption'' refers to the general principle that Federal law supersedes conflicting State law. U.S. Const. art. VI, cl. 2; *Gade* v. *Nat'l Solid Wastes Mgmt. Ass'n,* 505 U.S. 88, 98 (1992); *M'Culloch* v. *Maryland,* 17 U.S. 316, 317 (1819). However, the subject of insurance regulation is unique. Under 15 U.S.C. 1012, no Act of Congress may be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, unless such Act specifically relates to the business of insurance. Although section 510 does not include express preemption language, Congress intended to legislate about the business of insurance in several subsections of section 510, hence preempting conflicting State and local laws. See *Swanco Ins. Co.-Arizona* v. *Hager,* 879 F.2d 353, 359 (8th Cir. 1989) (''Instead of total preemption, Congress 'selected particularized means to [an] end in conscious recognition that a considerable area of state regulation would remain intact.' '') (quoting *Ins. Co. of the State of Pa.* v. *Corcoran,* 850 F.2d 88, 93 (2nd Cir. 1988)).

For example, section 510(h) requires VA to determine and annually adjust VADIP insurance premiums. Determining premium rates is an important aspect of the ''business of insurance.'' *Gilchrist* v. *State Farm Mut. Auto. Ins. Co.,* 390 F.3d 1327, 1331 (11th Cir. 2004) (citing *United States Dep't of Treasury* v. *Fabe,* 508 U.S. 491, 503 (1993); *Grp. Life & Health Ins. Co.* v. *Royal Drug Co.,* 440 U.S. 205, 224 (1979)). States strictly regulate insurance premium rates. See 5 Steven Plitt et al., Couch on Insurance § 69:13 (3d ed. 2012). If a State denies the premium rate set by VA and such rate is required by section 510(h)(1) in order ''to cover all costs associated with the pilot program,'' then the state would frustrate ''the lawful objective of a [F]ederal statute.'' *United States* v. *Composite State Bd. of Med. Exam'rs, State of Georgia,* 656 F.2d 131, 135 n.4 (5th Cir. 1981).

Applying these principles here, Congress specifically intended to legislate on the business of insurance under certain subsections of section 510. The following chart lists these subsections and their corresponding regulatory paragraphs.

Topic	Subsection of section 510	Paragraph of § 17.169
Eligibility for VADIP	510(b)	§ 17.169(b).
Duration of VADIP	510(c)	N/A.
Coverage locations	510(d)	N/A.
Plan benefits	510(f)	§ 17.169(c)(2).
Enrollment periods	510(g)	§ 17.169(d).
Establishing amounts of premiums, time frame for premium adjustments, and responsibility for payment of premiums.	510(h)	§ 17.169(c)(1).
Bases and minimum procedures for voluntary disenrollment	510(i)	§§ 17.169(e)(2)–(e)(5).

Consequently, these subsections of section 510 and their relevant regulatory counterparts preempt conflicting State and local laws.

State and local laws, including laws relating to the business of insurance, are not preempted by section 510, however, in areas where section 510 is silent. Examples of such areas of law include claims processes, licensing, underwriting, and appeals related to involuntarily disenrollment. Additionally, if State or local laws, including laws relating to the business of insurance, are not in conflict with any portion of section 510, then such State or local law may coexist with section 510.

Preemption allows for the implementation of uniform benefits in all States and may reduce the overall cost of VADIP. We therefore amend § 17.169 to add preemption language in accordance with the discussion above.

Executive Order 13132, Federalism

Section 6(c) of Executive Order 13132 (entitled ''Federalism'') requires an agency that is publishing a regulation that has federalism implications and that preempts State law to follow certain procedures. Regulations that have federalism implications, according to section 1(a) of Executive Order 13132, are those that have ''substantial direct effects 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.''

Because this regulation addresses a federalism issue, in particular preemption of State laws, VA conducted prior consultation with State officials in compliance with Executive Order 13132. VA solicited comment and input from State insurance regulators, through their representative national organization, the National Association of Insurance Commissioners (NAIC). In response to its request for comments, VA received a letter from the Chief Executive Officer of the NAIC, which agreed with VA's position that this rulemaking properly identifies the limited areas where the statutes and regulations implementing VADIP preempt state laws and regulations concerning the business of insurance. The NAIC also agreed with VA's position that state law and regulation should continue to apply where federal law and regulations are silent, including in the areas of licensing and claims processing. VA received no other comments from the NAIC on this rulemaking.

VA's promulgation of this regulation complies with the requirements of Executive Order 13132 by (1) in the absence of explicit preemption in the authorizing statute, identifying the clear evidence that Congress intended to preempt State law, or where the exercise of State authority conflicts with the exercise of Federal authority under a Federal statute; (2) limiting the preemption to only those areas where we find existence of a clear conflict or clear evidence of Congress' intention that Federal law preempt State law; (3) restricting the regulatory preemption to the minimum level necessary to achieve the objectives of the statute; (4) consulting with the State insurance regulators, as indicated above; and (5) providing opportunity for comment through this rulemaking and its companion proposed rulemaking, see RIN 2900–AO86.

Administrative Procedure Act

VA believes this regulatory amendment is non-controversial and anticipates that this rule will not result in any significant adverse comment, and therefore is issuing it as a direct final rule. The preemptive effect of certain criteria in this rulemaking is limited, and we have conducted formal consultation on the issue of preemption, in compliance with Executive Order 13132, Federalism. However, in the ''Proposed Rules'' section of this **Federal Register** publication, we are publishing a separate, substantially identical proposed rule document that will serve as a proposal for the provisions in this direct final rule if any significant adverse comment is filed. See RIN 2900–AO86.

For purposes of the direct final rulemaking, a significant adverse comment is one that explains why the rule would be inappropriate, including challenges to the rule's underlying premise or approach, or why it would be ineffective or unacceptable without a change. In determining whether an adverse comment is significant and warrants withdrawing a direct final rule, we will consider whether the comment raises an issue serious enough to warrant a substantive response in a notice-and-comment process in accordance with section 553 of the Administrative Procedure Act (5 U.S.C. 553). Comments that are frivolous, insubstantial, or outside the scope of the rule will not be considered adverse under this procedure. For example, a comment recommending an additional change to the rule will not be considered a significant comment unless the comment states why the rule would be ineffective or unacceptable without the additional change.

Under direct final rule procedures, if no significant adverse comment is received within the comment period, the rule will become effective on the date specified above. After the close of the comment period, VA will publish a document in the **Federal Register** indicating that no significant adverse comment was received and confirming the date on which the final rule will become effective. VA will also publish a notice in the **Federal Register** withdrawing the proposed rule.

However, if any significant adverse comment is received, VA will publish in the **Federal Register** a notice acknowledging receipt of a significant adverse comment and withdrawing this direct final rule. In the event this direct final rule is withdrawn because of receipt of any significant adverse comment, VA can proceed with the proposed rulemaking by addressing the comments received and publishing a final rule. Any comments received in response to this direct final rule will be treated as comments regarding the proposed rule. Likewise, any significant adverse comment received in response to the proposed rule will be considered as a comment regarding this direct final rule. VA will consider such comments in developing a subsequent final rule.

Effect of Rulemaking

Title 38 of the Code of Federal Regulations, as revised by this rulemaking, represents VA's implementation of its legal authority on this subject. Other than future amendments to this regulation or governing statutes, no contrary guidance or procedures are authorized. All existing or subsequent VA guidance is read to conform with this rulemaking if possible or, if not possible, such guidance is superseded by this rulemaking.

Paperwork Reduction Act

This document contains no provisions constituting a collection of information under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3521).

Regulatory Flexibility Act

The Secretary hereby certifies that this regulatory amendment 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. Only States, dental insurers, certain veterans and their survivors and dependents, none of which are small entities, will be affected. Therefore, pursuant to 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,'' which requires review by the Office of Management and Budget (OMB), 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 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 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 document are 64.009 Veterans Medical Care Benefits and 64.011 Veterans Dental 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 September 16, 2013, for publication.

List of Subjects in 38 CFR Part 17

Administrative practice and procedure, Dental health, Government contracts, Health care, Health professions, Health records, Veterans.

Dated: October 17, 2013.

William F. Russo,

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

For the reasons stated in the preamble, VA amends 38 CFR part 17 as follows:

PART 17—MEDICAL

■ 1. The authority citation for part 17 continues to read as follows:

Authority: 38 U.S.C. 501, and as noted in specific sections.

■ 2. In § 17.169, add paragraph (g) to read as follows:

§ 17.169 VA Dental Insurance Program for veterans and survivors and dependents of veterans (VADIP).

* * * * *

(g) *Limited preemption of State and local law.* To achieve important Federal interests, including but not limited to the assurance of the uniform delivery of benefits under VADIP and to ensure the operation of VADIP plans at the lowest possible cost to VADIP enrollees, paragraphs (b), (c)(1), (c)(2), (d), and (e)(2) through (5) of this section preempt conflicting State and local laws, including laws relating to the business of insurance. Any State or local law, or regulation pursuant to such law, is without any force or effect on, and State or local governments have no legal authority to enforce them in relation to, the paragraphs referenced in this paragraph or decisions made by VA or a participating insurer under these paragraphs.

* * * * *

[FR Doc. 2013–24585 Filed 10–21–13; 8:45 am]

BILLING CODE 8320–01–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 9 and 721

[EPA–HQ–OPPT–2012–0268; FRL–9397–1]

RIN 2070–AJ95

Perfluoroalkyl Sulfonates and Long-Chain Perfluoroalkyl Carboxylate Chemical Substances; Final Significant New Use Rule

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: Under the Toxic Substances Control Act (TSCA), EPA is amending a significant new use rule (SNUR) for perfluoroalkyl sulfonate (PFAS) chemical substances to add PFAS chemical substances that have completed the TSCA new chemical review process, but have not yet commenced production or import and is designating (for all listed PFAS chemical substances) processing as a significant new use. EPA is also finalizing a SNUR for long-chain perfluoroalkyl carboxylate (LCPFAC) chemical substances that designates manufacturing (including importing) and processing for use as part of carpets or for treating carpet (e.g., for use in the carpet aftercare market) as a significant new use, except for use of two chemical substances as a surfactant in carpet cleaning products. For this SNUR, EPA is also making an exemption inapplicable to persons who import or process the LCPAC chemical substances as part of an article. Persons subject to these SNURs will be required to notify EPA at least 90 days before commencing any significant new use. The required notifications will provide EPA with the opportunity to evaluate the intended use and, if necessary, to prohibit or limit that activity before it occurs.

DATES: This final rule is effective December 23, 2013.

ADDRESSES: The docket for this action, identified by docket identification (ID) number EPA–HQ–OPPT–2012–0268, is available at *http://www.regulations.gov* or at the Office of Pollution Prevention and Toxics Docket (OPPT Docket), Environmental Protection Agency

Docket Center (EPA/DC), EPA West Bldg., Rm. 3334, 1301 Constitution Ave. NW., Washington, DC. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566–1744, and the telephone number for the OPPT Docket is (202) 566–0280. Please review the visitor instructions and additional information about the docket available at *http://www.epa.gov/dockets.*

FOR FURTHER INFORMATION CONTACT: *For technical information contact:* Nicholas Nairn-Birch, Chemical Control Division (7405M), Office of Pollution Prevention and Toxics, Environmental Protection Agency, 1200 Pennsylvania Ave. NW., Washington, DC 20460–0001; telephone number: (202) 564–3668; email address: *nairn-birch.nicholas@epa.gov.*

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

SUPPLEMENTARY INFORMATION:

I. Does this action apply to me?

You may be potentially affected by this action if you manufacture (including import) or process any of the chemical substances listed in Table 4 of the regulatory text in this document or that meet the LCPFAC chemical category definition as described in this rule.

Potentially affected entities may include, but are not limited to:

- Manufacturers (including importers) of one or more of subject chemical substances (North American Industrial Classification System (NAICS) codes 325 and 324110); e.g., chemical manufacturing and petroleum refineries.
- Carpet and rug mills (NAICS code 314110).
- Fiber, yarn, and thread mills (NAICS code 31311).
- Home furnishing merchant wholesalers (NAICS code 423220).
- Carpet and upholstery cleaning services (NAICS code 561740).

This listing is not intended to be exhaustive, but rather provides a guide for readers regarding entities likely to be affected by this action. Other types of entities not listed in this unit could also be affected. The NAICS codes have been provided to assist you and others in determining whether this action might apply to certain entities. To determine whether you or your business may be affected by this action, you should carefully examine the applicability provisions in 40 CFR 721.5, 40 CFR 721.9582, and 40 CFR 721.10536, which is in the regulatory text of this document. If you have any questions regarding the applicability of this action to a particular entity, consult the technical person listed under **FOR FURTHER INFORMATION CONTACT**.

This action may also affect certain entities through pre-existing import certification and export notification rules under TSCA. Persons who import any chemical substance governed by a final SNUR are subject to the TSCA section 13 (15 U.S.C. 2612) import certification requirements and the corresponding regulations at 19 CFR 12.118 through 12.127; see also 19 CFR 127.28. Those persons must certify that the shipment of the chemical substance complies with all applicable rules and orders under TSCA, including any SNUR requirements. The EPA policy in support of import certification appears at 40 CFR part 707, subpart B. In addition, any persons who export or intend to export a chemical substance that is the subject of this rule are subject to the export notification provisions of TSCA section 12(b) (15 U.S.C. 2611(b)), (see 40 CFR 721.20), and must comply with the export notification requirements in 40 CFR part 707, subpart D.

II. Background

A. What action is the agency taking?

In the **Federal Register** of August 15, 2012 (77 FR 48924) (FRL–9358–7), EPA proposed to amend a SNUR at 40 CFR 721.9582 for PFAS chemical substances to add PFAS chemical substances that have completed the TSCA new chemical review process, but have not yet commenced production or import, and to designate (for all listed PFAS chemical substances) processing as a significant new use. In addition, the Agency also proposed a new SNUR for LCPFAC chemical substances that designates manufacturing (including importing) and processing for use as part of carpets or for treating carpet (e.g., for use in the carpet aftercare market) as a significant new use. On December 30, 2009, EPA issued the ''Long-Chain Perfluorinated Chemicals (PFCs) Action Plan'' (Ref. 1). Today's action is consistent with the purpose of that action plan.

This final rule requires persons who intend to manufacture (including import) or process one or more of the PFAS chemical substances listed in Table 4 of the regulatory text for the uses identified in 40 CFR 721.9582(a)(2) to submit a Significant New Use Notice (SNUN) at least 90 days before commencing manufacture (including import) or processing. Given the structural similarity of these chemicals to the PFAS chemicals covered under 40 CFR 721.9582 and EPA's health and environmental concerns associated with them, EPA has concluded that today's action on these PFAS chemicals is warranted and any manufacturing (including importing) or processing for any use of these uncommenced PFAS chemicals would be a significant new use.

EPA is also finalizing a SNUR for LCPFAC chemical substances that requires persons to notify the Agency at least 90 days before commencing manufacture (including import) or processing for use as part of carpets or for treating carpet (e.g., for use in the carpet aftercare market) as a significant new use, except for use of two LCPFAC chemical substances as surfactants in carpet cleaning products. Comments submitted to the docket after the comment period indicated use of two LCPFAC chemical substances as a surfactant in aftermarket carpet cleaning products as an ongoing use. The use of these two chemical substances is not included as a significant new use in this final rule.

For this SNUR, EPA is also making the article exemption at 40 CFR 721.45(f) inapplicable to persons who import LCPFAC chemical substances as part of carpets. The article exemption at 40 CFR 721.45(f) is based on an assumption that people and the environment will generally not be exposed to chemical substances in articles (see 49 FR 35014; September 5, 1984). However, as stated in Unit IV. of the proposed rule (77 FR 48928; August 15, 2012), exposure to LCPFAC chemical substances may occur both during the carpet manufacture process and during the lifetime of the finished carpet. Therefore, exposure would increase if in the future LCPFAC chemical substances are incorporated in carpets and then imported. The article exemption at 40 CFR 721.45(f) remains in effect, however, for persons who import LCPFAC chemical substances as part of other types of articles. The article exemption at 40 CFR 721.45(f) also remains in effect for processing of LCPFAC chemical substances as part of an article (i.e., carpet) since EPA is aware that this is an ongoing use. This final action does not affect the exemption at 40 CFR 721.45(f) for PFAS chemical substances, which remains in effect for persons who import or process these chemical substances.

The term PFAS refers to a general category of perfluorinated sulfonate chemical substances of any chain

length. The PFAS chemical substances for which EPA is modifying an existing SNUR are currently listed in 40 CFR 721.9582 in paragraph (a)(1). The PFAS chemical substances that EPA is adding to an existing SNUR are being inserted into this list. All of these chemical substances are collectively referred to in this rule as perfluoroalkyl sulfonates, or PFAS chemical substances.

The term LCPFAC refers to the long-chain category of perfluorinated carboxylate chemical substances with perfluorinated carbon chain lengths equal to or greater than seven carbons and less than or equal to 20 carbons. Based on comments filed on the proposed SNUR and all information available to EPA, the category definition of LCPFAC chemical substances differs in this final rule from the definition described in the proposed SNUR. The upper limit of the perfluorinated carbon chain length is now 20 carbons. In the proposed SNUR, there was no upper limit. Also, the LCPFAC chemical subgroup described in 40 CFR 721.10536(b)(1)(vi) of the proposed rule is removed from the definition in this final SNUR.

LCPFAC chemical substances are synthetic chemicals that do not occur naturally in the environment. The LCPFAC chemical substances subject to this SNUR are identified as follows, where $5 < n < 21$ or $6 < m < 21$:

a. $CF_3(CF_2)_n$-COO^-M where M = H^+ or any other group where a formal dissociation can be made;

b. $CF_3(CF_2)_n$-$CH{=}CH_2$;

c. $CF_3(CF_2)_n$-C(=O)-X where X is any chemical moiety;

d. $CF_3(CF_2)_m$-CH_2-X where X is any chemical moiety, and

e. $CF_3(CF_2)_m$-Y-X where Y = non-S, non-N heteroatom and where X is any chemical moiety.

The category of LCPFAC chemical substances, based on the chemical structures delineated in 40 CFR 721.10536 (b)(1)(i) through (b)(1)(v) of this final rule, also includes the salts and precursors of these perfluorinated carboxylates. LCPFAC precursors may be simple derivatives of perfluorooctanoic acid (PFOA) and higher homologues or certain polymers that may degrade to PFOA or higher homologues. These precursors include all fluorotelomers.

It is important to note that any LCPFAC chemical substance identified by paragraphs (b)(1)(i) through (b)(1)(v) of this final rule that is intentionally used during fluoropolymer formulation, such as an emulsion stabilizer in aqueous dispersions, is subject to reporting for the significant new uses described in 40 CFR 721.10536(b)(2). For example, ammonium perfluorooctanoate (APFO)—when used as an aqueous dispersion agent in fluoropolymer production—is subject to this SNUR if the final fluoropolymer product is used as part of carpets or to treat carpets.

B. What is the agency's authority for taking this action?

Section 5(a)(2) of TSCA (15 U.S.C. 2604(a)(2)) authorizes EPA to determine that a use of a chemical substance is a ''significant new use.'' EPA must make this determination by rule after considering all relevant factors, including those listed in TSCA section 5(a)(2). Once EPA determines that a use of a chemical substance is a significant new use, TSCA section 5(a)(1)(B) requires persons to submit a SNUN to EPA at least 90 days before they manufacture (including import) or process the chemical substance for that use (15 U.S.C. 2604(a)(1)(B)). As described in Unit II.C., the general SNUR provisions are found at 40 CFR part 721, subpart A.

C. Applicability of General Provisions

General provisions for SNURs appear under 40 CFR part 721, subpart A. These provisions describe persons subject to the rule, recordkeeping requirements, exemptions to reporting requirements, and applicability of the rule to uses occurring before the effective date of the final rule. However, EPA is making the exemption at 40 CFR 721.45(f) inapplicable to persons who import LCPFAC chemical substances as part of carpets under this SNUR. As a result, persons subject to the provisions of this rule would not be exempt from significant new use reporting if they import LCPFAC chemical substances as part of carpets. However, the articles exemption will remain in effect for persons who process chemical substances as part of an article because existing stocks of carpets may still contain LCPFAC substances.

Provisions relating to user fees appear at 40 CFR part 700. According to 40 CFR 721.1(c), persons subject to SNURs must comply with the same notice requirements and EPA regulatory procedures as submitters of premanufacture notices (PMNs) under TSCA section 5(a)(1)(A). In particular, these requirements include the information submissions requirements of TSCA section 5(b) and 5(d)(1), the exemptions authorized by TSCA section 5(h)(1), (h)(2), (h)(3), and (h)(5), and the regulations at 40 CFR part 720. Once EPA receives a SNUN, EPA may take regulatory action under TSCA section 5(e), 5(f), 6 or 7 to control the activities on which it has received the SNUN. If EPA does not take action, EPA is required under TSCA section 5(g) to explain in the **Federal Register** its reasons for not taking action.

Persons who export or intend to export a chemical substance identified in a proposed or final SNUR are subject to the export notification provisions of TSCA section 12(b). The regulations that interpret TSCA section 12(b) appear at 40 CFR part 707, subpart D. Persons who import a chemical substance identified in a final SNUR are subject to the TSCA section 13 import certification requirements, codified at 19 CFR 12.118 through 12.127; see also 19 CFR 127.28. Such persons must certify that the shipment of the chemical substance complies with all applicable rules and orders under TSCA, including any SNUR requirements. The EPA policy in support of import certification appears at 40 CFR part 707, subpart B.

III. Rationale and Objectives for This Final Rule

A. Rationale

As discussed in Units III. and IV. of the proposed rule (77 FR 48924; August 15, 2012), PFAS and LCPFAC chemical substances are found world-wide in the environment, wildlife, and humans. They are bioaccumulative in wildlife and humans, and are persistent in the environment. They are toxic to laboratory animals, producing reproductive, developmental, and systemic effects in laboratory tests. The exact sources and pathways by which these chemicals move into and through the environment and allow humans and wildlife to become exposed are not fully understood, but are likely to include releases from manufacturing of the chemicals, processing of these chemicals into products like carpets and textiles, and aging and wear of products containing them.

Since the manufacture (including import) and processing of PFAS and LCPFAC chemical substances for these uses have been discontinued in the United States, EPA expects their presence in humans and the environment to decline over time as has been observed in the past when production and use of other persistent chemicals has ceased. EPA is concerned that the manufacturing (including import) or processing of these chemical substances, as well as importing these chemicals as part of articles, for the new uses identified in this rule could be reinitiated in the future. If reinitiated, EPA believes that such use would increase the magnitude and duration of human and environmental exposure to

these chemical substances, constituting a significant new use.

EPA is adding processing of PFAS chemical substances (for any use in the United States, other than the uses listed under 40 CFR 721.9582 (a)(3), (a)(4), and (a)(5)) to the significant new uses of those chemical substances. EPA is concerned about the potential for PFAS chemical substances manufactured (including imported) for an ongoing use to be redirected to other uses without prior notice to the Agency. For example, a chemical substance could be initially manufactured for uses listed under 40 CFR 721.9582 (a)(3), (a)(4), or (a)(5), and then redirected for another use after its initial manufacture or import. For similar reasons, EPA is designating processing of LCPFAC chemical substances or use as part of carpets or to treat carpet as a significant new use, except for one specifically identified ongoing use of two LCPFAC chemical substances as a surfactant in aftermarket carpet cleaning products. As such, persons who process PFAS or LCPFAC chemical substances for a significant new use will be required to first notify EPA, even if they are not themselves manufacturers of the chemical substance. Note, the exemption at 40 CFR 721.45(f) is not applicable for persons who import these LCPFAC chemical substances as part of an article, but is applicable for persons who process these LCPFAC chemicals substances as part of an article. Pursuant to 40 CFR 721.45(f), processing of PFAS and LCPFAC chemical substances as part of articles remains exempt from notice requirements.

Accordingly, EPA will have the opportunity to evaluate and control, where appropriate, activities associated with those uses, if such manufacturing (including importing) or processing were to start or resume. The required notification provided by a SNUN will provide EPA with the opportunity to evaluate activities associated with a significant new use and an opportunity to protect against unreasonable risks, if any, from exposure to PFAS and LCPFAC chemical substances.

Consistent with EPA's past practice for issuing SNURs under TSCA section 5(a)(2), EPA's decision to promulgate a SNUR for a particular chemical use need not be based on an extensive evaluation of the hazard, exposure, or potential risk associated with that use. Rather, the Agency's action is based on EPA's determination that if the use begins or resumes, it may present a risk that EPA should evaluate under TSCA before the manufacturing or processing for that use begins. Since the new use does not currently exist, deferring a detailed consideration of potential risks or hazards related to that use is an effective use of resources. If a person decides to begin manufacturing or processing the chemical for the use, the notice to EPA allows the Agency to evaluate the use according to the specific parameters and circumstances surrounding that intended use.

With this action, the Agency is designating as significant new uses of LCPFAC chemical substances use as part of carpet or to treat carpet. The Agency believes the 2010/2015 PFOA Stewardship Program, in which companies committed to work toward eliminating facility emissions and product content of PFOA—a LCPFAC chemical substance—by 2015, will eliminate many other ongoing uses of LCPFAC chemical substances. As those uses are phased out in the United States, EPA anticipates taking additional regulatory actions to prevent resumption of the uses without prior notice to EPA.

B. Objectives

Based on the considerations in Unit III.A. of this rule, EPA will achieve the following objectives with regard to the significant new use(s) that are designated in this rule:

1. EPA will receive notice of any person's intent to manufacture (including import) or process PFAS or LCPFAC chemical substances for the described significant new use before that activity begins.

2. EPA will have an opportunity to review and evaluate data submitted in a SNUN before the notice submitter begins manufacturing (including importing) or processing PFAS or LCPFAC chemical substances for the described significant new use.

3. EPA will be able to regulate prospective manufacturers (including importers) or processors of PFAS or LCPFAC chemical substances before the described significant new use of the chemical substance occurs, provided that regulation is warranted pursuant to TSCA sections 5(e), 5(f), 6 or 7.

IV. Significant New Use Determination

Section 5(a)(2) of TSCA states that EPA's determination that a use of a chemical substance is a significant new use must be made after consideration of all relevant factors including:

- The projected volume of manufacturing and processing of a chemical substance.
- The extent to which a use changes the type or form of exposure of human beings or the environment to a chemical substance.
- The extent to which a use increases the magnitude and duration of exposure of human beings or the environment to a chemical substance.
- The reasonably anticipated manner and methods of manufacturing, processing, distribution in commerce, and disposal of a chemical substance.

In addition to these factors enumerated in TSCA section 5(a)(2), the statute authorizes EPA to consider any other relevant factors.

To determine what would constitute a significant new use of the PFAS and LCPFAC chemical substances subject to this rule, as discussed herein, EPA considered relevant information about the toxicity of these substances, likely human exposures and environmental releases associated with possible uses, and the four factors listed in TSCA section 5(a)(2).

Except for the ongoing uses specified in 40 CFR 721.9582 (a)(3) through (a)(5), the Agency believes the manufacture (including import) and processing of any of the PFAS chemical substances subject to this rule has been discontinued. Any new use of these chemicals, including processing, could change the type and form of exposure and/or the magnitude and duration of exposure to humans and the environment relative to what currently exists. Based on these considerations of the statutory factors discussed in this unit, EPA has determined that the manufacture (including import) or processing of any of the PFAS chemical substances subject to this rule, for any use except ongoing uses specified in 40 CFR 721.9582 (a)(3) through (a)(5), is a significant new use.

Exposure to LCPFAC chemical substances may occur both during the carpet manufacture process and during the lifetime of the finished carpet via inhalation and ingestion of dust generated from the abrasion of carpets. This is of particular concern for children since they engage in a variety of activities on carpets for longer periods of time and have a greater degree of hand-to-mouth activity in their earliest years. This will change both the magnitude of exposure and the duration of exposure. Except for one ongoing use specified in 40 CFR 721.10536(b)(3), the Agency believes the manufacture (including import) and processing of LCPFAC chemical substances as part of carpet or to treat carpet has been discontinued. EPA also believes LCPFAC chemicals substances are no longer imported as part of carpet. If reinitiated, EPA believes these uses of LCPFAC chemical substances would significantly increase the magnitude and duration of exposure to humans and the

environment relative to what currently exists. Based on these considerations of the statutory factors discussed in this unit, EPA has determined that the manufacture (including import) or processing of any of the LCPFAC chemical substances subject to this rule for use as part of carpet or to treat carpets, except ongoing uses specified in 40 CFR 721.10536(b)(3), is a significant new use. EPA has further determined that importing any of the LCPFAC chemical substances subject to this rule as part of carpet constitutes a significant new use and warrants making inapplicable the article exemption at 40 CFR 721.45(f).

V. Applicability of Rule to Uses Occurring Before Effective Date of the Final Rule

As discussed in the **Federal Register** of April 24, 1990 (55 FR 17376), EPA has decided that the intent of TSCA section 5(a)(1)(B) is best served by designating a use as a significant new use as of the date of publication of the proposed rule rather than as of the effective date of the final rule. If uses begun after publication of the proposed rule were considered ongoing rather than new, it would be difficult for EPA to establish SNUR notice requirements, because a person could defeat the SNUR by initiating the proposed significant new use before the rule became final, and then argue that the use was ongoing as of the effective date of the final rule. Thus, persons who may have begun commercial manufacture (including import) or processing of the chemical substance(s) subject to this rule for a significant new use after the proposal was published on August 15, 2012 (77 FR 48924), must cease such activity before the effective date of this final rule. To resume their activities, these persons will have to comply with all applicable SNUR notice requirements and wait until the notice review period, including all extensions, expires. Uses arising after the publication of the proposed rule are distinguished from uses that exist at publication of the proposed rule. The former would be new uses, the latter ongoing uses. To the extent that additional ongoing uses were found in the course of rulemaking, EPA has excluded these uses from the final SNUR. EPA promulgated provisions to allow persons to comply with this SNUR before the effective date. If a person were to meet the conditions of advance compliance under 40 CFR 721.45(h), that person would be considered to have met the requirements of the final SNUR for those activities.

VI. Test Data and Other Information

EPA recognizes that TSCA section 5 does not usually require developing any particular test data before submission of a SNUN. There are two exceptions: (1) Development of test data is required where the chemical substance subject to the SNUR is also subject to a test rule under TSCA section 4 (see TSCA section 5(b)(1)); and (2) development of test data may be necessary where the chemical substance has been listed under TSCA section 5(b)(4) (see TSCA section 5(b)(2)). In the absence of a TSCA section 4 test rule or a TSCA section 5(b)(4) listing covering the chemical substance, persons are required only to submit test data in their possession or control and to describe any other data known to or reasonably ascertainable by them (15 U.S.C. 2604(d); 40 CFR 721.25; and 40 CFR 720.50). However, as a general matter, EPA recommends that SNUN submitters include data that would permit a reasoned evaluation of risks posed by the chemical substance during its manufacture (including import), processing, use, distribution in commerce, or disposal. EPA encourages persons to consult with the Agency before submitting a SNUN. As part of this optional pre-notice consultation, EPA would discuss specific data it believes may be useful in evaluating a significant new use. SNUNs submitted for significant new uses without any test data may increase the likelihood that EPA will take action under TSCA section 5(e) to prohibit or limit activities associated with this chemical.

SNUN submitters should be aware that EPA will be better able to evaluate SNUNs that provide detailed information on:

1. Human exposure and environmental releases that may result from the significant new uses of the chemical substance.
2. Potential benefits of the chemical substance.
3. Information on risks posed by the chemical substances compared to risks posed by potential substitutes.

VII. SNUN Submissions

EPA recommends that submitters consult with the Agency prior to submitting a SNUN to discuss what data may be useful in evaluating a significant new use. Discussions with the Agency prior to submission can afford ample time to conduct any tests that might be helpful in evaluating risks posed by the substance. According to 40 CFR 721.1(c), persons submitting a SNUN must comply with the same notice requirements and EPA regulatory procedures as persons submitting a PMN, including submission of test data on health and environmental effects as described in 40 CFR 720.50. SNUNs must be submitted on EPA Form No. 7710–25, generated using e-PMN software, and submitted to the Agency in accordance with the procedures set forth in 40 CFR 721.25 and 40 CFR 720.40. E–PMN software is available electronically at *http://www.epa.gov/opptintr/newchems.*

VIII. Discussion of the Final Significant New Use Rule and Response to Comments

This action finalizes the SNUR proposed in the **Federal Register** on August 15, 2012 (77 FR 48924). This final rule requires persons who intend to manufacture (including import) or process one or more of the chemical substances listed in Table 4 of the regulatory text for the uses identified in 40 CFR 721.9582(a)(2) to submit a SNUN at least 90 days before commencing manufacture (including import) or processing. This rule also requires persons who intend to manufacture (including import) or process one or more LCPFAC chemical substances, as defined in 40 CFR 721.10536(b)(1), for use as part of carpets or for treating carpets (except for one specifically identified ongoing use of two LCPFAC chemical substances as a surfactant in aftermarket carpet cleaning products) to submit a SNUN at least 90 days before commencing manufacture (including import) or processing.

It should be noted that the LCPFAC chemical substances category definition now delineates a perfluorinated carbon chain length upper limit of 20 carbons. The definition in the proposed rule contained no upper limit. Also, the LCPFAC chemical subgroup that was described in 40 CFR 721.10536(b)(1)(vi) of the proposal is removed from the definition in this final SNUR. The rationale for these changes is explained in greater detail in the response to comments below.

The Agency reviewed and considered all comments received related to the proposed rule. Copies of all non-CBI comments are available at *http://www.regulations.gov* in the public docket for this action, EPA–OPPT–2012–0268. A discussion of the comments germane to the rulemaking and the Agency's responses follow.

1. *Comment summary.* In defining the chemicals subject to this SNUR in the proposed rule, no upper limit was given for carbon chain length. Submitters suggested an upper limit of 20 carbons, which would exclude from the LCPFAC

category definition polymers weighing greater than 1,000 daltons.

Response. EPA agrees with commenters that there should be an upper limit to the chain length in the definition. PFAC chemicals with greater than 20 perfluorinated carbons can be considered polymers within the polymer exemption under 40 CFR 723.250 (e.g., exceed a molecular weight of 1,000 daltons and contain at least three monomer units). As it is not the Agency's intent to regulate fluoropolymers in this rule, the LCPFAC category definition in this final rule includes a perfluorinated carbon chain length upper limit of 20.

2. *Comment summary.* Commenters requested clarification as to whether or not fluoropolymers are included in the LCPFAC definition. Commenters also requested a definition of fluoropolymers that clearly distinguished them from fluorotelomer-based chemicals.

Response. It is not the Agency's intent to regulate fluoropolymers. The category definition is changed in this final rule to include a perfluorinated carbon chain length upper limit of 20. With this change, fluoropolymers no longer meet the LCFPAC chemical substances definition.

Since fluoropolymers are not subject to this SNUR, EPA will not include a definition of fluoropolymers. However, the Agency notes that it has distinguished fluoropolymer and fluorotelomer-based chemicals in two corresponding enforceable consent agreement test rules published on July 8, 2005 (70 FR 39630 and 70 FR 39623).

3. *Comment summary.* Several commenters argued that the proposed 40 CFR 721.10536(b)(1)(vi) [''structurally similar degradation products of any of the compounds in (i) through (v) of this paragraph''] is prohibitively broad and unnecessary and therefore unenforceable. They argued that it should be either removed or replaced with a definition that explicitly delineates LCPFAC precursors.

Response. The Agency agrees that the chemical subgroup definition described in 40 CFR 721.10536(b)(1)(vi) is unnecessary and it is removed from the LCFPAC category definition in this final rule. The Agency believes that 40 CFR 721.10536 (b)(1)(i)–(b)(1)(v) do not exclude any LCPFAC chemical substances defined in 40 CFR 721.10536(b)(1)(vi), and thus sufficiently define the LCPFAC category of chemicals.

4. *Comment summary.* A submitter claimed that the LCPFAC chemical category definition is not adequate to verify which chemicals are in use by suppliers. Instead, a thorough list of CAS numbers is needed.

Response. EPA believes the most precise way to identify the chemicals subject to this SNUR is through the chemical structure definition. Downstream customers should have sufficient information from suppliers (i.e., CAS number and unique chemical identity) to generate the specific structure for any potentially reportable substance, which they can compare to the LCPFAC category definition.

As a convenience to the regulated community, EPA has made available in the public docket an illustrative list of chemical substances subject to the rule. As part of that list, EPA has provided specific examples of chemicals that meet the various components of the LCPFAC category definition.

5. *Comment summary.* A submitter suggested that 40 CFR 721.10536(b)(1)(ii) of the regulatory text should state ''$CF_3(CF2)_mCH{=}CH_2$, where m > 6'' rather than ''$CF_3(CF_2)_nCH{=}CH_2$, where n > 5'' to be consistent with PFOA precursors identified in the PFOA Stewardship Program.

Response. EPA disagrees with this comment. The specific structural formula was chosen to accommodate the possibility of oxidation cleavage of the olefin to produce PFOA directly. Applied to the representative structure suggested by the submitter, this mechanism would produce perfluorononanoic acid (PFNA), which is one carbon longer than PFOA, the smallest of the LCPFAC chemical substances.

6. *Comments summary.* A commenter expressed concern that the article exemption was not made inapplicable to PFAS as part of carpets.

Response. The Agency recognizes this concern and is addressing it in the upcoming proposed SNUR for long-chain perfluoroalkyl carboxylate chemical substances. Doing so in the upcoming proposed SNUR will allow EPA to solicit and respond to any public comments.

7. *Comment summary.* Submitters requested clarification on the applicability of the articles exemption to export notifications.

Response. This SNUR does not require notice of export for articles as part of the section 5 action. In accordance with 40 CFR 707.60(b), persons who export LCFPAC chemical substances contained in articles remain exempt from notices of export under TSCA 12(b).

8. *Comment summary.* One commenter asserted that the following statement in the proposed rule's preamble is incorrect: ''These precursors include certain fluoropolymers and all fluorotelomers.'' In support of this assertion, the submitter notes that many new short-chain fluorotelomer products cannot break down to PFOA.

Response. The LCPFAC category definition does not include short-chain fluorotelomers. The quote refers only to precursors of the long-chain perfluorinated chemicals defined in 40 CFR 721.10536(b)(1), which excludes short-chain fluorotelomers. Fluoropolymers are also no longer included in the LCPFAC definition.

9. *Comment summary.* A commenter noted that even fluoropolymers not made with PFOA can have detectable levels of PFOA in them due to environmental cross-contamination, which creates an enforcement and compliance problem. The uncertainty this issue creates suggests that fluoropolymers should be excluded from the LCPFAC definition. The commenter also requested clarification of the term 'contamination' used in the preamble.

Response. Fluoropolymers are not subject to this SNUR. In the preamble of the proposed rule, the Agency referred to a 'contaminated' chemical as one that does not meet the LCPFAC definition itself, but that contains a LCPFAC chemical substance due to its *intentional* use during chemical formulation. In such a case, this LCPFAC chemical substance would be subject to this SNUR for the significant new uses described in 40 CFR 721.10536(b)(2). For example, APFO used as an emulsifier in the production of fluoropolymers would be subject to this SNUR for the significant new uses described in 40 CFR 721.10536(b)(2).

IX. Economic Analysis

A. SNUNs

EPA has evaluated the potential costs of establishing SNUR reporting requirements for potential manufacturers (including importers) and processors of the chemical substance included in this rule (Ref. 2). In the event that a SNUN is submitted, costs are estimated at $8,589 per SNUN submission for large business submitters and $6,189 for small business submitters. These estimates include the cost to prepare and submit the SNUN, and the payment of a user fee. Businesses that submit a SNUN would be subject to either a $2,500 user fee required by 40 CFR 700.45(b)(2)(iii), or, if they are a small business with annual sales of less than $40 million when combined with those of the parent company (if any), a reduced user fee of $100 (40 CFR 700.45(b)(1)). The costs of

submission of SNUNs will not be incurred by any company unless a company decides to pursue a significant new use as defined in this SNUR. EPA's complete economic analysis is available in the public docket for this rule (Ref. 2).

The final SNUR will require importers of LCPFAC chemical substances as part of carpets to notify EPA at least 90 days before importing any such articles containing chemicals subject to the final rule. The final rule may also affect firms that do not currently import carpet containing the chemicals, but who may be interested in importing these articles in the future. Typically, firms have an understanding of the contents of the articles they import. However, EPA acknowledges that importers of articles may have varying levels of knowledge about the chemical content of the articles that they import.

While not required by the SNUR, these parties may incur costs to take additional steps to determine whether the articles they plan to import are covered by this SNUR. This determination may involve gathering information from suppliers along the supply chain, and/or testing samples of the article itself. EPA believes that the LCPFAC chemical substances included in this final rule are no longer being manufactured (including imported) for use as part of carpet or for treating carpet (e.g., for use in the carpet aftercare market) in the United States, except for use of two chemical substances in carpet cleaning solution, and that LCPFAC chemical substances are not being imported as part of carpets. Therefore, EPA believes that these costs would be minimal.

B. Export Notification

Under TSCA section 12(b) and the implementing regulations at 40 CFR part 707, subpart D, exporters must notify EPA if they export or intend to export a chemical substance or mixture for which, among other things, a rule has been proposed or promulgated under section 5. For persons exporting a substance the subject of a SNUR, a one-time notice must be provided for the first export or intended export to a particular country. The total costs of export notification will vary by chemical, depending on the number of required notifications (i.e., the number of countries to which the chemical is exported). EPA is unable to make any estimate of the likely number of export notifications for the chemical covered in this SNUR.

X. References

As indicated under **ADDRESSES**, a docket has been established for this rule under docket ID number EPA–HQ–OPPT–2012–0268. The following is a listing of the documents cited in this document. The docket includes information considered by EPA in developing this rule, including the documents listed in this unit, which are physically located in the docket. In addition, interested parties should consult documents that are referenced in the documents that EPA has placed in the docket, regardless of whether these referenced documents are physically located in the docket. For assistance in locating documents that are referenced in documents that EPA has placed in the docket, but that are not physically located in the docket, please consult the technical person listed under **FOR FURTHER INFORMATION CONTACT**. The docket is available for review as specified under **ADDRESSES**.

1. USEPA. ''Long-Chain Perfluorinated Chemicals Action Plan.'' December 30, 2009.
2. USEPA. ''Economic Analysis of the Significant New Use Rule for Perfluoroalkyl Sulfonates and Long-Chain Perfluoroalkyl Carboxylate Chemical Substances.'' Prepared by Timothy Lehman and Abt Associates Inc. May 7, 2013.

XI. Statutory and Executive Order Reviews

A. Executive Order 12866: Regulatory Planning and Review and Executive Order 13563: Improving Regulation and Regulatory Review

Under Executive Order 12866 (58 FR 51735, October 4, 1993), the Office of Management and Budget (OMB) has determined that this SNUR is not a ''significant regulatory action,'' because it does not meet the criteria in section 3(f) of the executive order. Accordingly, this action was not reviewed by OMB under Executive Orders 12866 and 13563 (76 FR 3821; January 21, 2011).

B. Paperwork Reduction Act (PRA)

According to the PRA, 44 U.S.C. 3501 *et seq.,* an Agency may not conduct or sponsor, and a person is not required to respond to a collection of information that requires OMB approval under the PRA, unless it has been approved by OMB and displays a currently valid OMB control number. The OMB control numbers for EPA's regulations in Title 40 of the CFR, after appearing in the **Federal Register**, are listed in 40 CFR part 9, and included on the related collection instrument, or form, if applicable. The information collection requirements related to this action have already been approved by OMB pursuant to the PRA under OMB control number 2070–0038 (EPA ICR No. 1188). This action does not impose any burden requiring additional OMB approval. If an entity were to submit a SNUN to the Agency, the annual burden is estimated to average 92 hours per response. This burden estimate includes the time needed to review instructions, search existing data sources, gather and maintain the data needed, and complete, review, and submit the required SNUN.

C. Regulatory Flexibility Act (RFA)

Pursuant to section 605(b) of the RFA, 5 U.S.C. 601 *et seq.,* the Agency hereby certifies that promulgation of this SNUR would not have a significant economic impact on a substantial number of small entities. The rationale supporting this conclusion is as follows. A SNUR applies to any person (including small or large entities) who intends to engage in any activity described in the rule as a ''significant new use.'' By definition of the word ''new'' and based on all information currently available to EPA, it appears that no small or large entities presently engage in such activity. Since this SNUR will require a person who intends to engage in such activity in the future to first notify EPA by submitting a SNUN, no economic impact will occur unless someone files a SNUN to pursue a significant new use in the future or forgoes profits by avoiding or delaying the significant new use. Although some small entities may decide to conduct such activities in the future, EPA cannot presently determine how many, if any, there may be. However, EPA's experience to date is that, in response to the promulgation of SNURs covering over 1,000 chemical substances, the Agency receives only a handful of notices per year. For example, the number of SNUNs was four in Federal fiscal year (FY) 2005, eight in FY 2006, six in FY 2007, eight in FY 2008, and seven in FY 2009. During this 5-year period, three small entities submitted a SNUN. Therefore, EPA believes that the potential economic impact of complying with this SNUR is not expected to be significant or adversely impact a substantial number of small entities. In a SNUR that published as a final rule on August 8, 1997 (62 FR 42690) (FRL–5735–4), the Agency presented its general determination that proposed and final SNURs are not expected to have a significant economic impact on a substantial number of small entities, which was provided to the Chief Counsel for Advocacy of the Small Business Administration.

D. Unfunded Mandates Reform Act (UMRA)

Based on EPA's experience with proposing and finalizing SNURs, State, local, and Tribal governments have not been impacted by these rulemakings, and EPA does not have any reason to believe that any State, local, or Tribal government would be impacted by this rulemaking. As such, EPA has determined that this regulatory action would not impose any enforceable duty, contain any unfunded mandate, or otherwise have any effect on small governments subject to the requirements of sections 202, 203, 204, or 205 of UMRA, 2 U.S.C. 1531–1538.

E. Executive Order 13132: Federalism

This action would not have a substantial direct effect on States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132 (64 FR 43255, August 10, 1999).

F. Executive Order 13175: Consultation and Coordination With Indian Tribal Governments

This rule does not have Tribal implications because it is not expected to have substantial direct effects on Indian Tribes. This rule does not significantly or uniquely affect the communities of Indian Tribal governments, nor involve or impose any requirements that affect Indian Tribes. Accordingly, the requirements of Executive Order 13175 (65 FR 67249, November 9, 2000) do not apply to this rule.

G. Executive Order 13045: Protection of Children From Environmental Health Risks and Safety Risks

This action is not subject to Executive Order 13045 (62 FR 19885, April 23, 1997), because this is not an economically significant regulatory action as defined by Executive Order 12866, and this action does not address environmental health or safety risks disproportionately affecting children.

H. Executive Order 13211: Actions That Significantly Affect Energy Supply, Distribution, or Use

This rule is not subject to Executive Order 13211 (66 FR 28355, May 22, 2001), because this action is not expected to affect energy supply, distribution, or use.

I. National Technology Transfer Advancement Act (NTTAA)

Since this action does not involve any technical standards; section 12(d) of the NTTAA, 15 U.S.C. 272 note, does not apply to this action.

J. Executive Order 12898: Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations

This action does not entail special considerations of environmental justice related issues as delineated by Executive Order 12898 (59 FR 7629, February 16, 1994).

XII. Congressional Review Act (CRA)

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

List of Subjects

40 CFR Part 9

Environmental protection, Reporting and recordkeeping requirements.

40 CFR Part 721

Environmental protection, Chemicals, Hazardous substances, Reporting and recordkeeping requirements.

Dated: September 30, 2013.

Wendy C. Hamnett,

Director, Office of Pollution Prevention and Toxics.

Therefore, 40 CFR parts 9 and 721 are amended as follows:

PART 9—[AMENDED]

■ 1. The authority citation for part 9 continues to read as follows:

Authority: 7 U.S.C. 135 *et seq.,* 136–136y; 15 U.S.C. 2001, 2003, 2005, 2006, 2601–2671; 21 U.S.C. 331j, 346a, 348; 31 U.S.C. 9701; 33 U.S.C. 1251 *et seq.,* 1311, 1313d, 1314, 1318, 1321, 1326, 1330, 1342, 1344, 1345 (d) and (e), 1361; E.O. 11735, 38 FR 21243, 3 CFR, 1971–1975 Comp. p. 973; 42 U.S.C. 241, 242b, 243, 246, 300f, 300g, 300g–1, 300g–2, 300g–3, 300g–4, 300g–5, 300g–6, 300j–1, 300j–2, 300j–3, 300j–4, 300j–9, 1857 *et seq.,* 6901–6992k, 7401–7671q, 7542, 9601–9657, 11023, 11048.

■ 2. In § 9.1, add the following section in numerical order under the undesignated center heading ''Significant New Uses of Chemical Substances'' to read as follows:

§ 9.1 OMB approvals under the Paperwork Reduction Act.

* * * * *

40 CFR citation	OMB control No.
* * * * *	
Significant New Uses of Chemical Substances	
* * * * *	
721.10536	2070–0038
* * * * *	

* * * * *

PART 721—[AMENDED]

■ 3. The authority citation for part 721 continues to read as follows:

Authority: 15 U.S.C. 2604, 2607, and 2625(c).

■ 4. In § 721.9582:

■ a. Revise paragraph (a)(1) introductory text.

■ b. Add Table 4 to paragraph (a)(1).

■ c. Revise paragraphs (a)(2) through (5).

The revisions and addition read as follows:

§ 721.9582 Certain perfluoroalkyl sulfonates.

(a) *Chemical substances and significant new uses subject to reporting.* (1) The chemical substances listed in Table 1, Table 2, Table 3, and Table 4 of this section are subject to reporting under this section for the significant new uses described in paragraph (a)(2) of this section.

* * * * *

TABLE 4—FOURTH SET OF PFAS CHEMICALS SUBJECT TO REPORTING

Premanufacture Notice Case No.	Generic chemical name
P–83–0126	Modified fluoroaliphatic adduct
P–90–0110	Fluorochemical epoxide
P–94–1508	Fluorinated polysiloxane
P–94–1509B	Fluorinated polysiloxane
P–98–0809	Fluorochemical esters
P–99–0296	Fluoroalkyl derivative
P–01–0035	Perfluorooctane sulfonate

(2) The significant new uses are:

(i) Manufacturing (including importing) or processing of any chemical substance listed in Table 1 of paragraph (a)(1) of this section for any use.

(ii) Manufacturing (including importing) or processing of any chemical substance listed in Table 2 of paragraph (a)(1) of this section for any

use, except as noted in paragraph (a)(3) of this section.

(iii) Manufacturing (including importing) or processing of any chemical substance listed in Table 3 of paragraph (a)(1) of this section for any use, except as noted in paragraphs (a)(3) through (5) of this section.

(iv) Manufacturing (including importing) or processing of any chemical substance listed in Table 4 of paragraph (a)(1) of this section for any use.

(3) Manufacturing (including importing) or processing of any chemical substance listed in Table 2 and Table 3 of paragraph (a)(1) of this section for the following specific uses shall not be considered as a significant new use subject to reporting under this section:

(i) Use as an anti-erosion additive in fire-resistant phosphate ester aviation hydraulic fluids.

(ii) Use as a component of a photoresist substance, including a photo acid generator or surfactant, or as a component of an anti-reflective coating, used in a photomicrolithography process to produce semiconductors or similar components of electronic or other miniaturized devices.

(iii) Use in coating for surface tension, static discharge, and adhesion control for analog and digital imaging films, papers, and printing plates, or as a surfactant in mixtures used to process imaging films.

(iv) Use as an intermediate only to produce other chemical substances to be used solely for the uses listed in paragraph (a)(3)(i), (ii), or (iii) of this section.

(4) Manufacturing (including importing) or processing of tetraethylammonium perfluorooctanesulfonate (CAS No. 56773–42–3) for use as a fume/mist suppressant in metal finishing and plating baths shall not be considered as a significant new use subject to reporting under this section. Examples of such metal finishing and plating baths include: Hard chrome plating; decorative chromium plating; chromic acid anodizing; nickel, cadmium, or lead plating; metal plating on plastics; and alkaline zinc plating.

(5) Manufacturing (including importing) or processing of: 1-Pentanesulfonic acid, 1,1,2,2,3,3,4,4,5,5,5-undecafluoro-, potassium salt (CAS No. 3872–25–1); Glycine, N-ethyl-N-[(tridecafluorohexyl)sulfonyl]-, potassium salt (CAS No. 67584–53–6); Glycine, N-ethyl-N-[(pentadecafluoroheptyl)sulfonyl]-, potassium salt (CAS No. 67584–62–7); 1-Heptanesulfonic acid, 1,1,2,2,3,3,4,4,5,5,6,6,7,7,7-pentadecafluoro-, ammonium salt (CAS No. 68259–07–4); 1-Heptanesulfonamide, N-ethyl-1,1,2,2,3,3,4,4,5,5,6,6,7,7,7-pentadecafluoro- (CAS No. 68957–62–0); Poly(oxy-1,2-ethanediyl), .alpha.-[2-[ethyl [(pentadecafluoroheptyl)sulfonyl] amino]ethyl]-.omega.-methoxy- (CAS No. 68958–60–1); or 1-Hexanesulfonic acid, 1,1,2,2,3,3,4,4,5,5,6,6,6-tridecafluoro-, compd. with 2,2′-iminobis[ethanol] (1:1) (CAS No. 70225–16–0) for use as a component of an etchant, including a surfactant or fume suppressant, used in the plating process to produce electronic devices shall not be considered a significant new use subject to reporting under this section.

* * * * *

■ 5. Add § 721.10536 to subpart E to read as follows:

§ 721.10536 Long-chain perfluoroalkyl carboxylate chemical substances.

(a) *Definitions.* The definitions in § 721.3 apply to this section. In addition, the following definition applies: *Carpet* means a finished fabric or similar product intended to be used as a floor covering. This definition excludes resilient floor coverings such as linoleum and vinyl tile.

(b) *Chemical substances and significant new uses subject to reporting.* (1) The chemical substances identified below, where $5 < n < 21$ or $6 < m < 21$, are subject to reporting under this section for the significant new uses described in paragraph (b)(2) of this section.

(i) $CF_3(CF_2)_n$-COO-M where M = H^+ or any other group where a formal dissociation can be made;

(ii) $CF_3(CF_2)_n$-CH = CH_2;

(iii) $CF_3(CF_2)_n$-C(=O)-X where X is any chemical moiety;

(iv) $CF_3(CF_2)_m$-CH_2-X where X is any chemical moiety; and

(v) $CF_3(CF_2)_m$-Y-X where Y = non-S, non-N heteroatom and where X is any chemical moiety.

(2) The significant new use for chemical substances identified in paragraph (b)(1) of this section are: Manufacture (including import) or processing for use as part of carpets or to treat carpets (e.g., for use in the carpet aftercare market), except as noted in paragraph (b)(3) of this section.

(3) Manufacture (including import) or processing of the following two long-chain perfluoroalkyl carboxylate (LCPFAC) chemical substances for use as a surfactant in aftermarket carpet cleaning products shall not be considered a significant new use subject to reporting under this section:

(i) Phosphonic acid, perfluoro-C6-12-alkyl derivs. (CAS No. 68412–68–0) and

(ii) Phosphinic acid, bis(perfluoro-C6-C12-alkyl) derivs. (CAS No. 68412–69–1).

(c) *Specific requirements.* The provisions of subpart A of this part apply to this section except as modified by this paragraph (c).

(1) *Revocation of certain notification exemptions.* With respect to imports of carpets, the provisions of § 721.45(f) do not apply to this section. A person who imports a chemical substance identified in this section as part of a carpet is not exempt from submitting a significant new use notice. The other provision of § 721.45(f), respecting processing a chemical substance as part of an article, remains applicable.

(2) [Reserved]

[FR Doc. 2013–24651 Filed 10–21–13; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 51

[EPA–HQ–OAR–2010–0605; FRL–9900–53–OAR]

RIN 2060–AR70

Air Quality: Revision to Definition of Volatile Organic Compounds—Exclusion of 2,3,3,3-tetrafluoropropene

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: The EPA is taking final action to revise the regulatory definition of volatile organic compounds (VOCs) for purposes of preparing state implementation plans (SIPs) to attain the national ambient air quality standards (NAAQS) for ozone under title I of the Clean Air Act (CAA). This final action adds 2,3,3,3-tetrafluoropropene (also known as HFO–1234yf) to the list of compounds excluded from the regulatory definition of VOCs on the basis that this compound makes a negligible contribution to tropospheric ozone formation. As a result, if you are subject to certain federal regulations limiting emissions of VOCs, your emissions of HFO–1234yf may not be regulated for some purposes. This action may also affect whether HFO–1234yf is considered a VOC for state regulatory purposes, depending on whether the state relies on the EPA's regulatory definition of VOCs.

DATES: This rule is effective on November 21, 2013.

ADDRESSES: The EPA has established a docket for this action under Docket ID

No. EPA–HQ–OAR–2010–0605. All documents in the docket are listed on the *www.regulations.gov* Web site. Although listed in the index, some information is not publicly available, i.e., confidential business information (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 *www.regulations.gov* or in hard copy at the Docket ID No. EPA–HQ–OAR–2010–0605, EPA/DC, EPA West, Room 3334, 1301 Constitution Avenue, Northwest, Washington, DC. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566–1744 and the telephone number for the Air and Radiation Docket Information Center is (202) 566–1742. For additional information about the EPA's public docket, visit the EPA Docket Center homepage at: *http://www.epa.gov/epahome/dockets.htm.*

FOR FURTHER INFORMATION CONTACT: David Sanders, Office of Air Quality Planning and Standards, Air Quality Policy Division, Mail Code C539–01, Research Triangle Park, NC 27711; telephone: (919) 541–3356; fax number: 919–541–0824; email address: *sanders.dave@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this action apply to me?

Entities potentially affected by this final rule include, but are not necessarily limited to, states (typically state air pollution control agencies) that control VOCs; manufacturers, importers or processors of this compound; and industries involved in the manufacture or servicing of automobiles or automotive air conditioning systems. This action has no substantial direct effects on industry because it does not impose any new mandates on these entities, but, to the contrary, removes HFO–1234yf from the regulatory definition of VOCs. The use of this compound is subject to restrictions under the CAA and the Toxic Substances Control Act (TSCA). Specifically, the use of this compound as an aerosol propellant, blowing agent, or refrigerant, or any other use in which it would substitute for chlorofluorocarbons, hydrochlorofluorocarbons or their substitutes, is prohibited unless such use has been approved under the Significant New Alternatives Policy (SNAP) program (CAA § 612; 40 CFR 82 subpart G). The SNAP program has issued a final approval for HFO–1234yf only as a substitute for use in the motor vehicle air conditioning end-use as a replacement for ozone depleting substances (76 FR 17488, March 29, 2011; revised at 77 FR 17344, March 26, 2012). Furthermore, any significant new use of HFO–1234yf is subject to a reporting requirement according to a significant new use rule (SNUR) established under TSCA (75 FR 65987, October 27, 2010; proposed for amendment at 78 FR 32617, May 31, 2013).

B. How is this preamble organized?

The information presented in this preamble is organized as follows:

I. General Information
  A. Does this action apply to me?
  B. How is this preamble organized?
II. Background
  A. The EPA's VOC Exemption Policy
  B. Petition To List HFO–1234yf as an Exempt Compound
  C. Contribution to Tropospheric Ozone
  D. Health and Environmental Risks
III. Proposed Action and Response to Comments
IV. Final Action
V. Statutory and Executive Order Reviews
  A. Executive Order 12866: Regulatory Planning and Review and Executive Order 13563: Improving Regulation and Regulatory Review
  B. Paperwork Reduction Act
  C. Regulatory Flexibility Act
  D. Unfunded Mandates Reform Act
  E. Executive Order 13132: Federalism
  F. Executive Order 13175: Consultation and Coordination With Indian Tribal Governments
  G. Executive Order 13045: Protection of Children From Environmental Health and Safety Risks
  H. Executive Order 13211: Actions That Significantly Affect Energy Supply, Distribution, or Use
  I. National Technology Transfer and Advancement Act
  J. Executive Order 12898: Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations
  K. Congressional Review Act
  L. Judicial Review

II. Background

A. The EPA's VOC Exemption Policy

Tropospheric ozone, commonly known as smog, is formed when VOCs and nitrogen oxides (NO_X) react in the atmosphere in the presence of sunlight. Because of the harmful health effects of ozone, the EPA and state governments limit the amount of VOCs that can be released into the atmosphere. VOCs are those organic compounds of carbon that form ozone through atmospheric photochemical reactions. Different VOCs have different levels of reactivity. That is, they do not react to form ozone at the same speed or do not form ozone to the same extent. Some VOCs react slowly or form less ozone; therefore, changes in their emissions have less and, in some cases, very limited effects on local or regional ozone pollution episodes. It has been the EPA's policy that organic compounds with a negligible level of reactivity should be excluded from the regulatory definition of VOCs so as to focus VOC control efforts on compounds that do significantly increase ozone concentrations. The EPA also believes that exempting such compounds creates an incentive for industry to use negligibly reactive compounds in place of more highly reactive compounds that are regulated as VOCs. The EPA lists compounds that it has determined to be negligibly reactive in its regulations as being excluded from the regulatory definition of VOCs (40 CFR 51.100(s)).

Section 302(s) of the CAA specifies that the EPA has the authority to define the meaning of ''VOC,'' and hence what compounds shall be treated as VOCs for regulatory purposes. The policy of excluding negligibly reactive compounds from the regulatory definition of VOCs was first set forth in the ''Recommended Policy on Control of Volatile Organic Compounds'' (42 FR 35314, July 8, 1977) and was supplemented most recently with the ''Interim Guidance on Control of Volatile Organic Compounds in Ozone State Implementation Plans'' (Interim Guidance) (70 FR 54046, September 13, 2005). The EPA uses the reactivity of ethane as the threshold for determining whether a compound has negligible reactivity. Compounds that are less reactive than, or equally reactive to, ethane under certain assumed conditions may be deemed negligibly reactive and therefore suitable for exemption from the regulatory definition of VOCs. Compounds that are more reactive than ethane continue to be considered VOCs for regulatory purposes and therefore are subject to control requirements. The selection of ethane as the threshold compound was based on a series of smog chamber experiments that underlay the 1977 policy.

The EPA has used three different metrics to compare the reactivity of a specific compound to that of ethane: (i) The reaction rate constant (known as k_{OH}) with the hydroxyl radical (OH); (ii) the maximum incremental reactivity (MIR) on a reactivity per unit mass basis; and (iii) the MIR expressed on a reactivity per mole basis. If a compound is equally or less reactive than ethane on

any one of these three metrics, then under the Interim Guidance it is considered by the EPA to be negligibly reactive in forming ozone. A full description of each metric and how it is derived can be found in the proposal notice for this action (76 FR 64059, October 17, 2011) and is not repeated here.

B. Petition To List HFO–1234yf as an Exempt Compound

Honeywell Inc. submitted a petition to the EPA on June 29, 2009, requesting that HFO–1234yf (CAS 754–12–1) be exempted from VOC control based on its low reactivity relative to ethane. The petitioner indicated that HFO–1234yf may be used as a refrigerant for refrigeration and air-conditioning. Honeywell also indicated that it expects HFO–1234yf to be widely used as a replacement for HFC–134a in motor vehicle air-conditioners (MVAC), and that it has been specifically developed for this purpose. Honeywell asserts that as a replacement for use in motor vehicle air conditioners, there will be an environmental advantage in that the global warming potential (GWP) of HFO–1234yf is 4, which is substantially lower than the GWP for HFC–134a (100-year GWP = 1430), which HFO–1234yf is designed to replace.

C. Contribution to Tropospheric Ozone

Detailed information on the ozone reactivity of HFO–1234yf was presented in the proposal notice for this action (76 FR 64059, October 17, 2011) and is summarized here.

HFO–1234yf has a higher k_{OH} value than ethane, meaning that it initially reacts more quickly in the atmosphere than ethane. A molecule of HFO–1234yf is also more reactive than a molecule of ethane. However, a gram of HFO–1234yf has the same reactivity as a gram of ethane.

Under the Interim Guidance, if a compound is equally or less reactive than ethane on any one or more of the three reactivity metrics, it is considered by the EPA to be negligibly reactive in forming ozone. The data submitted by Honeywell support the conclusion that the reactivity of HFO–1234yf is equal to or lower than that of ethane on a mass MIR basis. Thus, HFO–1234yf is eligible for exemption from the regulatory definition of VOCs under the terms of the Interim Guidance.

The EPA has also considered the results of a recent peer-reviewed study of the increase in ozone that may occur as a result of the substitution of HFO–1234yf for HFC–134a.[1] The additional information from this study shows that, under the assumptions used in the air quality modeling, the use of HFO–1234yf would produce slightly more ozone than continued use of HFC–134a, but the increase is unlikely to have a significant impact on local air quality. The EPA believes the very small increase (0.01 percent) in ozone concentrations that may result from encouraging the use of HFO–1234yf via an exemption from the regulatory definition of VOC does not constitute a sufficient reason to depart from the Interim Guidance's reliance on MIR comparisons to ethane as the basis for approving VOC exemption requests.

In summary, the EPA believes that this chemical qualifies as negligibly reactive with respect to its contribution to tropospheric ozone formation.

D. Health and Environmental Risks

The preamble to the proposal notice for this action (76 FR 64059, October 17, 2011) provided background information on the Premanufacture Notice (PMN) and SNAP reviews of HFO–1234yf. This information is summarized and updated here.

After reviewing available information and public comments regarding its safety, health and environmental risks and benefits under the SNAP program, the EPA issued a final listing on March 29, 2011, for HFO–1234yf as an acceptable substitute for use of ozone depleting substances in MVAC, subject to specific use conditions, in place of CFC–12 and HFC–134a (76 FR 174888).[2]

In the SNAP review, the EPA found that the use of HFO–1234yf in new passenger vehicle and light-duty truck MVAC systems, subject to the use conditions, does not present a significantly greater risk to human health and the environment compared to the currently approved MVAC alternatives. The 2011 SNAP rule for HFO–1234yf was amended on March 26, 2012, to incorporate by reference a revised standard for connecting fittings from SAE International (77 FR 17344).

Under the TSCA, the EPA in 2010 completed a pre-manufacture review for HFO–1234yf and issued a SNUR (75 FR 65987, October 27, 2010). The 2010 SNUR for HFO–1234yf requires significant new use notification to the EPA at least 90 days before manufacturing or processing for uses beyond air conditioning in new passenger cars and vehicles or commercial servicing of new passenger cars and vehicles originally designed for HFO–1234yf. In particular, under the 2010 rule, notification is required before HFO–1234yf can be sold directly to consumers for the purpose of servicing the MVAC system of their own vehicles. During the notification period, the EPA can take further action to prevent any unreasonable risk. This precautionary step was taken because of certain animal exposure studies indicating toxicity, and the possibility that consumers might be exposed to levels of HFO–1234yf that would cause an unreasonable health risk. However, based on information submitted subsequent to the 2010 rule that in the EPA's view resolves the issue pertaining to the potential risks from consumer exposure that was present in 2010, the EPA has proposed to amend the SNUR for HFO–1234yf such that notification would not be required prior to sale of HFO–1234yf-containing consumer products used to recharge the MVAC systems in passenger cars and vehicles originally designed for HFO–1234yf (78 FR 32617, May 31, 2013).

III. Proposed Action and Response to Comments

Based on the mass MIR value for HFO–1234yf being equal to or less than that of ethane, the EPA proposed to find that HFO–1234yf is ''negligibly reactive'' and to exempt HFO–1234yf from the regulatory definition of VOCs at 40 CFR 51.100(s) (76 FR 64059, October 17, 2011).[3]

There were two comments regarding HFO–1234yf submitted to the docket during the public comment period. One comment was from the petitioner, Honeywell. Another comment came from the Alliance of Automobile Manufacturers. Both comments were in favor of exempting HFO–1234yf. The EPA acknowledges the commenters' support for the proposed action.

IV. Final Action

The EPA is taking final action to approve the petition for exemption of HFO–1234yf from the regulatory definition of VOCs.

If an entity uses or produces HFO–1234yf and is subject to the EPA

[1] D. Luecken, R. Waterland, S. Papasavva, K. Taddonio, W. Hutzell, J. Rugh, and S. Andersen. Ozone and TFA Impacts in North America from Degradation of 2,3,3,3-Tetrafluoropropene (HFO–1234yf), A Potential Greenhouse Gas Replacement. Environ. Sci. Technol. 44, pp. 343–349. *See* 76 FR 64059 (October 17, 2011). *See* 76 FR 64059 (October 17, 2011) at 64062 for additional description of this study and the EPA's assessment of it.

[2] HFC–134a, which is not an ozone depleting substance, has already largely replaced CFC–12 in motor vehicle air conditioners.

[3] In this proposal, we also proposed to exempt *trans*-1,3,3,3-tetrafluoropropene (also known as HFO–1234ze) from the definition of VOC. We have taken final action separately for HFO–1234ze on that proposal. 77 FR 37610, June 22, 2012.

regulations limiting the use of VOC in a product other than an aerosol coating, limiting the VOC emissions from a facility, or otherwise controlling the use of VOC for purposes related to attaining the ozone NAAQS, then the compound will not be counted as a VOC in determining whether these regulatory obligations have been met. Emissions of this compound will not be considered in determining whether a proposed new or modified source triggers the applicability of Prevention of Significant Deterioration (PSD) requirements, in areas where the PSD program is implemented by the EPA or a delegated state, local or tribal agency. This action may also affect whether HFO–1234yf is considered a VOC for state regulatory purposes to reduce ozone formation, depending on whether a state relies on the EPA's regulatory definition of VOCs. States are not obligated to exclude from control as VOCs those compounds that the EPA has found to be negligibly reactive. However, states may not take credit for controlling these compounds in their ozone control strategies.

This action is consistent with the Interim Guidance in that one of the three reactivity metric values for HFO–1234yf compares favorably to the corresponding value for ethane. This action is also supported by the EPA's finding during PMN review that HFO–1234yf did not present an unreasonable risk to human health or the environment from the expected uses of the substance, our finding in the SNAP program review of this chemical that use of this chemical in currently-allowed applications poses lower or comparable overall risk to human health and the environment than other acceptable options for the same uses and our confidence that the SNAP program, and the requirements under TSCA will prevent the use of this chemical in any additional applications where such use would pose a significant risk to human health or the environment.

V. Statutory and Executive Order Reviews

A. Executive Order 12866: Regulatory Planning and Review and Executive Order 13563: Improving Regulation and Regulatory Review

This action is not a ''significant regulatory action'' under the terms of Executive Order 12866 (58 FR 51735, October 4, 1993) and is therefore not subject to review under Executive Orders 12866 and 13563 (76 FR 3821, January 21, 2011).

B. Paperwork Reduction Act

This action does not impose an information collection burden under the provisions of the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.* Burden is defined at 5 CFR 1320.3(b). It does not contain any recordkeeping or reporting requirement.

C. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) generally requires an agency to prepare a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements under the Administrative Procedure Act or any other statute unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. Small entities include small businesses, small organizations and small governmental jurisdictions.

For purposes of assessing the impacts of this action on small entities, small entity is defined as: (1) A small business as defined by the Small Business Administration (SBA) regulation (see 13 CFR 121.201); (2) a small governmental jurisdiction that is a government of a city, county, town, school district or special district with a population of less than 50,000; and (3) a small organization that is any not-for-profit enterprise which is independently owned and operated and is not dominant in its field.

After considering the economic impacts of today's final rule on small entities, I certify that this action will not have a significant economic impact on a substantial number of small entities. In determining whether a rule has a significant economic impact on a substantial number of small entities, the impact of concern is any significant adverse economic impact on small entities, since the primary purpose of the regulatory flexibility analyses is to identify and address regulatory alternatives ''which minimize any significant economic impact of the rule on small entities.'' 5 U.S.C. 603 and 604. Thus, an agency may certify that a rule will not have a significant economic impact on a substantial number of small entities if the rule relieves regulatory burden, or otherwise has a positive economic effect on all of the small entities subject to the rule. This final rule removes HFO–1234yf from the regulatory definition of VOCs and thereby relieves users from requirements to control emissions of the compound. We have, therefore, concluded that today's final rule will relieve regulatory burden for all affected small entities.

D. Unfunded Mandates Reform Act

This action contains no federal mandates under the provisions of Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), 2 U.S.C. 1531–1538 for state, local or tribal governments or the private sector. The action imposes no enforceable duty on any state, local or tribal governments or the private sector. Therefore, this action is not subject to the requirements of sections 202 and 205 of the UMRA.

This action is also not subject to the requirements of section 203 of UMRA because it contains no regulatory requirements that might significantly or uniquely affect small governments. This final rule removes HFO–1234yf from the regulatory definition of VOCs and thereby relieves users of the compound from requirements to control emissions of the compound.

E. Executive Order 13132: Federalism

This action does not have federalism implications. It will not have substantial direct effects 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, as specified in Executive Order 13132. This final rule removes HFO–1234yf from the regulatory definition of VOCs and thereby relieves users from requirements to control emissions of the compound. Thus, Executive Order 13132 does not apply to this rule.

F. Executive Order 13175: Consultation and Coordination With Indian Tribal Governments

This action does not have tribal implications, as specified in Executive Order 13175 (65 FR 67249, November 9, 2000). It would not have substantial direct effects on tribal governments, 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, as specified in Executive Order 13175. Thus, Executive Order 13175 does not apply to this rule.

G. Executive Order 13045: Protection of Children From Environmental Health and Safety Risks

This action is not subject to EO 13045 (62 FR 19885, April 23, 1997) because it is not economically significant as defined in EO 12866. While this final rule is not subject to the Executive Order, the EPA has reason to believe that ozone has a disproportionate effect on active children who play outdoors (62 FR 38856; 38859, July 18, 1997). The

EPA has not identified any specific studies on whether or to what extent HFO–1234yf may affect children's health.

H. Executive Order 13211: Actions That Significantly Affect Energy Supply, Distribution or Use

This action is not subject to Executive Order 13211 (66 FR 28355 (May 22, 2001)), because it is not a significant regulatory action under Executive Order 12866.

I. National Technology Transfer and Advancement Act

Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (''NTTAA''), Public Law 104–113, section 12(d), (15 U.S.C. 272 note) directs the EPA to use voluntary consensus standards in its regulatory activities unless to do so would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (e.g., materials specifications, test methods, sampling procedures and business practices) that are developed or adopted by voluntary consensus standards bodies. The NTTAA directs the EPA to provide Congress, through OMB, explanations when the agency decides not to use available and applicable voluntary consensus standards. This rulemaking does not involve technical standards. Therefore, the EPA has not considered the use of any voluntary consensus standards.

J. Executive Order 12898: Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations

Executive Order (EO) 12898 (59 FR 7629, February 16, 1994) establishes federal executive policy on environmental justice. Its main provision directs federal agencies, to the greatest extent practicable and permitted by law, to make environmental justice part of their mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of their programs, policies and activities on minority populations and low-income populations in the United States.

The EPA has determined that this final rule will not have disproportionately high and adverse human health or environmental effects on minority or low-income populations because it will not affect the level of protection provided to human health or the environment.

K. Congressional Review Act

The Congressional Review Act, 5 U.S.C. 801 *et seq.,* as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. The EPA will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. A major rule cannot take effect until 60 days after it is published in the **Federal Register**. This action is not a ''major rule'' as defined by 5 U.S.C. 804(2). This rule will be effective on November 21, 2013.

L. Judicial Review

Under section 307(b)(1) of the CAA, petitions for judicial review of this action must be filed in the United States Court of Appeals for the District of Columbia Circuit Court within 60 days from the date the final action is published in the **Federal Register**.

Filing a petition for review by the Administrator of this final action does not affect the finality of this action for the purposes of judicial review nor does it extend the time within which a petition for judicial review must be final, and shall not postpone the effectiveness of such action. Thus, any petitions for review of this action related to the exemption of HFO–1234yf from the regulatory definition of VOCs must be filed in the Court of Appeals for the District of Columbia Circuit within 60 days from the date final action is published in the **Federal Register**.

List of Subjects in 40 CFR Part 51

Environmental protection, Administrative practice and procedure, Air pollution control, Ozone, Reporting and recordkeeping requirements, Volatile organic compounds.

Dated: September 19, 2013.

Gina McCarthy,

EPA Administrator.

For reasons set forth in the preamble, part 51 of chapter I of title 40 of the Code of Federal Regulations is amended as follows:

PART 51—REQUIREMENTS FOR PREPARATION, ADOPTION, AND SUBMITTAL OF IMPLEMENTATION PLANS

Subpart F—[Amended]

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

Authority: 42 U.S.C. 7401, 7411, 7412, 7413, 7414, 7470–7479, 7501–7508, 7601, and 7602.

§ 51.100 [Amended]

■ 2. Section 51.100 is amended at the end of paragraph (s)(1) introductory text by removing the words ''and perfluorocarbon compounds which fall into these classes:'' and adding in their place the words ''2,3,3,3-tetrafluoropropene; and perfluorocarbon compounds which fall into these classes:''.

[FR Doc. 2013–23783 Filed 10–21–13; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R03–OAR–2013–0499; FRL–9901–35–Region3]

Approval and Promulgation of Air Quality Implementation Plans; District of Columbia; Infrastructure Requirements for the 2008 Lead National Ambient Air Quality Standards and State Board Requirements

AGENCY: Environmental Protection Agency (EPA).

ACTION: Direct final rule.

SUMMARY: EPA is taking direct final action to approve two State Implementation Plan (SIP) revisions submitted by the District of Columbia (hereafter ''the District'') pursuant to the Clean Air Act (CAA). Whenever new or revised national ambient air quality standards (NAAQS) are promulgated, the CAA requires states to submit a plan for the implementation, maintenance, and enforcement of such NAAQS. The plan is required to address basic program elements including, but not limited to, regulatory structure, monitoring, modeling, legal authority, and adequate resources necessary to assure attainment and maintenance of the NAAQS. These elements are referred to as infrastructure requirements. The District made a submittal addressing the infrastructure requirements for the 2008 lead (Pb) NAAQS and a separate submittal addressing requirements in

relation to State Boards. EPA is approving portions of the infrastructure requirements for the 2008 lead NAAQS and the requirements addressing State Boards for the District in accordance with the requirements of the CAA.

DATES: This rule is effective on December 23, 2013 without further notice, unless EPA receives adverse written comment by November 21, 2013. If EPA receives such comments, it will publish a timely withdrawal of the direct final rule in the **Federal Register** and inform the public that the rule will not take effect.

ADDRESSES: Submit your comments, identified by Docket ID Number EPA–R03–OAR–2013–0499 by one of the following methods:

A. *www.regulations.gov*. Follow the on-line instructions for submitting comments.

B. *Email: fernandez.cristina@epa.gov*.

C. *Mail:* EPA–R03–OAR–2013–0499, Cristina Fernandez, Associate Director, Office of Air Program Planning, Mailcode 3AP30, U.S. Environmental Protection Agency, Region III, 1650 Arch Street, Philadelphia, Pennsylvania 19103.

D. *Hand Delivery:* At the previously-listed EPA Region III address. 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–R03–OAR–2013–0499. 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 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, 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 electronic docket are listed in the *www.regulations.gov* index. Although listed in the index, some information is not publicly available, i.e., CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically in *www.regulations.gov* or in hard copy during normal business hours at the Air Protection Division, U.S. Environmental Protection Agency, Region III, 1650 Arch Street, Philadelphia, Pennsylvania 19103. Copies of the State submittal are available at the District of Columbia Department of the Environment, Air Quality Division, 1200 1st Street NE., 5th floor, Washington, DC 20002.

FOR FURTHER INFORMATION CONTACT: Emlyn Vélez-Rosa, (215) 814–2038, or by email at *velez-rosa.emlyn@epa.gov*.

SUPPLEMENTARY INFORMATION: On July 18, 2013, the District Department of the Environment (DDOE) submitted a revision to the District's SIP to satisfy the requirements of section 110(a)(2) of the CAA for the 2008 lead NAAQS (the infrastructure submittal). On this same date, DDOE submitted a revision to the District SIP addressing the State Board requirements under sections 128 and 110(a)(2)(E)(ii) of the CAA.

I. Background

On October 15, 2008, EPA substantially strengthened the primary and secondary lead NAAQS, revising the level of the primary (health-based) standard from 1.5 micrograms per cubic meter ($\mu g/m^3$) to 0.15 $\mu g/m^3$, measured as total suspended particles (TSP) and not to be exceeded with an averaging time of a rolling 3-month period. EPA also revised the secondary (welfare-based) standard to be identical to the primary standard, as well as the associated ambient air monitoring requirements. *See* 40 CFR 50.16.

Section 110(a) of the CAA requires states to submit SIPs to provide for the implementation, maintenance, and enforcement of a new or revised NAAQS within three years following the promulgation of such NAAQS or within such shorter period as EPA may prescribe. The contents of that submission may vary depending upon the facts and circumstances. In particular, the data and analytical tools available at the time the state develops and submits the SIP for a new or revised NAAQS affect the content of the submission. The contents of such SIP submission may also vary depending upon what provisions the state's existing SIP already contains.

Pursuant to section 110(a)(1) of the CAA, states are required to submit SIPs meeting the applicable requirements of section 110(a)(2) within three years after promulgation of a new or revised NAAQS or within such shorter period as EPA may prescribe. Section 110(a)(1) provides the procedural and timing requirements for SIPs and section 110(a)(2) requires states to address basic SIP elements such as requirements for monitoring, basic program requirements and legal authority that are designed to assure attainment and maintenance of the NAAQS. More specifically, section 110(a)(2) lists specific elements that states must meet for ''infrastructure'' SIP requirements related to a newly established or revised NAAQS.

For the 2008 lead NAAQS, states typically have met many of the basic program elements required in section 110(a)(2) through earlier SIP submissions in connection with previous NAAQS. Nevertheless, pursuant to section 110(a)(1), states have to review and revise, as appropriate, their existing SIPs to ensure that the SIPs are adequate to address the 2008 lead NAAQS. To assist states in meeting this statutory requirement, EPA issued a guidance on October 14, 2011, entitled, ''Guidance on Infrastructure State Implementation Plan (SIP) Elements Required Under sections 110(a)(1) and 110(a)(2) for the 2008 Lead (Pb) National Ambient Air Quality Standards (NAAQS)'' (hereafter the ''2011 Lead Infrastructure Guidance''), which lists the basic elements that states should include in their SIPs for the 2008 lead NAAQS.

Section 110(a)(2)(E)(ii) requires the states to satisfy for each NAAQS the requirements of section 128 of the CAA in relation to State Boards. Section 128(a) requires SIPs to contain provisions that: (1) Any board or body which approves permits or enforcement orders under the CAA have at least a majority of its members represent the public interest and not derive any significant portion of their income from persons subject to permits or enforcement orders under the CAA; and (2) any potential conflict of interest by members of such board or body or the

head of an executive agency with similar powers be adequately disclosed.

II. Summary of SIP Revision

A. Infrastructure Requirements

On July 18, 2013, DDOE provided a submittal to satisfy the requirements of section 110(a)(2) of the CAA for the 2008 lead NAAQS. This submittal addresses the following infrastructure elements, which EPA is proposing to approve: CAA section 110(a)(2)(A), (B), (C), (D)(i)(I), (D)(i)(II), (D)(ii), (E)(i), (E)(iii), (F), (G), (H), (J), (K), (L), and (M), or portions thereof. The infrastructure element (E)(ii) requirements, pertaining to State Boards, are satisfied by a separate submittal which was received by EPA on the same date and it is addressed in section II.B of this rulemaking action. The District did not submit element (I) which pertains to the nonattainment requirements of part D, Title I of the CAA, since this element is not required to be submitted by the 3-year submission deadline of section 110(a)(1), and will be addressed in a separate process, if necessary.

While the District failed to submit a complete SIP addressing the portions of (C), (D)(i)(II), (D)(ii), and (J) relating to the part C, Title I of the CAA for the 2008 lead NAAQS, EPA recognizes that such requirements have already been addressed by a Federal Implementation Plan (FIP) that remains in place, containing the Prevention of Significant Deterioration (PSD) permit program. EPA concludes that such findings of incompleteness would not trigger any additional FIP obligation for the District with respect to these infrastructure requirements. Therefore, EPA is not taking any action for the 2008 lead NAAQS for elements (C), (D)(i)(II), (D)(ii), and (J), for the portions which relate to the PSD permit program required by part C, Title I of the CAA.

In accordance with the decision of the U.S. Court of Appeals for the D.C. Circuit, EPA at this time is not treating the 110(a)(2)(D)(i)(I) SIP submission from the District as a required SIP submission. *See EME Homer City Generation, LP* v. *EPA,* 696 F.3d 7 (D.C. Cir. 2012), *cert. granted,* 2013 U.S. Lexis 4801 (2013). However, even if the submission is not considered to be ''required,'' EPA must act on the 110(a)(2)(D)(i)(I) SIP submission from the District because section 110(k)(2) of the CAA requires EPA to act on all SIP submissions. Unless the *EME Homer City* decision is reversed or otherwise modified by the Supreme Court, states are not required to submit 110(a)(2)(D)(i)(I) SIPs until EPA has quantified their obligations under that section. In this action, EPA is acting on the District's 110(a)(2)(D)(i)(I) submission.

A detailed summary of EPA's review and rationale for approving the District's infrastructure submittal may be found in the Technical Support Document (TSD) for this rulemaking action, which is available online at *www.regulations.gov*, Docket number EPA–R03–OAR–2013–0499.

B. State Board Requirements

On July 18, 2013, DDOE also submitted a separate SIP revision addressing the requirements of CAA section 128 in relation to the State Board requirements. This submission also satisfies the State Board requirements under 110(a)(2)(E)(ii) for the 2008 lead NAAQS. The SIP revision consists of updating the existing provisions in the District SIP which satisfy the obligations under sections 128 and 110(a)(2)(E)(ii). In this SIP revision, DDOE states that the relevant section 128 requirements are currently found in chapter 11A ''Government Ethics and Accountability'' of title I ''Government Organization'' of the District of Columbia Official Code (2012 Supp.), which the District through DDOE is requesting EPA to approve as part of the District's SIP. The conduct of the DDOE Director, and that of his employees, is currently subject to the requirements of title I, chapter 11A of the District of Columbia Official Code. All District employees are required to follow the laws in title I, chapter 11A of the District of Columbia Official Code regarding employee conduct.

Specifically, the SIP revision consists of incorporating into the SIP the following provisions of title I, chapter 11A of the District of Columbia Official Code, specifically section 1–1161.01 (''Definitions''); section 1–1162.23 (''Conflicts of Interest''); section 1–1162.24 (''Public Reporting''); and section 1–1162.25 (''Confidential Disclosure of Financial Interest''). These provisions supersede the section 128 provisions previously approved in the SIP, and DDOE requests as part of this SIP revision the removal of the prior provisions which addressed section 128 requirements from the District's SIP. *See* (49 FR 22810, June 1, 1984), as codified in 40 CFR 50.470(e).

The requirements of section 128(a)(1) are not applicable to the District because it does not have any board or body which approves air quality permits or enforcement orders. The requirements of section 128(a)(2), however, are applicable to the District because DDOE's Director (i.e., the head of an executive agency) has the similar powers discussed in section 128(a)(2). DDOE approves all CAA permits and enforcement orders in the District. DDOE is an executive agency that acts through its Director or a delegated state employee subordinate.

EPA finds that the measures in these provisions (sections 1–1161.01, 1–1162.23, 1–1162.24, and 1–1162.25 of the District of Columbia Official Code) are adequate to meet the District's obligations under section 128 as well as the infrastructure requirements of section 110(a)(2)(E)(ii). EPA also finds that the submittal specifically meets the infrastructure requirements of section 110(a)(2)(E)(ii) for the 2008 lead NAAQS.

III. Final Action

EPA is approving the District's two SIP revisions. EPA is approving the District's SIP revision addressing the following section 110(a)(2) elements for the 2008 lead NAAQS: (A), (B), (C), (D)(i)(I), (D)(i)(II), (D)(ii), (E)(i), (E)(iii), (F), (G), (H), (J), (K), (L), and (M), or portions thereof. This SIP revision provides the basic program elements specified in section 110(a)(2) necessary to implement, maintain, and enforce the 2008 lead NAAQS. This action does not include section 110(a)(2)(I) of the CAA which pertains to the nonattainment requirements of part D, title I of the CAA. EPA is also approving the District's SIP revision addressing the requirements of section 128. This SIP revision, which consists of incorporating the relevant provisions of title I, chapter 11A of the District of Columbia Official Code (2012 Supp.) in the District SIP and removing superseded provisions in the SIP under 40 CFR 50.470(e), meets the requirements of section 128. EPA is also approving this SIP revision as meeting the infrastructure requirements of section 110(a)(2)(E)(ii) for the 2008 lead NAAQS. The SIP revisions were formally and individually submitted on July 18, 2013. EPA is publishing this rule without prior proposal because EPA views this as a noncontroversial amendment and anticipates no adverse comment. However, in the ''Proposed Rules'' section of today's **Federal Register**, EPA is publishing a separate document that will serve as the proposal to approve the SIP revision if adverse comments are filed. This rule will be effective on December 23, 2013 without further notice unless EPA receives adverse comment by November 21, 2013. If EPA receives adverse comment, EPA will publish a timely withdrawal in the **Federal Register** informing the public that the rule will not take effect. EPA will address all public comments

in a subsequent final rule based on the proposed rule. EPA will not institute a second comment period on this action. Any parties interested in commenting must do so at this time.

IV. Statutory and Executive Order Reviews

A. General Requirements

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

- Is not a ''significant regulatory action'' subject to review by the Office of Management and Budget under Executive 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 CAA; 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.

B. Submission to Congress and the Comptroller General

The Congressional Review Act, 5 U.S.C. 801 *et seq.,* as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this action and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. A major rule cannot take effect until 60 days after it is published in the **Federal Register**. This action is not a ''major rule'' as defined by 5 U.S.C. 804(2).

C. Petitions for Judicial Review

Under section 307(b)(1) of the CAA, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by December 23, 2013. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this action for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. Parties with objections to this direct final rule are encouraged to file a comment in response to the parallel notice of proposed rulemaking for this action published in the proposed rules section of today's **Federal Register**, rather than file an immediate petition for judicial review of this direct final rule, so that EPA can withdraw this direct final rule and address the comment in the proposed rulemaking action. This action, which satisfies certain infrastructure requirements of section 110(a)(2) of the CAA for the 2008 lead NAAQS and State Board requirements under section 128 of the CAA for the District, may not be challenged later in proceedings to enforce its requirements. (*See* section 307(b)(2)).

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Incorporation by reference, Intergovernmental relations, Lead, Reporting and recordkeeping requirements.

Authority: 42 U.S.C. 7401 *et seq.*

Dated: September 13, 2013.

W.C. Early,

Acting Regional Administrator, Region III.

40 CFR part 52 is amended as follows:

PART 52—APPROVAL AND PROMULGATION OF IMPLEMENTATION PLANS

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

Authority: 42 U.S.C. 7401 *et seq.*

Subpart J—District of Columbia

■ 2. § 52.470 is amended by:

■ a. Revising the table heading in paragraph (c) to read EPA-Approved Regulations and Statutes in the District of Columbia SIP.

■ b. Adding at the end of the table in paragraph (c) headings for D.C. Official Code and Title I—Chapter 11A Government Ethics and Accountability, and entries for Sections 1–1161.01 and 1–1161.23 through 1–1161.25.

■ c. In paragraph (e):

■ i. Removing from the table the entry ''Revisions for conflict of interest procedures [CAA Section 128 SIP]''.

■ ii. Adding at the end of the table an entry ''Section 110(a)(2) Infrastructure Requirements for the 2008 Lead NAAQS''.

■ iii. Adding at the end of the table an entry ''CAA section 128 requirements in relation to State Boards''.

The amendments read as follows:

§ 52.470 Identification of plan.

* * * * *

(c) * * *

EPA-APPROVED REGULATIONS AND STATUTES IN THE DISTRICT OF COLUMBIA SIP

State citation	Title/subject	State effective date	EPA approval date	Additional explanation
* *	*	*	*	* *
D.C. Official Code				
Title I—Chapter 11A Government Ethics and Accountability				
Section 1–1161.01	Definitions	4/27/12	10/22/13 *[Insert page number where the document begins].*	
Section 1–1162.23	Conflicts of Interest	4/27/12	10/22/13 *[Insert page number where the document begins].*	
Section 1–1162.24	Public Reporting	4/27/12	10/22/13 *[Insert page number where the document begins].*	
Section 1–1162.25	Confidential Disclosure of Financial Interest.	4/27/12	10/22/13 *[Insert page number where the document begins].*	

* * * * * (e) * * *

Name of non-regulatory SIP revision	Applicable geographic area	State submittal date	EPA approval date	Additional explanation
* *	*	*	*	* *
Section 110(a)(2) Infrastructure Requirements for the 2008 Lead NAAQS.	Statewide	7/18/13	10/22/13 [Insert **Federal Register** page number where the document begins and date].	This action addresses the following CAA elements: 110(a)(2)(A), (B), (C), (D), (E), (F), (G), (H), (J), (K), (L), and (M), or portions thereof.
CAA section 128 requirements in relation to State Boards.	Statewide	7/18/13	10/22/13 *[Insert page number where the document begins].*	

[FR Doc. 2013–24125 Filed 10–21–13; 8:45 am]
BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 52 and 81

[EPA–R05–OAR–2012–0564; FRL–9901–63–Region 5]

Approval and Promulgation of Air Quality Implementation Plans; Ohio; Redesignation of the Canton-Massillon Area to Attainment of the 1997 Annual Standard and the 2006 24-Hour Standard for Fine Particulate Matter

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: EPA is approving, under the Clean Air Act (CAA), the state of Ohio's request to redesignate the Canton-Massillon nonattainment area (Canton), Stark County, to attainment of the 1997 annual and 2006 24-hour national ambient air quality standards (NAAQS or standards) for fine particulate matter ($PM_{2.5}$). On June 26, 2012, the Ohio Environmental Protection Agency (OEPA) submitted a request for EPA to redesignate the Canton nonattainment area. EPA determined that the Canton area has attained the 1997 annual and 2006 24-hour $PM_{2.5}$ standards, and proposed on August 7, 2013, to approve Ohio's request to redesignate the area. EPA is taking final action today on that proposal. EPA is also taking final action in this rulemaking on several related proposals. EPA is approving, as a revision to the Ohio state implementation plan (SIP), the state's plan for maintaining the 1997 annual and 2006 24-hour $PM_{2.5}$ NAAQS in the area through 2025. Finally, EPA finds adequate and is approving Ohio's nitrogen oxides (NO_X) and $PM_{2.5}$ motor vehicle emission budgets (MVEBs) for 2015 and 2025 for the Canton area. EPA is also approving the 2005 and 2008 emissions inventories for primary $PM_{2.5}$, NO_X, sulfur dioxide (SO_2), volatile organic compounds (VOCs) and ammonia for the area. EPA, therefore, grants Ohio's request to redesignate the Canton area to attainment for the 1997 annual and 2006 24-hour $PM_{2.5}$ standards.

DATES: This rule is effective October 22, 2013.

ADDRESSES: EPA has established a docket for this action under Docket Identification EPA–R05–OAR–2012–0564. All documents in these dockets are listed on the *www.regulations.gov* Web site. 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 *www.regulations.gov* or in hard copy at the U.S. Environmental Protection Agency, Region 5, Air and Radiation Division, 77 West Jackson Boulevard, Chicago, Illinois 60604. This facility is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding Federal holidays. We recommend that you telephone Carolyn Persoon at (312) 353–8290 before visiting the Region 5 office.

FOR FURTHER INFORMATION CONTACT: Carolyn Persoon, Environmental Engineer, Control Strategies Section, Air Programs Branch (AR–18J), Environmental Protection Agency, Region 5, 77 West Jackson Boulevard,

Chicago, Illinois 60604, (312) 353–8290, *persoon.carolyn@epa.gov.*

SUPPLEMENTARY INFORMATION:

Throughout this document whenever ''we,'' ''us,'' or ''our'' is used, we mean EPA. This supplementary information section is arranged as follows:

I. What is the background for the actions?
II. What actions is EPA taking?
III. What is EPA's response to comments?
IV. Why is EPA taking these actions?
V. Final Action
VI. Statutory and Executive Order Reviews

I. What is the background for the actions?

On June 26, 2012, OEPA submitted its request to redesignate the Canton nonattainment area to attainment for the 1997 annual and 2006 24-hour $PM_{2.5}$ NAAQS, and for EPA approval of the state's SIP revision containing a maintenance plan for the area. On August 7, 2013, (78 FR 48087), EPA proposed approval of Ohio's redesignation request and plan for maintaining the 1997 annual and 2006 24-hour $PM_{2.5}$ NAAQS. EPA also proposed approval of Ohio's MVEBs for $PM_{2.5}$ and NO_X for 2015 and 2025 for the area. Additional background for today's action is set forth in EPA's August 7, 2013, proposed rulemaking.

II. What actions is EPA taking?

EPA has determined that the entire Canton area is attaining the 1997 annual and 2006 24-hour $PM_{2.5}$ standards (78 FR 48087) and that the Canton area has met the requirements for redesignation under section 107(d)(3)(E) of the CAA. Thus, EPA is approving the requests from the state of Ohio to change the legal designation of the Canton area from nonattainment to attainment for the 1997 annual and 2006 24-hour $PM_{2.5}$ NAAQS. EPA is also taking several additional actions related to Ohio's $PM_{2.5}$ redesignation requests, as discussed below.

EPA is approving Ohio's $PM_{2.5}$ maintenance plan for the Canton area as a revision to the Ohio SIP (such approval being one of the CAA criteria for redesignation to attainment status). The maintenance plan is designed to keep the Canton area in attainment of the 1997 annual and 2006 24-hour $PM_{2.5}$ NAAQS through 2025.

EPA is also approving the 2005 and 2008 emission inventories for primary $PM_{2.5}$,[1] NO_X, SO_2,[2] VOCs, and ammonia documented in Ohio's $PM_{2.5}$ redesignation request and supplemental submittals. These emissions inventories satisfy the requirement in section 172(c)(3) of the CAA for a comprehensive, current emission inventory.

EPA also finds adequate and is approving Ohio's 2015 and 2025 primary $PM_{2.5}$ and NO_X MVEBs for the Canton area. These MVEBs will be used in future transportation conformity analyses for the area.

III. What is EPA's response to comments?

EPA received one supportive comment and no adverse comments on its proposed rulemaking. The comment has been added to the docket.

IV. Why is EPA taking these actions?

EPA has determined that the Canton area has attained the 1997 annual and 2006 24-hour $PM_{2.5}$ NAAQS. EPA has also determined that all other criteria have been met for the redesignation of the Canton area from nonattainment to attainment of the 1997 annual and 2006 24-hour $PM_{2.5}$ NAAQS and for approval of Ohio's maintenance plan for the area. *See* CAA sections 107(d)(3)(E) and 175A. The detailed rationale for EPA's findings and actions is set forth in the proposed rulemaking of August 7, 2013 (78 FR 48087).

V. Final Action

EPA is determining that the Canton area has attained the standards and that the area meets the requirements for redesignation to attainment of that standard under sections 107(d)(3)(E) and 175A of the CAA. Thus, EPA is granting the request from Ohio to change the legal designation of the Canton area from nonattainment to attainment for the 1997 annual and 2006 24-hour $PM_{2.5}$ NAAQS. EPA is also approving Ohio's 1997 annual and 2006 24-hour $PM_{2.5}$ maintenance plan for the Canton area as a revision to the SIP because the plan meets the requirements of section 175A of the CAA. EPA is approving the 2005 and 2008 emissions inventories for primary $PM_{2.5}$, NO_X, SO_2, VOCs, and ammonia documented in Ohio's June 26, 2012, and May 31, 2013, submittals as satisfying the requirement in section 172(c)(3) of the CAA for a comprehensive, current emission inventory. Finally, EPA finds adequate and is approving Ohio's 2015 and 2025 primary $PM_{2.5}$ and NO_X MVEBs for the Canton area. These MVEBs will be used in future transportation conformity analyses for the area after the effective date for the adequacy finding and approval.

In accordance with 5 U.S.C. 553(d), EPA finds there is good cause for this action to become effective immediately upon publication. This is because a delayed effective date is unnecessary due to the nature of a redesignation to attainment, which relieves the area from certain CAA requirements that would otherwise apply to it. The immediate effective date for this action is authorized under both 5 U.S.C. 553(d)(1), which provides that rulemaking actions may become effective less than 30 days after publication if the rule grants or recognizes an exemption or relieves a restriction, and section 553(d)(3), which allows an effective date less than 30 days after publication as otherwise provided by the agency for good cause found and published with the rule. The purpose of the 30-day waiting period prescribed in section 553(d) is to give affected parties a reasonable time to adjust their behavior and prepare before the final rule takes effect. Today's rule, however, does not create any new regulatory requirements such that affected parties would need time to prepare before the rule takes effect. Rather, today's rule relieves Ohio of various requirements for the Canton area. For these reasons, EPA finds good cause under 5 U.S.C. 553(d)(3) for this action to become effective on the date of publication of this action.

VI. Statutory and Executive Order Reviews

Under the CAA, redesignation of an area to attainment and the accompanying approval of the maintenance plan under CAA section 107(d)(3)(E) are actions that affect the status of geographical area and do not impose any additional regulatory requirements on sources beyond those required by state law. A redesignation to attainment does not in and of itself impose any new requirements, but rather results in the application of requirements contained in the CAA for areas that have been redesignated to attainment. Moreover, 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 action merely approves state law as meeting Federal requirements and does not impose additional requirements beyond those imposed by state law. For these reasons, this action:

- Is not a ''significant regulatory action'' subject to review by the Office

[1] Fine particulates directly emitted by sources and not formed in a secondary manner through chemical reactions or other processes in the atmosphere.

[2] NO_X and SO_2 are precursors for fine particulates through chemical reactions and other related processes in the atmosphere.

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 significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);

• Is not subject to requirements of Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the CAA; 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 final 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 Commonwealth, and EPA notes that it will not impose substantial direct costs on tribal governments or preempt tribal law.

The Congressional Review Act, 5 U.S.C. 801 *et seq.,* as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this action and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. A major rule cannot take effect until 60 days after it is published in the **Federal Register**. This action is not a ''major rule'' as defined by 5 U.S.C. 804(2).

Under section 307(b)(1) of the CAA, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by December 23, 2013. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this action for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements. (*See* section 307(b)(2).

List of Subjects

40 CFR Part 52

Environmental protection, Air pollution control, Incorporation by reference, Intergovernmental relations, Particulate matter.

40 CFR Part 81

Environmental protection, Air pollution control, National parks, Wilderness areas.

Dated: September 19, 2013.

Susan Hedman,

Regional Administrator, Region 5.

40 CFR parts 52 and 81 are 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 52.1880 is amended by adding paragraphs (p)(8), (q)(8), (s)(3), and (t)(3) to read as follows:

§ 52.1880 Control strategy: Particulate matter.

* * * * *

(p) * * *

(8) The Canton-Massillon nonattainment area (Stark County). The maintenance plan establishes motor vehicle emissions budgets for the Canton-Massillon area of 204.33 tpy for primary $PM_{2.5}$ and 7,782.84 tpy for NO_X for 2015, and 101.50 tpy for primary $PM_{2.5}$ and 4,673.83 tpy for NO_X for 2025.

(q) * * *

(8) Ohio's 2005 and 2008 NO_X, directly emitted $PM_{2.5}$, SO_2, VOC, and ammonia emissions inventory satisfies the emission inventory requirements of section 172(c)(3) for the Canton-Massillon area.

* * * * *

(s) * * *

(3) The Canton-Massillon nonattainment area (Stark County). The maintenance plan establishes motor vehicle emissions budgets for the Canton-Massillon area of 204.33 tpy for primary $PM_{2.5}$ and 7,782.84 tpy for NO_X for 2015, and 101.50 tpy for primary $PM_{2.5}$ and 4,673.83 tpy for NO_X for 2025.

(t) * * *

(3) Ohio's 2005 and 2008 NO_X, directly emitted $PM_{2.5}$, SO_2, VOC, and ammonia emissions inventory satisfies the emission inventory requirements of section 172(c)(3) for the Canton-Massillon area.

PART 81—DESIGNATION OF AREAS FOR AIR QUALITY PLANNING PURPOSES

■ 3. The authority citation for part 81 continues to read as follows:

Authority: 42 U.S.C. 7401 *et seq.*

■ 4. Section 81.336 is amended by revising the entry for Canton-Massillon, OH in the tables entitled ''Ohio—$PM_{2.5}$ (Annual NAAQS)'' and ''Ohio—$PM_{2.5}$ (24-Hour NAAQS)'' to read as follows:

§ 81.336 Ohio.

* * * * *

OHIO—$PM_{2.5}$

[Annual NAAQS]

Designated area	Designation [a]	
	Date [1]	Type
* * * * * * *		
Canton-Massillon, OH:		

OHIO—$PM_{2.5}$—Continued

[Annual NAAQS]

Designated area	Designation [a]	
	Date [1]	Type
Stark County	10/22/13	Attainment.
* * * * * * *		

[a] Includes Indian Country located in each county or area, except as otherwise specified.
[1] This date is 90 days after January 5, 2005, unless otherwise noted.

* * * * *

OHIO—$PM_{2.5}$

[24-Hour NAAQS]

Designated area	Designation for the 1997 NAAQS [a]		Designation for the 2006 NAAQS [a]	
	Date [1]	Type	Date [2]	Type
* * * * * * *				
Canton-Massillon, OH:				
Stark County		Unclassifiable/Attainment	10/22/13	Attainment.
* * * * * * *				

[a] Includes Indian Country located in each county or area, except as otherwise specified.
[1] This date is 90 days after January 5, 2005, unless otherwise noted.
[2] This date is 30 days after November 13, 2009, unless otherwise noted.

[FR Doc. 2013–24282 Filed 10–21–13; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 80

[EPA–HQ–OAR–2012–0223; FRL–9900–89–OAR]

RIN 2060–AR87

Regulation of Fuels and Fuel Additives: Modifications to Renewable Fuel Standard Program

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: In this final rule EPA is amending the definition of ''heating oil'' in the regulations for the Renewable Fuel Standard (RFS) program under section 211(o) of the Clean Air Act. This amendment expands the scope of renewable fuels that can be used to show compliance with the RFS renewable fuel volume obligations by adding an additional category of compliant renewable fuel referred to as ''fuel oils,'' produced from qualifying renewable biomass and used to generate heat to warm buildings or other facilities where people live, work, recreate, or conduct other activities. Producers or importers of fuel oil that meets the amended definition of heating oil will be allowed to generate Renewable Identification Numbers (RINs), provided that the fuel oil meets all other requirements specified in the RFS regulations. Fuel oils used to generate process heat, power, or other functions are not included in this additional category of heating oil. All fuels previously included in the definition of heating oil continue to be included as heating oil for purposes of the RFS program.

We are also finalizing specific registration, reporting, product transfer document, and recordkeeping requirements applicable specifically to these fuel oils, necessary to demonstrate that the fuel oil volume for which RINs were generated was or will be used to heat buildings for climate control for human comfort prior to generating RINs.

The final rule is being adopted with only minor changes from the rule proposed on October 9, 2012, and responses to public comments are provided.

DATES: This rule is effective on December 23, 2013.

ADDRESSES: EPA established a docket for this action under the Docket ID No. EPA–HQ–OAR–2012–0223. All documents in the docket are listed in the www.regulations.gov index. Although listed in the index, some information may not be 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 at *www.regulations.gov* or in hard copy at the Air and Radiation Docket and Information Center, EPA/DC, EPA West, Room 3334, 1301 Constitution Ave. NW., Washington, DC 20460. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566–1744, and the telephone number for the Air Docket is (202) 566–1742. You may be charged a reasonable fee for photocopying docket materials, as provided for in 40 CFR part 2.

FOR FURTHER INFORMATION CONTACT: Suzanne Bessette, Office of Transportation and Air Quality, U.S. Environmental Protection Agency, 2000 Traverwood Dr., Ann Arbor, MI 48105; telephone number: (734) 214–4703; fax number: (734) 214–4869; email address: *bessette.suzanne@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. Executive Summary

A. Purpose

This final rule expands the regulatory definition of ''heating oil'' for purposes of the RFS program. This expansion of the types of fuel that can be considered heating oil under the RFS program furthers the goals of the Energy Independence and Security Act of 2007 (EISA) to reduce the use of fossil fuels and encourage increased production of renewable fuels. The EPA expects this rule to allow for the generation of additional advanced and cellulosic RINs, which will help enable obligated parties under the RFS to meet their renewable fuel obligations and offer their customers more alternative fuel products.

B. Summary of Today's Rule

This rule amends the definition of ''heating oil'' in 40 CFR 80.1401 in the RFS program promulgated under section 211(o) of the Clean Air Act (CAA). This amendment expands the scope of renewable fuels that can generate RINs as heating oil by adding an additional category of fuel oils that will be used to generate heat to warm buildings or other facilities where people live, work, recreate, or conduct other activities. Fuel oils used to generate process heat, power, or other functions are not included in this additional category of heating oil. This rule will allow producers or importers of fuel oil that meets the amended definition of heating oil to generate RINs, provided that other requirements specified in the regulations are met. These include new registration, reporting, product transfer document, and recordkeeping requirements applicable specifically to these fuel oils, necessary to demonstrate that the fuel oil volume was or will be used to heat buildings for climate control for human comfort prior to generating RINs.

The amendment expands the fuels included in the definition of heating oil for purposes of the RFS program. All fuels previously included in the definition of heating oil continue to be included as heating oil under 40 CFR 80.1401 for purposes of the RFS program.

C. Costs and Benefits

This amendment provides new opportunities for RIN generation under the RFS program. Therefore, EPA believes that this amendment will impose no new direct costs or burdens on regulated entities beyond the minimal costs associated with reporting and recordkeeping requirements. At the same time, EPA does not believe that this amendment will adversely impact emissions.

II. Does this action apply to me?

Entities potentially affected by this action include those involved with the production, distribution and sale of transportation fuels, including gasoline and diesel fuel, or renewable fuels such as ethanol and biodiesel, as well as those involved with the production, distribution and sale of other fuel oils that are not transportation fuel. Regulated categories and entities affected by this action include:

Category	NAICS codes [a]	SIC codes [b]	Examples of potentially regulated parties
Industry	324110	2911	Petroleum refiners, importers.
Industry	325193	2869	Ethyl alcohol manufacturers.
Industry	325199	2869	Other basic organic chemical manufacturers.
Industry	424690	5169	Chemical and allied products merchant wholesalers.
Industry	424710	5171	Petroleum bulk stations and terminals.
Industry	424720	5172	Petroleum and petroleum products merchant wholesalers.
Industry	454319	5989	Other fuel dealers.

[a] North American Industry Classification System (NAICS).
[b] Standard Industrial Classification (SIC) system code.

This table is not intended to be exhaustive, but rather provides a guide for readers regarding entities likely to be regulated by this action. This table lists the types of entities that EPA is now aware could be potentially regulated by this action. Other types of entities not listed in the table could also be regulated. To determine whether your entity is regulated by this action, you should carefully examine the applicability criteria of Part 80, subpart M of title 40 of the Code of Federal Regulations. If you have any questions regarding applicability of this action to a particular entity, consult the person in the preceding **FOR FURTHER INFORMATION CONTACT** section above.

III. Amendments to the Renewable Fuel Standard Program

A. Amended Definition of Heating Oil

EPA is issuing this final rule to amend the definition of heating oil in 40 CFR 80.1401 in the RFS program promulgated under section 211(o) of the CAA.[1] This amendment will expand the scope of renewable fuels that can generate RINs as heating oil to include fuel oil that will be used to generate heat to warm buildings or other facilities where people live, work, recreate, or conduct other activities. This rule will allow producers or importers of fuel oil that meets the amended definition of heating oil to generate RINs, provided that other requirements specified in the regulations are met, including new registration, reporting, product transfer document, and recordkeeping requirements being finalized in this action that are applicable specifically to these fuel oils. Fuel oils used to generate process heat, power, or other functions will not be approved for RIN generation under the amended definition of heating oil, as these fuels are not within the scope of ''home heating oil'' as that term is used in EISA, for the RFS program. All fuels previously included in the definition of heating oil continue to be included as heating oil under 40 CFR 80.1401 for purposes of the RFS program.

The RFS program requires the production and use of renewable fuel to replace or reduce the quantity of fossil fuel present in transportation fuel. Under EPA's RFS program, producers or importers of qualified renewable fuel generate RINs which represent the volume of renewable fuel that has been produced or imported. RINs are transferred to the producers or importers of gasoline and diesel transportation fuel who then use the RINs to demonstrate compliance with their renewable fuel volume obligations. RINs also serve the function of credits under the RFS program for regulated

[1] The Energy Independence and Security Act of 2007 (EISA) amended section 211(o) of the Clean Air Act, which was originally added by the Energy Policy Act of 2005 (EPAct).

parties who exceed their annual volume obligation.

Congress provided that EPA could establish provisions for the generation of credits by producers of certain renewable fuel that was not used in transportation fuel, called ''additional renewable fuel.'' [2] Additional renewable fuel is defined as fuel produced from renewable biomass that is used to replace or reduce the quantity of fossil fuel present in home heating oil or jet fuel.[3] In essence, additional renewable fuel has to meet all of the requirements applicable to qualify it as renewable fuel under the regulations, with the only difference being that it is blended into or is home heating oil or jet fuel instead of transportation fuel. This does not change the volume requirements of the statute itself, but it can provide an important additional avenue for parties to generate RINs for use by obligated parties, thus promoting the overall cost-effective production and use of renewable fuels.

EPA addressed the provision for additional renewable fuels in the final rule published on March 26, 2010 (74 FR 14670), specifically addressing the category of ''home heating oil.'' EPA determined that this term was ambiguous, and defined it by incorporating the existing definition of heating oil at 40 CFR 80.2(ccc). EPA stated that:

> EISA uses the term ''home heating oil'' in the definition of ''additional renewable fuel.'' The statute does not clarify whether the term should be interpreted to refer only to heating oil actually used in homes, or to all fuel of a type that can be used in homes. We note that the term 'home heating oil' is typically used in industry in the latter manner, to refer to a type of fuel, rather than a particular use of it, and the term is typically used interchangeably in industry with heating oil, heating fuel, home heating fuel, and other terms depending on the region and market. We believe this broad interpretation based on typical industry usage best serves the goals and purposes of the statute. If EPA interpreted the term to apply only to heating oil actually used in homes, we would necessarily require tracking of individual gallons from production through ultimate [use] in homes in order to determine eligibility of the fuel for RINs. Given the fungible nature of the oil delivery market, this would likely be sufficiently difficult and potentially expensive so as to discourage the generation of RINs for renewable fuels used as home heating oil. This problem would be similar to that which arose under RFS1 for certain renewable fuels (in particular biodiesel) that were produced for the highway diesel market but were also suitable for other markets such as heating oil and non-road applications where it was unclear at the time of fuel production (when RINs are typically generated under the RFS program) whether the fuel would ultimately be eligible to generate RINs. Congress eliminated the complexity with regards to non-road applications in RFS2 by making all fuels used in both motor vehicle and nonroad applications subject to the renewable fuel standard program. We believe it best to interpret the Act so as to also avoid this type of complexity in the heating oil context. Thus, under today's regulations, RINs may be generated for renewable fuel used as ''heating oil,'' as defined in existing EPA regulations at § 80.2(ccc). In addition to simplifying implementation and administration of the Act, this interpretation will best realize the intent of EISA to reduce or replace the use of fossil fuels.[4]

The existing definition of heating oil at 40 CFR 80.2(ccc) is ''any #1, #2, or non-petroleum diesel blend that is sold for use in furnaces, boilers, and similar applications and which is commonly or commercially known or sold as heating oil, fuel oil, or similar trade names, and that is not jet fuel, kerosene, or MVNRLM [Motor Vehicle, Non-Road, Locomotive and Marine] diesel fuel.'' [5] The existing definition of non-petroleum diesel at 40 CFR 80.2(sss) is ''a diesel fuel that contains at least 80 percent mono-alkyl esters of long chain fatty acids derived from vegetable oils or animal fats.'' Thus, under the existing definitions, RINs may be generated for heating oil that is either a #1 or #2 fuel oil or a non-petroleum diesel blend containing at least 80 percent mono-alkyl esters of long chain fatty acids derived from vegetable oils or animal fats, as well as meeting all other requirements of the RFS regulations for renewable fuels.

The existing regulations do not allow a party to generate RINs for a non-petroleum fuel that is used as a heating oil unless the fuel contains at least 80 percent mono-alkyl esters of long chain fatty acids derived from vegetable oils or animal fats. Since the promulgation of the March 26, 2010 rule, we have received a number of requests from producers to consider expanding the scope of the home heating oil provision to include additional fuel oils that are produced from qualifying renewable biomass but do not meet the regulatory definition of heating oil because they are not #1 or #2 diesel and are not non-petroleum diesel containing at least 80 percent mono-alkyl esters. Parties raising this issue have suggested that limiting ''home heating oil'' to the fuel types defined in 40 CFR 80.2(ccc) disqualifies certain types of renewable fuel oils that could be used for home heating and that this limitation does not align with our reasoning in the preamble to take a broad interpretation of the term ''home heating oil'' in CAA section 211(o).

EPA considered this issue further and issued a direct final rule and parallel proposed rule to amend the definition of heating oil in the RFS program to expand the scope of fuels that can generate RINs as heating oil under the RFS program.[6] EPA received adverse public comment and withdrew the direct final rule.[7]

After considering the public comments, EPA is revising the definition of heating oil for purposes of the RFS program to include an additional category of fuel oil, as proposed. RINs may be generated for an additional category of renewable fuel that is fuel oil used to heat interior spaces of homes or buildings to control ambient climate for human comfort. This additional category will not include fuel oils used to generate process heat, power, or other functions. The fuel oil must be used to generate heat to warm buildings or other facilities where people live, work, recreate, or conduct other activities. The fuel oil must only be used in heating applications, where the sole purpose of the fuel is for heating and not for any other combined use such as process energy use. This is in addition to the fuel oils previously included in the definition of heating oil at 40 CFR 80.1401, which refers to section 80.2(ccc). All fuels previously included in the definition of heating oil continue to be included as heating oil under 40 CFR 80.1401 for purposes of the RFS program.

EPA believes this expansion of the scope of the home heating oil provision is appropriate and authorized under CAA section 211(o). As EPA described in the RFS final rule, Congress did not define the statutory term ''home heating oil,'' and it does not have a fixed or definite commercial meaning. In the March 26, 2010 final rule, EPA focused on whether the provision was limited to heating oil actually used in homes. EPA noted that the term home heating oil is usually used in the industry to refer to one type of fuel, and not to a specific

[2] 75 FR 14670, 14686 (March 26, 2010).

[3] *See* CAA sections 211(o)(1)(A) and (o)(5)(E).

[4] 75 FR 14670, 14687 (March 26, 2010).

[5] The reference to ''stationary diesel engines'' was removed from the definition of 40 CFR 80.2(ccc) as part of EPA's final rule concerning oceangoing vessels. 75 FR 22896 (April 30, 2010). Deleting this example from the definition avoids confusion that otherwise might arise, given the requirements under 40 CFR 60.4207 for use of ultra low sulfur diesel fuel in certain stationary diesel engines. *See* 40 CFR 60.4207, applicable beginning with model year 2007.

[6] 77 FR 61281 (October 9, 2012); 77 FR 61313 (October 9, 2012).

[7] 77 FR 72746 (December 6, 2012).

use for the fuel. Given this more general usage of the term, EPA defined home heating oil by identifying the types of fuel oils that are typically used to heat homes. EPA determined this was a reasonable interpretation of an ambiguous statutory provision that simplified implementation and administration of the Act and promoted achievement of the goals of the RFS program.

The expansion of the definition adopted in this rulemaking will add a category to the definition to include two types of fuel oils not included in the original definition of heating oil in section 80.1401. First, the new category will include additional fuel oils that do not meet the definition of heating oil in section 80.2(ccc) but are actually used to heat homes.

Second, the new category will include fuel oils that are used to heat facilities other than homes to control ambient climate for human comfort. Under the original definition of heating oil in section 80.1401, a fuel oil meets the definition of heating oil based on its physical properties, not whether it is actually used to heat a home. In the new category added in the amended definition, the additional qualifying fuel oils will be used for heating places where people live, work, or recreate, and not just their homes. It focuses more on what is getting heated—people—and not where the people are located. EPA believes this is a reasonable interpretation of the phrase ''home heating oil.'' This interpretation recognizes the ambiguity of the phrase used by Congress, which is not defined and does not have a clear and definite commercial meaning. It gives reasonable meaning to the term home heating oil, both by limiting the additional fuel oils to fuel oils used for heating facilities that people will occupy, and excluding the additional fuel oils when used for other purposes such as generation of energy used in the manufacture of products. It also focuses on the aspect of home that is most important here—the heating of people. This interpretation also promotes the purposes of the EISA in that it will increase the production and use of renewable fuels by introducing new sources of fuel producers to the RFS program. It will specifically promote the RFS programmatic goals by facilitating the generation of RINs for renewable fuels that reduce emissions of greenhouse gases compared to fossil fuels. For example, EPA has received information from Envergent Technologies (an alliance of Ensyn and UOP/Honeywell) that such an expanded definition of heating oil would result in nearly immediate production of 3.5 million gallons from their existing facilities, with an additional projected production of up to 45 million gallons per year within 24 months following regulatory action. Based on this information from Envergent Technologies and other parties who commented on the proposed rule, the application of the expanded definition of heating oil to the entire industry would result in the production of many more million additional gallons of RIN-generating renewable fuel.

B. Lifecycle Greenhouse Gas Assessment of the Amended Definition of Heating Oil

EPA has also evaluated whether any revisions will need to be made to Table 1 to 40 CFR 80.1426. Table 1 lists the applicable D codes for each fuel pathway for use in generating RINs in the RFS regulations in light of the additional fuel oils included in the expanded definition of heating oil. As discussed below, EPA has determined that the existing D code entries for heating oil in Table 1 to 40 CFR 80.1426 will continue to be appropriate and will not need to be revised in light of the expanded definition of heating oil.

Under the RFS program, EPA must assess lifecycle greenhouse gas (GHG) emissions to determine which fuel pathways meet the GHG reduction thresholds for the four required renewable fuel categories. The RFS program requires a 20% reduction in lifecycle GHG emissions for conventional renewable fuel (except for grandfathered facilities and volumes), a 50% reduction for biomass-based diesel or advanced biofuel, and a 60% reduction for cellulosic biofuel. For the final March 2010 RFS rule, EPA assessed the lifecycle greenhouse gas emissions of multiple renewable fuel pathways and classified pathways based on these GHG thresholds, as compared to the EISA statutory baseline.[8] In addition, EPA has added several pathways since the final rule was published. Expanding the definition of heating oil does not affect these prior analyses.

The fuel pathways consist of fuel type, feedstock, and production process requirements. GHG emissions are assessed at all points throughout the lifecycle pathway. For instance, emissions associated with sowing and harvesting of feedstocks and in the production, distribution and use of the renewable fuel are examples of what are accounted for in the GHG assessment. A full accounting of emissions is then compared with the petroleum baseline emissions for the conventional fuel being replaced. The lifecycle GHG emissions determination is one factor used to determine compliance with the regulations.

There are currently several fuel pathways that list heating oil as a fuel type with various types of feedstock and production processes used, qualifying the heating oil pathways as either biomass-based diesel, advanced, or cellulosic. The determinations for these different pathways were based on the current definition of heating oil. The pathways also include several types of distillate product including diesel fuel, jet fuel and heating oil.

The lifecycle calculations and threshold determinations are based on the GHG emissions associated with production of the fuel and processing of the feedstock. Converting biomass feedstocks such as triglycerides (if oils are used as feedstock) or hemi-cellulose, cellulose, lignin, starches, etc. (if solid biomass feedstock is used) into heating oil products can be accomplished through either a biochemical or thermochemical process converting those molecules into a fuel product. The existing heating oil pathways were based on the original definition of heating oil in section 80.1401, and were based on a certain level of processing to produce #1, #2, or a non-petroleum diesel blend and the related energy use and GHG emissions that were part of the lifecycle determination for those fuel pathways.

The main difference between the original definition of heating oil, which refers to #1, #2, or a non-petroleum diesel blend, and the new category added in the expanded definition adopted in this rulemaking is that the new category will include heavier types of fuel oil with larger molecules. Based on the type of conversion process, producing these heavier fuel oil products versus the #1, #2, or a non-petroleum diesel blend will affect the amount of energy used and therefore the GHG emissions from the process. There are two main paths for producing a fuel oil product from biomass. In one the biomass is converted into a biocrude which is further refined into lighter products. In this case, producing a heavier fuel oil product will require less processing energy and have lower GHG emissions than converting the same feedstock into a #1, #2, or non-petroleum diesel blend.

In the other type of process, the compounds in the biomass are changed into a set of intermediary products, such as hydrogen (H) and carbon monoxide

[8] *See* Table 1 to 40 CFR § 80.1426.

(CO).[9] These compounds are then either catalytically or biochemically converted into the fuel product. In this case, the vast majority of the energy is associated with breaking down the feedstock into the set of intermediary compounds. The process used and the energy needed for it does not vary based on the type of fuel that is then produced from these intermediary compounds. The type of fuel could affect the type of catalyst or biological process used to change the intermediary compounds into the fuel product, but based on EPA calculations and assessments developed as part of the March 26, 2010 RFS rulemaking,[10] this will have no real impact on the energy used or the GHG emissions associated with converting the biomass into a different fuel product.

Based on these considerations, EPA believes the GHG emissions associated with producing the additional fuel oils included in the expanded definition will be the same or lower than the GHG emissions associated with producing a #1, #2, or non-petroleum diesel blend. Therefore, the original lifecycle analyses for heating oil support applying the existing pathways for heating oil in the RFS regulations to the expanded definition of heating oil. Once the regulatory change to the definition of heating oil is final, all of the pathways currently applicable to heating oil under Table 1 to 40 CFR 80.1426 will apply to the expanded definition of heating oil.

C. Additional Registration, Reporting, Product Transfer Document, and Recordkeeping Requirements

An important issue to address is how to implement such an expanded definition. EPA recognized in the March 26, 2010 rule that it would be difficult and expensive to track heating oil to make sure it was actually used in homes, and so decided to define home heating oil as a type of fuel with certain characteristics, rather than a fuel used in a certain way. This approach avoided the need to track heating oil to its actual end use, and the definition of heating oil at 40 CFR 80.1401 simply referred back to the 40 CFR 80.2(ccc) technical definition.

The expansion of the definition raises this same issue but in a more significant way. The original definition does not provide a way to assure that RINs are only generated for fuel oils used to heat buildings for climate control for human comfort, and not for those used to generate process heat or other purposes. Therefore, for the additional fuel oils other than those qualifying as heating oil based on the definition in 40 CFR 80.2(ccc), EPA is requiring that the renewable fuel producer or importer have adequate documentation to demonstrate that the fuel oil volume for which RINs were generated was or will be used to heat buildings for climate control for human comfort as a condition for generating RINs.

EPA recognizes that for fuels meeting the original definition of heating oil in section 80.1401, no tracking or other documentation of end use is required, and some heating oils that meet the original definition could end up being used for other purposes. However, fuel qualifying as heating oil under the original definition has to have the physical or other characteristics that make it the type of fuel oil normally used to heat homes. The additional fuel oils qualifying as heating oil under the new category of the expanded definition will be identified as heating oil not by their chemical specifications but instead by their actual use for heating for the purposes of climate control for human comfort. EPA is not requiring physical specifications for the additional fuel oil category, beyond the requirement that it be a ''fuel oil'', meaning that it is a liquid at 60 degrees Fahrenheit and one atmosphere of pressure and contains no more than 2.5% mass solids. Solid or gaseous fuels, for example wood chips or unrefined waste fats or gases, would not qualify as heating oil capable of generating RINs under the RFS.

For informational purposes, there are industry standard specifications for fuel oils that could qualify as heating oils under the expanded definition of heating oil. For example, ASTM D396 covers grades of fuel oil intended for use in fuel oil burning equipment, ASTM D7666 covers two grades of burner fuel consisting of triglycerides and naturally occurring constituents of triglycerides including monoglycerides, diglycerides, and free fatty acids and distinguished by the pour point, and ASTM D7544 covers grades of pyrolysis liquid biofuel produced from biomass intended for use in fuel oil burner equipment. These and other fuel oils would also have to meet the requirements related to use of the fuel oil for heating, as well as any other regulatory requirements applicable under the RFS program.

In order to verify that the fuel oils are actually used to generate heat for climate control purposes, EPA is adopting the following registration, recordkeeping, product transfer document (PTD) and reporting requirements. These requirements will not apply to *fuels* qualifying under the original part of the 40 CFR 80.1401 definition, i.e., they would not apply to fuels that meet the definition of heating oil in section 80.2(ccc). These requirements will only apply to the additional *fuel oils* qualifying under the new category of the expanded definition in 40 CFR 80.1401. If those fuel oils are designated for but not actually used to generate heat for climate control purposes, the end user of that fuel oil is subject to and liable for violations of the RFS regulations and the CAA, as are as any parties that caused that violation. Also, pursuant to the existing regulation in § 80.1460(c)(2), the end user in this situation would not be allowed to retire RINs still associated with the fuel oil for RVO compliance purposes or transfer such RINs to any other party. Finally, since the additional category of fuel oils is defined as heating oil in terms of its use instead of its physical characteristics, EPA must ensure as far as is practicable that the RIN-generating renewable fuel is actually used for the proper purpose by the end user. We believe it is reasonable to require that the RIN-generating renewable fuel producer or importer document that the appropriate end use of the fuel is certified by an end user. As further discussed below, the RIN generator must submit proof of such assurances to EPA in its registration and quarterly reports.

Once the fuel producer has the appropriate affidavit from the end user certifying that it has used or intends to use the fuel for the proper purpose, the fuel producer may validly generate RINs for the fuel. We emphasize that subsequent improper end use would not invalidate any RINs generated by the fuel producer for that volume of fuel oil. We are not requiring that the RIN-generating producer track the fuel's actual end use; only that the fuel be sold for use as a heating oil and that the fuel producer receives the appropriate affidavit from the end user attesting that the fuel has or will actually be used as a heating oil prior to RIN generation. A RIN will not be considered valid unless the renewable producer can demonstrate by the end user's affidavit that the fuel has or will actually be used as heating oil. Parties that purchase RINs generated by renewable fuel producers that rely on this new definition will be able to evaluate whether the proper use requirement is

[9] This describes the Fischer-Tropsch process. Other processes rely on forming different sets of compounds from the biomass, and then producing the fuel product from the set of compounds.

[10] ''Regulation of Fuel and Fuel Additives; Changes to Renewable Fuel Standard Program,'' 75 FR 14670, *available at http://www.gpo.gov/fdsys/pkg/FR-2010-03-26/pdf/2010-3851.pdf. See also,* EPA's summary factsheet, ''EPA Lifecycle Analysis of Greenhouse Gas Emissions from Renewable Fuels,'' *available at http://www.epa.gov/otaq/renewablefuels/420f10006.pdf.*

met by examining these affidavits. Therefore, while there is a slight chance that the fuel associated with a validly generated RIN may be improperly used, once the appropriate certification is made, the RIN may be generated and will remain valid regardless of the actual end use.

1. Registration

For the purpose of registration, EPA is allowing the producer of the expanded fuel oil types to establish its facility's baseline volume in the same manner as all other producers under the RFS program, e.g., based on the facility's permitted capacity or actual peak capacity. Additionally, we are requiring producers of the new category fuel oils to submit affidavits in support of their registrations, including a statement that the RIN generating fuel will be used for the purposes of heating interior spaces of homes or buildings to control ambient climate for human comfort, and no other purpose. We also require that producers submit secondary affidavits from the existing end users to verify that the fuel oil is actually being used for or is intended for a qualifying purpose. We are also adopting new reporting, product transfer documents (PTD), and recordkeeping requirements, discussed below, that will help assure that the qualifying fuel oil is being used in an approved application. These requirements are necessary to provide assurance that the fuel oil used to generate RINs is actually used for a qualifying purpose because these types of fuel may not have previously been used as heating oil, and may not be readily identifiable by their physical characteristics. Without such safeguards, EPA could not be confident that the fuel oil is used as heating oil, and end users might not have adequate notice that the fuel oil must be used as heating oil. EPA believes these requirements will place a small but necessary burden on producers and end users, and greatly benefit the integrity of the program.

2. Reporting, Product Transfer Documents and Recordkeeping Requirements

For the purpose of continued verification after registration, EPA is adopting additional requirements for reporting in § 80.1451(b)(1)(ii)(T), PTDs in § 80.1453(d), and recordkeeping in § 80.1454(b), for the new category of fuel oils qualifying as heating oil.

The reporting, PTD, and recordkeeping requirements will help ensure that the new category of fuel oils used to generate RINs are actually used for the appropriate purpose of heating interior spaces for human comfort. For reporting, producers are required to file quarterly reports with EPA that identify certain information about the volume of fuel oil produced and used as heating oil. The additional reporting requirements stipulate that the producer of fuel oils submit affidavits to EPA reporting the total quantity of the fuel oils produced, the total quantity of the fuel oils sold to end users, and the total quantity of fuel oils sold to end users for which RINs were generated. Additionally, affidavits from each end user must be obtained by the producer and reported to EPA, describing the total quantity of fuel oils received from the producer, the total amount of fuel oil used for qualifying purposes, the date the fuel oil was received from the producer, the blend level of the fuel oil, quantity of assigned RINs received with the renewable fuel, and quantity of assigned RINs that the end user separated from the renewable fuel, if applicable.

The additional product transfer document requirement associated with the new category of heating oil is that a PTD must be prepared and maintained between the fuel oil producer and the final end user for the legal transfer of title and custody of a specific volume of fuel oil that is designated for use only for the purpose of heating interior spaces of buildings to control ambient climate for human comfort. This additional PTD requirement requires that the PTD used to transfer ownership and custody of the renewable fuel must contain the statement: ''This volume of renewable fuel oil is designated and intended to be used to heat interior spaces of homes or buildings to control ambient climate for human comfort. Do NOT use for process heat or any other purpose, as these uses are prohibited pursuant to 40 CFR 80.1460(g).'' EPA believes that this PTD requirement will help to ensure that each gallon of fuel oil that is transferred from the producer to the end user is used for qualifying purposes under the expanded definition of heating oil. If the fuel oil is used for some non-qualifying purpose instead of for generating heat for climate control purposes, then the end user of that fuel oil is subject to and liable for violations of the RFS regulations and the CAA, as are any parties that caused that violation.

The additional recordkeeping requirement for the new category of heating oil is that producers must keep copies of the contracts which describe the fuel oil under contract with each end user. If the producer is not selling the fuel oil directly to the end user, this may require the collection of one or more intermediate contracts showing the chain of custody of the fuel oil from the producer to the end user. Consistent with existing regulations, producers are required to maintain all documents and records submitted for registration, reporting, and PTDs as part of the producer's recordkeeping requirements. EPA believes the producer's maintenance of these records will allow for continued tracking and verification that the end use of the fuel oil is consistent with the meaning of ''heating oil'' intended under EISA.

IV. Summary and Analysis of Comments

EPA has provided a summary of the comments received and its response. EPA has developed a more thorough Response to Comments document that addresses each comment specifically and addresses requests for clarification to the extent appropriate for this rule.[11]

Clarification on Existing Definition of Heating Oil

Comment

Several commenters sought a variety of clarifications on changes being made to the existing definition of heating oil in section 80.1401.

Response

As explained in this final rule and the October 9, 2012 proposal, this amendment does not modify, limit, or in any way change the inclusion of fuels covered by the existing definition of heating oil at section 80.1401. All fuels included in the original definition of heating oil at section 80.1401 (i.e., those fuels that meet the definition of heating oil at section 80.2(ccc)) will continue to be included as heating oil for purposes of section 80.1401 and the RFS program.

Need for the Expanded Definition of Heating Oil

Comment

Several commenters expressed support for the expanded definition of heating oil. These commenters noted that the current definition is overly restrictive and inconsistent with the goals of the RFS program, and stated that the expanded definition will spur production of cellulosic biofuel from woody, biomass-based resources. Also, these commenters believe that the expanded definition will drive tens of millions of dollars of local investment and create jobs.

[11] *Regulation of Fuels and Fuel Additives: Modifications to Renewable Fuel Standard Program Response to Comments, available in the docket at http://www.regulations.gov.*

Response

As explained in greater detail above, EPA believes this expansion of the scope of the definition of heating oil for purposes of the RFS program is appropriate and authorized under CAA section 211(o).

Fuel Quality Standards

Comment

Commenters noted that the expanded definition of heating oil will not reference fuel quality standards, which they believed may present environmental and safety concerns. Specifically, one commenter (Global Renewable Strategies and Consulting (GRSAC)) asserted that the definition fails to consider the environment or safety, and should reference ASTM standards for fuel oils.

Response

Section 211(o) of the Clean Air Act, as amended by EISA, requires all renewable fuels used in the RFS program to be derived from renewable biomass and to meet specified thresholds for reductions in lifecycle greenhouse gas emissions compared to a baseline fossil fuel. Adding fuel quality specifications for the fuel oils added to the definition of ''heating oil'' in this rule would not affect whether the fuel oil was derived from renewable biomass, and would not affect the analysis of lifecycle greenhouse gas emissions associated with the heating oils. Thus the additional specifications suggested by the commenters are not relevant to the issues needed to determine whether the fuel oils would qualify as renewable fuel for purposes of the RFS program.

The purpose this regulation is to further define what types and uses of renewable fuel qualify for RIN generation, not to set safety standards or limitations for renewable heating oil. Such standards and limitations may be imposed by other regulations and regulatory entities, and through private sales agreements, by manufacturers of heating equipment, and so on. For example, we expect that many of these fuel oils will meet ASTM specifications for fuel oils (e.g., ASTM D396, ASTM D7666, and ASTM D7544). The ASTM fuel oil specifications not only provide fuel quality specifications, they also indicate appropriate uses for the fuel oils meeting the specification. Because the specific use of a particular fuel oil is often dependent upon the fuel oil conforming to the ASTM specification for that fuel oil, industry specification and use would provide a de facto application of fuel oil specifications for fuel oil used as heating oil. This de facto control would occur naturally within the course of business; an added regulatory requirement in the RFS regulations would not add value or provide any benefit, and as noted above is not relevant to the issues needed to determine whether the fuel oil is a renewable fuel for purposes of the RFS program.

Power Generation

Comment

Several commenters recommended that the expanded definition of heating oil should also include fuel oils used for power generation.

Response

The restriction on use for the additional fuel oils is necessary so that the additional fuel oils can reasonably be considered ''home heating oil.'' Congress allowed ''home heating oil'', not any and all fuel oils, to be considered an additional renewable fuel for purposes of the RFS program. EPA's expanded definition of heating oil includes fuel oils that are used for heating places where people live, work, or recreate, and not just their homes. EPA believes this is a reasonable interpretation of the phrase ''home heating oil'' and recognizes the ambiguity of the phrase used by Congress, which is not defined and does not have a clear and definite commercial meaning. It gives reasonable meaning to the term home heating oil by limiting them to fuel oils used for heating of facilities that people will occupy, and excludes fuel oils used for other purposes such as generation of energy used in the manufacture of products. It also focuses on the aspect of home that is important here—the heating of people—recognizing that EPA has already determined that fuel oil can be included in the scope of home heating oil even if it is not actually used to heat a home.

Need for Compliance Provisions Associated With the Expanded Definition

Comment

We received several comments regarding the compliance provisions associated with the expanded definition, including the affidavit requirement for RFS registration, reporting requirements, PTD requirements, and end use tracking required for recordkeeping. Commenters who are ready to produce renewable fuel oils for use as heating oil expressed their understanding of the need for affidavits and their ability to comply with the requirements based on existing and prospective customers.

Other commenters believe that these requirements are not necessary and that they will not be able to comply with the affidavit requirements. For example, two biomass-based diesel producers asserted that they would be unable to submit affidavits because their fuel product does not currently qualify as heating oil under the RFS. These producers also commented that many of their potential customers will not sign the required affidavits out of fear of potential legal ramifications. At the same time, parties interested in blending No.4 and No.6 diesel to be used as heating oil asserted that the affidavit requirements will be unworkable for their existing commercial arrangements, which tend to be informal, with small customers whose employees are not sophisticated enough to comply with the tracking requirements.

Response

EPA believes that the compliance provisions added by this final rule are necessary and appropriate to ensure, as far as is practicable, that the additional fuel oils under the expanded definition meet the requirements of heating oil for purposes of the RFS program. Fuel oils that generate RINs under this expanded definition are those that actually heat places where people live, work, or recreate, and are not used for other purposes such as generating process energy. These additional fuel oils are not readily identifiable based on their physical characteristics, so the additional registration, recordkeeping and reporting requirements are designed to ensure they in fact meet the expanded definition of heating oil as far as can practically be determined at the time of RIN generation. These requirements are tailored to be the least restrictive possible while reasonably ensuring compliance with the amended definition of heating oil.

Such requirements are necessary to ensure RFS programmatic integrity, specifically, that RINs generated for the additional fuel oils represent fuel oils that qualify under the amended definition. Therefore, EPA is requiring producers to identify the end users of their fuel oil at the time of registration. Producers who have not identified any end users for their product will not be able to produce fuel oil for use as heating oil and generate RINs. EPA is aware of producers who have customers willing to sign such affidavits. EPA believes it is reasonable and producers typically will be able to comply with such requirements. If a producer cannot

meet the affidavit requirements, that producer should not attempt to generate RINs using the amended definition of heating oil.

Similarly, the PTD requirements are necessary and tailored to be as least restrictive as possible while ensuring compliance. If a producer cannot meet the PTD requirements, that producer should not attempt to generate RINs using the amended definition of heating oil. PTDs must accompany the fuel oil from production to end use; sale contracts are not interchangeable with PTDs but are additionally required for recordkeeping.

RIN Generation

Comment

One commenter suggested that the heating oil definition should identify feedstocks and applicable pathways for RIN generation.

Response

EPA's existing pathways that refer to heating oil as the final RIN-generating renewable fuel, identified in Table 1 to 40 CFR 80.1426, continue to apply without change. This final rule does not change those pathways or add a new pathway. It merely adds a new category of fuel oils that can qualify as heating oil.

Pipeline Concerns

Comment

One commenter expressed concern that the new definition will create additional segregations of heating oil which will promote inefficiencies in the distribution system.

Response

Based on the information we have received from renewable fuel oil producers, the renewable fuel oil qualifying under the expanded definition is likely to be a drop-in fuel. As such, it would not be distributed through the pipeline system and therefore EPA does not believe the amended definition will create any new inefficiencies for the pipeline distribution system.

V. Statutory and Executive Order Reviews

A. Executive Order 12866: Regulatory Planning and Review and Executive Order 13563: Improving Regulation and Regulatory Review

Under Executive Order 12866 (58 FR 51735, October 4, 1993), this action is not a ''significant regulatory action'' and is therefore not subject to review under Executive Orders 12866 and 13563 (76 FR 3821, January 21, 2011).

B. Paperwork Reduction Act

The information collection requirements in this final rule have been submitted for approval to the Office of Management and Budget (OMB) under the Paperwork Reduction Act, 44 U.S.C. 3501 *et. seq.* The information collection requirements are not enforceable until OMB approves them.

This action contains recordkeeping and reporting requirements (including registration and product transfer documentation) that may affect parties who produce or import renewable fuel oils subject to the revised definition of heating oil at 40 CFR 80.1401. EPA expects that very few parties will be subject to additional recordkeeping and reporting. We estimate that up to 11 parties (i.e., RIN generators, consisting of up to 10 producers and one importer) may be subject to the proposed information collection over the next several years.[12] We estimate an average annual reporting and recordkeeping burden of 31 hours and $2,205 per respondent.[13] Burden means the total time, effort, or financial resources expended by persons to generate, maintain, retain, or disclose or provide information to or for a Federal agency. This includes the time needed to review the instructions; develop, acquire, install, and utilize technology and systems for the purpose of collecting, validating, and verifying information, processing and maintaining information, and disclosing and providing information; adjust the existing ways to comply with any previously applicable instructions and requirements; train personnel to be able to respond to a collection of information; search data sources; complete and review the collection of information; and transit or otherwise disclose the information. Burden is as defined at 5 CFR § 1320.3(b).

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number. The OMB control numbers for EPA's regulations are listed in 40 CFR part 9. When this ICR is approved by OMB, the Agency will publish a technical amendment to 40 CFR part 9 in the **Federal Register** to display the OMB control number for the approved information collection requirements contained in this final rule.

[12] We project that the number of affected parties will remain essentially constant over time.

[13] This includes the time to train staff, formulate and transmit responses, and other miscellaneous compliance related activities.

C. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) generally requires an agency to prepare a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements under the Administrative Procedure Act or any other statute unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. Small entities include small businesses, small organizations, and small governmental jurisdictions.

For purposes of assessing the impacts of today's rule on small entities, small entity is defined as: (1) A small business as defined by the Small Business Administration's (SBA) regulations at 13 CFR 121.201; (2) a small governmental jurisdiction that is a government of a city, county, town, school district or special district with a population of less than 50,000; and (3) a small organization that is any not-for-profit enterprise which is independently owned and operated and is not dominant in its field.

After considering the economic impacts of this action on small entities, I certify that this action will not have a significant economic impact on a substantial number of small entities. This final rule will not impose any significant new requirements on small entities.

D. Unfunded Mandates Reform Act

This rule does not contain a Federal mandate that may result in expenditures of $100 million or more for State, local, and tribal governments, in the aggregate, or the private sector in any one year. We have determined that this action will not result in expenditures of $100 million or more for the above parties and thus, this rule is not subject to the requirements of sections 202 or 205 of UMRA.

This rule is also not subject to the requirements of section 203 of UMRA because it contains no regulatory requirements that might significantly or uniquely affect small governments. It only applies to gasoline, diesel, and renewable fuel producers, importers, distributors and marketers and makes relatively minor corrections and modifications to the RFS regulations.

E. Executive Order 13132 (Federalism)

This action does not have federalism implications. It will not have substantial direct effects 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, as specified in Executive Order 13132. This action only applies to gasoline, diesel, and renewable fuel producers, importers, distributors and marketers and makes relatively minor corrections and modifications to the RFS regulations. Thus, Executive Order 13132 does not apply to this action.

F. Executive Order 13175 (Consultation and Coordination With Indian Tribal Governments)

This rule does not have tribal implications, as specified in Executive Order 13175 (65 FR 67249 (November 9, 2000)). It applies to gasoline, diesel, and renewable fuel producers, importers, distributors and marketers. This action makes relatively minor corrections and modifications to the RFS regulations, and does not impose any enforceable duties on communities of Indian tribal governments. Thus, Executive Order 13175 does not apply to this action.

G. Executive Order 13045: Protection of Children From Environmental Health Risks and Safety Risks

EPA interprets EO 13045 (62 FR 19885 (April 23, 1997)) as applying only to those regulatory actions that concern health or safety risks, such that the analysis required under section 5–501 of the EO has the potential to influence the regulation. This action is not subject to EO 13045 because it does not establish an environmental standard intended to mitigate health or safety risks.

H. Executive Order 13211: Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use

This action is not subject to Executive Order 13211 (66 FR 28355 (May 22, 2001)), because it is not a significant regulatory action under Executive Order 12866.

I. National Technology Transfer and Advancement Act

Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (''NTTAA''), Public Law 104–113, 12(d) (15 U.S.C. 272 note) directs EPA to use voluntary consensus standards in its regulatory activities unless to do so will be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (*e.g.,* materials specifications, test methods, sampling procedures, and business practices) that are developed or adopted by voluntary consensus standards bodies. NTTAA directs EPA to provide Congress, through OMB, explanations when the Agency decides not to use available and applicable voluntary consensus standards.

This action does not involve technical standards. Therefore, EPA did not consider the use of any voluntary consensus standards.

J. Executive Order 12898: Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations

Executive Order (EO) 12898 (59 FR 7629 (Feb. 16, 1994)) establishes Federal executive policy on environmental justice. Its main provision directs Federal agencies, to the greatest extent practicable and permitted by law, to make environmental justice part of their mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of their programs, policies, and activities on minority populations and low-income populations in the United States.

EPA has determined that this final rule will not have disproportionately high and adverse human health or environmental effects on minority or low-income populations because it does not affect the level of protection provided to human health or the environment. These amendments will not relax the control measures on sources regulated by the RFS regulations and therefore will not cause emissions increases from these sources.

K. Congressional Review Act

The Congressional Review Act, 5 U.S.C. 801 *et. seq.,* as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register.** A major rule cannot take effect until 60 days after it is published in the **Federal Register**. This action is not a ''major rule'' as defined by 5 U.S.C. 804(2).

VI. Statutory Provisions and Legal Authority

Statutory authority for the rule finalized today can be found in section 211(o) of the Clean Air Act, 42 U.S.C. 7545. Additional support for the procedural and compliance related aspects of today's rule, including the recordkeeping requirements, come from sections 114, 208, and 301(a) of the Clean Air Act, 42 U.S.C. 7414, 7542, and 7601(a).

List of Subjects in 40 CFR Part 80

Environmental protection, Administrative practice and procedure, Agriculture, Air pollution control, Confidential business information, Diesel, Energy, Forest and Forest Products, Fuel additives, Gasoline, Imports, Labeling, Motor vehicle pollution, Penalties, Petroleum, Reporting and Recordkeeping requirements.

Dated: September 24, 2013.

Gina McCarthy,

Administrator.

For the reasons set forth in the preamble, 40 CFR part 80 is amended as follows:

PART 80—REGULATION OF FUELS AND FUEL ADDITIVES

■ 1. The authority citation for part 80 continues to read as follows:

Authority: 42 U.S.C. 7414, 7542, 7545, and 7601(a).

Subpart M—[Amended]

■ 2. Section 80.1401 is amended by revising the definition of ''Heating oil'' to read as follows:

§ 80.1401 Definitions.

* * * * *

Heating oil means:

(1) A fuel meeting the definition of heating oil set forth in § 80.2(ccc); or

(2) A fuel oil that is used to heat interior spaces of homes or buildings to control ambient climate for human comfort. The fuel oil must be liquid at 60 degrees Fahrenheit and 1 atmosphere of pressure, and contain no more than 2.5% mass solids.

* * * * *

■ 3. Section 80.1426 is amended by adding a new paragraph (c)(7) to read as follows:

§ 80.1426 How are RINs generated and assigned to batches of renewable fuel by renewable fuel producers or importers?

* * * * *

(c) * * *

(7) For renewable fuel oil that is heating oil as defined in paragraph (2) of the definition of heating oil in § 80.1401, renewable fuel producers and importers shall not generate RINs unless they have received affidavits from the final end user or users of the fuel oil as specified in § 80.1451(b)(1)(ii)(T)(*3*).

* * * * *

■ 4. Section 80.1450 is amended by adding a new paragraph (b)(1)(xi) to read as follows:

§ 80.1450 What are the registration requirements under the RFS program?

* * * * *

(b) * * *

(1) * * *

(xi) For a producer of fuel oil meeting paragraph (2) of the definition of heating oil in § 80.1401:

(A) An affidavit from the producer of the fuel oil stating that the fuel oil for which RINs have been generated will be sold for the purposes of heating interior spaces of homes or buildings to control ambient climate for human comfort, and no other purpose.

(B) Affidavits from the final end user or users of the fuel oil stating that the fuel oil is being used or will be used for purposes of heating interior spaces of homes or buildings to control ambient climate for human comfort, and no other purpose, and acknowledging that any other use of the fuel oil would violate EPA regulations and subject the user to civil penalties under the Clean Air Act.

* * * * *

■ 5. Section 80.1451 is amended as follows:

■ a. By redesignating paragraph (b)(1)(ii)(T) as paragraph (b)(1)(ii)(U).

■ b. By adding a new paragraph (b)(1)(ii)(T).

§ 80.1451 What are the reporting requirements under the RFS program?

* * * * *

(b) * * *

(1) * * *

(ii) * * *

(T) Producers of fuel oil that meets paragraph (2) of the definition of heating oil in § 80.1401, shall report, on a quarterly basis, all the following for each volume of fuel oil:

(*1*) Total volume of fuel oil produced and sold, in units of U.S. gallon, and the lower heating value of the fuel oil, in units of BTU per U.S. gallon.

(*2*) Total volume of fuel oil for which RINs were generated, in units of U.S. gallon, and the respective quantities of fuel oil sold, organization names and locations of the buildings in which the fuel oil was used, and the RIN numbers assigned to each batch of fuel oil.

(*3*) For each batch of fuel oil for which RINs are generated that the renewable fuel producer claims meets paragraph (2) of the definition of heating oil in § 80.1401 and that is sold for the purposes specified in paragraph (2), affidavits from end user or users of the fuel oil that include the following information:

(*i*) Quantity of fuel oil received from producer.

(*ii*) Quantity of fuel oil used or to be used for heating interior spaces of homes or buildings to control ambient climate for human comfort, and for no other purpose.

(*iii*) Date the fuel oil was received.

(*iv*) Blend level of the fuel oil in petroleum based fuel oil when received (if applicable).

(*v*) Quantity of assigned RINs received with the fuel oil, if applicable.

(*vi*) Quantity of assigned RINs that the end user separated from the fuel oil, if applicable.

* * * * *

■ 6. Section 80.1453 is amended by adding a new paragraph (d) to read as follows:

§ 80.1453 What are the product transfer document (PTD) requirements for the RFS program?

* * * * *

(d) For fuel oil meeting paragraph (2) of the definition of heating oil in § 80.1401, the PTD of the fuel oil shall state: ''This volume of renewable fuel oil is designated and intended to be used to heat interior spaces of homes or buildings to control ambient climate for human comfort. Do NOT use for process heat or any other purpose, as these uses are prohibited pursuant to 40 CFR 80.1460(g).''.

■ 7. Section 80.1454 is amended by adding a new paragraph (b)(8) to read as follows:

§ 80.1454 What are the recordkeeping requirements under the RFS program?

* * * * *

(b) * * *

(8) A producer of fuel oil meeting paragraph (2) of the definition of heating oil in § 80.1401 shall keep copies of all contracts which describe the fuel oil under contract with each end user.

* * * * *

■ 8. Section 80.1460 is amended by adding a new paragraph (g) to read as follows:

§ 80.1460 What acts are prohibited under the RFS program?

* * * * *

(g) *Failing to use a renewable fuel oil for its intended use.* No person shall use fuel oil that meets paragraph (2) of the definition of heating oil in § 80.1401 and for which RINs have been generated in an application other than to heat interior spaces of homes or buildings to control ambient climate for human comfort.

[FR Doc. 2013–24280 Filed 10–21–13; 8:45 am]

BILLING CODE 6560–50–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 648

[Docket No. 130408348–3835–02]

RIN 0648–BD17

Fisheries of the Northeastern United States; Atlantic Herring Fishery; Framework Adjustment 2 and Specifications

Correction

In rule document 2013–24271 appearing on pages 61828 through 61838 in the issue of Friday, October 4, 2013, make the following correction:

1. On page 61828, in the second column, in the **DATES** section, ''Effective September 30, 2014'' should read ''Effective September 30, 2013''.

[FR Doc. C1–2013–24271 Filed 10–21–13; 8:45 am]

BILLING CODE 1505–01–D

Proposed Rules

Federal Register

Vol. 78, No. 204

Tuesday, October 22, 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.

DEPARTMENT OF ENERGY

10 CFR Parts 429 and 431

[Docket No. EERE–2011–BT–TP–0024]

RIN 1904–AC46

Energy Conservation Program: Alternative Efficiency Determination Methods, Basic Model Definition, and Compliance for Commercial HVAC, Refrigeration, and WH Equipment

AGENCY: Office of Energy Efficiency and Renewable Energy, Department of Energy.

ACTION: Supplemental Notice of Proposed Rulemaking (SNOPR).

SUMMARY: The U.S. Department of Energy (DOE) is proposing to revise and expand its existing regulations governing the use of particular methods as alternatives to testing for the purposes of certifying compliance with the applicable energy conservation standards and the reporting of related ratings for commercial and industrial equipment covered by EPCA. The proposals contained in this supplemental notice arose from a negotiated rulemaking effort on issues regarding certification of commercial heating, ventilating, air-conditioning (HVAC), water heating (WH), and refrigeration equipment. In addition, DOE is proposing to amend the compliance dates for the initial certification of commercial HVAC, WH, and refrigeration equipment.

DATES: DOE will accept comments, data, and information regarding this supplemental notice of proposed rulemaking (SNOPR) no later than November 21, 2013. See section VI, ''Public Participation,'' of this SNOPR for details.

ADDRESSES: Interested persons are encouraged to submit comments using the Federal eRulemaking Portal at *http://www.regulations.gov.* Follow the instructions for submitting comments. Alternatively, interested persons may submit comments, identified by docket number EERE–2011–BT–TP–0024, by any of the following methods:

- *Email:* to *AEDM/ARM–2011–TP–0024@ee.doe.gov.* Include EERE–2011–BT–TP–0024 in the subject line of the message.
- *Mail:* Ms. Brenda Edwards, U.S. Department of Energy, Building Technologies Office, Mailstop EE–2J, Alternative Efficiency Determination Methods, Basic Model Definition, and Compliance for Commercial HVAC, Refrigeration, and WH Equipment, EERE–2011–BT–TP–0024, 1000 Independence Avenue SW., Washington, DC 20585– 0121. Phone: (202) 586–2945. Please submit one signed paper original.
- *Hand Delivery/Courier:* Ms. Brenda Edwards, U.S. Department of Energy, Building Technologies Office, 6th Floor, 950 L'Enfant Plaza SW., Washington, DC 20024. Phone: (202) 586–2945. Please submit one signed paper original.

Instructions: All submissions received must include the agency name and docket number or RIN for this rulemaking.

Docket: For access to the docket to read background documents, or comments received, go to the Federal eRulemaking Portal at *http://www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: Ms. Ashley Armstrong, U.S. Department of Energy, Office of Energy Efficiency and Renewable Energy, Building Technologies Office, EE–2J, 1000 Independence Avenue SW., Washington, DC 20585–0121. Email: *Ashley.Armstrong@ee.doe.gov;* and Ms. Laura Barhydt, U.S. Department of Energy, Office of the General Counsel, Forrestal Building, GC–32, 1000 Independence Avenue SW., Washington, DC 20585. Email: *Laura.Barhydt@hq.doe.gov.*

SUPPLEMENTARY INFORMATION:

I. Authority and Background
A. Authority
B. Background
II. Discussion of Specific Revisions to DOE's Regulations for Alternative Efficiency Determination Methods and Alternative Rating Methods
A. General Issues
1. Pre-Approval
2. Applicable Equipment
B. Validation
1. Number of Tested Units Required for Validation
2. Tolerances
3. Certified Ratings
C. DOE Verification
1. Witness Testing
2. Verification Process
3. Verification Lab Requirements
4. Verification Tolerances
5. Invalid Rating Process
6. Consequences of an Invalid Rating
7. Regaining the Use of AEDMs
III. Basic Model Definitions
IV. Discussion of Specific Revisions to the Compliance Date for Certification of Commercial HVAC, WH, and Refrigeration Equipment
V. Procedural Issues and Regulatory Review
A. Review Under Executive Order 12866
B. Review Under the Regulatory Flexibility Act
C. Review Under the Paperwork Reduction Act
D. Review Under the National Environmental Policy Act
E. Review Under Executive Order 13132
F. Review Under Executive Order 12988
G. Review Under the Unfunded Mandates Reform Act of 1995
H. Review Under the Treasury and General Government Appropriations Act, 1999
I. Review Under Executive Order 12630
J. Review Under the Treasury and General Government Appropriations Act, 2001
K. Review Under Executive Order 13211
L. Review Under Section 32 of the Federal Energy Administration Act of 1974
VI. Public Participation
A. Submission of Comments
B. Issues on Which DOE Seeks Comment
VII. Approval of the Office of the Secretary

I. Authority and Background

A. Authority

Title III of the Energy Policy and Conservation Act of 1975, as amended (''EPCA'' or, in context, ''the Act'') sets forth a variety of provisions designed to improve energy efficiency. Part A of Title III (42 U.S.C. 6291–6309) provides for the Energy Conservation Program for Consumer Products Other Than Automobiles. The National Energy Conservation Policy Act (NECPA), Public Law 95–619, amended EPCA to add Part A–1 of Title III, which established an energy conservation program for certain industrial equipment. (42 U.S.C. 6311–6317) [1] The Department of Energy (''DOE'') is charged with implementing these provisions.

Under EPCA, this program consists essentially of four parts: (1) Testing; (2) labeling; (3) Federal energy conservation

[1] For editorial reasons, Parts B (consumer products) and C (commercial equipment) of Title III of EPCA were re-designated as parts A and A–1, respectively, in the United States Code.

standards; and (4) certification and enforcement procedures. The Federal Trade Commission (FTC) is primarily responsible for labeling of consumer products, and DOE implements the remainder of the program. The testing requirements consist of test procedures that manufacturers of covered products and equipment must use (1) as the basis for certifying to DOE that their products comply with the applicable energy conservation standards adopted under EPCA, and (2) for making representations about the efficiency of those products and equipment. Similarly, DOE must use these test requirements to determine whether the products comply with any relevant standards promulgated under EPCA. For certain consumer products and commercial equipment, DOE's existing testing regulations allow the use of an alternative efficiency determination method (AEDM) or an alternative rating method (ARM), in lieu of actual testing, to simulate the energy consumption or efficiency of certain basic models of covered products under DOE's test procedure conditions.

In addition, sections 6299–6305, and 6316 of EPCA authorize DOE to enforce compliance with the energy and water conservation standards (all non-product specific references herein referring to energy use and consumption include water use and consumption; all references to energy efficiency include water efficiency) established for certain consumer products and commercial equipment. (42 U.S.C. 6299–6305 (consumer products), 6316 (commercial equipment)) DOE has promulgated enforcement regulations that include specific certification and compliance requirements. *See* 10 CFR part 429; 10 CFR part 431, subparts B, U, and V.

B. Background

On March 7, 2011, DOE published a final rule in the **Federal Register** that, among other things, modified the requirements regarding manufacturer submission of compliance statements and certification reports to DOE (hereafter referred to as the March 2011 Final Rule). 76 FR 12421. This rule, among other things, imposed new or revised reporting requirements for some types of covered products and equipment, including a requirement that manufacturers submit annual reports to the Department certifying compliance of their basic models with applicable standards. See 76 FR 12428–12429 for more information.

In response to the initial deadline for certifying compliance imposed on commercial heating, ventilation, and air conditioning (HVAC), water heater (WH), and commercial refrigeration equipment (CRE) manufacturers by the March 2011 Final Rule, certain manufacturers of particular types of commercial and industrial equipment stated that, for a variety of reasons, they would be unable to meet that deadline. DOE initially extended the deadline for certifications for commercial HVAC, WH, and refrigeration equipment in a final rule published June 30, 2011 (hereafter referred to as the June 2011 Final Rule). 76 FR 38287 (June 30, 2011). DOE subsequently extended the compliance date for certification by an additional 12 months to December 31, 2013, for these types of equipment (December 2012 Final Rule) to allow, among other things, the Department to explore the negotiated rulemaking process for this equipment. 77 FR 72763.

In the summer of 2012, DOE had an independent convener evaluate the likelihood of success, analyzing the feasibility of developing certification requirements for commercial HVAC, WH, and CRE (not including walk-in coolers and freezers) through consensus-based negotiations among affected parties. In October 2012, the convener issued his report based on a confidential interview process involving forty (40) parties from a wide range of commercial HVAC, WH, and refrigeration equipment interests. Ultimately, the convener recommended that, with the proper scope of issues on the table surrounding commercial HVAC, WH, and refrigeration equipment certification, a negotiated rulemaking appeared to have a reasonable likelihood of achieving consensus based on the factors set forth in the Negotiated Rulemaking Act because the interviewed parties believed the negotiated rulemaking was superior to notice and comment rulemaking for certification-related issues. Additional details of the report can be found at *https://www1.eere.energy.gov/buildings/appliance_standards/pdfs/convening_report_hvac_cre_1.pdf.*

On February 26, 2013, members of the Appliance Standards and Rulemaking Federal Advisory Committee (ASRAC) unanimously decided to form a working group to engage in a negotiated rulemaking effort on the certification of HVAC, WH, and commercial refrigeration equipment. A notice of intent to form the Commercial Certification Working Group was published in the **Federal Register** on March 12, 2013, to which DOE received 35 nominations. 78 FR 15653. On April 16, 2013, the Department published a notice of open meeting that announced the first meeting and listed the 22 nominations that were selected to serve as members of the Working Group, in addition to two members from ASRAC, and one DOE representative. 78 FR 22431. The members of the Working Group were selected to ensure a broad and balanced array of stakeholder interests and expertise, and included efficiency advocates, manufacturers, a utility representative, and third party laboratory representatives.

AEDMs are computer modeling or mathematical tools that predict the performance of non-tested basic models. They are derived from mathematical models and engineering principles that govern the energy efficiency and energy consumption characteristics of a type of covered equipment. These computer modeling and mathematical tools, when properly developed, can provide a relatively straight-forward and reasonably accurate means to predict the energy usage or efficiency characteristics of a basic model of a given covered product or equipment and reduce the burden and cost associated with testing.

Where authorized by regulation, AEDMs enable manufacturers to rate and certify their basic models by using the projected energy use or energy efficiency results derived from these simulation models in lieu of testing. DOE has authorized the use of AEDMs for certain covered products and equipment that are difficult or expensive to test in an effort to reduce the testing burden faced by manufacturers of expensive or highly customized basic models. DOE's regulations currently permit manufacturers of commercial HVAC, WHs, distribution transformers, electric motors, and small electric motors to use AEDMs to rate their non-tested combinations provided they meet the Department's regulations governing such use.

Initially, DOE undertook a conventional rulemaking to consider expanding and revising its regulations for AEDMs. On April 18, 2011, DOE published a Request for Information (hereafter referred to as the April 2011 RFI). 76 FR 21673. The April 2011 RFI requested suggestions, comments, and information relating to the Department's intent to expand and revise its existing AEDM and ARM requirements. In response to comments it received on the April 2011 RFI, DOE published a Notice of Proposed Rulemaking (NOPR) in the **Federal Register** on May 31, 2012 (hereafter referred to as the May 2012 NOPR). 77 FR 32038. DOE proposed to permit AEDM-based ratings and certifications for additional types of equipment, such as commercial

refrigeration equipment (CRE), automatic commercial ice makers (ACIMs), beverage vending machines (BVMs), and walk-in cooler and freezer (WICF) refrigeration systems. 77 FR 32055. Furthermore, DOE proposed a number of requirements that manufacturers would need to meet in order to use an AEDM. DOE also proposed a method that it would employ to determine if an AEDM had been used appropriately by a manufacturer along with the consequences if it had not been. 77 FR 32055–32056.

During the Working Group's first meeting, Working Group members voted to expand the scope of the negotiated rulemaking efforts to include developing methods of estimating equipment performance based on AEDM simulations. The issues discussed by the the various participants during the negotiations with DOE were those raised by the commenters in response to the May 2012 NOPR. The discussion of those issues in the negotiated rulemaking and the consensus reached as proposed in this supplemental NOPR are summarized in two documents included in the docket of this proposal and constitute DOE's response to the comments on the May 2012 NOPR. The documents discuss the particular elements that the AEDM simulations for each equipment should address and other related considerations of note, including potential basic model definitions, test procedure issues, the treatment of certain features, and certification of these equipment. See *http://www.regulations.gov/#!docketBrowser;rpp=25;po=0;dct=SR;D=EERE-2013-BT-NOC-0023.*

As required, the Working Group submitted an interim report to ASRAC on June 26, 2013, summarizing the group's recommendations regarding AEDMs for commercial HVAC, WH, and refrigeration equipment. The interim report to ASRAC can be found at *http://www.regulations.gov/#!documentDetail;D=EERE-2013-BT-NOC-0023-0046.* ASRAC subsequently voted unanimously to approve the recommendations in the interim report for AEDMs. Subsequently, the Working Group submitted a final report on August 30, 2013, summarizing the Working Group's recommendations for model grouping, certification requirements and deadlines, and features to be excluded from certification, verification, and enforcement testing as long as specific conditions were met. ASRAC voted unanimously to approve the recommendations in the final report. In this notice of proposed rulemaking, DOE is proposing to adopt the Working Group's recommendations, without modification, for AEDMs, basic model definitions, and the initial compliance date for certification. DOE will be addressing the remaining Working Group's recommendations for certification requirements, and for the treatment of specific features when testing, in a separate rulemaking or guidance document.

II. Discussion of Specific Revisions to DOE's Regulations for Alternative Efficiency Determination Methods and Alternative Rating Methods

On May 14–15, 2013, the Commercial Certification Working Group held a two-day meeting at the U.S. Department of Energy's headquarters in Washington, DC. 69 interested parties, including members of the Working Group, attended. The Working Group's recommendations are presented in this notice of proposed rulemaking. A more detailed discussion of the discussions and recommendations can be found in the Commercial Certification Working Group meeting transcripts, which are located at *http://www.regulations.gov/#!docketDetail;D=EERE-2013-BT-NOC-0023.*

A. General Issues

1. Pre-Approval

The Commercial Certification Working Group unanimously recommended that DOE not require pre-approval for AEDMs for commercial HVAC, WH, or refrigeration equipment. This recommendation is consistent with DOE's proposal in the May 21, 2012, notice of proposed rulemaking amending AEDM requirements. 77 FR 32038. Thus, DOE is not proposing to adopt a pre-approval process for AEDMs for the aforementioned equipment.

2. Applicable Equipment

The Commercial Certification Working Group unanimously recommended the following types of covered equipment be allowed to use AEDMs.

- Commercial HVAC Equipment
  - Commercial packaged air-conditioning and heating equipment (air-cooled, water-cooled, evaporatively-cooled, and water-source)
  - Packaged terminal air conditioners and heat pumps
  - Computer room air conditioners
  - Single package vertical air conditioners and heat pumps
  - Variable refrigerant flow systems
  - Commercial packaged boilers
  - Commercial warm-air furnaces
- Commercial WH Equipment
  - Commercial electric storage water heaters
  - Commercial gas-fired and oil-fired storage water heaters
  - Commercial gas-fired and oil-fired instantaneous water heaters greater than or equal to 10 gallons
  - Commercial gas-fired and oil-fired hot water supply boilers greater than or equal to 10 gallons
  - Commercial gas-fired and oil-fired instantaneous water heaters less than 10 gallons
  - Commercial gas-fired and oil-fired hot water supply boilers less than 10 gallons
  - Commercial unfired hot water storage tanks
- Commercial Refrigeration Equipment

DOE currently allows the use of AEDMs for commercial HVAC equipment and water heating equipment. In this notice of proposed rulemaking, DOE proposes, in alignment with the Working Group's recommendation, to also permit manufacturers to use AEDMs when certifying CRE.

B. Validation

Prior to use for certifying the energy efficiency or energy use of a basic model, DOE generally requires AEDMs to be validated. The Commercial Certification Working Group recommended the following validation process for AEDMs, which DOE proposes to adopt in today's notice.

1. Number of Tested Units Required for Validation

To validate an AEDM, a manufacturer must select the minimum number of basic models, specified in Table II.1 through Table II.5, for each of the validation classes to which the AEDM is going to apply. Each selection represents a single test conducted in accordance with the DOE test procedure (TP) or applicable DOE TP waiver at a manufacturer's testing facility or a third-party testing facility, whose test result is directly compared to the result for that model from the AEDM.

TABLE II.1—COMMERCIAL HVAC VALIDATION CLASSES

Validation class	Minimum number of basic models that must be tested per AEDM
Air-Cooled, Split and Packaged Air Conditioners (ACs) and Heat Pumps (HPs) less than 65,000 Btu/h Cooling Capacity (3-Phase).	2 Basic Models.
Air-Cooled, Split and Packaged ACs and HPs greater than or equal to 65,000 Btu/h Cooling Capacity and Less than 760,000 Btu/h Cooling Capacity.	2 Basic Models.
Water-Cooled, Split and Packaged ACs and HPs, All Cooling Capacities	2 Basic Models.
Evaporatively-Cooled, Split and Packaged ACs and HPs, All Capacities	2 Basic Models.
Water-Source HPs, All Capacities	2 Basic Models.
Single Package Vertical ACs and HPs	2 Basic Models.
Packaged Terminal ACs and HPs	2 Basic Models.
Air-Cooled, Variable Refrigerant Flow ACs and HPs	2 Basic Models.
Water-Cooled, Variable Refrigerant Flow ACs and HPs	2 Basic Models.
Computer Room Air Conditioners, Air Cooled	2 Basic Models.
Computer Room Air Conditioners, Water-Cooled	2 Basic Models.

TABLE II.2—COMMERCIAL WATER HEATERS VALIDATION CLASSES

Validation class	Minimum number of basic models that must be tested
Gas-fired Water Heaters and Hot Water Supply Boilers Less than 10 Gallons	2 Basic Models.
Gas-fired Water Heaters and Hot Water Supply Boilers Greater than or Equal to 10 Gallons	2 Basic Models.
Oil-fired Water Heaters and Hot Water Supply Boilers Less than 10 Gallons	2 Basic Models.
Oil-fired Water Heaters and Hot Water Supply Boilers Greater than or Equal to 10 Gallons	2 Basic Models.
Electric Water Heaters	2 Basic Models.
Heat Pump Water Heaters	2 Basic Models.
Unfired Hot Water Storage Tanks	2 Basic Models.

TABLE II.3—COMMERCIAL PACKAGED BOILERS VALIDATION CLASSES

Validation class	Minimum number of basic models that must be tested
Gas-fired, Hot Water Only Commercial Packaged Boilers	2 Basic Models.
Gas-fired, Steam Only Commercial Packaged Boilers	2 Basic Models.
Gas-fired Hot Water/Steam Commercial Packaged Boilers	2 Basic Models.
Oil-fired, Hot Water Only Commercial Packaged Boilers	2 Basic Models.
Oil-fired, Steam Only Commercial Packaged Boilers	2 Basic Models.
Oil-fired Hot Water/Steam Commercial Packaged Boilers	2 Basic Models.

TABLE II.4—COMMERCIAL FURNACES VALIDATION CLASSES

Validation class	Minimum number of basic models that must be tested
Gas-fired Furnaces	2 Basic Models.
Oil-fired Furnaces	2 Basic Models.

TABLE II.5—COMMERCIAL REFRIGERATION EQUIPMENT VALIDATION CLASSES

Validation class*	Minimum number of basic models that must be tested
Self-Contained Open Refrigerators	2 Basic Models.
Self-Contained Open Freezers	2 Basic Models.
Remote Condensing Open Refrigerators	2 Basic Models.
Remote Condensing Open Freezers	2 Basic Models.
Self-Contained Closed Refrigerators	2 Basic Models.
Self-Contained Closed Freezers	2 Basic Models.
Remote Condensing Closed Refrigerators	2 Basic Models.
Remote Condensing Closed Freezers	2 Basic Models.

*The minimum number of tests indicated above must be comprised of a transparent model, a solid model, a vertical model, a semi-vertical model, a horizontal model, and a service-over-the counter model, as applicable based on the equipment offering. However, manufacturers do not need to include all types of these models if it will increase the minimum number of tests that need to be conducted.

A manufacturer may elect to develop multiple AEDMs per validation class and each AEDM may span multiple validation classes; however, the minimum number of tests must be maintained per validation class for each AEDM a manufacturer chooses to develop and use. An AEDM may be applied to any individual model within the applicable validation classes at the manufacturer's discretion. All documentation of test results for the models used to validate each AEDM, the AEDM results, and the subsequent comparisons to the AEDM must be maintained as part of both the test data underlying the certified rating and the AEDM validation package pursuant to 10 CFR 429.71. DOE requests comment on the minimum number of tests proposed for each validation class.

2. Tolerances

To validate the AEDM, the test results from each model required per the validation requirements described in the previous section must be compared to the simulated results from the applicable AEDM. The Commercial Certification Working Group recommended that for energy consumption metrics, the AEDM result for a model must be greater than or equal to 95 percent of the tested results for that same model. For energy efficiency metrics, the AEDM results for a model must be less than or equal to 105 percent of the tested results for that same model. DOE is proposing this one-sided 5 percent tolerance for AEDM validation for all commercial HVAC, WH, and refrigeration equipment. DOE requests comment on the proposed tolerances on the AEDM results as compared to the tested results for a given model.

3. Certified Ratings

For each basic model of commercial HVAC, WH, and refrigeration equipment distributed in commerce, manufacturers must determine the certified rating based on testing or use of a validated AEDM. DOE's current regulations provide manufacturers with some flexibility in rating each basic model by allowing the manufacturer the discretion to rate conservatively. The Working Group recommended that for energy consumption metrics each model's certified rating must be less than or equal to the applicable Federal standard and greater than or equal to the model's AEDM result. For energy efficiency metrics, each model's certified rating must be less than or equal to the model's AEDM result and greater than or equal to the applicable Federal standard. DOE is proposing to retain the flexibility provided by its current regulatory approach and is proposing the Working Group's recommendation without modification. DOE requests comment on this method of rating.

C. DOE Verification

Once a basic model has been distributed in commerce, DOE may select any model and verify the equipment's performance at any time. 10 CFR 429.104. The Commercial Certification Working Group recommended the following process described in section II.C.1 through II.C.7 for DOE verification of certified ratings determined by an AEDM. In today's notice, DOE proposes to adopt these recommendations.

1. Witness Testing

Currently, DOE's regulations do not require a manufacturer to be present for DOE-initiated testing to verify equipment performance of a given basic model. The Working Group considered two options for witness testing when certifying a basic model. A manufacturer may elect to have a DOE representative and a manufacturer's representative on-site for the initial verification test for up to 10 percent of the manufacturer's certified basic models rated with an AEDM. The 10 percent requirement applies to all of the basic models certified by a given manufacturer no matter how many AEDMs a manufacturer has used to develop its ratings. Manufacturers who elect to select 10 percent of their basic models must include this information as part of their certification prior to the unit being selected for verification testing. In general, DOE will perform testing without a manufacturer's representative present for all basic models DOE selects for assessment testing as long as the two following conditions are met: (1) A manufacturer has not elected a given basic model as part of its 10 percent election allowed for witness testing; and (2) the manufacturer does not require the basic model to be started only by a factory-trained installer per the installation manual instructions. For the basic models for which a manufacturer elected to have the initial verification test witnessed, the manufacturer cannot request the unit be retested. The results from this initial test would be used to make a definitive determination regarding the validity of the basic model's rating. For those basic models that are initially tested without the manufacturer present, a manufacturer is automatically eligible to request a retest for those basic models where the initial results indicate a potential rating issue. DOE requests comment on the proposal for witness testing.

2. Verification Process

The Working Group negotiated the process that DOE would use to assess a unit's performance through third party testing. Under this approach, DOE would begin the verification process by selecting a single unit of a given basic model for testing either from retail or by obtaining a sample from the manufacturer. DOE will select a third-party testing laboratory at its discretion to test the unit selected. The lab will adhere to the requirements recommended by the Commercial Certification Working Group described in section II.C.3 below. DOE will conduct the test in accordance with the witness testing arrangements discussed above. In the cases where a factory-trained installer is required per the installation manual instructions or the model is a variable refrigerant flow commercial HVAC system, the manufacturer's representative and DOE will only be on-site for test set up. In all cases, the Department will be responsible for the logistics of arranging a witnessed test, and the laboratory is not allowed to communicate directly with the manufacturer.

The manufacturer will provide any additional information needed regarding test set up or testing to DOE through the certification process in pdf format. (This provision will be addressed in a separate rulemaking.) DOE will provide this information to the test facility as long as the additional instructions are not in conflict with the DOE test procedure or applicable DOE test procedure waiver. The test facility may not use any additional information during the testing process that has not been approved by DOE or shipped in the packaging of the unit. If needed, the test facility may request from DOE additional information on test set up, installation, or testing. Upon receiving a request from the test facility for additional information, DOE may hold and coordinate a meeting with the manufacturer and the test facility to discuss the additional details needed for testing. Additional instructions may be given to the test facility as agreed upon by DOE and the manufacturer. At no time may the test facility discuss DOE verification testing with the manufacturer without the Department present.

If a unit is tested and determined to be outside the rating tolerances described in section II.C.4, DOE will notify the manufacturer. The manufacturer will receive all

documentation related to the test set up, test conditions, and test results for the unit if the unit falls outside the rating tolerances. At that time, a manufacturer may present all claims regarding any issues directly associated with the test and initiate a discussion regarding retesting. If the manufacturer was not on-site for the initial test, the manufacturer may request a retest of the same unit, and DOE and the manufacturer can be present for the retest. DOE will not retest a different unit of the same basic model unless DOE and the manufacturer determine it is necessary based on the test results, claims presented, and DOE regulations. DOE requests comment on this proposal.

3. Verification Lab Requirements

The Commercial Certification Working Group recommended that all AEDM verification tests should be conducted in a third-party testing facility of DOE's choice. Commercial equipment that cannot be tested at an independent third-party facility may be tested at a manufacturer's facility upon DOE's request. DOE requests comment on this proposal.

4. Verification Tolerances

To verify the certified rating of a given model, the test results from a single unit test of the model will be compared to the certified rating in accordance with the tolerances set forth below. For energy consumption metrics, the Commercial Certification Working Group recommended:

Test Result ≤ Certified Rating × (1 + Applicable Tolerance)

For energy efficiency metrics, the Commercial Certification Working Group recommended:

Test Result ≥ Certified Rating × (1 − Applicable Tolerance)

DOE requests comment on the proposed tolerances.

TABLE II.6—RATING TOLERANCES

Equipment	Metric	Applicable tolerance
Commercial Packaged Boilers	Combustion Efficiency	5% (0.05)
	Thermal Efficiency	5% (0.05)
Commercial Water Heaters or Hot Water Supply Boilers	Thermal Efficiency	5% (0.05)
	Standby Loss	10% (0.1)
Unfired Storage Tanks	R-Value	10% (0.1)
Air-Cooled, Split and Packaged ACs and HPs less than 65,000 Btu/h Cooling Capacity (3-Phase).	Seasonal Energy-Efficiency Ratio	5% (0.05)
	Heating Season Performance Factor	5% (0.05)
	Energy Efficiency Ratio	10% (0.1)
Air-Cooled, Split and Packaged ACs and HPs greater than or equal to 65,000 Btu/h Cooling Capacity and Less than 760,000 Btu/h Cooling Capacity.	Energy Efficiency Ratio	5% (0.05)
	Coefficient of Performance	5% (0.05)
	Integrated Energy Efficiency Ratio	10% (0.1)
Water-Cooled, Split and Packaged ACs and HPs, All Cooling Capacities	Energy Efficiency Ratio	5% (0.05)
	Coefficient of Performance	5% (0.05)
	Integrated Energy Efficiency Ratio	10% (0.1)
Evaporatively-Cooled, Split and Packaged ACs and HPs, All Capacities	Energy Efficiency Ratio	5% (0.05)
	Coefficient of Performance	5% (0.05)
	Integrated Energy Efficiency Ratio	10% (0.1)
Water-Source HPs, All Capacities	Energy Efficiency Ratio	5% (0.05)
	Coefficient of Performance	5% (0.05)
	Integrated Energy Efficiency Ratio	10% (0.1)
Single Package Vertical ACs and HPs	Energy Efficiency Ratio	5% (0.05)
	Coefficient of Performance	5% (0.05)
Packaged Terminal ACs and HPs	Energy Efficiency Ratio	5% (0.05)
	Coefficient of Performance	5% (0.05)
Variable Refrigerant Flow ACs and HPs	Energy Efficiency Ratio	5% (0.05)
	Coefficient of Performance	5% (0.05)
	Integrated Energy Efficiency Ratio	10% (0.1)
Computer Room Air Conditioners	Sensible Coefficient of Performance	5% (0.05)
Commercial Warm-Air Furnaces	Thermal Efficiency	5% (0.05)
Commercial Refrigeration Equipment	Daily Energy Consumption	5% (0.05)

5. Invalid Rating Process

Once DOE has determined that a basic model is outside of the tolerances based on the verification process described in sections II.C.1 through II.C.4, the Commercial Working Group negotiated the following process for remedying the invalid rating. First, DOE will notify the manufacturer and the manufacturer would have 15 days to select and report one of the following pathways: (1) Conservatively rerate and recertify the model based on the DOE test data only, (2) discontinue the model through the certification process, or (3) conduct additional testing, rerate, and recertify the model using all additional manufacturer test data and the DOE test data. The manufacturer and DOE will determine the specific date by which the manufacturer must complete the process for correcting the invalid rating, but the process shall not take more than 180 days to complete. DOE requests comment on the proposed options for addressing invalid ratings.

6. Consequences of an Invalid Rating

The Commercial Working Group negotiated the consequences of DOE determining that a rating is invalid for a given basic model based on assessment testing. If the Department finds that within 24 rolling months a manufacturer has more than one basic model with an invalid rating whose results were derived from the same AEDM, then the manufacturer will be subject to the requirements listed in Table II.7. In general, to continue using the AEDM, if a manufacturer has

between two and seven basic models with invalid ratings that were derived from the same AEDM, then the manufacturer must re-validate the AEDM according to the requirements in Table II.7 by conducting new testing of different basic models. If the manufacturer has eight or more basic models with invalid ratings from the same AEDM, then all the models to which the AEDM applied must be re-rated with physical testing in accordance with the applicable sampling plans in part 429. 10 CFR 429.11. DOE requests comment on these proposed consequences that would flow from an invalid rating.

TABLE II.7—CONSEQUENCES FOR INVALID RATINGS

Number of invalid certified ratings from the same AEDM** within a rolling 24 month period †	Required manufacturer actions
2	Submit different test data and reports from testing to validate that AEDM within the validation classes to which it is applied.* Adjust the rating as appropriate.
4	Conduct double the minimum number of validation tests for the validation classes to which the AEDM is applied. Note, the tests required under subsection (c)(5)(H)(1) must be different tests on different models than the original tests required under subsection (c)(2).
6	Conduct the minimum number of validation tests for the validation classes to which the AEDM is applied; And Conduct addition testing, which is equal to ½ the minimum number of validation tests for the validation classes to which the AEDM is applied, at either the manufacturer's facility or a third-party test facility, at the manufacturer's discretion. Note, the tests required under subsection (c)(5)(H)(1) must be different tests on different models than the original tests required under subsection (c)(2).
>=8	Manufacturer has lost privilege to use AEDM. All ratings for models within the validation classes to which the AEDM applied should be rated via testing. Distribution cannot continue until certification(s) are corrected to reflect actual test data.

* A manufacturer may discuss with DOE's Office of Enforcement whether existing test data on different basic models within the validation classes to which that specific AEDM was applied may be used to meet this requirement.

** Where the same AEDM means a computer simulation or mathematical model that is identified by the manufacturer at the time of certification as having been used to rate a model or group of models.

† The twenty-four month period begins with a DOE determination that a rating is invalid through the process outlined above. Additional invalid ratings apply for the purposes of determining the appropriate consequences if the subsequent determination(s) is based on selection of a unit for testing within the twenty-four month period (i.e., subsequent determinations need not be made within 24 months).

7. Regaining the Use of AEDMs

If, as a result of eight or more invalid ratings, a manufacturer has lost the privilege of using an AEDM for rating purposes, the manufacturer may regain the ability to use an AEDM by (1) Investigating the cause(s) for the failures, (2) identifying the root cause(s) for the failures, (3) taking corrective action to address the root cause(s), (4) validating the AEDM by performing six new tests per validation class with a minimum of two of the tests performed at a third-party test facility, and (5) obtaining DOE authorization to resume the use of the AEDM. At its discretion, DOE may reduce or waive these requirements, in which case DOE will provide public notice and a written explanation of the grounds for reducing or waiving the requirements. DOE requests comment on the proposed method for regaining the use of AEDMs.

III. Basic Model Definitions

The Working Group recommended amended basic model definitions for commercial refrigeration equipment; commercial warm air furnaces; commercial packaged boilers; and commercial water heaters. Additionally, the Working Group recommended distinct basic model definitions for each type of commercial HVAC equipment, such as packaged terminal air conditioners (PTACs) and heat pumps (PTHPs); small, large, and very large air-cooled commercial package air conditioning and heating equipment; small, large, and very large water-cooled, evaporatively-cooled, and water source commercial package air conditioning and heating equipment; single package vertical air conditioners and heat pumps (SPVUs); computer room air conditioner; and variable refrigerant flow multi-split air conditioner and heat pump with capacities greater than 65,000 Btu/h. DOE is proposing the basic model definitions by covered equipment type that were development by the Working Group except DOE has included several clarifications to harmonize the wording of the definitions for consistency purposes, but did not change the meaning of the definitions as agreed upon by the Working Group.

IV. Discussion of Specific Revisions to the Compliance Date for Certification of Commercial HVAC, WH, and Refrigeration Equipment

The Working Group recommended that certification reports must be initially submitted for all basic models distributed in commerce according to the schedule shown in Table IV.1. After the initial certification date, DOE's existing regulations require that manufacturers certify: (1) New basic models before distribution in commerce; (2) existing basic models, whose certified rating remains valid, annually; (3) existing basic models, whose design is altered resulting in a change in rating that is more consumptive or less efficient, at the time the design change is made; and (4) previously certified basic models that have been discontinued annually.

TABLE IV.1—INITIAL CERTIFICATION COMPLIANCE SCHEDULE

The initial certification date is the number of months shown below after the AEMD final rule is published in the **Federal Register**	Equipment type
6	Commercial Warm Air Furnaces, PTACs and PTHPs.
9	Commercial gas-fired and oil-fired instantaneous water heaters less than 10 gallons.
	Commercial gas-fired and oil-fired hot water supply boilers less than 10 gallons.
12	Commercial water heaters (all others types).
	Small commercial packaged boilers (≤ 2.5 million Btu/h).
	Self-Contained CRE with solid or transparent doors.
15	VRFs.
18	Small, large and very large air, water, and evaporatively-cooled and water source commercial packaged ACs and HPs.
	SPVUs.
	CRACs.
	Large packaged boilers (> 2.5 million Btu/h).
	CRE (all other types).

The Working Group also agreed to the following caveats on the schedule proposed above. If, in the separate, certification rulemaking, DOE adopts regulations that are significantly different from the remainder of the Working Group recommendations, then the initial certification compliance dates will be based on the final rule date for the separate rulemaking effort. The Working Group agreed that in no instance should the initial certification compliance date be less than two months after the issuance of the final rule adopting the remainder of the Working Group's recommendations. Additionally, the Working Group recommended that DOE allow a six-month grace period following each certification date during which DOE will not pursue civil penalties for certification violations. The Working Group emphasized that a grace period would allow manufacturers time to gain familiarity with the certification process and remedy any problems. DOE proposes to adopt this compliance schedule in its entirety and requests comment on this approach to establishing compliance deadlines.

V. Procedural Issues and Regulatory Review

A. Review Under Executive Order 12866

The Office of Management and Budget has determined that test procedure rulemakings do not constitute ''significant regulatory actions'' under section 3(f) of Executive Order 12866, Regulatory Planning and Review, 58 FR 51735 (Oct. 4, 1993). Accordingly, this action was not subject to review under the Executive Order by the Office of Information and Regulatory Affairs (OIRA) in the Office of Management and Budget (OMB).

B. Review Under the Regulatory Flexibility Act

The Regulatory Flexibility Act (5 U.S.C. 601, et seq.) requires the preparation of an initial regulatory flexibility analysis (IRFA) for any rule that by law must be proposed for public comment, unless the agency certifies that the rule, if promulgated, will not have a significant economic impact on a substantial number of small entities. As required by Executive Order 13272, ''Proper Consideration of Small Entities in Agency Rulemaking,'' 67 FR 53461 (August 16, 2002), DOE published procedures and policies on February 19, 2003, to ensure that the potential impacts of its rules on small entities are properly considered during the DOE rulemaking process. 68 FR 7990. DOE has made its procedures and policies available on the Office of the General Counsel's Web site: *www.gc.doe.gov*. DOE reviewed the test procedures considered in today's SNOPR under the provisions of the Regulatory Flexibility Act (RFA) and the policies and procedures published on February 19, 2003.

DOE reviewed the AEDM requirements being proposed under the provisions of the Regulatory Flexibility Act and the procedures and policies published on February 19, 2003. As discussed in more detail below, DOE found that because the provisions of this rule will not result in increased testing and/or reporting burden for manufacturers already eligible to use an AEDM and will extend AEDM use to a number of manufacturers, thus reducing their testing burden, manufacturers will not experience increased financial burden as a result of this rule.

Today's proposal, which presents voluntary methods for certifying compliance in lieu of conducting actual physical testing, would not increase the testing or reporting burden of manufacturers who currently use, or are eligible to use, an AEDM to certify their products. Furthermore, proposed requirements for validation of an AEDM do not require more testing than that required by the AEDM provisions included in the March 7, 2011 Certification, Compliance and Enforcement Final Rule (76 FR 12422) (''March 2011 Final Rule''), and would relax tolerances that tested products are required to meet in order to substantiate the AEDM.

DOE has also clarified in today's proposal how it intends to exercise its authority to validate AEDM performance and verify the performance of products certified using an AEDM. DOE negotiated the process with industry resulting in the proposal in today's proposed rule. Since any testing falling under this category would be DOE-initiated testing and DOE is outlining the process to determine an invalid rating in today's proposal which includes manufacturer involvement throughout, DOE does not believe that this will verification of ratings resulting from an AEDM will have a substantial impact on small businesses.

This notice of proposed rulemaking also proposes to permit the manufacturer of many other covered products who are currently not permitted to use an AEDM to certify or rate their products to have the option of doing so. Manufacturers not eligible to use AEDMs must currently test at least two units of every basic model that they produce in order to certify compliance to the Department pursuant to the March 2011 Final Rule. Today's proposal would reduce a manufacturer's testing burden by enabling these manufacturers to simulate testing based

on testing data derived from a reduced number of units. While the Department believes that permitting greater use of AEDMs will reduce the affected manufacturer's test burden, their use is at the manufacturer's discretion. If, as a result of any of the proposals herein, a manufacturer believes that use of an AEDM would increase rather than decrease their financial burden, the manufacturer may choose not to employ the method. Should a manufacturer choose to abstain from using an AEDM, this proposed provision would not apply and the manufacturer would continue to remain subject to the requirements of any DOE test procedure that applies to that product, which would result in no change in burden from that which is required currently.

Finally, DOE is proposing two aspects of regarding certification of commercial HVAC, WH, and refrigeration equipment, which should further decrease the burden of existing DOE regulations. First, DOE is proposing basic model definition that allows a manufacturer to group its individual models based on certain characteristics. The basic model definition provides the manufacturer with flexibility in making these groupings and was negotiated as part of the Working Group's meeting. Lastly, DOE is proposing to extend the initial compliance date for certification of commercial HVAC, WH, and refrigeration equipment from 6 months to 18 months from publication of this final rule as compared to the current date of December 31, 2013. This will allow manufacturer time to implement the proposals agreed to by the Working Group, if they are ultimately promulgated, prior to initially certifying their basic models.

For the reasons enumerated above, DOE is certifying that the proposed rule, if promulgated, would not have a significant impact on a substantial number of small entities.

C. Review Under the Paperwork Reduction Act

Manufacturers of the covered products addressed in today's SNOPR must certify to DOE that their equipment comply with any applicable energy conservation standards. In certifying compliance, manufacturers must test their equipment according to the applicable DOE test procedures for the given equipment type, including any amendments adopted for those test procedures, or use the AEDMs to develop the certified ratings of the basic models. DOE has established regulations for the certification and recordkeeping requirements for all covered consumer products and commercial equipment, including the equipment at issue in this SNOPR. (76 FR 12422 (March 7, 2011)). The collection-of-information requirement for these certification and recordkeeping provisions is subject to review and approval by OMB under the Paperwork Reduction Act (PRA). This requirement has been approved by OMB under OMB Control Number 1910–1400. Public reporting burden for the certification is estimated to average 20 hours per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information.

Notwithstanding any other provision of the law, no person is required to respond to, nor shall any person be subject to a 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.

D. Review Under the National Environmental Policy Act

DOE has determined that this rule falls into a class of actions that are categorically excluded from review under the National Environmental Policy Act of 1969 (42 U.S.C. 4321, et seq.) and DOE's implementing regulations at 10 CFR part 1021. Specifically, this proposed rule would adopt changes for certifying certain covered products and equipment, so it would not affect the amount, quality or distribution of energy usage, and, therefore, would not result in any environmental impacts. Thus, this rulemaking is covered by Categorical Exclusion A6 under 10 CFR part 1021, subpart D. Accordingly, neither an environmental assessment nor an environmental impact statement is required.

E. Review Under Executive Order 13132

Executive Order 13132, ''Federalism,'' 64 FR 43255 (August 4, 1999) imposes certain requirements on agencies formulating and implementing policies or regulations that preempt State law or that have Federalism implications. The Executive Order requires agencies to examine the constitutional and statutory authority supporting any action that would limit the policymaking discretion of the States and to carefully assess the necessity for such actions. The Executive Order also requires agencies to have an accountable process to ensure meaningful and timely input by State and local officials in the development of regulatory policies that have Federalism implications. On March 14, 2000, DOE published a statement of policy describing the intergovernmental consultation process it will follow in the development of such regulations. 65 FR 13735. DOE has examined this proposed rule and has determined that it would not have a substantial direct effect on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. EPCA governs and prescribes Federal preemption of State regulations as to energy conservation for the products that are the subject of today's proposed rule. States can petition DOE for exemption from such preemption to the extent, and based on criteria, set forth in EPCA. (42 U.S.C. 6297(d)) No further action is required by Executive Order 13132.

F. Review Under Executive Order 12988

Regarding the review of existing regulations and the promulgation of new regulations, section 3(a) of Executive Order 12988, ''Civil Justice Reform,'' 61 FR 4729 (Feb. 7, 1996), imposes on Federal agencies the general duty to adhere to the following requirements: (1) Eliminate drafting errors and ambiguity; (2) write regulations to minimize litigation; (3) provide a clear legal standard for affected conduct rather than a general standard; and (4) promote simplification and burden reduction. Section 3(b) of Executive Order 12988 specifically requires that Executive agencies make every reasonable effort to ensure that the regulation: (1) Clearly specifies the preemptive effect, if any; (2) clearly specifies any effect on existing Federal law or regulation; (3) provides a clear legal standard for affected conduct while promoting simplification and burden reduction; (4) specifies the retroactive effect, if any; (5) adequately defines key terms; and (6) addresses other important issues affecting clarity and general draftsmanship under any guidelines issued by the Attorney General. Section 3(c) of Executive Order 12988 requires Executive agencies to review regulations in light of applicable standards in sections 3(a) and 3(b) to determine whether they are met or it is unreasonable to meet one or more of them. DOE has completed the required review and determined that, to the extent permitted by law, the proposed rule meets the relevant standards of Executive Order 12988.

G. Review Under the Unfunded Mandates Reform Act of 1995

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA) requires each Federal agency to assess the effects

of Federal regulatory actions on State, local, and Tribal governments and the private sector. Public Law 104–4, sec. 201 (codified at 2 U.S.C. 1531). For a proposed regulatory action likely to result in a rule that may cause the expenditure by State, local, and Tribal governments, in the aggregate, or by the private sector of $100 million or more in any one year (adjusted annually for inflation), section 202 of UMRA requires a Federal agency to publish a written statement that estimates the resulting costs, benefits, and other effects on the national economy. (2 U.S.C. 1532(a), (b)) The UMRA also requires a Federal agency to develop an effective process to permit timely input by elected officers of State, local, and Tribal governments on a proposed ''significant intergovernmental mandate,'' and requires an agency plan for giving notice and opportunity for timely input to potentially affected small governments before establishing any requirements that might significantly or uniquely affect small governments. On March 18, 1997, DOE published a statement of policy on its process for intergovernmental consultation under UMRA. 62 FR 12820; also available at *www.gc.doe.gov.* DOE examined today's proposed rule according to UMRA and its statement of policy and determined that the rule contains neither an intergovernmental mandate, nor a mandate that may result in the expenditure of $100 million or more in any year, so these requirements do not apply.

H. Review Under the Treasury and General Government Appropriations Act, 1999

Section 654 of the Treasury and General Government Appropriations Act, 1999 (Pub. L. 105–277) requires Federal agencies to issue a Family Policymaking Assessment for any rule that may affect family well-being. This proposal would not have any impact on the autonomy or integrity of the family as an institution. Accordingly, DOE has concluded that it is not necessary to prepare a Family Policymaking Assessment.

I. Review Under Executive Order 12630

DOE has determined, under Executive Order 12630, ''Governmental Actions and Interference with Constitutionally Protected Property Rights'' 53 FR 8859 (March 18, 1988), that this proposed regulation would not result in any takings that might require compensation under the Fifth Amendment to the U.S. Constitution.

J. Review Under the Treasury and General Government Appropriations Act, 2001

Section 515 of the Treasury and General Government Appropriations Act, 2001 (44 U.S.C. 3516 note) provides for agencies to review most disseminations of information to the public under guidelines established by each agency pursuant to general guidelines issued by OMB. OMB's guidelines were published at 67 FR 8452 (Feb. 22, 2002), and DOE's guidelines were published at 67 FR 62446 (Oct. 7, 2002). DOE has reviewed today's proposed rule under the OMB and DOE guidelines and has concluded that it is consistent with applicable policies in those guidelines.

K. Review Under Executive Order 13211

Executive Order 13211, ''Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use,'' 66 FR 28355 (May 22, 2001), requires Federal agencies to prepare and submit to OMB, a Statement of Energy Effects for any proposed significant energy action. A ''significant energy action'' is defined as any action by an agency that promulgated or is expected to lead to promulgation of a final rule, and that: (1) Is a significant regulatory action under Executive Order 12866, or any successor order; and (2) is likely to have a significant adverse effect on the supply, distribution, or use of energy; or (3) is designated by the Administrator of OIRA as a significant energy action. For any proposed significant energy action, the agency must give a detailed statement of any adverse effects on energy supply, distribution, or use should the proposal be implemented, and of reasonable alternatives to the action and their expected benefits on energy supply, distribution, and use.

Today's proposal to establish alternate certification requirements for certain covered equipment is not a significant regulatory action under Executive Order 12866. Moreover, it would not have a significant adverse effect on the supply, distribution, or use of energy, nor has it been designated as a significant energy action by the Administrator of OIRA. Therefore, it is not a significant energy action, and, accordingly, DOE has not prepared a Statement of Energy Effects.

L. Review Under Section 32 of the Federal Energy Administration Act of 1974

Under section 301 of the Department of Energy Organization Act (Pub. L. 95–91; 42 U.S.C. 7101), DOE must comply with section 32 of the Federal Energy Administration Act of 1974, as amended by the Federal Energy Administration Authorization Act of 1977. (15 U.S.C. 788; FEAA) Section 32 essentially provides in relevant part that, where a proposed rule authorizes or requires use of commercial standards, the notice of proposed rulemaking must inform the public of the use and background of such standards. In addition, section 32(c) requires DOE to consult with the Attorney General and the Chairman of the Federal Trade Commission (FTC) concerning the impact of the commercial or industry standards on competition. Today's proposal to amend regulations relating to AEDMs does not propose the use of any commercial standards.

VI. Public Participation

A. Submission of Comments

DOE will accept comments, data, and information regarding the proposed rule no later than the date provided at the beginning of this notice of proposed rulemaking. Comments, data, and information submitted to DOE's email address for this rulemaking should be provided in WordPerfect, Microsoft Word, PDF, or text (ASCII) file format. Interested parties should avoid the use of special characters or any form of encryption, and wherever possible, comments should include the electronic signature of the author. Absent an electronic signature, comments submitted electronically must be followed and authenticated by submitting a signed original paper document to the address provided at the beginning of this notice of proposed rulemaking. Comments, data, and information submitted to DOE via mail or hand delivery/courier should include one signed original paper copy. No telefacsimiles (faxes) will be accepted.

According to 10 CFR 1004.11, any person submitting information that he or she believes to be confidential and exempt by law from public disclosure should submit two copies: One copy of the document including all the information believed to be confidential and one copy of the document with the information believed to be confidential deleted. DOE will make its own determination as to the confidential status of the information and treat it according to its determination.

Factors of interest to DOE when evaluating requests to treat submitted information as confidential include (1) A description of the items, (2) whether and why such items are customarily treated as confidential within the industry, (3) whether the information is generally known by or available from

other sources, (4) whether the information has previously been made available to others without obligation concerning its confidentiality, (5) an explanation of the competitive injury to the submitting person which would result from public disclosure, (6) a date upon which such information might lose its confidential nature due to the passage of time, and (7) why disclosure of the information would be contrary to the public interest.

B. Issues on Which DOE Seeks Comment

Although DOE welcomes comments on any aspect of this proposal, DOE is particularly interested in receiving comments and views of interested parties concerning the following issues:

1. DOE requests comment on its proposal to require manufacturers to test a minimum number of models, specified in Table II.1 through Table II.5, from each validation class to which the AEDM is going to apply in order to substantiate each AEDM.
2. DOE requests comment on its proposed tolerances on AEDM results as compared to the test results for a given model.
3. DOE requests comment on its proposal to certify models rated with an AEDM between the AEDM result and the Federal standard.
4. DOE requests comment on its proposal to allow manufacturers to witness the testing of a maximum of 10 percent of their certified basic models. If a basic model is not witness tested then it can be retested at the discretion of the manufacturer according to the process outlined in section II.C.1.
5. DOE requests comment on the proposed process for validation test. This process outlines when a model can be witness tested, how additional test information can be communicated to the test lab, and how a manufacturer can request a retest.
6. DOE requests comment on its proposal that verification testing should take place a third-party test lab unless the equipment is unable to be tested at a third-party facility in which case testing may occur the manufacturer's facility.
7. DOE requests comment on the tolerances proposed in Table II.6.
8. DOE requests comment on the proposed options manufacturers may select from in order to address an invalid rating.
9. DOE requests comment on the consequences listed in Table II.7 for manufacturers found to have invalid ratings.
10. DOE requests comment on the proposed process for regaining the use of AEDMs.

VII. Approval of the Office of the Secretary

The Secretary of Energy has approved publication of today's SNOPR.

List of Subjects

10 CFR Part 429

Administrative practice and procedure, Confidential business information, Energy conservation, Reporting and recordkeeping requirements.

10 CFR Part 431

Administrative practice and procedure, Confidential business information, Energy conservation, Reporting and recordkeeping requirements.

Issued in Washington, DC, on September 30, 2013.

Kathleen B. Hogan,

Deputy Assistant Secretary for Energy Efficiency, Energy Efficiency and Renewable Energy.

For the reasons set forth in the preamble, DOE proposes to amend parts 429 and 431 of chapter II, subchapter D, of title 10 of the Code of Federal Regulations, as set forth below:

PART 429—CERTIFICATION, COMPLIANCE AND ENFORCEMENT FOR CONSUMER PRODUCTS AND COMMERCIAL AND INDUSTRIAL EQUIPMENT

■ 1. The authority citation for part 429 continues to read as follows:

Authority: 42 U.S.C. 6291–6317.

■ 2. Revise § 429.12 paragraph (i) to read as follows:

§ 429.12 General requirements applicable to certification reports.

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(i) *Compliance dates.* For any product subject to an applicable energy conservation standard for which the compliance date has not yet occurred, a certification report must be submitted not later than the compliance date for the applicable energy conservation standard. The covered products enumerated below are subject to the stated compliance dates for initial certification:

(1) Commercial warm air furnaces, packaged terminal air conditioners, and packaged terminal heat pumps, [date 6 months after date of publication of the final rule in the **Federal Register**];

(2) Commercial gas-fired and oil-fired instantaneous water heaters less than 10 gallons and commercial gas-fired and oil-fired hot water supply boilers less than 10 gallons, [date 9 months after date of publication of the final rule in the **Federal Register**];

(3) All other types of covered commercial water heaters except those specified in paragraph (i)(2) of this section, commercial packaged boilers with input capacities less than or equal to 2.5 million Btu/h, and self-contained commercial refrigeration equipment with solid or transparent doors, [date 12 months after date of publication of the final rule in the **Federal Register**];

(4) Variable refrigerant flow air conditioners and heat pumps, [date 15 months after date of publication of the final rule in the **Federal Register**];

(5) Small, large, or very large air-cooled, water-cooled, evaporatively-cooled, and water-source commercial air conditioning and heating equipment, single package vertical units, computer room air conditioners, commercial packaged boilers with input capacities greater than 2.5 million Btu/h, and all other types of commercial refrigeration equipment except those specified in paragraph (i)(3) of this section, [date 18 months after date of publication of the final rule in the **Federal Register**].

■ 3. Section 429.42 is amended by revising paragraph (a) to read as follows:

§ 429.42 Commercial refrigerators, freezers, and refrigerator-freezers.

(a) *Determination of represented value.* Manufacturers must determine the represented value, which includes the certified rating, for each basic model of commercial refrigerator, freezer, or refrigerator-freezer either by testing, in conjunction with the applicable sampling provisions, or by applying a validated AEDM.

(1) *Units to be tested.* (i) If the represented value for a given basic model is determined through testing, the general requirements of § 429.11 are applicable; and

(ii) For each basic model selected for testing, a sample of sufficient size shall be randomly selected and tested to ensure that—

(A) Any represented value of energy consumption or other measure of energy use of a basic model for which consumers would favor lower values shall be greater than or equal to the higher of:

(*1*) The mean of the sample, where:

$$\bar{x} = \frac{1}{n}\sum_{i=1}^{n} x_i$$

and $\bar{x}$ is the sample mean; n is the number of samples; and x_i is the ith sample; or,

(*2*) The upper 95 percent confidence limit (UCL) of the true mean divided by 1.10, where:

$$UCL = \bar{x} + t_{0.95}\left(\frac{s}{\sqrt{n}}\right)$$

and $\bar{x}$ is the sample mean; s is the sample standard deviation; n is the number of samples; and $t_{0.95}$ is the t statistic for a 95% one-tailed confidence interval with n − 1 degrees of freedom (from Appendix A to subpart B of this part); and,

(B) Any represented value of the energy efficiency or other measure of energy consumption of a basic model for which consumers would favor higher values shall be less than or equal to the lower of:

(*1*) The mean of the sample, where:

$$\bar{x} = \frac{1}{n}\sum_{i=1}^{n} x_i$$

and, $\bar{x}$ is the sample mean; n is the number of samples; and x_i is the ith sample; or,

(*2*) The lower 95 percent confidence limit (LCL) of the true mean divided by 0.90, where:

$$LCL = \bar{x} - t_{0.95}\left(\frac{s}{\sqrt{n}}\right)$$

and $\bar{x}$ is the sample mean; s is the sample standard deviation; n is the number of samples; and $t_{0.95}$ is the t statistic for a 95% one-tailed confidence interval with n − 1 degrees of freedom (from Appendix A to subpart B of this part).

(2) *Alternative efficiency determination methods.* In lieu of testing, a represented value of efficiency or consumption for a basic model of commercial refrigerator, freezer or refrigerator-freezer must be determined through the application of an AEDM pursuant to the requirements of § 429.70 and the provisions of this section, where:

(i) Any represented value of energy consumption or other measure of energy use of a basic model for which consumers would favor lower values shall be greater than or equal to the output of the AEDM and less than or equal to the Federal standard for that basic model; and

(ii) Any represented value of energy efficiency or other measure of energy consumption of a basic model for which consumers would favor higher values shall be less than or equal to the output of the AEDM and greater than or equal to the Federal standard for that basic model.

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■ 4. Section 429.43 is amended by revising paragraph (a) to read as follows:

§ 429.43 Commercial heating, ventilating, air conditioning (HVAC) equipment.

(a) *Determination of represented value.* Manufacturers can determine the represented value, which includes the certified rating, for each basic model of commercial HVAC equipment either by testing, in conjunction with the applicable sampling provisions, or by applying a validated AEDM.

(1) *Units to be tested.* (i) If the represented value is determined through testing, the general requirements of § 429.11 are applicable; and

(ii) For each basic model selected for testing, a sample of sufficient size shall be randomly selected and tested to ensure that—

(A) Any represented value of energy consumption or other measure of energy use of a basic model for which consumers would favor lower values shall be greater than or equal to the higher of:

(*1*) The mean of the sample, where:

$$\bar{x} = \frac{1}{n}\sum_{i=1}^{n} x_i$$

and, $\bar{x}$ is the sample mean; n is the number of samples; and x_i is the ith sample; Or,

(*2*) The upper 95 percent confidence limit (UCL) of the true mean divided by 1.05, where:

$$UCL = \bar{x} + t_{.95}\left(\frac{s}{\sqrt{n}}\right)$$

and $\bar{x}$ is the sample mean; s is the sample standard deviation; n is the number of samples; and $t_{0.95}$ is the t statistic for a 95% one-tailed confidence interval with n − 1 degrees of freedom (from Appendix A to subpart B of this part); and,

(B) Any represented value of energy efficiency or other measure of energy consumption of a basic model for which consumers would favor higher values shall be less than or equal to the lower of:

(*1*) The mean of the sample, where:

$$\bar{x} = \frac{1}{n}\sum_{i=1}^{n} x_i$$

and, $\bar{x}$ is the sample mean; n is the number of samples; and x_i is the ith sample; Or,

(*2*) The lower 95 percent confidence limit (LCL) of the true mean divided by 0.95, where:

$$LCL = \bar{x} - t_{.95}\left(\frac{s}{\sqrt{n}}\right)$$

and $\bar{x}$ is the sample mean; s is the sample standard deviation; n is the number of samples; and $t_{0.95}$ is the t statistic for a 95% one-tailed confidence interval with n − 1 degrees of freedom (from Appendix A to subpart B of this part).

(2) *Alternative efficiency determination methods.* In lieu of testing, a represented value of efficiency or consumption for a basic model of commercial HVAC equipment must be determined through the application of an AEDM pursuant to the requirements of § 429.70 and the provisions of this section, where:

(i) Any represented value of energy consumption or other measure of energy use of a basic model for which consumers would favor lower values shall be greater than or equal to the output of the AEDM and less than or equal to the Federal standard for that basic model; and

(ii) Any represented value of energy efficiency or other measure of energy consumption of a basic model for which consumers would favor higher values shall be less than or equal to the output of the AEDM and greater than or equal to the Federal standard for that basic model.

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■ 5. Section 429.44 is amended by revising paragraph (a) to read as follows:

§ 429.44 Commercial water heating equipment.

(a) *Determination of represented value.* Manufacturers can determine the represented value, which includes the certified rating, for each basic model of commercial water heating equipment, either by testing, in conjunction with the applicable sampling provisions, or by applying a validated AEDM.

(1) *Units to be tested.* (i) If the represented value for a given basic model is determined through testing, the general requirements of § 429.11 are applicable; and

(ii) For each basic model selected for testing, a sample of sufficient size shall be randomly selected and tested to ensure that—

(A) Any represented value of energy consumption or other measure of energy use of a basic model for which consumers would favor lower values shall be greater than or equal to the higher of:

(*1*) The mean of the sample, where:

$$\bar{x} = \frac{1}{n}\sum_{i=1}^{n} x_i$$

and, $\bar{x}$ is the sample mean; n is the number of samples; and x_i is the ith sample; Or,

(*2*) The upper 95 percent confidence limit (UCL) of the true mean divided by 1.05, where:

$$UCL = \bar{x} + t_{.95}\left(\frac{s}{\sqrt{n}}\right)$$

and $\bar{x}$ is the sample mean; s is the sample standard deviation; n is the number of samples; and $t_{0.95}$ is the t statistic for a 95% one-tailed confidence interval with n − 1 degrees of freedom (from Appendix A to subpart B of this part); and,

(B) Any represented value of energy efficiency or other measure of energy consumption of a basic model for which consumers would favor higher values shall be less than or equal to the lower of:

(*1*) The mean of the sample, where:

$$\bar{x} = \frac{1}{n}\sum_{i=1}^{n} x_i$$

and, $\bar{x}$ is the sample mean; n is the number of samples; and x_i is the i_{th} sample; or,

(*2*) The lower 95 percent confidence limit (LCL) of the true mean divided by 0.95, where:

$$LCL = \bar{x} - t_{.95}\left(\frac{s}{\sqrt{n}}\right)$$

and $\bar{x}$ is the sample mean; s is the sample standard deviation; n is the number of samples; and $t_{0.95}$ is the t statistic for a 95% one-tailed confidence interval with n − 1 degrees of freedom (from Appendix A to subpart B of this part).

(2) *Alternative efficiency determination methods.* In lieu of testing, a represented value of efficiency or consumption for a basic model of commercial water heating equipment must be determined through the application of an AEDM pursuant to the requirements of § 429.70 and the provisions of this section, where:

(i) Any represented value of energy consumption or other measure of energy use of a basic model for which consumers would favor lower values shall be greater than or equal to the output of the AEDM and less than or equal to the Federal standard for that basic model; and

(ii) Any represented value of energy efficiency or other measure of energy consumption of a basic model for which consumers would favor higher values shall be less than or equal to the output of the AEDM and greater than or equal to the Federal standard for that basic model.

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■ 6. Section 429.70 is amended by revising paragraphs (a) and (c) to read as follows:

§ 429.70 Alternative methods for determining energy efficiency and energy use.

(a) *General applicability of an AEDM.* A manufacturer of covered products or covered equipment explicitly authorized to use an AEDM in §§ 429.14 through 429.54 of this subpart may not distribute any basic model of such equipment in commerce unless the manufacturer has determined the energy efficiency of the basic model, either from testing the basic model in conjunction with DOE's certification sampling plans and statistics or from applying an alternative method for determining energy efficiency or energy use (AEDM) of the basic model, in accordance with the requirements of this section. In instances where a manufacturer has tested a basic model to validate the alternative method the manufacturer may not knowingly use an AEDM to overrate the efficiency (or underrate the consumption) of a basic model.

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(c) *Alternative efficiency determination method (AEDM) for Commercial HVAC, WH, and Refrigeration Equipment*—(1) *Criteria an AEDM must satisfy.* A manufacturer may not apply an AEDM to a basic model to determine its efficiency pursuant to this section unless:

(i) The AEDM is derived from a mathematical model that estimates the energy efficiency or energy consumption characteristics of the basic model as measured by the applicable DOE test procedure;

(ii) The AEDM is based on engineering or statistical analysis, computer simulation or modeling, or other analytic evaluation of performance data; and

(iii) The manufacturer has validated the AEDM, in accordance with paragraph (c)(2) of this section.

(2) *Validation of an AEDM.* Before using an AEDM, the manufacturer must validate the AEDM's accuracy and reliability as follows:

(i) For each identified validation class specified in paragraph (c)(2)(iv) of this section to which the particular AEDM applies, the minimum number of basic models must be tested as specified in paragraph (c)(2)(iv) of this section. Using the AEDM, calculate the energy use or efficiency for each of the selected basic models. Test a single unit of each selected basic model in accordance with paragraph (c)(2)(iii) of this section. Compare the results from the single unit test and the AEDM energy use or efficiency output according to paragraph (c)(2)(ii) of this section.

(ii) *Individual model tolerances.* (A) For those covered products with an energy-efficiency metric, the predicted efficiency for each model calculated by applying the AEDM may not be more than five percent greater than the efficiency determined from the corresponding test of the model.

(B) For those covered products with an energy-consumption metric, the predicted energy consumption for each model, calculated by applying the AEDM, may not be more than five percent less than the energy consumption determined from the corresponding test of the model.

(iii) *Additional test unit requirements.* (A) Each AEDM must be supported by test data obtained from physical tests of current models; and

(B) Test results used to validate the AEDM must meet or exceed current, applicable Federal standards as specified in part 431 of this chapter; and

(C) Each test must have been performed in accordance with the DOE test procedure specified in parts 430 or 431 of this chapter or test procedure waiver for which compliance is required at the time the basic model is distributed in commerce.

(iv) *Validation classes.* (A) Commercial HVAC validation classes:

Validation class	Minimum number of distinct models that must be tested per AEDM
Air-Cooled, Split and Packaged Air Conditioners (ACs) and Heat Pumps (HPs) less than 65,000 Btu/h Cooling Capacity (3-Phase).	2 Basic Models.
Air-Cooled, Split and Packaged ACs and HPs greater than or equal to 65,000 Btu/h Cooling Capacity and Less than 760,000 Btu/h Cooling Capacity.	2 Basic Models.
Water-Cooled, Split and Packaged ACs and HPs, All Cooling Capacities	2 Basic Models.
Evaporatively-Cooled, Split and Packaged ACs and HPs, All Capacities	2 Basic Models.

Validation class	Minimum number of distinct models that must be tested per AEDM
Water-Source HPs, All Capacities	2 Basic Models.
Single Package Vertical ACs and HPs	2 Basic Models.
Packaged Terminal ACs and HPs	2 Basic Models.
Air-Cooled, Variable Refrigerant Flow ACs and HPs	2 Basic Models.
Water-Cooled, Variable Refrigerant Flow ACs and HPs	2 Basic Models.
Computer Room Air Conditioners, Air Cooled	2 Basic Models.
Computer Room Air Conditioners, Water-Cooled	2 Basic Models.

(B) Commercial water heater validation classes:

Validation class	Minimum number of distinct models that must be tested
Gas-fired Water Heaters and Hot Water Supply Boilers Less than 10 Gallons	2 Basic Models.
Gas-fired Water Heaters and Hot Water Supply Boilers Greater than or Equal to 10 Gallons	2 Basic Models.
Oil-fired Water Heaters and Hot Water Supply Boilers Less than 10 Gallons	2 Basic Models.
Oil-fired Water Heaters and Hot Water Supply Boilers Greater than or Equal to 10 Gallons	2 Basic Models.
Electric Water Heaters	2 Basic Models.
Heat Pump Water Heaters	2 Basic Models.
Unfired Hot Water Storage Tanks	2 Basic Models.

(C) Commercial packaged boilers validation classes:

Validation class	Minimum number of distinct models that must be tested
Gas-fired, Hot Water Only Commercial Packaged Boilers	2 Basic Models.
Gas-fired, Steam Only Commercial Packaged Boilers	2 Basic Models.
Gas-fired Hot Water/Steam Commercial Packaged Boilers	2 Basic Models.
Oil-fired, Hot Water Only Commercial Packaged Boilers	2 Basic Models.
Oil-fired, Steam Only Commercial Packaged Boilers	2 Basic Models.
Oil-fired Hot Water/Steam Commercial Packaged Boilers	2 Basic Models.

(D) Commercial furnace validation classes:

Validation class	Minimum number of distinct models that must be tested
Gas-fired Furnaces	2 Basic Models.
Oil-fired Furnaces	2 Basic Models.

(E) Commercial refrigeration equipment validation classes:

Validation class [1]	Minimum number of distinct models that must be tested
Self-Contained Open Refrigerators	2 Basic Models.
Self-Contained Open Freezers	2 Basic Models.
Remote Condensing Open Refrigerators	2 Basic Models.
Remote Condensing Open Freezers	2 Basic Models.
Self-Contained Closed Refrigerators	2 Basic Models.
Self-Contained Closed Freezers	2 Basic Models.
Remote Condensing Closed Refrigerators	2 Basic Models.
Remote Condensing Closed Freezers	2 Basic Models.

[1] The minimum number of tests indicated above must be comprised of a transparent model, a solid model, a vertical model, a semi-vertical model, a horizontal model, and a service-over-the counter model, as applicable based on the equipment offering. However, manufacturers do not need to include all types of these models if it will increase the minimum number of tests that need to be conducted.

(4) *AEDM records retention requirements.* (i) If a manufacturer has used an AEDM to determine representative values pursuant to this section, the manufacturer must have available upon request for inspection by the Department records showing:

(A) The AEDM, including the mathematical model, the engineering or statistical analysis, and/or computer simulation or modeling that is the basis of the AEDM;

(B) Product information, complete test data, AEDM calculations, and the statistical comparisons from the units tested that were used to validate the AEDM pursuant to paragraph (c)(2) of this section; and

(C) Product information and AEDM calculations for each basic model to which the AEDM has been applied.

(5) *Additional AEDM requirements.* (i) If requested by the Department and at DOE's discretion, the manufacturer must perform at least one of the following:

(A) Conduct simulations before representatives of the Department to predict the performance of particular basic models of the product to which the AEDM was applied;

(B) Provide analyses of previous simulations conducted by the manufacturer; or

(C) Conduct certification testing of basic models selected by the Department.

(6) *AEDM verification testing.* DOE may use the test data for a given individual model generated pursuant to § 429.104 to verify the certified rating determined by an AEDM as long as the following process is followed:

(i) *Selection of units.* DOE will obtain units for test from retail, where available. If units cannot be obtained from retail, DOE will request that a unit be provided by the manufacturer;

(ii) *Lab requirements.* DOE will conduct testing at an independent, third-party testing facility of its choosing. In cases where no third-party laboratory is capable of testing the equipment, it may be tested at a manufacturer's facility upon DOE's request.

(iii) *Manufacturer participation:* Testing will be performed without DOE or manufacturer representatives on-site, unless:

(A) The model is specifically required to be started only by a factory-trained installer per the installation manual instructions, in which case DOE and the manufacturer representative will only be on-site for the test set-up; or

(B) The manufacturer has elected, as part of their certification of that model, to witness testing. A manufacturer may elect to have a DOE representative and a manufacturer's representative on-site for the initial verification test for up to 10 percent of the manufacturer's certified basic models rated with an AEDM. The 10 percent requirement applies to all of the basic models certified by a given manufacturer no matter how many AEDMs a manufacturer has used to develop its ratings. Manufacturers who elect to select 10 percent of their basic models must include this information as part of their certification prior to the unit being selected for verification testing.; or

(C) The model is a variable refrigerant flow system, in which case DOE and the manufacturer representative will only be on-site for the test set-up.

(iv) *Testing.* All verification testing will be conducted in accordance with the applicable DOE test procedure, as well as each of the following to the extent that they apply:

(A) Any active test procedure waivers that have been granted for the basic model;

(B) Any test procedure guidance that has been issued by DOE;

(C) The installation and operations manual that is shipped with the unit;

(D) Any additional information that was provided by the manufacturer in the pdf at the time of certification; and

(E) If during test set-up or testing, the lab indicates to DOE that it needs additional information regarding a given basic model in order to test in accordance with the applicable DOE test procedure, DOE may organize a meeting between DOE, the manufacturer and the lab to provide such information. At no time during the process may the lab communicate directly with the manufacturer without DOE present.

(v) *Failure to meet certified rating.* If a model tests worse than its certified rating by an amount exceeding the tolerance prescribed in paragraph (c)(4)(iii)(F) of this section, DOE will notify the manufacturer. Within the timeframe allotted by DOE, the manufacturer may then:

(A) Present all claims regarding testing validity; and

(B) If the manufacturer was not on site for the initial test, may request a retest of the previously tested unit with manufacturer and DOE representatives on-site. DOE will not retest a different unit of the same basic model unless DOE and the manufacturer determine it is necessary based on the test results, claims presented, and DOE regulations.

(vi) *Tolerances.* (A) For consumption metrics, the result from a DOE verification test must be less than or equal to the certified rating × (1 + the applicable tolerance).

(B) For efficiency metrics, the result from a DOE verification test must be greater than or equal to the certified rating × (1—the applicable tolerance).

Equipment	Metric	Applicable tolerance
Commercial Packaged Boilers	Combustion Efficiency	5% (0.05)
	Thermal Efficiency	5% (0.05)
Commercial Water Heaters or Hot Water Supply Boilers	Thermal Efficiency	5% (0.05)
	Standby Loss	10% (0.1)
Unfired Storage Tanks	R-Value	10% (0.1)
Air-Cooled, Split and Packaged ACs and HPs less than 65,000 Btu/h Cooling Capacity (3-Phase).	Seasonal Energy-Efficiency Ratio	5% (0.05)
	Heating Season Performance Factor	5% (0.05)
	Energy Efficiency Ratio	10% (0.1)
Air-Cooled, Split and Packaged ACs and HPs greater than or equal to 65,000 Btu/h Cooling Capacity and Less than 760,000 Btu/h Cooling Capacity.	Energy Efficiency Ratio	5% (0.05)
	Coefficient of Performance	5% (0.05)
	Integrated Energy Efficiency Ratio	10% (0.1)
Water-Cooled, Split and Packaged ACs and HPs, All Cooling Capacities	Energy Efficiency Ratio	5% (0.05)
	Coefficient of Performance	5% (0.05)
	Integrated Energy Efficiency Ratio	10% (0.1)
Evaporatively-Cooled, Split and Packaged ACs and HPs, All Capacities	Energy Efficiency Ratio	5% (0.05)
	Coefficient of Performance	5% (0.05)
	Integrated Energy Efficiency Ratio	10% (0.1)
Water-Source HPs, All Capacities	Energy Efficiency Ratio	5% (0.05)
	Coefficient of Performance	5% (0.05)

Equipment	Metric	Applicable tolerance
	Integrated Energy Efficiency Ratio	10% (0.1)
Single Package Vertical ACs and HPs	Energy Efficiency Ratio	5% (0.05)
	Coefficient of Performance	5% (0.05)
Packaged Terminal ACs and HPs	Energy Efficiency Ratio	5% (0.05)
	Coefficient of Performance	5% (0.05)
Variable Refrigerant Flow ACs and HPs	Energy Efficiency Ratio	5% (0.05)
	Coefficient of Performance	5% (0.05)
	Integrated Energy Efficiency Ratio	10% (0.1)
Computer Room Air Conditioners	Sensible Coefficient of Performance	5% (0.05)
Commercial Warm-Air Furnaces	Thermal Efficiency	5% (0.05)
Commercial Refrigeration Equipment	Daily Energy Consumption	5% (0.05)

(vii) *Invalid rating.* If, following discussions with the manufacturer and a retest where applicable, DOE determines that the testing was conducted appropriately in accordance with the DOE test procedure, the rating for the model will be considered invalid. The manufacturer must elect, within 15 days, one of the following to be completed in a time frame specified by DOE, which is never to exceed 180 days:

(A) Re-rate and re-certify the model based on DOE's test data alone; or

(B) Discontinue the model through the certification process; or

(C) Conduct additional testing and re-rate and re-certify the basic model based on all test data collected, including DOE's test data.

(viii) *AEDM use.* (A) If DOE has determined that a manufacturer made invalid ratings on two or more models rated using the same AEDM within a 24 month period, the manufacturer must take the action listed in the table corresponding to the number of invalid certified ratings. The twenty-four month period begins with a DOE determination that a rating is invalid through the process outlined above. Additional invalid ratings apply for the purposes of determining the appropriate consequences if the subsequent determination(s) is based on selection of a unit for testing within the twenty-four month period (i.e., subsequent determinations need not be made within 24 months).

Number of invalid certified ratings from the same AEDM[2] within a rolling 24 month period	Required manufacturer actions
2	Submit different test data and reports from testing to validate that AEDM within the validation classes to which it is applied.[1] Adjust the rating as appropriate.
4	Conduct double the minimum number of validation tests for the validation classes to which the AEDM is applied. Note, the tests required under subsection (c)(5)(H)(1) must be different tests on different models than the original tests required under subsection (c)(2).
6	Conduct the minimum number of validation tests for the validation classes to which the AEDM is applied; And Conduct addition testing, which is equal to ½ the minimum number of validation tests for the validation classes to which the AEDM is applied, at either the manufacturer's facility or a third-party test facility, at the manufacturer's discretion. Note, the tests required under subsection (c)(5)(H)(1) must be different tests on different models than the original tests required under subsection (c)(2).
>=8	Manufacturer has lost privilege to use AEDM. All ratings for models within the validation classes to which the AEDM applied should be rated via testing. Distribution cannot continue until certification(s) are corrected to reflect actual test data.

[1] A manufacturer may discuss with DOE's Office of Enforcement whether existing test data on different basic models within the validation classes to which that specific AEDM was applied may be used to meet this requirement.

[2] Where the same AEDM means a computer simulation or mathematical model that is identified by the manufacturer at the time of certification as having been used to rate a model or group of models.

(B) If, as a result of eight or more invalid ratings, a manufacturer has lost the privilege of using an AEDM for rating, the manufacturer may regain the ability to use an AEDM by:

(*1*) Investigating and identifying cause(s) for failures;

(*2*) Taking corrective action to address cause(s);

(*3*) Performing six new tests per validation class, a minimum of two of which must be performed by an independent, third party laboratory to validate the AEDM;

(*4*) Obtaining DOE authorization to resume use of the AEDM.

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PART 431—ENERGY EFFICIENCY PROGRAM FOR CERTAIN COMMERCIAL AND INDUSTRIAL EQUIPMENT

■ 7. The authority citation for part 431 continues to read as follows:

Authority: 42 U.S.C. 6291–6317.

■ 8. Section 431.62 is amended by revising the definition of ''basic model'' to read as follows:

§ 431.62 Definitions concerning commercial refrigerators, freezers and refrigerator-freezers.

* * * * *

Basic model means all commercial refrigeration equipment manufactured by one manufacturer within a single equipment class, having the same primary energy source, and that have essentially identical electrical, physical, and functional characteristics that affect energy consumption.

* * * * *

■ 9. Section 431.72 is amended by revising the definition of ''basic model'' to read as follows:

§ 431.72 Definitions concerning commercial warm air furnaces.

* * * * *

Basic model means all commercial warm air furnaces manufactured by one manufacturer within a single equipment class, that have the same nominal input rating and the same primary energy source (e.g. gas or oil) and that do not have any differing physical or functional characteristics that affect energy efficiency.

* * * * *

■ 10. Section 431.82 is amended by revising the definition of ''basic model'' to read as follows:

§ 431.82 Definitions concerning commercial packaged boilers.

* * * * *

Basic model means all commercial packaged boilers manufactured by one manufacturer within a single equipment class having the same primary energy source (e.g., gas or oil) and that have essentially identical electrical, physical and functional characteristics that affect energy efficiency.

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■ 11. Section 431.92 is amended by revising the definition of ''basic model'' to read as follows:

§ 431.92 Definitions concerning commercial air conditioners and heat pumps.

* * * * *

Basic model includes:

(1) *Packaged terminal air conditioner (PTAC) or packaged terminal heat pump (PTHP)* means all units manufactured by one manufacturer within a single equipment class, having the same primary energy source (e.g., electric or gas), and which have the same or comparable compressors, same or comparable heat exchangers, and same or comparable air moving systems that have a cooling capacity within 300 Btu/h of one another.

(2) *Small, large, and very large air-cooled or water-cooled commercial package air conditioning and heating equipment* means all units manufactured by one manufacturer within a single equipment class, having the same or comparably performing compressor(s), heat exchangers, and air moving system(s) that have a common ''nominal'' cooling capacity.

(3) *Single package vertical units* means all units manufactured by one manufacturer within a single equipment class, having the same primary energy source (e.g., electric or gas), and which have the same or comparably performing compressor(s), heat exchangers, and air moving system(s) that have a rated cooling capacity within 1500 Btu/h of one another.

(4) *Computer room air conditioners* means all units manufactured by one manufacturer within a single equipment class, having the same primary energy source (e.g., electric or gas), and which have the same or comparably performing compressor(s), heat exchangers, and air moving system(s) that have a common ''nominal'' cooling capacity.

(5) *Variable refrigerant flow systems* means all units manufactured by one manufacturer within a single equipment class, having the same primary energy source (e.g., electric or gas), and which have the same or comparably performing compressor(s) that have a common ''nominal'' cooling capacity and the same heat rejection medium (e.g., air or water) (includes VRF water source heat pumps).

(6) *Small, large, and very large water source heat pump* means all units manufactured by one manufacturer within a single equipment class, having the same primary energy source (e.g., electric or gas), and which have the same or comparable compressors, same or comparable heat exchangers, and same or comparable ''nominal'' capacity.

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■ 12. Section 431.102 is amended by revising the definition of ''basic model'' to read as follows:

§ 431.102 Definitions concerning commercial water heaters, hot water supply boilers, and unfired hot water storage tanks.

* * * * *

Basic model means all water heaters, hot water supply boilers, or unfired hot water storage tanks manufactured by one manufacturer within a single equipment class, having the same primary energy source (e.g., gas or oil) and that have essentially identical electrical, physical and functional characteristics that affect energy efficiency.

* * * * *

[FR Doc. 2013–24351 Filed 10–21–13; 8:45 am]

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DEPARTMENT OF ENERGY

10 CFR Part 430

[Docket No. EERE–2013–BT–TP–0044]

RIN 1904–AD06

Energy Conservation Program: Compliance Date for the Dehumidifier Test Procedure

AGENCY: Office of Energy Efficiency and Renewable Energy, Department of Energy.

ACTION: Notice of proposed rulemaking.

SUMMARY: The U.S. Department of Energy (DOE) proposes to revise the compliance date for the dehumidifier test procedures established under the Energy Policy and Conservation Act (EPCA). The proposed amendments would require manufacturers to test using only the active mode provisions in the test procedure for dehumidifiers currently found in the DOE regulations to determine compliance with the existing energy conservation standards, with the following exceptions. The appendix in its entirety would be required for use by manufacturers that make representations of standby mode or off mode energy use, and, after the compliance date for any amended energy conservation standards enacted in the future that incorporate measures of standby mode and off mode energy use, to demonstrate compliance with such amended standards. The proposed amendments would remove from use, 30 days after publication of the final rule in the **Federal Register**, the test procedure for dehumidifiers because DOE has determined that this test procedure would be made redundant by the proposed amendments, as well as clarify test procedure instructions.

DATES: DOE will accept comments, data, and information regarding this notice of proposed rulemaking (NOPR) no later than November 21, 2013. See section IV, ''Public Participation,'' for details.

ADDRESSES: Any comments submitted must identify the NOPR for Test Procedures for Dehumidifiers and provide docket number EERE–2013–BT–TP–0044 and/or regulatory information number (RIN) number 1904–AD06. Comments may be submitted using any of the following methods:

1. *Federal eRulemaking Portal: www.regulations.gov.* Follow the instructions for submitting comments.

2. *Email: Dehumidifiers2013TP0044@ee.doe.gov.* Include the docket number and/or RIN in the subject line of the message.

3. *Mail:* Ms. Brenda Edwards, U.S. Department of Energy, Building Technologies Program, Mailstop EE–2J, 1000 Independence Avenue SW., Washington, DC 20585–0121. If possible, please submit all items on a CD. It is not necessary to include printed copies.

4. *Hand Delivery/Courier:* Ms. Brenda Edwards, U.S. Department of Energy, Building Technologies Program, 950 L'Enfant Plaza SW., Suite 600, Washington, DC 20024. Telephone: (202) 586–2945. If possible, please submit all items on a CD. It is not necessary to include printed copies.

For detailed instructions on submitting comments and additional information on the rulemaking process, see section IV of this document (Public Participation).

Docket:

A link to the docket Web page can be found at: *http://www.regulations.gov/#!docketDetail;D=EERE-2013-BT-TP-0044*. This Web page will contain a link to the docket for this notice on the regulations.gov site. The regulations.gov Web page will contain simple instructions on how to access all documents, including **Federal Register** notices, comments, and other supporting documents/materials, in the docket. See section IV for information on how to submit comments through regulations.gov.

For further information on how to submit a comment, or review other public comments and the docket, contact Ms. Brenda Edwards at (202) 586–2945 or by email: *Brenda.Edwards@ee.doe.gov*.

FOR FURTHER INFORMATION CONTACT:

Ashley Armstrong, U.S. Department of Energy, Office of Energy Efficiency and Renewable Energy, Building Technologies Program, EE–2J, 1000 Independence Avenue SW., Washington, DC 20585–0121. Telephone: (202) 586–6590. Email: *dehumidifiers@ee.doe.gov*.

James Silvestro, U.S. Department of Energy, Office of the General Counsel, GC–77, 1000 Independence Avenue SW., Washington, DC 20585–0121. Telephone: (202) 586–4224. Email: *james.silvestro@hq.doe.gov*.

SUPPLEMENTARY INFORMATION:

Table of Contents

I. Authority and Background
II. Discussion
III. Procedural Issues and Regulatory Review
A. Review Under Executive Order 12866
B. Review Under the Regulatory Flexibility Act
C. Review Under the Paperwork Reduction Act of 1995
D. Review Under the National Environmental Policy Act of 1969
E. Review Under Executive Order 13132
F. Review Under Executive Order 12988
G. Review Under the Unfunded Mandates Reform Act of 1995
H. Review Under the Treasury and General Government Appropriations Act, 1999
I. Review Under Executive Order 12630
J. Review Under Treasury and General Government Appropriations Act, 2001
K. Review Under Executive Order 13211
L. Review Under Section 32 of the Federal Energy Administration Act of 1974
IV. Public Participation
V. Approval of the Office of the Secretary

I. Authority and Background

Title III of the Energy Policy and Conservation Act of 1975 (42 U.S.C. 6291, *et seq.*; ''EPCA'' or ''the Act'') sets forth a variety of provisions designed to improve energy efficiency. (All references to EPCA refer to the statute as amended through the American Energy Manufacturing Technical Corrections Act (AEMTCA), Pub. L. 112–210 (Dec. 18, 2012).) Part B of title III, which for editorial reasons was redesignated as Part A upon incorporation into the U.S. Code (42 U.S.C. 6291–6309, as codified), establishes the ''Energy Conservation Program for Consumer Products Other Than Automobiles.'' The list of ''covered products'' under EPCA includes dehumidifiers, which are the subject of today's notice. 42 U.S.C. 6292(a)(11).

Under EPCA, the energy conservation program consists essentially of four parts: (1) Testing, (2) labeling, (3) Federal energy conservation standards, and (4) certification and enforcement procedures. The testing requirements consist of test procedures that manufacturers of products must use to: (1) Ensure that their products meet the applicable energy conservation standards adopted under EPCA; and (2) make representations about the efficiency of those products.

General Test Procedure Rulemaking Process

Under 42 U.S.C. 6293, EPCA sets forth the criteria and procedures DOE must follow when prescribing or amending test procedures for covered products. EPCA provides in relevant part that any test procedures prescribed or amended under section 6293 shall be reasonably designed to produce test results which measure energy efficiency, energy use, or estimated annual operating cost of a covered product during a representative average use cycle or period of use and shall not be unduly burdensome to conduct. (42 U.S.C. 6293(b)(3)) In addition, if DOE determines that a test procedure amendment is warranted, it must publish proposed test procedures and offer the public an opportunity to present oral and written comments on them. (42 U.S.C. 6293(b)(2)) Finally, in any rulemaking to amend a test procedure, DOE must determine to what extent, if any, the proposed test procedure would alter the measured energy efficiency of any covered product as determined under the existing test procedure. (42 U.S.C. 6293(e)(1)) If DOE determines that the amended test procedure would alter the measured efficiency of a covered product, DOE must amend the applicable energy conservation standard accordingly. (42 U.S.C. 6293(e)(2))

The Energy Policy Act of 2005 (EPACT) amended EPCA to specify that the dehumidifier test criteria used under the ENERGY STAR [1] program in effect as of January 1, 2001, must serve as the basis for the DOE test procedure for dehumidifiers, unless revised by DOE. (EPACT, section 135(b); 42 U.S.C. 6293(b)(13)) The ENERGY STAR test criteria required that the Canadian Standards Association (CAN/CSA) standard CAN/CSA–C749–1994 (R2005), ''*Performance of Dehumidifiers,*'' be used to calculate the energy factor (EF) and that ANSI/AHAM Standard DH–1, ''Dehumidifiers,'' be used to measure capacity. The ENERGY STAR test criteria did not, however, state which version of ANSI/AHAM Standard DH–1, ''Dehumidifiers,'' was to be used, although the version in effect on January 1, 2001, was ANSI/AHAM DH–1–1992. DOE adopted these test criteria, along with related definitions and tolerances, as its test procedure for dehumidifiers at 10 Code of Federal Regulations (CFR) part 430, subpart B, appendix X in 2006. 71 FR 71340, 71347, 71366, 713667–68 (Dec. 8, 2006).

On October 31, 2012, DOE published a final rule to establish a new test procedure for dehumidifiers that references ANSI/AHAM Standard DH–1–2008, ''Dehumidifiers,'' (ANSI/AHAM DH–1–2008) rather than the ENERGY STAR test criteria for both energy use and capacity measurements. 77 FR 65995 (Oct. 31, 2012). The final rule also adopted standby and off mode provisions that satisfy the requirement in the Energy Independence and Security Act of 2007 (EISA) for DOE to include measures of standby mode and off mode energy consumption in its test procedures for residential products, if technically feasible. (42 U.S.C. 6295(gg)(2)(A)) This new DOE test procedure, codified at 10 CFR part 430, subpart B, appendix X1 (''appendix X1''), establishes a new metric,

[1] For more information, please visit *http://www.energystar.gov/*.

integrated energy factor (IEF), which incorporates measures of active mode, standby mode, and off mode energy use. Appendix X1 is not currently required to demonstrate compliance with energy conservation standards, but would be required after the compliance date of any amended standards that include standby mode and off mode energy consumption. Prior to the compliance date of any amended energy conservation standards, manufacturers may currently use the test procedure set forth in either appendix X or appendix X1 to make representations related to active mode energy consumption of dehumidifiers; however, manufacturers are required to use the test procedure set forth in appendix X1 to make any representations related to standby mode and off mode energy consumption.

II. Discussion

Manufacturers may currently test dehumidifiers using the test procedure set forth in either appendix X or appendix X1 to determine compliance with the existing energy conservation standards and to make representations related to active mode energy consumption. Although the version of ANSI/AHAM Standard DH–1 referenced in the test requirements set forth in appendix X for measuring energy use in active mode is not specified, DOE believes, based on its observations, that manufacturers and test laboratories typically use the current version, ANSI/AHAM DH–1–2008, when testing to determine compliance with the existing dehumidifier energy conservation standards. DOE further notes that this current version of ANSI/AHAM DH–1 is required to be used for other industry testing purposes, such as for the AHAM dehumidifier verification program.[2] AHAM is also approved by the EPA to administer verification testing for purposes of the ENERGY STAR program.

DOE determined, in a supplemental notice of proposed rulemaking (SNOPR) in the previous dehumidifier test procedure rulemaking, that the use of either ANSI/AHAM DH–1–2008 or ANSI/AHAM DH–1–1992, would produce comparable results for active mode testing. 77 FR 31444, 31453–54 (May 25, 2012). Therefore, manufacturers that choose to measure EF and capacity according to appendix X using ANSI/AHAM DH–1–1992 obtain dehumidifier performance results that are generally comparable to the results using the active mode provisions of appendix X1. Because appendix X is functionally equivalent to the active mode provisions of appendix X1, DOE is proposing in today's notice that manufacturers would demonstrate compliance with existing energy conservation standards using appendix X1, and that appendix X would no longer be used.

In addition to the active mode provisions in sections 1, 2, 3.1, and 4.1, appendix X1 contains provisions for the measurement of standby mode and off mode energy consumption in sections 4.2, 4.2.1, and 4.2.2 and the calculation of IEF in section 5.2, which will not be mandatory until the compliance date of any amended standards. Because these provisions are not used for determining EF or capacity, manufacturers would incur an increased test burden when demonstrating compliance with existing standards by conducting the entire test procedure at appendix X1 rather than appendix X. To preclude this unnecessary testing burden, DOE is proposing to clarify in the introductory note in appendix X1 and in 10 CFR 430.23(z) that manufacturers that do not make representations with respect to standby mode and off mode energy consumption may perform only the active mode test provisions when testing to determine compliance with the existing energy conservation standards.

Because the April 29, 2013 effective date currently provided in the introductory notes in both appendix X and appendix X1 for representations of standby mode and off mode energy use has passed, DOE proposes to remove reference to that date in both appendices and require that manufacturers making representations of standby mode and off mode energy use must test their dehumidifier(s) in accordance with appendix X1 in its entirety.

Accordingly, under the proposed rule, 30 days after publication, all testing must be conducted using all or part of appendix X1, depending on whether a manufacturer makes representations about standby mode and off mode energy consumption. This includes testing by the manufacturer, DOE, and any third parties. Manufacturers will have 180 additional days to make any changes needed to representations, including labels, certification reports, marketing materials, etc. DOE does not expect that any modifications will be needed because this proposed test procedure modification does not change the measured consumption. (42 U.S.C. 6293(e)(2))

Finally, DOE proposes to amend the test procedures at 10 CFR 430.23(z) to require that EF, when measured, be determined according to the relevant active mode provisions of appendix X1, and IEF, when measured, be determined according to appendix X1 in its entirety.

DOE requests comment on all aspects of today's proposal, and in particular on the burden associated with the proposed requirement that the active mode provisions of appendix X1 be used rather than appendix X for demonstrating compliance with existing energy conservation standards.

III. Procedural Issues and Regulatory Review

A. Review Under Executive Order 12866

The Office of Management and Budget (OMB) has determined that test procedure rulemakings do not constitute ''significant regulatory actions'' under section 3(f) of Executive Order 12866, Regulatory Planning and Review, 58 FR 51735 (Oct. 4, 1993). Accordingly, this action was not subject to review under the Executive Order by the Office of Information and Regulatory Affairs (OIRA) in the Office of Management and Budget.

B. Review Under the Regulatory Flexibility Act

The Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) requires preparation of an initial regulatory flexibility analysis (IFRA) for any rule that by law must be proposed for public comment, unless the agency certifies that the rule, if promulgated, will not have a significant economic impact on a substantial number of small entities. As required by Executive Order 13272, ''Proper Consideration of Small Entities in Agency Rulemaking,'' 67 FR 53461 (August 16, 2002), DOE published procedures and policies on February 19, 2003, to ensure that the potential impacts of its rules on small entities are properly considered during the DOE rulemaking process. (68 FR 7990) DOE has made its procedures and policies available on the Office of the General Counsel's Web site: *http://energy.gov/gc/office-general-counsel*.

DOE reviewed today's proposal under the provisions of the Regulatory Flexibility Act and the procedures and policies published on February 19, 2003. DOE has tentatively concluded that the proposal would not have a significant impact on a substantial number of small entities. The factual basis for this certification is as follows:

The Small Business Administration (SBA) considers a business entity to be small business, if, together with its

[2] Under section 4.1 of AHAM's ''Dehumidifier Certification Program Procedural Guide, January 2006'' dehumidifier water removal capacity and EF must be certified in accordance with the latest edition of ANSI/AHAM DH–1.

affiliates, it employs less than a threshold number of workers specified in 13 CFR part 121. These size standards and codes are established by the North American Industry Classification System (NAICS). The threshold number for NAICS classification code 335211, ''Electric Housewares and Household Fan Manufacturing,'' which applies to dehumidifier manufacturers, is 750 employees.

Most of the manufacturers supplying residential dehumidifiers are large multinational corporations. DOE surveyed the AHAM member directory to identify manufacturers of residential dehumidifiers. DOE then consulted publicly-available data, purchased company reports from vendors such as Dun and Bradstreet, and contacted manufacturers, where needed, to determine if they meet the SBA's definition of a ''small business manufacturing facility'' and have their manufacturing facilities located within the United States. Based on this analysis, DOE identified five small businesses that manufacture residential dehumidifiers.

Today's proposal would amend DOE's test procedures for dehumidifiers by requiring an updated reference to the industry dehumidifier test method. This amendment could potentially require manufacturers to install a larger test chamber and different air handling equipment. However, some manufacturers may already be using ANSI/AHAM DH–1–2008 in certifying their products. DOE notes that one of the small businesses has products listed in AHAM's current dehumidifier database of verified products, indicating that those tests were conducted according to DH–1–2008. In addition, AHAM selected an independent test laboratory to conduct dehumidifier testing and verification for its certification program using DH–1–2008. It is likely that this laboratory also performs testing for manufacturers to determine compliance with energy conservation standards in the same facility as the AHAM verification testing. Therefore, DOE concludes that small businesses would not be likely to require investments in facility upgrades due to the requirement to use the DOE dehumidifier test procedure that references DH–1–2008.

For these reasons, DOE concludes and certifies that today's proposal would not have a significant economic impact on a substantial number of small entities. Accordingly, DOE has not prepared a regulatory flexibility analysis for this rulemaking. DOE will transmit the certification and supporting statement of factual basis to the Chief Counsel for Advocacy of the SBA for review under 5 U.S.C. 605(b).

C. Review Under the Paperwork Reduction Act of 1995

Manufacturers of residential dehumidifiers must certify to DOE that their products comply with any applicable energy conservation standards. In certifying compliance, manufacturers must test their products according to the DOE test procedures for dehumidifiers, including any amendments adopted for those test procedures. DOE has established regulations for the certification and recordkeeping requirements for all covered consumer products and commercial equipment, including residential dehumidifiers. (76 FR 12422 (March 7, 2011)) The collection-of-information requirement for the certification and recordkeeping is subject to review and approval by OMB under the Paperwork Reduction Act (PRA). This requirement has been approved by OMB under OMB control number 1910–1400. Public reporting burden for the certification is estimated to average 20 hours per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information.

Notwithstanding any other provision of the law, no person is required to respond to, nor shall any person be subject to a 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.

D. Review Under the National Environmental Policy Act of 1969

In this proposed rule, DOE proposes test procedure amendments that it expects will be used to develop and implement future energy conservation standards for residential dehumidifiers. DOE has determined that this rule falls into a class of actions that are categorically excluded from review under the National Environmental Policy Act of 1969 (42 U.S.C. 4321 *et seq.*) and DOE's implementing regulations at 10 CFR part 1021. Specifically, this proposed rule would amend the existing test procedures without affecting the amount, quality or distribution of energy usage, and, therefore, would not result in any environmental impacts. Thus, this rulemaking is covered by Categorical Exclusion A5 under 10 CFR part 1021, subpart D, which applies to any rulemaking that interprets or amends an existing rule without changing the environmental effect of that rule. Accordingly, neither an environmental assessment nor an environmental impact statement is required.

E. Review Under Executive Order 13132

Executive Order 13132, ''Federalism,'' 64 FR 43255 (August 4, 1999), imposes certain requirements on agencies formulating and implementing policies or regulations that preempt State law or that have Federalism implications. The Executive Order requires agencies to examine the constitutional and statutory authority supporting any action that would limit the policymaking discretion of the States and to carefully assess the necessity for such actions. The Executive Order also requires agencies to have an accountable process to ensure meaningful and timely input by State and local officials in the development of regulatory policies that have Federalism implications. On March 14, 2000, DOE published a statement of policy describing the intergovernmental consultation process it will follow in the development of such regulations. (65 FR 13735) DOE has examined this proposed rule and has determined that it would not have a substantial direct effect on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. EPCA governs and prescribes Federal preemption of State regulations as to energy conservation for the products that are the subject of today's proposed rule. States can petition DOE for exemption from such preemption to the extent, and based on criteria, set forth in EPCA. (42 U.S.C. 6297(d)) No further action is required by Executive Order 13132.

F. Review Under Executive Order 12988

Regarding the review of existing regulations and the promulgation of new regulations, section 3(a) of Executive Order 12988, ''Civil Justice Reform,'' 61 FR 4729 (Feb. 7, 1996), imposes on Federal agencies the general duty to adhere to the following requirements: (1) Eliminate drafting errors and ambiguity; (2) write regulations to minimize litigation; (3) provide a clear legal standard for affected conduct rather than a general standard; and (4) promote simplification and burden reduction. Section 3(b) of Executive Order 12988 specifically requires that Executive agencies make every reasonable effort to ensure that the regulation: (1) clearly specifies the preemptive effect, if any; (2) clearly specifies any effect on existing Federal law or regulation; (3) provides a clear

legal standard for affected conduct while promoting simplification and burden reduction; (4) specifies the retroactive effect, if any; (5) adequately defines key terms; and (6) addresses other important issues affecting clarity and general draftsmanship under any guidelines issued by the Attorney General. Section 3(c) of Executive Order 12988 requires Executive agencies to review regulations in light of applicable standards in sections 3(a) and 3(b) to determine whether they are met or it is unreasonable to meet one or more of them. DOE has completed the required review and determined that, to the extent permitted by law, the proposed rule meets the relevant standards of Executive Order 12988.

G. Review Under the Unfunded Mandates Reform Act of 1995

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA) requires each Federal agency to assess the effects of Federal regulatory actions on State, local, and Tribal governments and the private sector. Public Law 104–4, sec. 201 (codified at 2 U.S.C. 1531). For a proposed regulatory action likely to result in a rule that may cause the expenditure by State, local, and Tribal governments, in the aggregate, or by the private sector of $100 million or more in any one year (adjusted annually for inflation), section 202 of UMRA requires a Federal agency to publish a written statement that estimates the resulting costs, benefits, and other effects on the national economy. (2 U.S.C. 1532(a), (b)) The UMRA also requires a Federal agency to develop an effective process to permit timely input by elected officers of State, local, and Tribal governments on a proposed ''significant intergovernmental mandate,'' and requires an agency plan for giving notice and opportunity for timely input to potentially affected small governments before establishing any requirements that might significantly or uniquely affect small governments. On March 18, 1997, DOE published a statement of policy on its process for intergovernmental consultation under UMRA. (62 FR 12820; *also available at http://energy.gov/gc/office-general-counsel*) DOE examined today's proposed rule according to UMRA and its statement of policy and determined that the rule contains neither an intergovernmental mandate, nor a mandate that may result in the expenditure of $100 million or more in any year, so these requirements do not apply.

H. Review Under the Treasury and General Government Appropriations Act, 1999

Section 654 of the Treasury and General Government Appropriations Act, 1999 (Pub. L. 105–277) requires Federal agencies to issue a Family Policymaking Assessment for any rule that may affect family well-being. This rule would not have any impact on the autonomy or integrity of the family as an institution. Accordingly, DOE has concluded that it is not necessary to prepare a Family Policymaking Assessment.

I. Review Under Executive Order 12630

DOE has determined, under Executive Order 12630, ''Governmental Actions and Interference with Constitutionally Protected Property Rights,'' 53 FR 8859 (March 18, 1988), that this regulation would not result in any takings that might require compensation under the Fifth Amendment to the U.S. Constitution.

J. Review Under Treasury and General Government Appropriations Act, 2001

Section 515 of the Treasury and General Government Appropriations Act, 2001 (44 U.S.C. 3516 note) provides for agencies to review most disseminations of information to the public under guidelines established by each agency pursuant to general guidelines issued by OMB. OMB's guidelines were published at 67 FR 8452 (Feb. 22, 2002), and DOE's guidelines were published at 67 FR 62446 (Oct. 7, 2002). DOE has reviewed today's proposed rule under the OMB and DOE guidelines and has concluded that it is consistent with applicable policies in those guidelines.

K. Review Under Executive Order 13211

Executive Order 13211, ''Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use,'' 66 FR 28355 (May 22, 2001), requires Federal agencies to prepare and submit to OMB, a Statement of Energy Effects for any proposed significant energy action. A ''significant energy action'' is defined as any action by an agency that promulgated or is expected to lead to promulgation of a final rule, and that: (1) Is a significant regulatory action under Executive Order 12866, or any successor order; and (2) is likely to have a significant adverse effect on the supply, distribution, or use of energy; or (3) is designated by the Administrator of OIRA as a significant energy action. For any proposed significant energy action, the agency must give a detailed statement of any adverse effects on energy supply, distribution, or use should the proposal be implemented, and of reasonable alternatives to the action and their expected benefits on energy supply, distribution, and use.

Today's regulatory action to amend the test procedure for measuring the energy efficiency of residential dehumidifiers is not a significant regulatory action under Executive Order 12866. Moreover, it would not have a significant adverse effect on the supply, distribution, or use of energy, nor has it been designated as a significant energy action by the Administrator of OIRA. Therefore, it is not a significant energy action, and, accordingly, DOE has not prepared a Statement of Energy Effects.

L. Review Under Section 32 of the Federal Energy Administration Act of 1974

Under section 301 of the Department of Energy Organization Act (Pub. L. 95–91; 42 U.S.C. 7101), DOE must comply with section 32 of the Federal Energy Administration Act of 1974, as amended by the Federal Energy Administration Authorization Act of 1977 (FEAA). (15 U.S.C. 788; FEAA) Section 32 essentially provides in relevant part that, where a proposed rule authorizes or requires use of commercial standards, the notice of proposed rulemaking must inform the public of the use and background of such standards. In addition, section 32(c) requires DOE to consult with the Attorney General and the Chairman of the Federal Trade Commission (FTC) concerning the impact of the commercial or industry standards on competition.

IV. Public Participation

DOE will accept comments, data, and information regarding this proposed rule before or after the public meeting, but no later than the date provided in the **DATES** section at the beginning of this proposed rule. Interested parties may submit comments using any of the methods described in the **ADDRESSES** section at the beginning of this notice.

Submitting comments via regulations.gov. The regulations.gov Web page will require you to provide your name and contact information. Your contact information will be viewable to DOE Building Technologies staff only. Your contact information will not be publicly viewable except for your first and last names, organization name (if any), and submitter representative name (if any). If your comment is not processed properly because of technical difficulties, DOE will use this information to contact you. If DOE cannot read your comment due to technical difficulties and cannot contact

you for clarification, DOE may not be able to consider your comment.

However, your contact information will be publicly viewable if you include it in the comment or in any documents attached to your comment. Any information that you do not want to be publicly viewable should not be included in your comment, nor in any document attached to your comment. Persons viewing comments will see only first and last names, organization names, correspondence containing comments, and any documents submitted with the comments.

Do not submit to regulations.gov information for which disclosure is restricted by statute, such as trade secrets and commercial or financial information (hereinafter referred to as Confidential Business Information (CBI)). Comments submitted through regulations.gov cannot be claimed as CBI. Comments received through the Web site will waive any CBI claims for the information submitted. For information on submitting CBI, see the Confidential Business Information section.

DOE processes submissions made through regulations.gov before posting. Normally, comments will be posted within a few days of being submitted. However, if large volumes of comments are being processed simultaneously, your comment may not be viewable for up to several weeks. Please keep the comment tracking number that regulations.gov provides after you have successfully uploaded your comment.

Submitting comments via email, hand delivery, or mail. Comments and documents submitted via email, hand delivery, or mail also will be posted to regulations.gov. If you do not want your personal contact information to be publicly viewable, do not include it in your comment or any accompanying documents. Instead, provide your contact information on a cover letter. Include your first and last names, email address, telephone number, and optional mailing address. The cover letter will not be publicly viewable as long as it does not include any comments.

Include contact information each time you submit comments, data, documents, and other information to DOE. If you submit via mail or hand delivery, please provide all items on a CD, if feasible. It is not necessary to submit printed copies. No facsimiles (faxes) will be accepted.

Comments, data, and other information submitted to DOE electronically should be provided in PDF (preferred), Microsoft Word or Excel, WordPerfect, or text (ASCII) file format. Provide documents that are not secured, written in English and free of any defects or viruses. Documents should not contain special characters or any form of encryption and, if possible, they should carry the electronic signature of the author.

Campaign form letters. Please submit campaign form letters by the originating organization in batches of between 50 to 500 form letters per PDF or as one form letter with a list of supporters' names compiled into one or more PDFs. This reduces comment processing and posting time.

Confidential Business Information. According to 10 CFR 1004.11, any person submitting information that he or she believes to be confidential and exempt by law from public disclosure should submit via email, postal mail, or hand delivery two well-marked copies: one copy of the document marked confidential including all the information believed to be confidential, and one copy of the document marked non-confidential with the information believed to be confidential deleted. Submit these documents via email or on a CD, if feasible. DOE will make its own determination about the confidential status of the information and treat it according to its determination.

Factors of interest to DOE when evaluating requests to treat submitted information as confidential include: (1) A description of the items; (2) whether and why such items are customarily treated as confidential within the industry; (3) whether the information is generally known by or available from other sources; (4) whether the information has previously been made available to others without obligation concerning its confidentiality; (5) an explanation of the competitive injury to the submitting person which would result from public disclosure; (6) when such information might lose its confidential character due to the passage of time; and (7) why disclosure of the information would be contrary to the public interest.

It is DOE's policy that all comments may be included in the public docket, without change and as received, including any personal information provided in the comments (except information deemed to be exempt from public disclosure).

V. Approval of the Office of the Secretary

The Secretary of Energy has approved publication of this proposed rule.

List of Subjects in 10 CFR Part 430

Administrative practice and procedure, Confidential business information, Energy conservation, Household appliances, Imports, Incorporation by reference, Intergovernmental relations, Small businesses.

Issued in Washington, DC, on September 30, 2013.

Kathleen B. Hogan,

Deputy Assistant Secretary for Energy Efficiency, Energy Efficiency and Renewable Energy.

For the reasons stated in the preamble, DOE is proposing to amend part 430 of chapter II of title 10, Code of Federal Regulations as set forth below:

PART 430—ENERGY CONSERVATION PROGRAM FOR CONSUMER PRODUCTS

■ 1. The authority citation for part 430 continues to read as follows:

Authority: 42 U.S.C. 6291–6309; 28 U.S.C. 2461 note.

■ 2. Section 430.23 is amended by revising paragraph (z) to read as follows:

§ 430.23 Test procedures for the measurement of energy and water consumption.

* * * * *

(z) *Dehumidifiers.* (1) When measuring the energy factor for dehumidifiers (see the note at the beginning of appendix X), expressed in liters per kilowatt hour (L/kWh), energy factor shall be measured in accordance with section 4.1 of appendix X to this subpart.

(2) When measuring the integrated energy factor for dehumidifiers (see the note at the beginning of appendix X), expressed in L/kWh, integrated energy factor shall be determined according to paragraph 5.2 of appendix X to this subpart.

* * * * *

Appendix X to Subpart B of Part 430—[Removed]

■ 3. Appendix X to subpart B of part 430 is removed.

Appendix X1 to Subpart B of Part 430—[Redesignated as Appendix X]

■ 4. Appendix X1 to subpart B of part 430 is amended by redesignating Appendix X1 as Appendix X and revising the heading and note after the heading for newly redesignated Appendix X to read as follows:

Appendix X to Subpart B of Part 430—Uniform Test Method for Measuring the Energy Consumption of Dehumidifiers

Note: After [DATE 180 DAYS AFTER PUBLICATION OF THE FINAL RULE IN THE **Federal Register**], any representations

made with respect to the energy use or efficiency of dehumidifiers must be made in accordance with the results of testing pursuant to this appendix. After this date, if a manufacturer elects to make representations with regard to standby mode and off mode energy consumption, then testing must also include the provisions of this appendix related to standby mode and off mode energy consumption.

Manufacturers conducting tests of dehumidifiers after [DATE 30 DAYS AFTER PUBLICATION OF THE FINAL RULE IN THE **Federal Register**] and prior to [DATE 180 DAYS AFTER PUBLICATION OF THE FINAL RULE IN THE **Federal Register**], must conduct such test in accordance with either this appendix or appendix X as it appeared at 10 CFR part 430, subpart B, appendix X, in the 10 CFR parts 200 to 499 edition revised as of January 1, 2013. Any representations made with respect to the energy use or efficiency of such dehumidifiers must be in accordance with whichever version is selected. Given that after [DATE 180 DAYS AFTER PUBLICATION OF THE FINAL RULE IN THE **Federal Register**] representations with respect to the energy use or efficiency of dehumidifiers must be made in accordance with tests conducted pursuant to this appendix, manufacturers may wish to begin using this test procedure as soon as possible.

On or after the compliance date for any amended energy conservation standards that incorporate standby mode and off mode energy consumption, all representations must be based on testing performed in accordance with this appendix in its entirety.

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[FR Doc. 2013–24597 Filed 10–21–13; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

10 CFR Part 430

[Docket Number EERE–2012–BT–STD–0045]

RIN 1904–AC87

Energy Conservation Program: Energy Conservation Standards for Ceiling Fans

AGENCY: Office of Energy Efficiency and Renewable Energy, Department of Energy.

ACTION: Request for information.

SUMMARY: Through this Request for Information (RFI), the U.S. Department of Energy (DOE) seeks certain information to help inform its current rulemaking to consider setting energy conservation standards for ceiling fans. Specifically, DOE seeks information on the interaction between ceiling fan and air conditioning usage. To inform interested parties and to facilitate this process, DOE has identified several related issues in this RFI on which DOE particularly seeks to receive comment and data from stakeholders and the public.

DATES: Written comments and information are requested on or before November 21, 2013.

ADDRESSES: Interested persons are encouraged to submit comments using the Federal eRulemaking Portal at *http://www.regulations.gov*. Follow the instructions for submitting comments. Alternatively, interested persons may submit comments, identified by docket number EERE–2012–BT–STD–0045 and/or regulatory identification number (RIN) 1904–AC87, by any of the following methods:

- *Email: CeilingFanLightKits2012STD0045@ee.doe.gov*. Include docket number EERE–2012–BT–STD–0045 and/or RIN 1904–AC87 in the subject line of the message. All comments should clearly identify the name, address, and, if appropriate, organization of the commenter. Submit electronic comments in Word Perfect, Microsoft Word, PDF, or ASCII file format, and avoid the use of special characters or any form of encryption.
- *Postal Mail:* Ms. Brenda Edwards, U.S. Department of Energy, Building Technologies Office, Mailstop EE–2J, Framework Document for Ceiling Fans and Ceiling Fan Light Kits (Docket No. EERE–2012–BT–STD–0045; RIN 1904–AC87), 1000 Independence Avenue SW., Washington, DC 20585–0121. If possible, please submit all items on a compact disc (CD), in which case it is not necessary to include printed copies.
- *Hand Delivery/Courier:* Ms. Brenda Edwards, U.S. Department of Energy, Building Technologies Office, Sixth Floor, 950 L'Enfant Plaza SW., Washington, DC 20024. Telephone: (202) 586–2945. If possible, please submit all items on a CD, in which case it is not necessary to include printed copies.

Instructions: All submissions received must include the agency name and docket number or RIN for this rulemaking. No telefacsimilies (faxes) will be accepted.

Docket: For access to the docket to read background documents, or comments received, go to the Federal eRulemaking Portal at *http://www.regulations.gov*.

FOR FURTHER INFORMATION CONTACT: Requests for additional information may be sent to Ms. Lucy deButts, U.S. Department of Energy, Office of Energy Efficiency and Renewable Energy, Building Technologies Office, EE–2J, 1000 Independence Avenue SW., Washington, DC 20585–0121. Telephone: (202) 287–1604. Email: *ceiling_fans@ee.doe.gov*.

Mr. Eric Stas, U.S. Department of Energy, Office of the General Counsel, GC–71, 1000 Independence Avenue SW., Washington, DC 20585–0121. Telephone: (202) 586–9507. Email: *Eric.Stas@hq.doe.gov*.

For information on how to submit or review comments, contact Ms. Brenda Edwards, U.S. Department of Energy, Office of Energy Efficiency and Renewable Energy, Building Technologies Office, EE–2J, 1000 Independence Avenue SW., Washington, DC 20585–0121. Telephone (202) 586–2945. Email: *Brenda.Edwards@ee.doe.gov*.

SUPPLEMENTARY INFORMATION:

I. Introduction

Title III, Part B [1] of the Energy Policy and Conservation Act of 1975 (EPCA or ''the Act''), Public Law 94–163 (42 U.S.C. 6291–6309, as codified), sets forth various provisions designed to improve energy efficiency and established the Energy Conservation Program for Consumer Products Other Than Automobiles.[2] The Energy Policy Act of 2005 (EPACT 2005), Public Law 109–58, amended EPCA and provided in relevant part that DOE may establish energy conservation standards for ceiling fans. 42 U.S.C. 6295(ff).

On March 15, 2013, DOE published in the **Federal Register** a notice of public meeting and availability of the ''Energy Conservation Standards Rulemaking Framework Document for Ceiling Fans and Ceiling Fan Light Kits'' (Framework Document), with a public comment period running through April 29, 2013. 78 FR 16443. The Framework Document describes the approaches DOE anticipates using to evaluate energy conservation standards for ceiling fans. On May 2, 2013, DOE published a notice in the **Federal Register** extending the comment period on the Framework Document until June 14, 2013. 78 FR 25626.

During the Framework Document comment period, ceiling fan manufacturers and their industry association stated that ceiling fans are inherently energy-saving appliances because they reduce the use of air conditioning. (American Lighting Association, No. 39 at p. 1) [3]

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[1] For editorial reasons, upon codification in the U.S. Code, Part B was redesignated as Part A.

[2] All references to EPCA in this document refer to the statute as amended through the American Energy Manufacturing Technical Corrections Act (AEMTCA), Public Law 112–210 (Dec. 18, 2012).

[3] A notation in this form provides a reference for information that is in the docket of DOE's rulemaking to develop energy conservation

Furthermore, manufacturers expressed concern that if DOE sets overly stringent standards for ceiling fans, resulting increases in product cost could result in decreased shipments and a corresponding increase in air conditioner use by consumers, thereby potentially negating the energy savings of the current rulemaking. (Hunter Fan Company, No. 37 at p. 2)

In light of these comments, DOE requests information and data from the public regarding the interaction between ceiling fans and air conditioning products. Although DOE welcomes any relevant data on this topic, section II (Discussion) presents questions on which the agency is particularly interested in receiving public input.

II. Discussion

DOE seeks information from interested parties on the following topics regarding the interaction between consumer use of ceiling fans and air-conditioning products. Specifically, DOE seeks information and data on how use of a ceiling fan affects the way that consumers set the thermostat of their central air conditioner or the frequency of use of a room air conditioner. Related questions include:

- What percentage of homes have a ceiling fan, a central air conditioner, room air conditioner(s), more than one of these products, or none of these products?
- What percentage of consumers who own both a ceiling fan and an air conditioner set the thermostat differently when a ceiling fan is operating than when a ceiling fan is not operating?
- What percentage of consumers who own both a ceiling fan and an air conditioner leave the thermostat at the same setting regardless of ceiling fan operation?
- For those consumers that do adjust their thermostat due to a ceiling fan, how much do they adjust the thermostat, and do they adjust it warmer or colder?

DOE seeks information and data on how use of a ceiling fan affects the operating duration, operating time (*e.g.,* time of day or year), and energy consumption of an air conditioner. Related questions include:

- Do consumers with both a ceiling fan and an air conditioner operate their air conditioner for a different number of hours than consumers that have an air conditioner but do not have a ceiling fan? If so, what is the difference in operating duration?
- Do consumers with both a ceiling fan and an air conditioner operate their air conditioner at different times of day or in different months than consumers that have an air conditioner but do not have a ceiling fan? If so, how do these patterns differ?
- Based on the results to the previous questions, do consumers with both a ceiling fan and an air conditioner use a different amount of energy for air conditioning than consumers that have an air conditioner but do not have a ceiling fan? If so, what is the difference in energy consumption? Does this difference in energy consumption vary by region?
- For the above questions, are there differences between consumers with central air conditioners and consumers with room air conditioners?

DOE seeks information on how ceiling fan ownership affects consumers' decisions about purchasing air conditioning equipment. For example:

- How much more or less likely are consumers to own or purchase an air conditioner if they already have a ceiling fan?
- How much more or less likely are consumers to own or purchase a ceiling fan if they already have an air conditioner?
- Do consumers with a ceiling fan purchase different numbers or sizes of air conditioners than consumers without a ceiling fan? If so, how do these quantities and sizes vary?
- At what price point would consumers stop purchasing ceiling fans and purchase/use air conditioners instead?

III. Public Participation

DOE is also interested in input on other relevant issues that participants believe would affect energy conservation standards applicable to ceiling fans. DOE invites all interested parties to submit in writing by November 21, 2013, comments, information, and data on matters addressed in this notice and on other related matters relevant to DOE's consideration of energy conservation standards for ceiling fans.

After the close of the comment period, DOE will begin collecting data, conducting the analyses, and reviewing the public comments. These actions will be taken to aid in the development of energy conservation standards for ceiling fans. DOE will remain interested in these issues after the close of the comment period on this RFI, and any further comments, information, and data submitted at later stages of the rulemaking will be considered in the notice of proposed rulemaking (NOPR).

DOE considers public participation to be a very important part of the process for developing energy conservation standards. DOE actively encourages the participation and interaction of the public during the comment period at each stage of the rulemaking process. Interactions with and between members of the public provide a balanced discussion of the issues and assist DOE in the rulemaking process. Anyone who wishes to be added to the DOE mailing list to receive future notices and information about this rulemaking should contact Ms. Brenda Edwards at (202) 586–2945, or via email at *Brenda.Edwards@ee.doe.gov*.

Issued in Washington, DC, on September 30, 2013.

Kathleen B. Hogan,

Deputy Assistant Secretary for Energy Efficiency, Energy Efficiency and Renewable Energy.

[FR Doc. 2013–24612 Filed 10–21–13; 8:45 am]

BILLING CODE 6450–01–P

standards for ceiling fans and ceiling fan light kits (Docket No. EERE–2012–BT–STD–0045), which is maintained at *www.regulations.gov.* This notation indicates that the statement preceding the reference was made by American Lighting Association, and the statement appears at page 1 of document number 39 in the docket.

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 25

[Docket No. FAA–2013–0763; Notice No. 25–13–07–SC]

Special Conditions: Learjet Model 35, 35A, 36, and 36A Airplanes; Rechargeable Lithium-Ion Batteries and Battery Systems

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed special conditions.

SUMMARY: This action proposes special conditions for the Learjet Model 35, 35A, 36, and 36A airplanes. These airplanes, as modified by Peregrine, 13000 E. Control Tower Road, Unit K–4, Englewood, CO, 80112, will have a novel or unusual design feature associated with rechargeable lithium-ion batteries and battery systems. These batteries have certain failure, operational, and maintenance characteristics that differ significantly from those of the nickel-cadmium and lead-acid rechargeable batteries currently approved for installation on large transport-category airplanes. The applicable airworthiness regulations do not contain adequate or appropriate safety standards for this design feature.

These proposed special conditions contain the additional safety standards that the Administrator considers necessary to establish a level of safety equivalent to that established by the existing airworthiness standards.

DATES: Send your comments on or before November 12, 2013.

ADDRESSES: Send comments, identified by docket number FAA–2013–0763, using any of the following methods:

- *Federal eRegulations Portal:* Go to *http://www.regulations.gov/* and follow the online instructions for sending your comments electronically.
- *Mail:* Send comments to Docket Operations, M–30, U.S. Department of Transportation (DOT), 1200 New Jersey Avenue SE., Room W12–140, West Building Ground Floor, Washington, DC, 20590–0001.
- *Hand Delivery or Courier:* Take comments to Docket Operations in Room W12–140 of the West Building Ground Floor at 1200 New Jersey Avenue SE., Washington, DC, between 8 a.m. and 5 p.m., Monday through Friday, except federal holidays.
- *Fax:* Fax comments to Docket Operations at 202–493–2251.

Privacy: The FAA will post all comments it receives, without change, to *http://www.regulations.gov/,* including any personal information the commenter provides. Using the search function of the docket Web site, anyone can find and read the electronic form of all comments received into any FAA docket, including the name of the individual sending the comment (or signing the comment for an association, business, labor union, etc.). DOT's complete Privacy Act Statement can be found in the **Federal Register** published on April 11, 2000 (65 FR 19477–19478), as well as at *http://DocketsInfo.dot.gov/* .

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

FOR FURTHER INFORMATION CONTACT: Nazih Khaouly, FAA, Airplane and Flight Crew Interface Branch, ANM–111, Transport Airplane Directorate, Aircraft Certification Service, 1601 Lind Avenue SW., Renton, Washington, 98057–3356; telephone 425–227–2432; facsimile 425–227–1149.

SUPPLEMENTARY INFORMATION:

Comments Invited

We invite interested people to take part in this rulemaking by sending written comments, data, or views. The most helpful comments reference a specific portion of the special conditions, explain the reason for any recommended change, and include supporting data.

We will consider all comments we receive on or before the closing date for comments. We may change these special conditions based on the comments we receive.

Background

On June 29, 2012, Peregrine applied for a supplemental type certificate for installing equipment that uses rechargeable lithium-ion battery systems in Learjet Model 35, 35A, 36, and 36A airplanes. The Learjet Model 35, 35A, 36, and 36A airplanes are small transport-category airplanes powered by two turbojet engines, with maximum takeoff weights of up to 18,000 pounds. These airplanes operate with a two-pilot crew and can seat up to eight passengers. The Learjet Model 35, 35A, 36, and 36A airplanes are powered by two Garrett TF731–2–2B engines, and are equipped with an emergency power supply and software-configurable avionics.

Existing airworthiness regulations did not anticipate the use of lithium-ion batteries and battery systems on aircraft. Lithium-ion batteries and battery systems have new hazards that were not contemplated when the existing regulations were issued. In Title 14, Code of Federal Regulations (14 CFR) 25.1353, the FAA provided an airworthiness standard for lead-acid batteries and nickel-cadmium batteries. These special conditions provide an equivalent level of safety as that of the existing regulation. The current regulations are not adequate for rechargeable lithium-battery and battery system installations. Additional lithium-battery and battery system special conditions are required to ensure the same level of safety as set forth by the existing regulation intended for other battery technology.

Type Certification Basis

Under the provisions of 14 CFR 21.17, Peregrine must show that the Learjet Model 35, 35A, 36, and 36A airplanes, as changed, continue to meet the applicable provisions of the regulations incorporated by reference in Type Certificate No. A10CE or the applicable regulations in effect on the date of application for the change. The regulations incorporated by reference in the type certificate are commonly referred to as the ''original type certification basis.'' The regulations incorporated by reference in Type Certificate No. A10CE are as follows:

Title 14, Code of Federal Regulations part 25, effective February 1, 1965, as amended by Amendments 25–1, 25–2, 25–4, 25–7, 25–18, and § 25.571(d) of Amendment 25–10; Special Conditions set forth in FAA letter to Learjet dated March 1, 1967; Special Conditions No. 25–50–CE–6 dated April 18, 1973, and Amendment 1 dated September 18, 1973. The certification basis for Models 35A and 36A also includes Special Conditions No. 25–72–CE–8 dated November 3, 1976, and Amendment 1 dated March 14, 1978. The certification basis for Model 35A, in addition to the basis listed above, includes Special Conditions 25–ANM–28 dated May 3, 1989. In addition, the certification basis includes certain later amended sections of the applicable part 25 regulations that are not relevant to these special conditions.

If the regulations incorporated by reference do not provide adequate standards regarding the change, the applicant must comply with certain regulations in effect on the date of application for the change.

If the Administrator finds that the applicable airworthiness regulations (i.e., 14 CFR part 25) do not contain adequate or appropriate safety standards for the Learjet Model 35, 35A, 36, and 36A airplanes because of a novel or unusual design feature, special conditions are prescribed under the provisions of § 21.16.

Special conditions are initially applicable to the model for which they are issued. Should the applicant apply for a supplemental type certificate to modify any other model included on the same type certificate, to incorporate the same or similar novel or unusual design feature, the special conditions would also apply to the other model under § 21.101.

In addition to the applicable airworthiness regulations and special conditions, the Learjet Model 35, 35A, 36, and 36A airplanes must comply with the fuel-vent and exhaust-emission requirements of 14 CFR part 34, and the noise-certification requirements of 14 CFR part 36.

The FAA issues special conditions, as defined in 14 CFR 11.19, in accordance with § 11.38, and they become part of the type-certification basis under § 21.101.

Novel or Unusual Design Features

The Learjet Model 35, 35A, 36, and 36A airplanes will incorporate the

following novel or unusual design features: a Mid-Continent MD835–5 Emergency Power Supply that uses a rechargeable lithium-ion battery and battery system. Lithium-ion batteries and battery systems have certain failure, operational, and maintenance characteristics that differ significantly from those of the nickel-cadmium and lead-acid rechargeable batteries. Rechargeable lithium-ion batteries and battery systems are considered to be a novel or unusual design feature in transport-category airplanes, with respect to the requirements in 14 CFR 25.1353.

Discussion

The current regulations governing installation of batteries in large transport-category airplanes were derived from Civil Air Regulations (CAR) part 4b.625(d) as part of the re-codification of CAR 4b that established 14 CFR part 25 in February 1965. The new battery requirements, § 25.1353(c)(1) through (c)(4), basically reworded the CAR requirements.

Increased use of nickel-cadmium batteries in small airplanes resulted in increased incidents of battery fires and failures which led to additional rulemaking affecting large transport-category airplanes as well as small airplanes. On September 1, 1977 and March 1, 1978, the FAA issued § 25.1353(c)(5) and (c)(6), respectively, governing nickel-cadmium battery installations on large transport-category airplanes.

The proposed use of lithium-ion batteries and battery systems for equipment and systems on the Learjet Model 35, 35A, 36, and 36A airplanes has prompted the FAA to review the adequacy of these existing regulations. Our review indicates that the existing regulations do not adequately address several failure, operational, and maintenance characteristics of lithium-ion batteries and battery systems that could affect the safety and reliability of the MD835–5 Emergency Power Supply installations.

At present, commercial aviation has limited experience with use of rechargeable lithium-ion batteries and battery systems in applications involving commercial aviation. However, other users of this technology, ranging from wireless telephone manufacturers to the electric-vehicle industry, have noted potential hazards with lithium-ion batteries and battery systems. These problems include overcharging, over-discharging, and flammability of cell components.

1. Overcharging

In general, lithium-ion batteries and battery systems are significantly more susceptible to internal failures that can result in self-sustaining increases in temperature and pressure (i.e., thermal runaway) than their nickel-cadmium or lead-acid counterparts. This condition is especially true for overcharging, which causes heating and destabilization of the components of the cell, leading to the formation (by plating) of highly unstable metallic lithium. The metallic lithium can ignite, resulting in a self-sustaining fire or explosion. Finally, the severity of thermal runaway, due to overcharging, increases with increasing battery capacity due to the higher amount of electrolyte in large batteries.

2. Over-Discharging

Discharge of some types of lithium-ion batteries and battery systems, beyond a certain voltage (typically 2.4 volts), can cause corrosion of the electrodes of the cell, resulting in loss of battery capacity that cannot be reversed by recharging. This loss of capacity may not be detected by the simple voltage measurements commonly available to flightcrews as a means of checking battery status—a problem shared with nickel-cadmium batteries.

3. Flammability of Cell Components

Unlike nickel-cadmium and lead-acid batteries, some types of lithium-ion batteries and battery systems use liquid electrolytes that are flammable. The electrolyte can serve as a source of fuel for an external fire, if there is a breach of the battery container.

The problems lithium-ion battery and battery-system users experience raise concern about the use of these batteries in commercial aviation. The intent of the proposed special conditions is to establish appropriate airworthiness standards for lithium-ion battery installations in the Learjet Model 35, 35A, 36, and 36A airplanes and to ensure, as required by §§ 25.1309 and 25.601, that these lithium-ion batteries and battery systems are not hazardous or unreliable. To address these concerns, these special conditions adopt the following requirements:

- Those sections of 14 CFR 25.1353 that are applicable to lithium ion batteries.
- The flammable fluid fire protection requirements of 14 CFR 25.863. In the past, this rule was not applied to batteries of transport category airplanes, since the electrolytes used in lead-acid and nickel-cadmium batteries are not flammable.
- New requirements to address the hazards of overcharging and over-discharging that are unique to lithium ion batteries.
- New maintenance requirements to ensure that batteries used as spares are maintained in an appropriate state of charge.

These special conditions are similar to lithium-ion batteries and battery systems special conditions adopted for numerous other aircraft, including Boeing Model 787 (72FR57842; October 11, 2007).

Applicability

As discussed above, these special conditions are applicable to the Learjet Model 35, 35A, 36, and 36A airplanes. Should Peregrine apply at a later date for a supplemental type certificate to modify any other model included on Type Certificate No. A10CE, to incorporate the same novel or unusual design feature, the special conditions would apply to that model as well.

Conclusion

This action affects only certain novel or unusual design features on one model of airplanes. It is not a rule of general applicability and it affects only the applicant who applied to the FAA for approval of these features on the airplane.

List of Subjects in 14 CFR Part 25

Aircraft, Aviation safety, Reporting and recordkeeping requirements.

The authority citation for these special conditions is as follows:

Authority: 49 U.S.C. 106(g), 40113, 44701, 44702, 44704.

The Proposed Special Conditions

Accordingly, the Federal Aviation Administration (FAA) proposes the following special conditions as part of the type certification basis for the Learjet Model 35, 35A, 36, and 36A airplanes modified by Peregrine.

These proposed special conditions require that (1) all characteristics of the rechargeable lithium-ion batteries and battery systems, and their installation, that could affect safe operation of the Learjet Model 35, 35A, 36, and 36A airplanes, are addressed, and (2) appropriate Instructions for Continued Airworthiness, which include maintenance requirements, are established to ensure the availability of electrical power, when needed, from the batteries.

The FAA proposes that the following special conditions apply to all rechargeable lithium-ion batteries and battery systems on Learjet Model 35, 35A, 36, and 36A airplanes, in lieu of

the requirements of § 25.1353(b)(1) through (b)(4) at Amendment 25–113:

Rechargeable lithium-ion batteries and battery systems on Learjet Model 35, 35A, 36, and 36A airplanes must be designed and installed as follows:

1. Safe cell temperatures and pressures must be maintained during any foreseeable charging or discharging condition, and during any failure of the charging or battery monitoring system not shown to be extremely remote. The rechargeable lithium-ion batteries and battery systems must preclude explosion in the event of those failures.

2. Design of the rechargeable lithium-ion batteries and battery systems must preclude the occurrence of self-sustaining, uncontrolled increases in temperature or pressure.

3. No explosive or toxic gases emitted by any rechargeable lithium-ion batteries and battery systems in normal operation, or as the result of any failure of the battery charging system, monitoring system, or battery installation that is not shown to be extremely remote, may accumulate in hazardous quantities within the airplane.

4. Installations of rechargeable lithium-ion batteries and battery systems must meet the requirements of § 25.863(a) through (d).

5. No corrosive fluids or gases that may escape from any lithium-ion batteries and battery systems may damage surrounding structure or any adjacent systems, equipment, or electrical wiring of the airplane in such a way as to cause a major or more severe failure condition, in accordance with § 25.1309(b) and applicable regulatory guidance.

6. Each lithium-ion battery and battery system must have provisions to prevent any hazardous effect on structure or essential systems caused by the maximum amount of heat the battery can generate during a short circuit of the battery or of its individual cells.

7. Rechargeable lithium-ion batteries and battery systems must have a system to automatically control the charging rate of the battery, so as to prevent battery overheating or overcharging, and:

i. A battery-temperature sensing and over-temperature warning system with a means for automatically disconnecting the battery from its charging source in the event of an over-temperature condition, or,

ii. A battery-failure sensing and warning system with a means for automatically disconnecting the battery from its charging source in the event of battery failure.

8. Any rechargeable lithium-ion batteries and battery systems, the function of which are required for safe operation of the airplane, must incorporate a monitoring and warning feature that will provide an indication to the appropriate flight crewmembers whenever the state-of-charge of the batteries has fallen below levels considered acceptable for dispatch of the airplane.

9. The Instructions for Continued Airworthiness required by § 25.1529 must contain maintenance requirements to assure that the lithium-ion batteries are sufficiently charged at appropriate intervals specified by the battery manufacturer and the equipment manufacturer of the rechargeable lithium-ion battery or rechargeable lithium-ion battery system. This is required to ensure that rechargeable lithium-ion batteries and battery systems will not degrade below specified ampere-hour levels sufficient to power the aircraft system, for intended applications. The Instructions for Continued Airworthiness must also contain procedures for the maintenance of batteries in spares storage to prevent the replacement of batteries with batteries that have experienced degraded charge-retention ability or other damage due to prolonged storage at a low state of charge. Replacement batteries must be of the same manufacturer and part number as approved by the FAA. Precautions should be included in the Instructions for Continued Airworthiness maintenance instructions to prevent mishandling of the rechargeable lithium-ion batteries and battery systems, which could result in short-circuit or other unintentional impact damage caused by dropping or other destructive means.

Note 1: The term ''sufficiently charged''' means that the battery will retain enough of a charge, expressed in ampere-hours, to ensure that the battery cells will not be damaged. A battery cell may be damaged by lowering the charge below a point where the battery experiences a reduction in the ability to charge and retain a full charge. This reduction would be greater than the reduction that may result from normal operational degradation.

Note 2: These special conditions are not intended to replace § 25.1353(b) at Amendment 25–113 in the certification basis for Learjet Model 35, 35A, 36, and 36A airplanes. These special conditions apply only to rechargeable lithium-ion batteries and battery systems and their installations. The requirements of § 25.1353(b) at Amendment 25–113 remain in effect for batteries and battery installations on Learjet Model 35, 35A, 36, and 36A airplanes that do not use rechargeable lithium-ion batteries.

Issued in Renton, Washington, on September 19, 2013.

Ross Landes,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 2013–24727 Filed 10–21–13; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Docket No. FAA–2013–0708; Airspace Docket No. 13–AWP–11]

Proposed Establishment of Class E Airspace, Amendment of Class D and Class E Airspace, and Revocation of Class E Airspace; Salinas, CA

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: This action proposes to establish Class E airspace and modify Class E airspace at Salinas, CA, to accommodate aircraft departing and arriving under Instrument Flight Rules (IFR) at Salinas Municipal Airport. This action also would remove Class E airspace designated as surface area. The geographic coordinates of the airport also would be adjusted in the respective Class D and Class E airspace areas. This action, initiated by the biennial review of the Salinas airspace area, would enhance the safety and management of aircraft operations at the airport.

DATES: Comments must be received on or before December 6, 2013.

ADDRESSES: Send comments on this proposal to the U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE., Washington, DC 20590; telephone (202) 366–9826. You must identify FAA Docket No. FAA–2013–0708; Airspace Docket No. 13–AWP–11, at the beginning of your comments. You may also submit comments through the Internet at *http://www.regulations.gov*.

FOR FURTHER INFORMATION CONTACT: Eldon Taylor, Federal Aviation Administration, Operations Support Group, Western Service Center, 1601 Lind Avenue SW., Renton, WA 98057; telephone (425) 203–4537.

SUPPLEMENTARY INFORMATION:

Comments Invited

Interested parties are invited to participate in this proposed rulemaking

by submitting such written data, views, or arguments, as they may desire. Comments that provide the factual basis supporting the views and suggestions presented are particularly helpful in developing reasoned regulatory decisions on the proposal. Comments are specifically invited on the overall regulatory, aeronautical, economic, environmental, and energy-related aspects of the proposal.

Communications should identify both docket numbers (FAA Docket No. FAA 2013–0708 and Airspace Docket No. 13–AWP–11) and be submitted in triplicate to the Docket Management System (see **ADDRESSES** section for address and phone number). You may also submit comments through the Internet at *http://www.regulations.gov*.

Commenters wishing the FAA to acknowledge receipt of their comments on this action must submit with those comments a self-addressed stamped postcard on which the following statement is made: ''Comments to FAA Docket No. FAA–2013–0708 and Airspace Docket No. 13–AWP–11''. The postcard will be date/time stamped and returned to the commenter.

All communications received on or before the specified closing date for comments will be considered before taking action on the proposed rule. The proposal contained in this action may be changed in light of comments received. All comments submitted will be available for examination in the public docket both before and after the closing date for comments. A report summarizing each substantive public contact with FAA personnel concerned with this rulemaking will be filed in the docket.

Availability of NPRMs

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

You may review the public docket containing the proposal, any comments received, and any final disposition in person in the Dockets Office (see the **ADDRESSES** section for the address and phone number) between 9:00 a.m. and 5:00 p.m., Monday through Friday, except federal holidays. An informal docket may also be examined during normal business hours at the Northwest Mountain Regional Office of the Federal Aviation Administration, Air Traffic Organization, Western Service Center, Operations Support Group, 1601 Lind Avenue SW., Renton, WA 98057.

Persons interested in being placed on a mailing list for future NPRMs should contact the FAA's Office of Rulemaking, (202) 267–9677, for a copy of Advisory Circular No. 11–2A, Notice of Proposed Rulemaking Distribution System, which describes the application procedure.

The Proposal

The FAA is proposing an amendment to Title 14 Code of Federal Regulations (14 CFR) Part 71 by establishing Class E airspace extending upward from 700 feet above the surface within a 13.1-mile radius of Salinas Municipal Airport, Salinas, CA. Additionally, the 10-mile southeast segment of Class E airspace designated as an extension to Class D surface area would be modified from the 4.3-mile radius of the airport to 8 miles southeast of the airport to meet current standards for IFR departures and arrivals at the airport. This modification eliminates the need for Class E airspace designated as surface area, and, therefore, would be removed. Also, the geographic coordinates of the airport would be updated to coincide with the FAA's aeronautical database for the respective Class D and Class E airspace areas. This action, initiated by a biennial review of the airspace, is necessary for the safety and management of aircraft departing and arriving under IFR operations at the airport.

Class D airspace and Class E airspace designations are published in paragraphs 5000, 6002, 6004 and 6005, respectively, of FAA Order 7400.9X, dated August 7, 2013, and effective September 15, 2013, which is incorporated by reference in 14 CFR Part 71.1. The Class D airspace and Class E airspace designation listed in this document will be published subsequently in this Order.

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

The FAA's authority to issue rules regarding aviation safety is found in Title 49 of the U.S. Code. Subtitle 1, Section 106, describes the authority for the FAA Administrator. Subtitle VII, Aviation Programs, describes in more detail the scope of the agency's authority. This rulemaking is promulgated under the authority described in Subtitle VII, Part A, Subpart I, Section 40103. Under that section, the FAA is charged with prescribing regulations to assign the use of the airspace necessary to ensure the safety of aircraft and the efficient use of airspace. This regulation is within the scope of that authority as it would amend controlled airspace at Salinas Municipal Airport, Salinas, CA.

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

List of Subjects in 14 CFR Part 71

Airspace, Incorporation by reference, Navigation (air).

The Proposed Amendment

Accordingly, pursuant to the authority delegated to me, the Federal Aviation Administration proposes to amend 14 CFR Part 71 as follows:

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

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

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

§ 71.1 [Amended]

■ 2. The incorporation by reference in 14 CFR Part 71.1 of the Federal Aviation Administration Order 7400.9X, Airspace Designations and Reporting Points, dated August 7, 2013, and effective September 15, 2013 is amended as follows:

Paragraph 5000 Class D airspace.

* * * * *

AWP CA D Salinas, CA [Modified]

Salinas Municipal Airport, CA
(Lat. 36°39′46″ N., long. 121°36′23″ W.)

That airspace extending upward from the surface to but not including 2,500 feet MSL within a 4.3-mile radius of the Salinas Municipal Airport. This Class D airspace area is effective during the specific dates and times established in advance by a Notice to

Airmen. The effective date and time will thereafter be continuously published in the Airport/Facility Directory.

Paragraph 6002 Class E airspace Designated as Surface Areas.

* * * * *

AWP CA E2 Salinas, CA [Removed]

Paragraph 6004 Class E airspace areas designated as an extension to Class D surface area.

* * * * *

AWP CA E4 Salinas, CA [Modified]

Salinas Municipal Airport, CA
(Lat. 36°39′46″ N., long. 121°36′23″ W.)

That airspace extending upward from the surface within 1.8 miles each side of the 150° bearing of Salinas Municipal Airport extending from the 4.3-mile radius of the airport to 8 miles southeast of the airport. This Class E airspace area is effective during the specific dates and times established in advance by a Notice to Airmen. The effective date and time will thereafter be continuously published in the Airport/Facility Directory.

Paragraph 6005 Class E airspace areas extending upward from 700 feet or more above the surface of the earth.

* * * * *

AWP CA E5 Salinas, CA [New]

Salinas Municipal Airport, CA
(Lat. 36°39′46″ N., long. 121°36′23″ W.)

That airspace extending upward from 700 feet above the surface within a 13.1-mile radius of Salinas Municipal Airport.

Issued in Seattle, Washington, on September 26, 2013.

Johanna Forkner,

Acting Manager, Operations Support Group, Western Service Center.

[FR Doc. 2013–24744 Filed 10–21–13; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

21 CFR Part 1308

[Docket No. DEA–374]

Schedules of Controlled Substances: Placement of Perampanel into Schedule III

AGENCY: Drug Enforcement Administration, Department of Justice.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Drug Enforcement Administration (DEA) proposes to place the substance perampanel [2-(2-oxo-1-phenyl-5-pyridin-2-yl-1,2-dihydropyridin-3-yl) benzonitrile hydrate], including its salts, isomers, and salts of isomers, into Schedule III of the Controlled Substances Act (CSA). This proposed action is based on a recommendation from the Assistant Secretary for Health of the Department of Health and Human Services (HHS) and on an evaluation of all other relevant data by the DEA. If finalized, this action would impose the regulatory controls and administrative, civil, and criminal sanctions of Schedule III controlled substances on persons who handle (manufacture, distribute, dispense, import, export, engage in research, conduct instructional activities, and possess) or propose to handle perampanel.

DATES: Interested persons may file written comments on this proposal in accordance with 21 CFR 1308.43(g). Comments must be submitted electronically or postmarked on or before November 21, 2013. Commenters should be aware that the electronic Federal Docket Management System will not accept comments after midnight Eastern Time on the last day of the comment period.

Interested persons, defined as those ''adversely affected or aggrieved by any rule or proposed rule issuable pursuant to section 201 of the Act (21 U.S.C. 811),'' 21 CFR 1300.01, may file a request for hearing or waiver of participation pursuant to 21 CFR 1308.44 and in accordance with 21 CFR 1316.45 and 1316.47. Requests for hearing, notices of appearance, and waivers of an opportunity for a hearing or to participate in a hearing must be received on or before November 21, 2013.

ADDRESSES: To ensure proper handling of comments, please reference ''Docket No. DEA–374'' on all electronic and written correspondence. The DEA encourages that all comments be submitted through the Federal eRulemaking Portal, which provides the ability to type short comments directly into the comment field on the Web page or attach a file for lengthier comments. Go to *http://www.regulations.gov* and follow the on-line instructions at that site for submitting comments. An electronic copy of this document and supplemental information to this proposed rule are also available at *http://www.regulations.gov* for easy reference. Paper comments that duplicate electronic submissions are not necessary. All comments submitted to *http://www.regulations.gov* will be posted for public review and are part of the official docket record. Should you, however, wish to submit written comments, in lieu of electronic comments, they should be sent via regular or express mail to: Drug Enforcement Administration, Attention: DEA **Federal Register** Representative/ODW, 8701 Morrissette Drive, Springfield, Virginia 22152. All requests for hearing and waivers of participation must be sent to: Drug Enforcement Administration, Attention: Hearing Clerk/LJ, 8701 Morrissette Drive, Springfield, Virginia 22152.

FOR FURTHER INFORMATION CONTACT: Ruth A. Carter, Chief, Policy Evaluation and Analysis Section, Office of Diversion Control, Drug Enforcement Administration; Mailing Address: 8701 Morrissette Drive, Springfield, Virginia 22152; Telephone: (202) 598–6812.

SUPPLEMENTARY INFORMATION:

Posting of Public Comments

Please note that comments received in response to this docket are considered part of the public record and will be made available for public inspection and posted at *http://www.regulations.gov.* Such information includes personal identifying information (such as your name, address, etc.) voluntarily submitted by the commenter.

If you want to submit personal identifying information (such as your name, address, etc.) as part of your comment, but do not want it to be made public, you must include the phrase ''PERSONAL IDENTIFYING INFORMATION'' in the first paragraph of your comment. You must also place all the personal identifying information you do not want made publicly available in the first paragraph of your comment and identify what information you want redacted.

If you want to submit confidential business information as part of your comment, but do not want it to be made publicly available, you must include the phrase ''CONFIDENTIAL BUSINESS INFORMATION'' in the first paragraph of your comment. You must also prominently identify confidential business information to be redacted within the comment. If a comment has so much confidential business information that it cannot be effectively redacted, all or part of that comment may not be made publicly available.

Comments containing personally identifying information or confidential business information identified as directed above will be made publicly available in redacted form. The Freedom of Information Act (FOIA) applies to all comments received. If you wish to personally inspect the comments and materials received or the supporting documentation the DEA used in preparing the proposed action, these materials will be available for public inspection by appointment. To arrange

a viewing, please see the **FOR FURTHER INFORMATION CONTACT** paragraph, above.

Requests for Hearing, Notice of Appearance at Hearing, or Waiver of Participation in Hearing

Pursuant to the provisions of the CSA (21 U.S.C. 811(a)), this action is a formal rulemaking ''on the record after opportunity for a hearing.'' Such proceedings are conducted pursuant to the provisions of the Administrative Procedure Act (APA) (5 U.S.C. 551–559), 21 CFR 1308.41–1308.45, and 21 CFR part 1316 subpart D. In accordance with 21 CFR 1308.44(a)–(c), requests for a hearing, notices of appearance, and waivers of an opportunity for a hearing or to participate in a hearing may be submitted only by interested persons, defined as those ''adversely affected or aggrieved by any rule or proposed rule issuable pursuant to section 201 of the Act (21 U.S.C. 811).'' 21 CFR 1300.01. Such requests or notices must conform to the requirements of 21 CFR 1308.44(a) or (b) and 1316.47 or 1316.48, as applicable, and include a statement of the interest of the person in the proceeding and the objections or issues, if any, concerning which the person desires to be heard. Any waiver must conform to the requirements of 21 CFR 1308.44(c) and 1316.49, including a written statement regarding the interested person's position on the matters of fact and law involved in any hearing.

Please note that pursuant to 21 U.S.C. 811(a), the purpose and subject matter of a hearing held in relation to this rulemaking is restricted to ''(A) find[ing] that such drug or other substance has a potential for abuse, and (B) mak[ing] with respect to such drug or other substance the findings prescribed by subsection (b) of section 812 of [Title 21] for the schedule in which such drug is to be placed. . . .'' Requests for hearing, notices of appearance at the hearing, and waivers of an opportunity for a hearing or to participate in a hearing must be submitted to the DEA using the address information provided above.

Legal Authority

The DEA implements and enforces titles II and III of the Comprehensive Drug Abuse Prevention and Control Act of 1970 and the Controlled Substances Import and Export Act, as amended, and collectively referred to as the Controlled Substances Act (CSA) (21 U.S.C. 801–971). The DEA publishes the implementing regulations for these statutes in title 21 of the Code of Federal Regulations (CFR), parts 1300 to 1321. The CSA and its implementing regulations are designed to prevent, detect, and eliminate the diversion of controlled substances and listed chemicals into the illicit market while providing for legitimate medical, scientific, research, and industrial needs of the United States. Controlled substances have the potential for abuse and dependence and are controlled to protect the public health and safety.

Under the CSA, controlled substances are classified into one of five schedules based upon their potential for abuse, their currently accepted medical use, and the degree of dependence the substance may cause. 21 U.S.C. 812. The initial schedules of controlled substances established by Congress are found at 21 U.S.C. 812(c), and the current list of all scheduled substances is published at 21 CFR part 1308. Pursuant to 21 U.S.C. 811(a)(1), the Attorney General may, by rule, ''add to such a schedule or transfer between such schedules any drug or other substance if he (A) finds that such drug or other substance has a potential for abuse, and (B) makes with respect to such drug or other substance the findings prescribed by [21 U.S.C. 812(b)] for the schedule in which such drug is to be placed . . . .'' Pursuant to 28 CFR 0.100(b), the Attorney General has delegated this scheduling authority to the Administrator of the DEA who has further delegated this authority to the Deputy Administrator of the DEA under 28 CFR 0.104.

The CSA provides that scheduling of any drug or other substance may be initiated by the Attorney General (1) on his own motion; (2) at the request of the Secretary of the Department of Health and Human Services (HHS); or (3) on the petition of any interested party. 21 U.S.C. 811(a). If finalized, this action would impose the regulatory controls and administrative, civil, and criminal sanctions of Schedule III on the manufacture, distribution, dispensing, importation, exportation, research, instructional activities, and possession of perampanel.

Background

Perampanel [2-(2-oxo-1-phenyl-5-pyridin-2-yl-1,2-dihydropyridin-3-yl) benzonitrile hydrate] is a new chemical entity with central nervous system (CNS) depressant and hallucinogenic properties. The HHS states that on October 22, 2012, the Food and Drug Administration (FDA) approved a new drug application for perampanel as an adjunctive therapy for the treatment of partial-onset seizures with or without secondarily generalized seizures in patients with epilepsy aged 12 years and older. Perampanel will initially be marketed in the United States under the trade name FYCOMPA®. Perampanel is a non-competitive AMPA (α-amino-3-hydroxy-5-methyl-4-isoxazolepropionic acid)-type glutamate receptor antagonist. Perampanel was approved in Europe in May 2012 and has been marketed there since July 2012.

Proposed Determination to Schedule Perampanel

Pursuant to 21 U.S.C. 811(a), proceedings to add a drug or substance to those controlled under the CSA may be initiated by request of the Secretary of the Department of Health and Human Services (HHS). On January 22, 2013, the HHS recommended that the DEA add perampanel to Schedule III of the CSA and provided the DEA with the scientific and medical evaluation document, ''Basis for the Recommendation for Control of Perampanel and Its Salts in Schedule III of the Controlled Substances Act.'' Following consideration of the eight factors determinative of control under the CSA, with findings related to the substance's abuse potential, legitimate medical use, and dependence liability, the HHS recommended that perampanel be controlled in Schedule III of the CSA. In response, the DEA reviewed the scientific and medical evaluation and scheduling recommendation provided by the HHS, and all other relevant data, and completed an eight factor review document pursuant to 21 U.S.C. 811(c). Included below is a brief summary of each factor as analyzed by the HHS and the DEA, and as considered by the DEA in its proposed scheduling decision. Please note that the DEA and HHS analyses are available in their entirety under ''Supporting and Related Material'' in the public docket for this proposed rule, at *http://www.regulations.gov*, under Docket Number ''DEA–374.'' Full analysis of, and citations to, the information referenced in the summary may also be found in the supporting and related material.

1. *The Drug's Actual or Relative Potential for Abuse:* Perampanel is a new chemical entity that has been marketed in Europe since July 2012. According to the HHS, since perampanel has been marketed in Europe only since July 2012, there is a lack of information regarding perampanel's actual or relative potential for abuse. However, the legislative history of the CSA offers the following criterion for assessing a new drug or substance's potential for abuse:

The drug or drugs containing such a substance are new drugs so related in their action to a drug or drugs already listed as

having a potential for abuse to make it likely that the drug will have the same potentiality for abuse as such drugs, thus making it reasonable to assume that there may be significant diversions from legitimate channels, significant use contrary to or without medical advice, or that it has a substantial capability of creating hazards to the health of the user or to the safety of the community.[1]

According to the HHS, perampanel is a non-competitive AMPA-type glutamate receptor antagonist, which has been demonstrated by various groups. Antagonism of the AMPA receptors has been shown to produce a broad-spectrum anti-convulsant activity of focal and generalized epilepsy in animal models.

The HHS states that monkeys self-administered perampanel at rates similar to or greater than those for pentobarbital (Schedule II). These data indicate that perampanel may have a high psychological dependence liability. It was demonstrated in rats that cessation of administration of perampanel produced withdrawal symptoms similar to those produced after cessation of diazepam (Schedule IV) administration.

According to the HHS, a clinical study of recreational drug abusers (with histories of abuse of sedative hypnotic and psychoactive drugs such as ketamine (Schedule III) and alprazolam (Schedule IV)) using ketamine (Schedule III), alprazolam (Schedule IV), and perampanel produced subjective effects indicative of abuse potential. The subjective effects reported were ''euphoria,'' ''high,'' and ''drug-liking.'' For the measures of ''floating,'' ''spaced out,'' and ''detached,'' perampanel produced similar responses to those of ketamine (Schedule III) and greater responses than those of alprazolam (Schedule IV). The study used 8, 24, and 36 mg doses of perampanel, 100 mg doses of ketamine (Schedule III), 1.5 and 3mg doses of alprazolam (Schedule IV), or a placebo. Those that received 24 and 36 mg doses of perampanel reported measures of ''sedation,'' ''slowed down,'' ''confused,'' ''clear crisp vision,'' and ''attention span'' at levels similar to or greater than alprazolam (Schedule IV) and greater than ketamine (Schedule III). Forty-six percent of the subjects reported euphoria-type adverse events (AEs) with the 24 and 36 mg perampanel doses, which was higher than the rate reported for 3 mg alprazolam (Schedule IV) (13 percent), and lower than that reported for 100 mg ketamine (Schedule III) (89 percent). The data from the study indicated that perampanel produces behavioral and subjective effects in humans similar to or greater than alprazolam (Schedule IV) and similar to ketamine (Schedule III).

According to the HHS, based on results from the clinical study with recreational drug users, it is reasonable to assume that perampanel will appeal to individuals who prefer to abuse drugs that elicit the subjective and behavioral effects of alprazolam (Schedule IV) and ketamine (Schedule III). The HHS anticipates that abuse will result in: diversions of perampanel from legitimate pharmaceutical distribution channels; significant use of perampanel contrary to or without medical advice; and a substantial capability to create hazards to the abuser's health and to the safety of the community.

2. *Scientific Evidence of the Drug's Pharmacological Effects, If Known:* Perampanel is a non-competitive antagonist of the AMPA glutamate receptor. According to the HHS, perampanel is also a direct and indirect antagonist of the NMDA receptor. The HHS states that perampanel is pharmacologically similar to ketamine (Schedule III), a NMDA receptor antagonist and a recreational drug known for its euphorigenic, dissociative, and hallucinogenic properties. Binding studies revealed that perampanel did not inhibit binding at any receptor site by more than 50 percent.

According to the HHS, based on electrophysiological assays performed on ion channels of $GABA_A$ receptors, perampanel would be expected to cause sedation, muscle relaxation, impairment of motor coordination and memory, development of dependency, and occurrence of benzodiazepine-like withdrawal symptoms after discontinuation.

The DEA further adds that perampanel has inhibited AMPA-induced increases in $[Ca^{2+}]_i$ in rat cortical neurons in a concentration-dependent manner, with an IC_{50} of 93 nM. Perampanel (300 nM) inhibited AMPA receptor-mediated excitatory postsynaptic field potentials (f-EPSPs) in rat hippocampal slices by 50 percent. Perampanel inhibited AMPA receptor-mediated f-EPSPs in a dose-dependent manner, with 10 μM causing complete inhibition; the IC_{50} was 230 nM.

According to the HHS, animal studies indicate that perampanel is a depressant. The Irwin test is an observational procedure that assesses and scores the effects of drugs on rodents' behavior and physiology. Perampanel (5 mg/kg), administered orally by gavage, decreased alertness, touch response, body position, limb tone, grip strength, body tone, spontaneous activity, and abdominal tone, and caused staggering and inhibition of palpebral opening (eyelid) in male rats.

The HHS reported on two human abuse potential studies that were performed in healthy, adult, recreational poly-drug users. In the first study, eight doses of perampanel (8, 12, 16, 20, 24, 28, 32, and 36 mg) were administered to the subjects. It was determined that 36 mg was the maximum tolerated dose (MTD). The most commonly reported AEs were psychiatric, in particular euphoria, which occurred at a rate of 22.6 percent in the higher dose group which received 24, 28, 32, and 36 mg doses of perampanel.

In the second human abuse potential study, perampanel produced subjective responses similar to or greater than those produced by alprazolam (Schedule IV) and ketamine (Schedule III). Perampanel (8, 24, and 36 mg), ketamine (Schedule III) (100 mg), alprazolam (Schedule IV) (1.5 and 3 mg), and placebo were administered to 34 subjects who were current recreational poly-drug users with histories of CNS depressant and psychedelic drug use. The effects of perampanel (24 and 36 mg) on the drug-liking Visual Analogue Scale (VAS) were higher than that of alprazolam (Schedule IV) (1.5 and 3 mg) and similar to ketamine (Schedule III) (100 mg). For the Addiction Research Center Inventory Morphine-Benzedrine Group (ARCI MBG) (euphoria) measure, the responses produced by perampanel (24 and 36 mg) were comparable to those produced by alprazolam (Schedule IV) (3 mg) and ketamine (Schedule III) (100 mg), indicating that perampanel produces euphoria comparable to that produced by alprazolam (Schedule IV) and ketamine (Schedule III). The rates reported for euphoria AEs were 37 percent for the 8 mg dose and 46 percent for the 24 and 36 mg doses of perampanel. The rates reported for euphoria AEs for 3 mg alprazolam (Schedule IV) and 100 mg ketamine (Schedule III), were 13 percent and 89 percent, respectively.

For the measure of feeling ''high'' on a VAS, perampanel (24 and 36 mg) produced responses that were comparable to those for ketamine (Schedule III) (100 mg) and alprazolam (Schedule IV) (1.5 and 3 mg). Perampanel (36 mg) was long-acting for the sedation and ''high'' effects. They lasted at least 22 hours. It was demonstrated that perampanel caused

[1] Comprehensive Drug Abuse Prevention and Control Act of 1970, H.R. Rep. No. 91–1444, 91st Cong., Sess. 1 (1970); *as reprinted in* 1970 U.S.C.C.A.N. 4566, 4601.

NMDA-antagonist specific effects, such as ''floating,'' ''spaced out,'' ''detached,'' and ''feeling happy,'' that were similar to those of ketamine (Schedule III) and greater than those of alprazolam (Schedule IV) (1.5 and 3 mg). The duration of these effects was longer for perampanel (24 and 36 mg) than for ketamine (Schedule III) (100 mg): 24 to 48 hours compared to 3 hours, respectively. The measures of ''sedation,'' ''confused,'' ''slowed down,'' ''attention span,'' and ''clear crisp vision'' following doses of 24 and 36 mg perampanel were similar to, or greater than, alprazolam (Schedule IV), and greater than ketamine (Schedule III). The duration of effects of higher doses of perampanel on the majority of measures was longer than for 3 mg alprazolam (Schedule IV) and 100 mg ketamine (Schedule III).

According to the HHS, in clinical trials that were conducted to study the effect of perampanel on certain chronic diseases, e.g., epilepsy, Parkinson's disease, migraines, multiple sclerosis (MS), and peripheral neuropathy, perampanel caused CNS depressant effects including somnolence/sedation, dizziness, ataxia, confusion, amnesia and memory impairment, euphoria, depression, and suicidality. The AEs that are related to NMDA receptor antagonists were also associated with perampanel. These included psychotic disorder/psychosis, hallucinations, dissociation, delusional behavior, delirium, paranoia, euphoria, agitation, amnesia, confusion, and catatonia.

3. *The State of Current Scientific Knowledge Regarding the Drug or Other Substance:* Perampanel (2-(2-oxo-1-phenyl-5-pyridin-2-yl-1,2-dihydropyridin-3-yl)benzonitrile hydrate (4:3) is a white-to-yellowish powder. The molecular formula is $C_{23}H_{15}N_3O \bullet 3/4H_2O$. It is freely soluble in N-methylpyrrolidone, sparingly soluble in acetonitrile and acetone, slightly soluble in methanol, ethanol, and ethyl acetate, very slightly soluble in 1-octanol and diethyl ether, and practically insoluble in heptanes and water.

Perampanel is rapidly and almost completely absorbed, slowly metabolized, and slowly eliminated after oral administration. In humans, the median T_{max} ranged from 0.5–2.5 hours under fasted conditions; the T_{max} increased by 2–3 hours under fed conditions. T_{max} is the amount of time for a substance to reach maximal plasma concentrations after administration. According to the HHS, the mean half-life of perampanel (1 mg) in the fasted state was 84.5 and 129.5 hours for men and women, respectively. The steady state is reached in about 2–3 weeks. Perampanel is slowly metabolized and the metabolites are eliminated rapidly via urine or feces. Three metabolites of perampanel have been identified as HU1, HU2, and HU3. HU1 and HU2 are oxygen glucuronide conjugates and HU3 is a dihydrodiol analog. Oxidative metabolism is mediated by CYP3A4 and/or CYP3A5.

4. *Its History and Current Pattern of Abuse:* An assessment of the history and current pattern of perampanel abuse is not available because it has only been marketed in Europe since July 2012. As stated in HHS's review, the results of a human abuse potential study indicate that perampanel has an abuse potential comparable to or greater than the abuse potential of alprazolam (Schedule IV) and similar to that of ketamine (Schedule III). In addition, higher doses of perampanel produced a high rate of euphoria-type AEs (up to 46 percent). The HHS asserts that the positive subjective effects reported from supratherapeutic doses of perampanel administration are predictive of its potential to be abused. Alprazolam (Schedule IV) and ketamine (Schedule III) have histories of diversion and abuse. Based on perampanel's subjective AE profile and its similarity to ketamine (Schedule III) and alprazolam (Schedule IV), it is reasonable to assume that perampanel will produce an abuse pattern that will have features of both ketamine (Schedule III) and alprazolam (Schedule IV) abuse.

5. *The Scope, Duration, and Significance of Abuse:* According to the HHS review, the scope, duration, and significance of abuse of perampanel are unknown because it has only been marketed in Europe since July 2012. However, the scope, duration, and significance of abuse of perampanel can be predicted from the data obtained in pre-market clinical studies such as abuse potential studies and other clinical studies. In its analysis, the HHS concluded that:

> [I]f perampanel were marketed in the United States, the scope and significance of abuse of perampanel would be similar to or greater than alprazolam [Schedule IV] and similar to or greater than ketamine [Schedule III]. If perampanel were marketed as a non-controlled antiepileptic drug, it is reasonable to assume that perampanel would be abused to an even greater extent than it would be when controlled in Schedule III of the CSA. This is because individuals who abuse such drugs, namely ketamine, would likely prefer to use a drug that is non-controlled, or in a lower level of control, rather than drugs that act similarly and are controlled in [Schedule III], or more restrictive schedules of the CSA.

6. *What, if Any, Risk There Is to the Public Health:* According to HHS, perampanel likely poses a risk to public health similar to or greater than that of alprazolam (Schedule IV) and similar to that of ketamine (Schedule III). The HHS asserts that the ability of a drug to have an abuse potential is an indication of the public health risk associated with the drug. As summarized in Factor 2, supratherapeutic doses of perampanel (24 and 36 mg) produced euphoria-type AEs in 46 percent of subjects, which was greater than the rate of euphoria AEs in subjects given 3 mg alprazolam (Schedule IV) (13 percent) and less than that produced by 100 mg ketamine (Schedule III) (89 percent).

Clinical studies have demonstrated that perampanel does affect psychomotor performance. In a study of healthy volunteers, single and multiple doses of 8 and 12 mg perampanel dose-dependently impaired psychomotor performance. In the same study, healthy volunteers were given alcohol until their alcohol blood level reached 80–100 mg/100 ml, in addition to perampanel. The effects of perampanel on complex tasks, such as driving ability, were additive or supra-additive to the impairment effects of alcohol.

According to the HHS, the risk of perampanel to the public health was demonstrated by the AEs of aggression, anger, hostility, suicidal ideation and attempts, and homicidal ideation and threats associated with perampanel during the clinical trials. The FYCOMPA® drug label includes a boxed warning alerting prescribers and ultimate users to these public health risks. Approximately 50 subjects from the clinical trials, without previous relevant psychiatric histories, developed psychotic disorders, such as paranoia, delusion, delirium, schizophrenia, and catatonia while taking perampanel. This indicates that perampanel may cause users to display unpredictable or aggressive behavior towards themselves or others. Based on the AEs of perampanel summarized above, the HHS determined that the public health risks of perampanel are likely to be similar to other CNS drugs, such as ketamine (Schedule III).

7. *Its Psychic or Physiological Dependence Liability:* According to the HHS, low (up to 14.7 mg/kg) and high doses (up to 43.5 mg/kg) of oral perampanel were administered to rats for 4 weeks, followed by a 1-week withdrawal period. During the withdrawal period, the rats displayed withdrawal symptoms indicative of dependence, such as hyper-reactivity and muscle rigidity, along with reduced food consumption.

According to the HHS, the physical dependence of perampanel in humans

has not been fully evaluated, because in Phase 3 clinical trials, symptoms of withdrawal were collected in only a small fraction of patients. Reported withdrawal symptoms included fatigue/lethargy/asthenia, irritability, anxiety/nervousness, worsening of mood/tearfulness, mood swings, sleep disorders, weight changes, changes in appetite, muscle pain/stiffness, diarrhea/nausea/vomiting, rhinorrhea, lacrimation, headache, dizziness, hallucinations, panic, and craving/drug seeking. The HHS asserts that the limited results demonstrate that discontinuation of perampanel administration causes signs and symptoms of withdrawal.

8. *Whether the Substance Is an Immediate Precursor of a Substance Already Controlled Under the CSA:* Perampanel is not an immediate precursor of a substance already controlled under the CSA.

Conclusion: Based on consideration of the scientific and medical evaluation conducted by the HHS and its recommendation, and after considering its own eight-factor analysis, the DEA has determined that these facts and all relevant data constitute substantial evidence of potential for abuse of perampanel. As such, the DEA hereby proposes to schedule perampanel as a controlled substance under the CSA.

Proposed Determination of Appropriate Schedule

The CSA outlines the findings required to place a drug or other substance in any particular schedule (I, II, III, IV or V). 21 U.S.C. 812(b). After consideration of the analysis and recommendation by the Assistant Secretary for Health of the HHS, and review of all available data, the Deputy Administrator of the DEA, pursuant to 21 U.S.C. 812(b)(3), finds that:

1. Perampanel has a potential for abuse less than the drugs or other substances in Schedules I and II;

2. Perampanel has a currently accepted medical use in treatment in the United States. Perampanel was approved for marketing by the FDA as an adjunctive treatment of partial-onset seizures with or without secondarily generalized seizures in patients with epilepsy aged 12 years and older; and

3. Abuse of perampanel may lead to moderate or low physical dependence or high psychological dependence.

Based on these findings, the Deputy Administrator of the DEA concludes that perampanel [2-(2-oxo-1-phenyl-5-pyridin-2-yl-1,2-dihydropyridin-3-yl) benzonitrile hydrate], including its salts, isomers, and salts of isomers, warrants control in Schedule III of the CSA. 21 U.S.C. 812(b)(3).

Requirements for Handling Perampanel

If this rule is finalized as proposed, perampanel would be subject to the CSA's Schedule III regulatory controls and administrative, civil, and criminal sanctions applicable to the manufacture, distribution, dispensing, importing, exporting, research, and conduct of instructional activities, including the following:

Registration. Any person who handles (manufactures, distributes, dispenses, imports, exports, engages in research, or conducts instructional activities) perampanel, or who desires to handle perampanel, would be required to be registered with the DEA to conduct such activities, pursuant to 21 U.S.C. 822, 823, 957, and 958, and in accordance with 21 CFR parts 1301 and 1312. Any person who handles perampanel, and is not registered with the DEA, must be registered with the DEA to conduct such activities pursuant to 21 U.S.C. 822, 823, 957, and 958, and in accordance with 21 CFR parts 1301 and 1312. Any person who handles perampanel, and is not registered with the DEA, would need to be registered with the DEA to conduct such activities by the effective date of the final rule.

Security. Perampanel would be subject to Schedule III–V security requirements and would need to be handled and stored in accordance with 21 CFR 1301.71–1301.93, pursuant to 21 U.S.C. 823, 821, 871(b).

Labeling and Packaging. All labels and labeling for commercial containers of perampanel distributed on or after finalization of this rule would need to be in accordance with 21 CFR 1302.03–1302.07, pursuant to 21 U.S.C. 825, 958(e).

Inventory. Every DEA registrant who possesses any quantity of perampanel on the effective date of the final rule would be required to take an inventory of all stocks of perampanel on hand as of the effective date of the rule, pursuant to 21 U.S.C. 827, 958(e) and in accordance with 21 CFR 1304.03, 1304.04, and 1304.11(a) and (d).

Any person who becomes registered with the DEA after the effective date of the final rule would be required to take an initial inventory of all stocks of controlled substances (including perampanel) on hand at the time of registration pursuant to 21 U.S.C. 827, 958(e), and in accordance with 21 CFR 1304.03, 1304.04, and 1304.11(a) and (b). After the initial inventory, every DEA registrant would be required to take a biennial inventory of all controlled substances (including perampanel) on hand, on a biennial basis, pursuant to 21 U.S.C. 827, 958(e) and in accordance with 21 CFR 1304.03, 1304.04, and 1304.11.

Records. All DEA registrants would be required to maintain records of perampanel pursuant to 21 U.S.C. 827, 958(e) and in accordance with 21 CFR parts 1304 and 1312.

Prescriptions. All prescriptions for perampanel or prescriptions for products containing perampanel would be required to be issued pursuant to 21 U.S.C. 829 and in accordance with 21 CFR part 1306.

Importation and Exportation. All importation and exportation of perampanel would need to be done in accordance with 21 CFR part 1312, pursuant to 21 U.S.C. 952, 953, 957, and 958.

Liability. Any activity with perampanel not authorized by, or in violation of, the CSA, occurring on or after finalization of this proposed rule, would be unlawful, and may subject the person to administrative, civil, and/or criminal sanctions.

Regulatory Analyses

Executive Orders 12866 and 13563

In accordance with 21 U.S.C. 811(a), this proposed scheduling action is subject to formal rulemaking procedures performed ''on the record after opportunity for a hearing,'' which are conducted pursuant to the provisions of 5 U.S.C. 556 and 557. The CSA sets forth the procedures and criteria for scheduling a drug or other substance. Such actions are exempt from review by the Office of Management and Budget (OMB) pursuant to Section 3(d)(1) of Executive Order 12866 and the principles reaffirmed in Executive Order 13563.

Executive Order 12988

This proposed regulation meets the applicable standards set forth in Sections 3(a) and 3(b)(2) of Executive Order 12988 Civil Justice Reform to eliminate drafting errors and ambiguity, minimize litigation, provide a clear legal standard for affected conduct, and promote simplification and burden reduction.

Executive Order 13132

This proposed rulemaking does not have federalism implications warranting the application of Executive Order 13132. The proposed rule does not have substantial direct effects on the States, on the relationship between the national government and the States, or the distribution of power and responsibilities among the various levels of government.

Executive Order 13175

This proposed rule does not have tribal implications warranting the application of Executive Order 13175. It does not 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.

Regulatory Flexibility Act

The Deputy Administrator, in accordance with the Regulatory Flexibility Act (RFA) (5 U.S.C. 601–612), has reviewed this proposed rule and by approving it certifies that it will not have a significant economic impact on a substantial number of small entities. The purpose of this proposed rule is to place perampanel, including its salts, isomers, and salts of isomers, into Schedule III of the CSA. No less restrictive measures (i.e., non-control) enable the DEA to meet its statutory obligations under the CSA. In preparing this certification, the DEA has assessed economic impact by size category and has considered costs with respect to the various DEA registrant business activity classes.

Perampanel is a new molecular entity, approved by the FDA on October 22, 2012. It was approved in Europe in May 2012, and has been marketed in Europe since July 2012. According to publicly available information reviewed by the DEA, perampanel is currently anticipated to enjoy patent protection for at least a decade before generic equivalents may be manufactured and marketed. Accordingly, the number of currently identifiable manufacturers, importers, and distributors for perampanel is extremely small. The publicly available materials also specify the readily identifiable persons subject to direct regulation by this proposed rule. Based on guidelines utilized by the Small Business Administration, the perampanel manufacturer/distributor/importer was determined not to be a small entity. Once generic equivalents are developed and approved for manufacturing and marketing, there may be additional manufacturers, importers, and distributors of perampanel, but whether they may qualify as small entities cannot be determined at this time.

There are approximately 1.5 million controlled substance registrants, approximately 381,559 of which are estimated to be businesses. The DEA estimates that 371,588 (97 percent) of the affected businesses are considered ''small entities'' in accordance with the RFA and Small Business Administration (SBA) standards. 5 U.S.C. 601(6) and 15 U.S.C. 632. However, due to the wide variety of unidentifiable and unquantifiable variables that could potentially influence the dispensing rates of new chemical entities, the DEA is unable to determine the number of small entities that might dispense (including administer and prescribe) perampanel (e.g., pharmacies and prescribers).

Despite the fact that the number of small businesses potentially impacted by this proposed rule could not be determined at this time, the DEA concludes that they would not experience a significant economic impact as a result of this rule. Currently, 98 percent of DEA registrants (most of which are small businesses) are authorized to handle Schedule III controlled substances. Even if we assume that all of the DEA registrants were to dispense perampanel, (e.g., practitioners prescribe, administer, or dispense the substance, and pharmacies dispense the prescriptions), the costs that they would incur as a result of perampanel scheduling would be minimal. Registrants that dispense (but not prescribe) would incur nominal additional security, inventory, recordkeeping, and labeling costs, as they have already established and implemented the required systems and processes to handle Schedule III controlled substances. For example, pharmacies and institutional practitioners may disperse Schedule II through V controlled substances throughout their stock of non-controlled substances in such a manner as to obstruct theft or diversion of the controlled substances. The inclusion of one additional substance to this system would result in little or no additional burden to such practitioners. In addition, because DEA-registered dispensers must label all Schedule II–V controlled substances dispensed, the requirement to label all controlled substances containing perampanel would not impose a significant economic burden upon DEA-registered dispensers (as the infrastructure and materials for doing so would already be in place). Accordingly, compliance would not require significant manpower, capital investments, or recordkeeping burdens.

Registrants who only prescribe perampanel by oral or written prescription would not incur any additional security, inventory, recordkeeping, or labeling costs as a result of this rule as they would not physically handle perampanel.

Because of these facts, this proposed rule will not result in significant economic impact on a substantial number of small entities.

Unfunded Mandates Reform Act of 1995

In accordance with the Unfunded Mandates Reform Act (UMRA) of 1995 (2 U.S.C. 1501 *et seq.*), on the basis of information contained in the ''Regulatory Flexibility Act'' section above, the DEA has determined and certifies pursuant to UMRA that this action would not result in any federal mandate that may result ''in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of $100,000,000 or more (adjusted for inflation) in any one year. . . .'' Therefore, neither a Small Government Agency Plan nor any other action is required under provisions of UMRA of 1995.

Paperwork Reduction Act of 1995

This action does not impose a new collection of information requirement under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3521). This action would not impose recordkeeping or reporting requirements on State or local governments, individuals, businesses, or organizations. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number.

List of Subjects in 21 CFR Part 1308

Administrative practice and procedure, Drug traffic control, Reporting and recordkeeping requirements.

For the reasons set out above, 21 CFR part 1308 is proposed to be amended as follows:

PART 1308—SCHEDULES OF CONTROLLED SUBSTANCES

■ 1. The authority citation for 21 CFR part 1308 continues to read as follows:

Authority: 21 U.S.C. 811, 812, 871(b), unless otherwise noted.

■ 2. Amend § 1308.13 by redesignating paragraphs (c)(11) through (c)(14) as paragraphs (c)(12) through (c)(15) and adding new paragraph (c)(11) to read as follows:

§ 1308.13 Schedule III.

* * * * *

(c) * * *

(11) Perampanel, and its salts, isomers, and salts of isomers 2261

* * * * *

Dated: October 9, 2013.

Thomas M. Harrigan,

Deputy Administrator.

[FR Doc. 2013–24600 Filed 10–21–13; 8:45 am]

BILLING CODE P

DEPARTMENT OF DEFENSE

Office of the Secretary

32 CFR Part 199

[DOD–2013–HA–0164]

RIN 0720–AB61

TRICARE; Coverage of Care Related to Non-Covered Initial Surgery or Treatment

AGENCY: Office of the Secretary, Department of Defense.

ACTION: Proposed rule.

SUMMARY: The Department of Defense (DoD) is publishing this proposed rule to allow coverage for otherwise covered services and supplies required in the treatment of complications (unfortunate sequelae), as well as medically necessary and appropriate follow-on care, resulting from a non-covered incident of treatment provided pursuant to a properly granted Supplemental Health Care Program waiver. This proposed rule is necessary to protect TRICARE beneficiaries from incurring financial hardships due to the current regulatory restrictions that prohibit TRICARE coverage of the treatment of complications resulting from non-covered medical procedures, even when those procedures were provided while the beneficiary was an active duty member and were authorized by the Director, TRICARE Management Activity (TMA), based on a determination that a waiver authorizing the original non-covered surgery or treatment was necessary to assure adequate availability of health care to the Active Duty member. Additionally, with respect to care that is related to a non-covered initial surgery or treatment, the proposed rule seeks to eliminate any confusion regarding what services and supplies will be covered by TRICARE and under what circumstances they will be covered.

DATES: Comments must be received on or before December 23, 2013. Do not submit comments directly to the point of contact or mail your comments to any address other than what is shown below. Doing so will delay the posting of the submission.

ADDRESSES: You may submit comments, identified by docket number and/or Regulatory Identification Number (RIN) 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 and docket number or RIN 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://regulations.gov* as they are received without change, including any personal identifiers or contact information.

FOR FURTHER INFORMATION CONTACT: Thomas Doss (703) 681–7512.

SUPPLEMENTARY INFORMATION:

I. Executive Summary

1. Purpose of Regulatory Actions

a. Need for Regulatory Actions

Under the TRICARE private sector health care program, certain conditions and treatments are excluded from coverage. For example, any drug, device, medical treatment, or procedure whose safety and efficacy has not been established by reliable evidence is considered unproven and excluded from coverage. This exclusion includes all services directly related to the unproven drug, device, medical treatment or procedure. Specifically, benefits for otherwise covered services and supplies that are required in the treatment of complications (unfortunate sequelae) resulting from a non-covered incident of treatment, are generally excluded from TRICARE coverage pursuant to title 32 of the Code of Federal Regulation (CFR) section 199.4(e)(9), unless the complication represents a separate medical condition such as a systemic infection, cardiac arrest, and acute drug reaction. TRICARE also excludes any needed follow-on care resulting from a non-covered condition or initial surgery or treatment pursuant to § 199.4(g)(63).

There is currently one exception to this general exclusion, published in the **Federal Register** [76 FR 57642] on September 16, 2011, to allow coverage of otherwise covered services and supplies required in the treatment of complications (unfortunate sequelae) resulting from a non-covered incident of treatment provided in a Military Treatment Facility (MTF), when the initial non-covered service has been authorized by the MTF Commander and the MTF is unable to provide the necessary treatment of the complications. This current exception recognizes that in order to support Graduate Medical Education and maintain provider skill levels, MTF providers are required to perform medical procedures that may be excluded from coverage under the TRICARE private sector program. The final rule at 32 CFR199.4(e)(9)(ii) was viewed as necessary to protect TRICARE beneficiaries from incurring financial hardships in such cases.

Currently, Active Duty Service members (ADSMs) may receive non-covered TRICARE private sector health care services under the Supplemental Health Care Program (SHCP) if a waiver is submitted through the Service and approved by the Director, TMA, or designee, in accordance with § 199.6(f). While the Department wants to ensure that Service members have access to the latest, promising medical technologies and procedures, there must be assurance that the care is safe and effective, and that members are not subjected to undue risk, or rendered unfit for continued service, due to complications suffered as a result of unproven medical care. Consequently, requests for non-covered procedures and treatments, including unproven care, are carefully reviewed in conjunction with other available, proven treatments, if any exist, to determine whether or not approval of the requested care is necessary to assure the adequate availability of health care to the member. Currently, Service members are counseled that the treatment remains a non-covered TRICARE benefit, and that any follow-on care, including care for complications, will not be covered by TRICARE once the member separates or retires. Members are left to make a difficult choice between pursuing a SHCP waiver in an effort to remain fit for full duty while assuming the financial risk of any necessary follow-on care after discharge, or, electing not to receive the care and risk separation from the Service.

Like the existing exception at 32 CFR199.4(e)(9)(ii) for non-covered care provided in a MTF, this proposed exception is narrowly tailored to serve a similar government interest; namely, protecting former active duty members who have received private sector care pursuant to a SHCP waiver in an effort to ensure their fitness for duty and continued service.

Additionally, some confusion has arisen regarding the terms ‘‘complication’’ and ‘‘unfortunate sequelae’’ as these terms are not

currently defined in regulation. Questions have arisen with respect to whether necessary follow-on care resulting from a non-covered procedure or treatment in an MTF is covered in situations where the MTF is unable to provide the necessary treatment. The intent of the original September 16, 2011, final rule, as well as the current proposal, is to protect TRICARE beneficiaries from incurring financial hardships in limited circumstances, which serve valid governmental purposes. Absent an exception to the general exclusion from coverage, treatment of adverse outcomes, both expected and unexpected, as well as any necessary follow-on care that is a direct result of the initial non-covered treatment, are excluded and could result in less than optimal care (e.g., not receiving necessary physical therapy following surgery) and/or a significant financial hardship for the beneficiary. The Agency did not intend to prevent coverage of necessary follow-on private sector care in situations where an MTF is unable to provide that care but the current regulatory language is subject to such a narrow interpretation absent additional clarification. This proposal would permit coverage of necessary continued treatment, such as physical therapy following a non-covered surgical procedure in an MTF. It would also cover medically necessary follow-on care, including, for example, anti-rejection medications for former members who have received face and hand transplants. This proposal will eliminate the need to try to determine whether the medically necessary and appropriate care the patient is seeking from the private sector is considered to be treatment of an expected complication, an unexpected complication or routine follow-on care, because it will be clearly covered.

b. Legal Authority for the Regulatory Action

This regulation is proposed under the authority of 10 U.S.C. section 1073, which authorizes the Secretary of Defense to administer the medical and dental benefits provided in chapter 55 of title 10, United States Code. The Department is authorized to provide medically necessary and appropriate treatment for mental and physical illnesses, injuries and bodily malfunctions, including hospitalization, outpatient care, drugs, treatment of medical and surgical conditions and other types of health care outlined in 10 U.S.C. 1077(a). Although section 1077 defines benefits to be provided in the MTFs, these benefits are incorporated by reference for the benefits provided in the civilian health care sector to active duty family members and retirees and their dependents through section 1079 and 1086 respectively.

2. Summary of Major Provisions of the Regulatory Action

The proposed rule amends the existing special benefit provision regarding complications (unfortunate sequelae) resulting from non-covered initial surgery, to more clearly address what services and supplies will be covered by TRICARE and under what circumstances they will be covered. The provision itself is relabeled ''Care related to non-covered initial surgery or treatment'' to eliminate any confusion regarding what constitutes a complication or unfortunate sequelae and how broadly or narrowly the exclusion and exceptions to the exclusion should be applied. As amended, the regulatory section will specifically address coverage of otherwise covered medically necessary treatment, to include (i) coverage of complications that represent a separate medical condition; (ii) treatment of complications and necessary follow-on care resulting from a non-covered incident of treatment provided in an MTF; and (iii) treatment of complications and necessary follow-on care resulting from a non-covered incident of treatment provided pursuant to an approved SHCP waiver. Inclusion of the third prong will support the provision of care necessary to allow members to return to full duty and/or reach their maximum rehabilitative potential without requiring the member to bear the sole financial risk for unfortunate sequelae once they are no longer on active duty. This amendment provides consistent treatment of unfortunate sequelae and necessary follow-on care when an original episode of non-covered care is provided for a valid governmental purpose, whether to support Graduate Medical Education (GME) and maintain provider skill levels within an MTF or an ADSM's fitness for duty through authorization of the purchase of otherwise non-covered care via an SHCP waiver. Additionally, the regulatory exclusion at 32 CFR 199.4(g)(63) is amended to clearly state that all services and supplies related to a non-covered condition or treatment, including any necessary follow-on care and treatment of complications, are excluded from coverage except as provided in 32 CFR 199.4(e)(9).

3. Summary of Costs and Benefits

This proposed rule is not anticipated to have an annual effect on the economy of $100 million or more; therefore, it is not an economically significant rule under Executive Order 12866 and the Congressional Review Act. All services and supplies authorized under the TRICARE Basic Program must be determined to be medically necessary in the treatment of an illness, injury or bodily malfunction before the care can be cost shared by TRICARE. For this reason, DoD anticipates that TRICARE will have a marginal increase in cost associated with the inclusion of coverage for treatment of complications and necessary follow-on care for TRICARE beneficiaries who received previously authorized non-covered treatment pursuant to a SHCP waiver while on active duty.

II. Background

Members of the uniformed services on active duty are entitled to medical and dental care pursuant to 10 U.S.C. 1074, including the provision of such care in private facilities. 32 CFR199.16 implements, with respect to the purchase of private sector health care services for ADSMs under the SCHP, the statutory authority at 10 U.S.C. 1074(c). As a general rule, the same rules that govern payment and administration of private sector health care claims under TRICARE apply to the SHCP and the care that members receive in private facilities is comparable to coverage for medical care under the TRICARE Prime program. 32 CFR 199.16(f) authorizes the Director of TRICARE Management Activity (TMA) discretionary authority to waive any requirements of TRICARE regulations, including any restrictions or limitations under the TRICARE Basic Program benefits, except those specifically set forth in statute, based on ''a determination that such waiver is necessary to assure adequate availability of health care to Active Duty members.'' ADSMs have access to non-covered care including experimental or unproven medical care and treatments in the purchased care sector on a case-by-case basis using the SHCP waiver process. These case-by-case treatment decisions are specifically approved by the Director or Deputy Director of the TRICARE Management Activity, resulting in a number of ADSMs receiving otherwise non-covered private sector care while serving.

If an ADSM is granted a waiver under the SCHP to receive an otherwise non-covered incident of treatment by a private sector provider, rather than in an MTF, and suffers complications from the care, SHCP funds can be used to cover necessary follow-on care and treatment of complications in the purchased care system as long as the member remains on active duty. Once

the member retires, however, SHCP coverage no longer exists and TRICARE does not cover unfortunate sequelae of non-covered care done in the purchased care sector except in limited circumstances (e.g. later complications that represent a separate medical condition separate from the condition that the non-covered treatment or surgery was directed toward, and the treatment of the complication is not essentially similar to the covered procedures. This may include a systemic infection, cardiac arrest, or acute drug reaction). Additionally, once retired, existing regulations would not allow the continuation of any needed follow-on care such as rehabilitative care or drug therapy. When these beneficiaries require such treatment, they are responsible for the payment for this necessary treatment resulting in significant financial hardship. This rule will address that unfortunate situation by allowing coverage of treatment for necessary follow-on care, including complications, resulting from the non-covered treatment provided to beneficiaries pursuant to a SHCP waiver while they were on active duty. The specific procedures for approval of this treatment will be addressed in the TRICARE Policy Manual rather than in the regulation to ensure that this information is current and easily accessible. TRICARE manuals may be accessed at *http://www.tricare.mil.*

III. Regulatory Procedure

Executive Order 12866, ''Regulatory Planning and Review'' and E.O. 13563, ''Improving Regulation and Regulatory Review''

It has been determined that this proposed rule is not a significant regulatory action. This rule does not:

(1) Have an annual effect on the economy of $100 million or more or adversely affect in a material way the economy; a section of the economy; productivity; competition; jobs; the environment; public health or safety; or State, local, or tribunal 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 these Executive Orders.

Unfunded Mandates Reform Act (Sec. 202, Pub. L. 104–4)

It has been certified that this proposed rule does not contain a Federal mandate that may result in the expenditure by State, local and tribal governments, in aggregate, or by the private sector, of $100 million or more in any one year.

Public Law 96–354, ''Regulatory Flexibility Act'' (5 U.S.C. 601)

It has been certified that this proposed rule is not subject to the Regulatory Flexibility Act (5 U.S.C. 601) because it would not, if promulgated, have a significant economic impact on a substantial number of small entities. Set forth in the proposed rule are minor revisions to the existing regulation. The DoD does not anticipate a significant impact on the Program.

Public Law 96–511, ''Paperwork Reduction Act'' (44 U.S.C. Chapter 35)

It has been certified that this proposed rule does not impose reporting or recordkeeping requirements under the Paperwork Act of 1995.

Executive Order 13132, Federalism

It has been certified that this proposed rule does not have federalism implications, as set forth in Executive Order 13132. This rule does not have substantial direct effects on:

(1) The States;

(2) The relationship between the National Government and the States; or

(3) The distribution of power and responsibilities among the various levels of Government.

List of Subjects in 32 CFR Part 199

Claims, Dental health, Health care, Health insurance, Individuals with disabilities, and Military personnel.

Accordingly, 32 CFR part 199 is proposed to be amended to read as follows:

PART 199— [AMENDED]

■ 1. The authority citation for part 199 continues to read as follows:

Authority: 5 U.S.C. 301; 10 U.S.C. chapter 55.

■ 2. Amend § 199.4 by revising paragraphs (e)(9) and (g)(63) to read as follows:

§ 199.4 Basic Program Benefits.

* * * * *

(e) * * *

(9) *Care related to non-covered initial surgery or treatment.* (i) Benefits are available for otherwise covered services and supplies required in the treatment of complications resulting from a non-covered incident of treatment (such as nonadjunctive dental care or cosmetic surgery) but only if, the later complication represents a separate medical condition such as a systemic infection, cardiac arrest, and acute drug reaction. Benefits may not be extended for any later care or a procedure related to the complication that essentially is similar to the initial non-covered care. Examples of complications similar to the initial episode of care (and thus not covered) would be repair of facial scarring resulting from dermabrasion for acne.

(ii) Benefits are available for otherwise covered services and supplies required in the treatment of complications (unfortunate sequelae) and any necessary follow-on care resulting from a non-covered incident of treatment provided in an MTF, when the initial non-covered service has been authorized by the MTF Commander and the MTF is unable to provide the necessary treatment of the complications or required follow-on care, according to the guidelines adopted by the Director, TMA, or a designee.

(iii) Benefits are available for otherwise covered services and supplies required in the treatment of complications (unfortunate sequelae) and any necessary follow-on care resulting from a non-covered incident of treatment provided in the private sector pursuant to a properly granted waiver under § 199.16(f) of this chapter. The Director, TMA, or designee, shall issue guidelines for implementing this provision.

* * * * *

(g) * * *

(63) *Non-covered condition/treatment, unauthorized provider.* All services and supplies (including inpatient institutional costs) related to a non-covered condition or treatment, including any necessary follow-on care or the treatment of complications, are excluded from coverage except as provided in under paragraph (e)(9) of this section. In addition, all services and supplies provided by an unauthorized provider are excluded.

* * * * *

Dated: September 26, 2013.

Patricia L. Toppings,

OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 2013–24233 Filed 10–21–13; 8:45 am]

BILLING CODE 5001–06–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 49

[EPA–R09–OAR–2013–0009; FRL–9901–66–Region9]

Approval of Air Quality Implementation Plans; Navajo Nation; Regional Haze Requirements for Navajo Generating Station; Supplemental Proposal

AGENCY: Environmental Protection Agency (EPA).

ACTION: Supplemental proposed rule and notice of public hearings.

SUMMARY: On February 5, 2013, EPA published its proposed source-specific Federal Implementation Plan (FIP) requiring the Navajo Generating Station (NGS), located on the Navajo Nation, to reduce emissions of oxides of nitrogen (NO_X) under the Best Available Retrofit Technology (BART) provision of the Clean Air Act (CAA or Act). EPA proposed the BART FIP to reduce visibility impairment caused by NGS at 11 National Parks and Wilderness Areas. EPA's proposed FIP included: (1) A proposed BART determination; (2) A proposed ''better than BART'' alternative that achieves greater reasonable progress towards the national visibility goals than BART; and (3) a framework for evaluating additional alternatives to BART. This framework for evaluating additional alternatives was included in the proposal due to the unique purpose and history of NGS and the numerous stakeholder interests in it. On March 19, 2013 and June 19, 2013, EPA provided two extensions of the public comment period based on requests of several stakeholders who were actively working to develop an alternative to BART. On July 26, 2013, a group of stakeholders, known as the Technical Work Group (TWG), submitted to EPA their suggested alternative to BART (the ''TWG Alternative''). The TWG Alternative establishes a lifetime cap in NO_X emissions over 2009–2044 (the 2009–2044 NO_X Cap) that is equivalent to the cumulative NO_X emissions over 2009–2044 that NGS would emit under EPA's proposed BART determination of 0.055 lb/MMBtu achieved within five years of the final rule. Due to on-going lease and ownership uncertainties, the operators of NGS cannot yet commit to a single course of action for maintaining emissions below the 2009–2044 NO_X Cap. The TWG Alternative therefore includes several alternative operating scenarios for meeting the 2009–2044 NO_X Cap. EPA did not participate in the TWG or assist in developing the TWG Alternative, and has independently evaluated the TWG Alternative to determine if it meets the requirements of the CAA and the Regional Haze Rule (RHR). In this action, EPA is proposing to determine that the TWG Alternative is ''better than BART'' because maintaining emissions below the 2009–2044 NO_X Cap, as provided in the TWG Alternative, achieves greater reasonable progress than EPA's proposed BART determination towards the national visibility goal. EPA is accepting comment concurrently on today's Supplemental Proposal and our proposal from February 5, 2013.

DATES: Comments on EPA's February 5, 2013 proposal and today's Supplemental Proposal for NGS must be postmarked no later than January 6, 2014.

ADDRESSES: Submit comments, identified by docket number EPA–R09–OAR–2013–0009, by one of the following methods:

(1) *Federal eRulemaking Portal: www.regulations.gov.* Follow the on-line instructions.

(2) *Email: r9ngsbart@epa.gov.*

(3) *Mail or deliver:* Anita Lee (Air-2), U.S. Environmental Protection Agency Region 9, 75 Hawthorne Street, San Francisco, CA 94105–3901.

For more detailed instructions concerning how to submit comments on this supplemental proposed rule, and for more information on our proposed rule, please see the notice of proposed rulemaking, published in the **Federal Register** on February 5, 2013 (78 FR 8274).

Instructions: All comments 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 Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Information that you consider CBI or otherwise protected should be clearly identified as such and should not be submitted through *www.regulations.gov* or email. *www.regulations.gov* is an ''anonymous access'' system, and EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an email directly to EPA, your email address will be automatically captured and included as part of the public comment. 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.

Hearings: EPA has scheduled five public hearings to accept oral and written comments on the proposed rulemaking. Prior to, or concurrent with, each public hearing, EPA will be holding an informal open house to allow members of the public additional time to review information related to EPA's proposed BART determination and Supplemental Proposal, and to speak with representatives from EPA. Any comments made to EPA staff during the open houses must still be provided in writing or orally during the formal public hearing in order to be considered in the record. The open house and public hearing schedule is as follows:

1. LeChee Chapter House (Navajo Nation), located in LeChee, Arizona, three miles south of Page on Coppermine Road (Navajo Route 20), (928) 698–2805, November 12, 2013, concurrent Open House and Public Hearing from 10 a.m.–1 p.m., local time;
2. Page High School Cultural Arts Building, 434 Lake Powell Boulevard, located in Page, Arizona, (928) 608–4138, November 12, 2013, Open House from 3–5 p.m., local time and Public Hearing from 6–9 p.m., local time;
3. Hopi Day School, Quarter-Mile East Main Street, located in Kykotsmovi, Arizona, (928) 734–2467, November 13, 2013, Open House from 3–5 p.m., local time and Public Hearing from 6–9 p.m., local time;
4. Phoenix Convention Center, 100 North 3rd Street, located in Phoenix, Arizona, (602) 262–6225, November 14, 2013, Open House from 3–5 p.m., local time and Public Hearing from 6–10 p.m., local time;
5. Proscenium Theatre, Pima Community College West Campus, Center for the Arts Building located two miles west of Interstate–10 on St. Mary's Road, (520) 206–6986, in Tucson, Arizona–November 15, 2013, Open House from 3–5 p.m., local time and Public Hearing from 6–9 p.m., local time.

EPA will provide oral interpretation services between English and Diné at the open houses and public hearings in LeChee and Page. EPA may provide oral interpretation services between English and the Hopi language at the open house and public hearing in Kykotsmovi, pending availability of a Hopi interpreter. To request additional oral interpretation services or to request reasonable accommodation for a disability, please contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section, by October 21, 2013. Verbatim transcripts, in English, of the hearings and written statements provided at the hearings will be included in the docket for this rulemaking.

Oral testimony may be limited to five minutes or less for each commenter to address the proposal or supplemental proposed rule. We will not be providing equipment for commenters to show overhead slides or make computerized presentations. The public hearings for the four evening events are scheduled to close at 9 p.m. (in Page, Kykotsmovi, and Tucson) or 10 p.m. (in Phoenix), but may close later, if necessary, depending on the number of speakers wishing to participate.

Written statements and supporting information submitted electronically or by mail during the comment period will be considered with the same weight as any oral comments and supporting information presented at the public hearings. If you are unable to attend the hearings but wish to submit comments on the proposed rule, you may submit comments as indicated in the **ADDRESSES** section above.

Docket: The index to the docket for this action is available electronically at *www.regulations.gov* and in hard copy at EPA Region 9, 75 Hawthorne Street, San Francisco, California. While documents in the docket are listed in the index, some information may be publicly available only at EPA Region 9 (e.g., maps, voluminous reports, copyrighted material), and some may not be publicly available in either location (e.g., CBI). To inspect the hard copy materials, please schedule an appointment during normal business hours with the contact listed in the **FOR FURTHER INFORMATION CONTACT** section.

FOR FURTHER INFORMATION CONTACT: Anita Lee, EPA Region 9, (415) 972–3958, *r9ngsbart@epa.gov.*

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

Table of Contents

I. Background
A. The Significance of the Navajo Generating Station
B. EPA's February 5, 2013 Proposed BART Determination
C. Technical Work Group Agreement
II. Legal Background for Proposing the TWG Alternative to BART as Achieving Greater Progress Towards the National Visibility Goal
III. EPA's Technical Evaluation of Greater Reasonable Progress Towards the National Visibility Goal
A. Summary of TWG Alternative to BART
B. EPA's Technical Evaluation of TWG Alternative to BART
IV. EPA's Supplemental Proposal
V. Statutory and Executive Order Reviews
A. Executive Order 12866: Regulatory Planning and Review and Executive Order 13563: Improving Regulation and Regulatory Review 13563B. Paperwork Reduction Act
B. Paperwork Reduction Act
C. Regulatory Flexibility Act
D. Unfunded Mandates Reform Act
E. Executive Order 13132: Federalism
F. Executive Order 13175: Consultation and Coordination With Indian Tribal Governments
G. Executive Order 13045: Protection of Children From Environmental Health Risks and Safety Risks
H. Executive Order 13211: Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use
I. National Technology Transfer and Advancement Act
J. Executive Order 12898: Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations

I. Background

A. The Significance of the Navajo Generating Station

NGS is a coal-fired power plant located on the Navajo Nation Indian Reservation, just east of Page, Arizona, approximately 135 miles north of Flagstaff, Arizona. Emissions of NO_X from NGS affect visibility at 11 National Parks and Wilderness Areas that are designated as Class I federal areas, mandated by Congress to receive heightened protection: Arches National Park (NP), Bryce Canyon NP, Canyonlands NP, Capitol Reef NP, Grand Canyon NP, Mazatzal Wilderness Area (WA), Mesa Verde NP, Petrified Forest NP, Pine Mountain WA, Sycamore Canyon WA, and Zion NP. These areas support an active tourism industry drawing over four million visitors to the Grand Canyon National Park alone in 2011.[1] NGS is subject to the BART requirements of the CAA and the RHR based on its age and its effects on visibility in Class I areas. For a more detailed discussion of our determination that NGS is subject to BART and the requirements of the RHR, please see our proposed FIP at 78 FR 8274 and 8277 (February 5, 2013).

NGS is co-owned by six entities: the U.S. Bureau of Reclamation (Reclamation)—24.3 percent, Salt River Project Agricultural Improvement and Power District (SRP), which also acts as the facility operator—21.7 percent, Los Angeles Department of Water and Power (LADWP)—21.2 percent, Arizona Public Service (APS)—14 percent, Nevada Energy (NV Energy, also known as Nevada Power Company)—11.3 percent, and Tucson Electric Power (TEP)—7.5 percent.

Federal participation in NGS was authorized in the Colorado River Basin Project Act of 1968 as a preferred alternative to building hydroelectric dams in the Grand Canyon for providing power to the Central Arizona Project (CAP).[2] The CAP is a 336-mile water distribution system that delivers about 1.5 million acre-feet (AF) per year of Colorado River water from Lake Havasu in western Arizona to non-tribal agricultural water users in central Arizona, Indian tribes located in Arizona, and municipal water users in Maricopa, Pinal, and Pima counties.[3] The CAP water is used to meet the terms of a number of Indian water-rights settlements in central Arizona and to reduce groundwater usage in the region.[4] Electricity from NGS powers the pumps that move CAP water to its destinations along the distribution system.

Several tribes located in Arizona including the Gila River Indian Community, the Ak-Chin Indian Community, the Tohono O'odham Nation, the San Carlos Apache Tribe, the White Mountain Apache Indian Tribe, the Fort McDowell Yavapai Nation, the Salt River Pima-Maricopa Indian Community, the Navajo Nation, the Yavapai-Apache Nation, the Hopi Tribe, the Pascua Yaqui Tribe, the Yavapai-Prescott Tribe, and the Tonto Apache Nation, have CAP water allocations or contracts.[5] In exchange for allocations of CAP water at reduced cost and access to funds for the development of water infrastructure, the tribes with water settlement agreements have released their claims to other water in Arizona. Excess NGS power owned by Reclamation that is not used by CAP is sold and profits are deposited into a fund to support the tribal water settlement agreements.[6] The U.S. Department of the Interior (DOI or the Interior), through Reclamation, plays an important role in the implementation of

[1] See document titled ''Grand Canyon Annual Visitation.pdf'' within document number 0005 in the docket for this proposed rulemaking at EPA–R09–OAR–2013–0009.

[2] See information on the Central Arizona Project at *http://www.usbr.gov/projects/Project.jsp?proj_Name=Central+Arizona+Project.* See also report by the National Renewable Energy Lab (NREL), discussed in more detail in Section G.iii of this notice, titled ''Navajo Generating Station and Air Visibility Regulations: Alternatives and Impacts'', revision dated March 2012 (NREL report) within document number 0005 in the docket for this proposed rulemaking at EPA–R09–OAR–2013–0009.

[3] See Section titled ''Welcome'' on CAP homepage: *http://www.cap-az.com/.*

[4] See, for example, Section 4 of the NREL report and Comments from the Central Arizona Water Conservation District on the NREL report to DOI and EPA dated February 23, 201[2], within document number 0005 in the docket for this proposed rulemaking at EPA–R09–OAR–2013–0009.

[5] See Table 7, 78 FR at 8283 (February 5, 2013).

[6] *Id.*

these settlement agreements and the management of the funds set aside for water infrastructure development for tribes.

The coal used by NGS is supplied by the Kayenta Mine, operated by Peabody Energy and located on reservation lands of both the Navajo Nation and the Hopi Tribe. Taxes and royalties from NGS and the Kayenta Mine paid to the Navajo Nation and Hopi Tribe contribute to the annual revenues for both governments.[7]

Given the extent of federal and tribal interests in NGS, on January 4, 2013, EPA, DOI, and the Department of Energy (DOE) signed a joint federal agency statement (Joint Statement) committing to collaborate on several short- and long-term goals, including analyzing and pursuing strategies for providing clean, affordable, and reliable power, affordable and sustainable water, and sustainable economic development to key stakeholders who currently depend on NGS.[8] The Joint Statement also recognizes the trust responsibilities of the Federal government to Indian tribes.

B. EPA's February 5, 2013 Proposed BART Determination

As previously stated, NGS is subject to the BART requirements of the CAA and the RHR based on its age and its effects on visibility in Class I areas. Because NGS is located in Indian country, and because the Navajo Nation has not developed a Tribal Implementation Plan to implement the BART requirement for NGS, on February 5, 2013, EPA proposed a BART determination to require NGS to meet a NO_X emission limit of 0.055 pound per million British thermal units of heat input (lb/MMBtu) within five years of the effective date of a final rule.[9] For a number of reasons, including the importance of NGS to numerous Indian tribes located in Arizona and the federal government's reliance on NGS to meet the requirements of water settlements with several tribes, EPA proposed an Alternative to BART (i.e., Alternative 1) within the ''better than BART'' framework we outlined. EPA recognized that there may be other approaches that could result in better visibility benefits over time and that there may be changes in energy demand, supply, or other developments over the next several decades that may change electricity generation on the Navajo Nation.

EPA's proposed ''better than BART'' framework established total emissions of NO_X over 2009–2044 as the ''BART Benchmark'' against which an Alternative to BART would be compared.[10] EPA's ''better than BART'' framework included a NO_X emission credit for the early and voluntary installation of LNB/SOFA over the 2009–2011 timeframe (LNB/SOFA credit).[11] As discussed in our proposed rulemaking, EPA was exercising its authority and discretion under section 301(d)(4) of the CAA and 40 CFR 49.11(a) to propose an extended timeframe for an alternative measure under the RHR for NGS. We proposed the LNB/SOFA credit supporting an extended timeframe based on the flexibility under section 301(d)(4) of the CAA, and 40 CFR 49.11(a).[12] EPA applied the LNB/SOFA credit to each Alternative to BART (adjusted emissions) and compared those values against the BART benchmark. Total adjusted emissions of an Alternative to BART over 2009–2044 that were lower than the BART Benchmark were then determined to be ''better than BART'' and result in greater reasonable progress towards the national visibility goal than BART. Conversely, alternatives that result in total NO_X emissions exceeding the BART Benchmark would not be acceptable unless those alternatives provided additional emission reductions to bridge the deficit in NO_X emission reductions.

To calculate the value of the LNB/SOFA credit, EPA first calculated the total NO_X emissions over 2009–2044 that NGS would emit if NGS had waited until the proposed BART compliance date to install LNB/SOFA concurrently with SCR. EPA then calculated total NO_X emissions over 2009–2044 with the actual installation date of LNB/SOFA in 2009–2011 and installation of SCR by the BART compliance date. The difference between the two values was calculated to be the LNB/SOFA credit.[13] Under EPA's proposed framework, EPA established, as the BART benchmark, the total NO_X emissions over 2009–2044 with the actual installation date of LNB/SOFA in 2009–2011 and installation of SCR by the BART compliance date. For a more detailed discussion of this approach, please see our proposed FIP at 78 FR at 8288–91.

EPA applied this framework to several alternatives we developed. In the February 2013 proposal, we proposed one Alternative to BART that would provide an additional three to five years to NGS in the schedule for the installation of new post-combustion control equipment to meet the proposed BART limit of 0.055 lb/MMBtu (i.e., Alternative 1 requiring compliance with the proposed BART limit on one unit per year in 2021, 2022, and 2023). Additional NO_X emissions resulting from delayed compliance were offset by the emissions credit NGS achieved by its early and voluntary installation of LNB/SOFA. We calculated that under this proposed Alternative 1, total adjusted emissions of NO_X over 2009–2044 were lower than total emissions of NO_X under EPA's proposed BART determination. Therefore, EPA proposed to find that Alternative 1 achieves greater reasonable progress than BART.

In the February 2013 proposal, EPA also described, but did not propose, two additional alternatives (Alternatives 2 and 3) that would provide an additional five to eight years for NGS to meet the proposed BART limit of 0.055 lb/MMBtu (i.e., Alternatives 2 and 3 called for compliance with the BART limit on one unit per year over 2023–2025 and 2024–2026, respectively). Total NO_X emissions over 2009–2044, after accounting for the LNB/SOFA early installation credit, from each of these two additional alternatives both exceeded the BART Benchmark. However, under our proposed framework, these two additional alternatives would be viable if the owners of NGS achieved sufficient additional emission reductions to bridge the NO_X reduction deficit. EPA requested comment on our proposed ''better than BART'' framework and how NGS might achieve the emission reduction bridge necessary for the longer compliance schedules under

[7] *Id.*

[8] See document title ''2013_0104 Joint Federal Agency Statement on NGS'' within document number 0005 in the docket for this proposed rulemaking at EPA–R09–OAR–2013–0009.

[9] Unless otherwise noted, the averaging period, for all emission limits, is based on a rolling average of 30 boiler operating days.

[10] In our proposed rulemaking, we use the term ''BART threshold'' to describe the total emissions of NO_X over 2009–2044 against which Alternatives to BART would be compared. Although we use the term ''BART benchmark'' here, the two terms are intended to be identical in meaning.

[11] The NO_X reductions achieved by installing the modern LNB/SOFA were not required under any regulatory program under the CAA and resulted in more NO_X emission reductions during the period between 2009 and the BART compliance date than if LNB/SOFA were installed concurrently with SCR by the BART compliance date.

[12] See 78 FR 8289 (February 5, 2013).

[13] As discussed in greater detail in our proposed rule (78 FR at 8289, February 5, 2013), EPA notes that LNB with SOFA is a potential control option evaluated under BART and that these technologies are typically used in conjunction with SCR or other add-on controls to first reduce NO_X formation during combustion. EPA recognizes that the owners of NGS could have waited until the compliance date of the final BART determination before installing any new controls, including LNB/SOFA, and that the early and voluntary NO_X reductions achieved beginning in 2009 were not required under any regulatory program under the CAA.

Alternatives 2 and 3 to qualify as ''better than BART.''

In both the February 2013 proposal and in the accompanying fact sheet, EPA encouraged a robust public discussion of our proposed BART determination, our proposed Alternative 1, as well as our proposed ''better than BART'' framework and other possible alternatives that meet the framework. In addition, we recognized the potential need for a supplemental proposal if other approaches developed by other parties are identified as meeting the requirements of the CAA.[14]

After EPA published the proposed FIP on February 5, 2013, we received requests for a 90-day extension of the public comment period from the Navajo Nation, the Gila River Indian Community, SRP, and the Central Arizona Water Conservation District (CAWCD), the CAP operating entity, in order to allow stakeholders additional time to develop alternatives to BART for EPA's consideration. Recognizing the significant time and effort necessary to develop viable alternatives and the critical importance of active participation by affected parties in the development of alternatives to BART, on March 19, 2013, EPA extended the close of the public comment period to August 5, 2013 (78 FR 16825).

On June 10, 2013, EPA signed a notice, published on June 19, 2013, of our intent to hold five public hearings throughout the state of Arizona (78 FR 36716), at one location each on reservation lands of the Navajo Nation and Hopi Tribe, and in Page, Phoenix, and Tucson, Arizona.

On June 20, 2013, SRP submitted a letter, on behalf of itself and certain other stakeholders, requesting another extension of the comment period for NGS. The SRP letter described work that had been on-going for several months with representatives from several organizations (the TWG) to develop an Alternative to BART. On July 9, 2013, EPA extended the close of the public comment period again to October 4, 2013 (78 FR 41012). On September 16, 2013, EPA signed a notice extending the close of the public comment period a third time, to January 6, 2014.[15]

C. Technical Work Group Agreement

On July 26, 2013, a group of stakeholders known as the TWG and composed of the Central Arizona Water Conservation District (CAWCD), the Environmental Defense Fund (EDF), the Gila River Indian Community (Gila River, or the Community), the Navajo Nation, SRP, on behalf of itself and the other non-federal Participants, the Department of the Interior, and Western Resource Advocates, submitted a document memorializing a multi-party agreement (the TWG Agreement) to EPA for consideration.[16] EPA had attended a ''kick-off'' meeting for the TWG on March 21, 2013, at which we described our February 5, 2013 proposal, but EPA did not have any further participation in the TWG.[17] As described in Section III of the TWG Agreement, ''Summary of Agreement Elements; Reasonable Progress Alternative to BART, Obligations of Support, and Reservation Right'', the Agreement consists of seven elements: (1) A description of a ''Reasonable Progress Alternative to BART'' (the TWG Alternative);[18] (2) a study of options by Reclamation for replacing the federal share of energy being generated from NGS with low-emitting energy; (3) commitments by Interior to reduce or offset emissions of carbon dioxide (CO_2) by three percent per year and facilitate the development of clean energy resources; (4) commitments by Interior to mitigate potential impacts from EPA's final BART rule to Affected Tribes; (5) a commitment by Interior to carry out the Phase 2 Study by the National Renewable Energy Laboratory (NREL) for the purposes of studying options for the future of NGS; (6) a commitment by SRP to make funds available for a Local Benefit Fund for community improvement projects within 100 miles of NGS or the Kayenta Mine; and (7) a summary of obligations of the Parties to the Agreement and miscellaneous legal provisions.

The TWG Agreement, in its entirety, is included in the docket for this proposed rulemaking. Appendix B to the TWG Agreement is the only component of the TWG Agreement that is applicable to today's action. EPA is not requesting comment on the provisions of the TWG Agreement unrelated to Appendix B, and will not be responding to comments on aspects of the TWG Agreement that are not related to our authority under section 169A of the CAA to require BART or an Alternative to BART.

II. Legal Background for Proposing the TWG Alternative to BART as Achieving Greater Progress Towards the National Visibility Goal

In our proposed BART determination for NGS on February 5, 2013 (78 FR 8274), we provided a detailed discussion of the statutory and regulatory framework for addressing visibility, addressing sources located in Indian country under the Tribal Authority Rule (TAR), and developing BART determinations pursuant to the CAA and the BART Guidelines set forth in Appendix Y to 40 CFR Part 51. Please see 77 FR 8275–8277 for our discussion on these topics. In the following paragraphs, we describe the legal background and authority for evaluating Alternatives to BART and for providing additional compliance flexibility to NGS.

Under the CAA, compliance with emission limits determined as BART must be achieved ''as expeditiously as practicable but in no event later than five years'' after the effective date of the final BART determination (See CAA 169A(b)(2)(A) and (g)(4)). Therefore, the BART compliance date for NGS would be no later than 2019 if the rule is finalized in 2014. As discussed in greater detail in our proposed BART determination, EPA recognizes that the circumstances related to NGS create unusual and significant challenges for a five-year compliance schedule.[19] Based on those challenges and our discretion under the TAR for implementing CAA requirements on tribal lands, we considered other options that are consistent with the CAA and RHR, and that provide for a more flexible, extended compliance schedule.

EPA's BART regulations allow an Alternative to BART provided the alternative results in greater reasonable progress than would have been achieved

[14] See Fact Sheet at *http://www.epa.gov/region9/air/navajo/index.html#proposed.*

[15] See document number 0172 in the docket for this proposed rulemaking at EPA–R09–OAR–2013–0009.

[16] See ''Technical Work Group Agreement Related to Navajo Generating Station (NGS)'' dated July 25, 2013, and submitted to EPA on July 26, 2013, in the docket for this proposed rulemaking at EPA–R09–OAR–2013–0009–0122.

[17] See document number 0033 in the docket for the proposed rulemaking at EPA–R09–OAR–2013–0009.

[18] The ''Reasonable Progress Alternative to BART'' is a term from the TWG Agreement. EPA interprets this term to have the same meaning as an Alternative to BART or a ''better than BART'' Alternative, however, we do not otherwise use this term in today's Supplemental Proposal.

[19] SRP expressed concern that the owners of NGS may choose to retire the facility if faced with the financial risk of making a large capital investment within five years without also having certainty that the lease and contract re-negotiations would conclude in a timely and favorable manner. EPA understands that the owners of NGS face numerous uncertainties and the unusual requirement to comply with NEPA for lease and other rights-of-way approvals, which apply only to NGS and Four Corners Power Plant, the other coal-fired power plant located on the Navajo Nation. EPA also understands the importance of the continued operation of NGS and the Kayenta Mine to the Navajo Nation and Hopi Tribe as a source of direct revenues through lease payments or coal royalties, as well as the importance of Reclamation's share of NGS to supply water to many tribes located in Arizona in accordance with several water settlement acts.

through installation of BART. 40 CFR 51.308(e)(2). The regulations provide that an Alternative to BART must ensure that all necessary emission reductions occur within the period of the first long-term strategy for regional haze (i.e., by 2018) for States that were required to submit regional haze SIPs in December 2007. 40 CFR 51.308(e)(2)(iii). Thus, if states had submitted timely regional haze SIPs in 2007 with BART compliance deadlines in 2012, the RHR provided over five additional years for the implementation of Alternatives to BART.

In our February 5, 2013 proposal for NGS, EPA proposed an Alternative to BART (Alternative 1). In particular, EPA proposed that consideration of a compliance schedule beyond 2018 for Alternative 1 at NGS was appropriate for a number of reasons, including the importance of NGS to numerous Indian tribes located in Arizona and the federal government's reliance on NGS to meet the requirements of water settlements with several tribes. The timeframe for compliance would not, in itself, avoid or mitigate increases in water rates for tribes located in Arizona; however, it would provide time for the collaborating federal agencies to explore options to avoid or minimize potential impacts to tribes, including seeking funding to cover expenses for the federal portion of pollution control at NGS.

In developing this framework, EPA proposed to exercise its authority and discretion under section 301(d)(4) of the CAA, 42 U.S.C. 7601(d)(4), and the TAR, 40 CFR 49.11(a) and proposed an extended timeframe for an alternative measure under the RHR for NGS. EPA considered this extension of time to be consistent with the general programmatic requirements. States and regulated sources accordingly had almost 20 years under the RHR to design and implement alternative measures to BART. Because of the myriad stakeholder interests and complex governmental interests unique to NGS, we are only now addressing the BART requirements for NGS. For all the reasons explained above, we considered it appropriate to consider an extended compliance period for NGS.

Our proposal to require emission reductions beyond 2018 was supported by the Tribal Authority Rule codified at 40 CFR 49.11(a). The TAR reflects EPA's commitment to promulgate ''such Federal implementation plan *provisions as are necessary or appropriate* to protect air quality'' in Indian country where a tribe either does not submit a Tribal Implementation Plan (TIP) or does not receive approval of a submitted TIP. (Emphasis added.)

The use of the term ''provisions as are necessary or appropriate'' indicates EPA's determination that it may only be necessary or appropriate to promulgate a FIP of limited scope. The United States Court of Appeals for the Tenth Circuit has previously endorsed the application of this approach in a challenge to the FIP for the Four Corners Power Plant, stating: ''[40 C.F.R. 49.11(a)] provides the EPA discretion to determine what rulemaking is necessary or appropriate to protect air quality and requires the EPA to promulgate such rulemaking.'' *Ariz. Public Serv. Co.* v. *EPA,* 562 F.3d 1116 (10th Cir. 2009). The court went on to observe: ''Nothing in section 49.11(a) requires EPA . . . to submit a plan meeting the completeness criteria of [40 CFR part 51] Appendix V.'' *Id.* While the decision in *Arizona Public Service Company* focused on 40 CFR Part 51 Appendix V, EPA believes the same considerations apply to the promulgation of a FIP intended to address the objectives set forth in 40 CFR 51.308(e)(2). In particular, EPA has discretion to determine if and when a FIP addressing the objectives set forth in 40 CFR 51.308(e)(2) should be promulgated, which necessarily includes discretion to determine the timing for complying with the requirements of any such FIP.

III. EPA's Technical Evaluation of Greater Reasonable Progress Towards the National Visibility Goal

A. Summary of TWG Alternative to BART

Appendix B of the TWG Agreement contains the TWG Alternative that was submitted to EPA for consideration as a ''better than BART'' Alternative.[20] The TWG Alternative was developed by the Technical Work Group, which did not include EPA, to satisfy the ''better than BART'' requirements of the RHR.[21] The core element of the TWG Alternative is that the TWG Alternative establishes a cap in NO_X emissions over the period 2009–2044 (the 2009–2044 NO_X Cap). The TWG Alternative then outlines the operating scenarios that would be required depending on the final outcome of NGS ownership after the expiration of the current lease term at the end of 2019. The owners of NGS commit to maintaining emissions from NGS below the 2009–2044 NO_X Cap regardless of the post-2019 ownership of NGS and the applicable operating scenario. In general, the operating scenarios include specific actions for achieving emission reductions by 2019 and 2030 to ensure compliance with the 2009–2044 NO_X Cap. The TWG Alternative also provides for an operating scenario that is less well-defined but establishes a second NO_X emissions cap over the period of 2009–2029 (the 2009–2029 NO_X Cap) that is equivalent to emission reductions that would be achieved by the more well-defined operating scenarios. The 2009–2029 NO_X Cap would apply in addition to the 2009–2044 NO_X Cap. The TWG Alternative also includes annual reporting requirements to EPA.

The 2009–2044 NO_X Cap is calculated based on expected emissions that would result if NGS complied with EPA's proposed BART emission limit of 0.055 lb/MMBtu on each unit within five years of the effective date of a final rule. The TWG Alternative also incorporates EPA's proposed credit to NGS for the emission reductions achieved from the early and voluntary installation of LNB/SOFA beginning in 2009 (the LNB/SOFA credit).

The TWG Alternative puts forth two main operating scenarios, with additional sub-options, for limiting NO_X emissions below the 2009–2044 NO_X Cap. These scenarios are called TWG

[20] The TWG Alternative is divided into distinct operating scenarios that the TWG calls Alternative A and Alternative B. The TWG Alternative further divides Alternative A into sub-scenarios. EPA refers to the sub-scenarios under Alternative A as A1, A2, and A3. EPA is reviewing all four scenarios (Alternatives A1, A2, A3, and B) together as one Alternative.

[21] The TWG Agreement also states that the TWG Alternative is intended to satisfy any requirements of the Reasonably Attributable Visibility Impairment (RAVI) program. On May 5, 2009, the National Parks Conservation Association (NPCA) petitioned the Department of the Interior to certify that emissions of NO_X and particulate matter cause visibility impairment at the Grand Canyon National Park. This type of visibility impairment, reasonably attributable from a single stationary source, is known as Reasonably Attributable Visibility Impairment (RAVI). On January 20, 2011, NPCA filed a complaint in the United States District Court for the District of Columbia contending that the Department of the Interior was unreasonably delaying making a finding of reasonable attribution from NGS. In a letter dated March 8, 2011 to NPCA, the National Park Service (NPS) declined to make such a finding based on EPA's on-going work related to a BART determination for NGS. On June 30, 2011, the Court dismissed the complaint holding the NPS letter refusing to make the finding of reasonable attribution constituted denying the Petitioner's request for a RAVI finding. If NPS were to certify RAVI at Grand Canyon from NGS, EPA must determine whether visibility impairment at Grand Canyon is indeed reasonably attributable to NGS. If EPA were to make a positive attribution determination, then EPA would be required to conduct a BART determination for NGS. We note, however, that while the process for determining whether a given stationary source causes or contributes to RAVI or regional haze are different, the process for determining BART under both programs is essentially the same. In other words, a BART determination for RAVI would likely be the same as a BART determination for regional haze. The 2009 NPCA petition, the 2011 NPCA complaint, the 2011 letter from NPS, and the 2011 Court decision are all included in the docket for this proposed rulemaking.

Alternatives A and B. The TWG Alternative provides different operating scenarios because of current uncertainty over the ownership interests in NGS following the expiration of the initial NGS lease term at the end of 2019. Specifically, two owners, LADWP and NV Energy, have announced plans to divest from any continuing ownership interest in NGS after 2019. These owners may retire or sell their interest in NGS. In addition, the recent Lease Amendment with the Navajo Nation that extends the NGS lease to 2044 includes an option for the Navajo Nation to purchase up to a 170 MW ownership share in NGS.[22]

Each of the three scenarios under TWG Alternative A (i.e., A1, A2, or A3) requires two significant emission reductions, one to occur by December 31, 2019 and the other by December 31, 2030. The emission reductions in the first step, by December 31, 2019, under TWG Alternative A1 would be achieved through closure of one unit. Alternative A2 would entail closure of one unit with an increase in capacity, not to exceed 189 MW, at the remaining two units; Alternative A3 would entail the curtailment of energy production across all three units such that the emission reductions are equivalent to the closure of approximately one unit. The emission reductions to occur in the second step, under Alternatives A1–3, would occur by December 31, 2030, and would be achieved by compliance of two units at NGS with an emission limit of 0.07 lb/MMBtu, achievable with the installation of SCR. Under the TWG Alternative, although the 2009–2044 NO_X Cap is calculated based on EPA's proposed BART emission limit of 0.055 lb/MMBtu, the owners of NGS commit to meeting a limit of 0.07 lb/MMBtu from the installation of SCR. The operator states that a limit of 0.055 lb/MMBtu is not achievable for a retrofit application when startup, shutdown, and load following emissions are included.[23]

Alternative A1 would be triggered if LADWP and NV Energy retire their ownership shares of NGS without selling, or if LADWP and NV Energy sell their ownership shares to an existing NGS participant and the Navajo Nation does not elect to purchase an interest in NGS. Alternative A2 is triggered if LADWP or NV Energy sell their ownership shares to an existing NGS participant, the Navajo Nation elects to purchase an interest in NGS, and the NGS participants can increase the capacity of NGS by no more than 189 MW[24] without triggering major source pre-construction permitting requirements.[25] Alternative A3 is triggered if LADWP or NV Energy sell their ownership shares to an existing NGS Participant, the Navajo Nation elects to purchase an interest in NGS, and the NGS Participants cannot increase the capacity of NGS without triggering major source pre-construction permitting requirements.

TWG Alternative B would be triggered if LADWP and/or NV Energy sell their ownership interest to a third party (i.e., a party that is not an existing NGS participant). TWG Alternative B establishes similar emission reductions to Alternative A by setting a second NO_X emission cap over the 2009–2029 period, i.e., the 2009–2029 NO_X Cap (calculated to be equivalent to the closure of one unit in 2020), in addition to the 2009–2044 NO_X Cap. Alternative B specifies that NO_X emissions must be maintained below the cap during each applicable period (2009–2029 and 2009–2044), but does not specify how the NGS owners must operate NGS to meet each cap. The TWG Alternative outlines annual emissions reporting and planning requirements both to the public and to EPA to ensure progress towards emissions goals and maintenance of emissions below the 2009–2044 NO_X Cap.

B. EPA's Technical Evaluation of TWG Alternative to BART

EPA is proposing to include the TWG Alternative as a second ''better than BART'' Alternative to achieve compliance with the RHR.[26] We are proposing to determine that the TWG Alternative satisfies the requirements of the RHR as discussed below.

As stated previously, the TWG Alternative establishes a 2009–2044 NO_X Cap based on expected emissions that would result if NGS complied with EPA's proposed BART determination. The TWG Alternative also incorporates EPA's proposed LNB/SOFA credit into the 2009–2044 NO_X Cap. In our February 5, 2013 proposed rule, EPA established our proposed BART determination as a BART Benchmark based on actual emissions and applied the LNB/SOFA credit to each Alternative to BART (to calculate ''adjusted'' emissions). Adjusted emissions, from each Alternative, were then compared against the BART Benchmark. As discussed in the following paragraphs, these two methods of applying credit for the early and voluntary installation of LNB/SOFA beginning in 2009 are equivalent.[27]

As shown in our proposed rulemaking, EPA's proposed BART Benchmark was 358,974 tons of NO_X over 2009–2044.[28] This value was calculated assuming compliance with EPA's proposed BART emission limit of 0.055 lb/MMBtu on January 1, 2018, based on a final rule effective date of January 1, 2013. A final rule effective date of January 1, 2013 is no longer appropriate for NGS because EPA will

[22] See Section XI of the ''Amendment No. 1 to Indenture of Lease Navajo Units 1, 2, and 3 Between the Navajo Nation and Arizona Public Service Company, Department of Water and Power of the City of Los Angeles, Nevada Power Company dba NV Energy, Salt River Project Agricultural Improvement and Power District, and Tucson Electric Company'', within document number 0150 in the docket for this proposed rulemaking at EPA–R09–OAR–2013–0009.

[23] See Appendix B.1.A.3 of the Technical Work Group Agreement on NGS, document number 0122 in the docket for this proposed rulemaking. EPA does not consider the limit of 0.07 lb/MMBtu to be a BART emission limit, rather, a component of the TWG Alternative. Under the TWG Alternative, this higher emission rate is offset by the closure of one unit, or the curtailment of generation. In other words, despite the higher emission rate under the TWG Alternative compared to EPA's proposed BART emission limit, NGS would comply with the 2009–2044 NO_X Cap because additional emission reductions are achieved from closure or curtailment.

[24] LADWP owns approximately 477 MW of NGS, while NV Energy owns approximately 254 MW. The sum of their shares is 731 MW, which is 19 MW short of one 750 MW unit at NGS. The Navajo Nation has the option to purchase up to a 170 MW interest in NGS. A 189 MW limit in the capacity increase is based on making up the 19 MW shortfall and the maximum amount the Navajo Nation can purchase (i.e., the sum of 19 MW and 170 MW).

[25] The Prevention of Significant Deterioration (PSD) Program generally requires pre-construction permitting for major sources if the intended modification increases emissions of certain air pollutants above the PSD significance thresholds. The TWG Alternative also cites the Nonattainment New Source Review Program, a pre-construction permitting program for areas that are not in attainment with the National Ambient Air Quality Standards (NAAQS). Currently, this program does not apply to NGS as it is not located in an area that is out of attainment with any of the NAAQS.

[26] In our proposed action on February 5, 2013, EPA proposed a BART determination for NGS and Alternative 1 as a ''better than BART'' Alternative. In today's action, we are proposing that the TWG Alternative also meets our ''better than BART'' framework. Taken together, EPA has proposed a BART determination for NGS, Alternative 1, and the TWG Alternative.

[27] See also Spreadsheet titled ''Supplemental Better than BART Alternatives.xlsx'' in the docket for this proposed rulemaking.

[28] See Table 12 at 78 FR at 8290 and document titled ''BART Alternatives.xlsx'' in document number 0005 in the docket for this proposed rulemaking at EPA–R09–OAR–2013–0009. In our BART proposal, and in calculating the 2009–2044 NO_X Cap in this Supplemental Proposal, EPA used the average annual NO_X emissions from NGS over 2001–2008 (34,152 tons) to estimate future annual emissions before compliance with the 0.055 lb/MMBtu NO_X limit. The TWG Alternative also used this value in estimating its cap. Estimates for annual emissions in 2020 and thereafter were based on the 0.055 lb/MMBtu NO_X limit for BART and the average heat input over 2001–2008. This method was similarly used by EPA in our BART proposal and this Supplemental Proposal, as well as the TWG Alternative.

not issue a final BART rule by that date. The TWG Alternative provided an example calculation for the 2009–2044 NO_X Cap assuming a final rule effective date of December 31, 2013, an emission limit of 0.055 lb/MMBtu, and the application of the LNB/SOFA credit to the cap.[29] The LNB/SOFA credit, as applied to the cap, assumes that LNB/SOFA are installed at NGS concurrently with SCR, rather than using the actual early installation dates on one unit per year over 2009–2011. The example in the TWG Alternative calculates a 2009–2044 NO_X Cap of 480,490 tons and acknowledges that the cap would change depending on the actual effective date of the final rule. The difference between the BART Benchmark from EPA's proposed rulemaking (of 358,974 tons) and the example calculated in the TWG Alternative (of 480,490 tons) is based on the application of the LNB/SOFA credit to the 2009–2044 NO_X Cap and the use of a different final rule effective date, i.e., 2014 instead of 2013. Additionally, in our proposed rulemaking, EPA included a transcription error in our calculation of the BART Benchmark, which contributes nominally to the difference.[30]

TABLE 1—DIFFERENCES BETWEEN BART BENCHMARK AND EXAMPLE CALCULATION OF NO_X CAP FROM TWG ALTERNATIVE

	BART Benchmark for NO_X	Assumptions
As reported in 2/5/13 Proposed Rulemaking	358,974	BART compliance by January 1, 2018 (final rule effective January 1, 2013).
Step 1: Correction for Transcription Error	359,028	Transcription Error of 2 tpy for 27 years = addition of 54 tons.
Step 2: Plus Correction for Revised BART Compliance Date.	377,015	Change BART Compliance date from January 1, 2018 to January 1, 2019 = Difference between LNB/SOFA and SCR+LNB/SOFA for one year = 23,325 tons minus 5,345 tons = 17,980 tons.
Step 3: Plus Application of LNB/SOFA Credit	480,489	Early emission reductions over 2009–2018 achieved from LNB/SOFA installation = (34,152 tpy * 10 years)—(30,500 + 24,427 + 19,837 + (23,325 * 7 years) = 103,481 tons.

Table 1 shows that the correction for EPA's transcription error, a revised BART compliance date, and the application of the LNB/SOFA credit to the BART Benchmark instead of alternatives, account for the full difference between EPA's BART Benchmark, as reported in our proposed rulemaking, and the example calculation from the TWG Alternative.[31]

Using the value from Table 1 of 480,489 tons, representing total NO_X emissions over 2009–2044 if LNB/SOFA were installed concurrently with SCR by 2019, and the value of 377,015 tons, representing total NO_X emissions over 2009–2044 with actual installation years for LNB/SOFA, the LNB/SOFA credit is 103,481 tons. As discussed previously, in our proposed rulemaking, EPA set, as the BART Benchmark, the value of total NO_X emissions over 2009–2044 based on the actual early installation years for LNB/SOFA (i.e., 377,015 tons), and applied the LNB/SOFA credit to BART Alternatives to calculated a value for ''adjusted emissions''. If the ''adjusted emissions'' were lower than the BART Benchmark, the BART Alternative was determined to be ''better than BART''. The TWG Alternative, instead, applied the LNB/SOFA credit to the 2009–2044 NO_X Cap (i.e., resulting in 480,489 tons, very close to the value reported by TWG of 480,490 tons), and calculated total emissions from Alternatives based on the actual early installation years for LNB/SOFA. If emissions from the BART Alternative are lower than the 2009–2044 NO_X Cap, the Alternative is ''better than BART''. Using Alternative 1 from our February 5, 2013 proposed rulemaking, i.e., compliance with the proposed BART emission limit in 2021, 2022, and 2023, as an example, Table 2 shows that these two methods of comparing Alternatives against BART are equivalent.[32]

TABLE 2—EPA AND TWG METHODS OF COMPARING ALTERNATIVES AGAINST BART

	BART	Alternative 1
EPA Method		
Compliance Years	By 2019	2021, 2022, 2023.
Total Emissions (tons)	377,008 tons	430,948 tons.
LNB/SOFA Credit	n/a	103,481 tons.
Adjusted Emissions	n/a	327,467 tons.
Better than BART?	n/a	Yes, by 49,541 tons (377,008–327,467 tons).
TWG Method		
Compliance Years	By 2019	2021, 2022, 2023.
Total Emissions (tons)	377,008 tons	430,948 tons.
LNB/SOFA Credit	103,481 tons	n/a.
Adjusted Emissions	480,489 tons	n/a.
Better than BART?	n/a	Yes, by 49,541 tons (480,489–430,948 tons).

[29] Regarding the final rule effective date, see *Infra.* at footnote 33.

[30] EPA erroneously used the value 5,343 tons per year to represent NO_X emissions from NGS after installation of SCR. The correct value was 5,345 tons per year. See, for example, comparison of cells B23 and C23 in ''emissions'' tab of the spreadsheet entitled ''BART Alternatives.xlsx'' in document number 0005 in the docket for this proposed rulemaking at EPA–R09–OAR–2013–0009.

[31] *Id.*

[32] See also Spreadsheet titled ''Supplemental Better than BART Alternatives.xlsx'' in the docket for this proposed rulemaking.

As discussed previously, EPA anticipates that the compliance date for BART would be based on the effective date of the final rule, which is typically 60 days following publication of the final rule in the **Federal Register**. Therefore, in calculating the 2009–2044 NO_X Cap, EPA assumes that an effective date of July 1, 2014 is reasonable and justified.[33] Based on a July 1, 2014 effective date, compliance with the BART emission limit must occur by July 1, 2019. Using this compliance date, as well as correcting for the transcription error in our proposed rulemaking and applying the LNB/SOFA credit to the BART Benchmark instead of BART Alternatives, EPA calculates the 2009–2044 NO_X Cap to be 494,899 tons.[34]

In our proposed BART determination on February 5, 2013, we established a framework for evaluating other Alternatives to BART, centered on our proposed BART determination that calculated a BART benchmark for total NO_X emissions over 2009–2044. We compared total emissions from our proposed alternative, Alternative 1 (adjusted for the emission reductions associated with the early installation of LNB/SOFA) against the BART benchmark to determine that Alternative 1 was ''better than BART''. The TWG Alternative to BART uses EPA's BART benchmark to establish an emission cap and commits to operate NGS in a manner such that total NO_X emissions over 2009–2044 remain below the 2009–2044 NO_X Cap, which we calculate to be 494,899 tons. In ensuring that total NO_X emissions over 2009–2044 from NGS remain below the 2009–2044 NO_X Cap, the TWG Alternative meets the criteria of our proposed ''better than BART'' framework.

EPA's technical evaluation has also focused on whether the four potential operating scenarios in the TWG Alternative (Alternatives A1–A3 and B) provide a reasonable basis to ensure the NO_X emissions will remain below the 2009–2044 NO_X Cap of 494,899 tons.

The four possible operating scenarios under the TWG Alternative (Alternatives A1, A2, A3, and B) are summarized in section III.A of this Supplemental Proposal. These four scenarios are also shown in Table 3 and compared against the 2009–2044 NO_X Cap. The 2009–2044 NO_X Cap reflects the final rule effective date that EPA estimates is reasonable and justified for this rulemaking (July 1, 2014), resulting in a BART compliance date of July 1, 2019. As discussed above, the 2009–2044 NO_X Cap incorporates the LNB/SOFA early installation credit. EPA calculates the 2009–2044 NO_X Cap to be 494,899 tons.

The three operating scenarios under Alternative A represent emission reductions that occur during three distinct periods of time: over 2009–2011 (through the early installation of LNB/SOFA), by 2020 (from closure or curtailment of one unit, and by 2031 (through compliance with a NO_X limit of 0.07 lb/MMBtu on two units). Similarly, Alternative B represents emission reduction that would occur during three distinct periods of time: over 2009–2011 (through the early installation of LNB/SOFA), any time prior to 2029 (to maintain compliance with the 2009–2029 NO_X Cap), and any time between 2029 and 2044 (to maintain compliance with the 2009–2044 NO_X Cap).

EPA notes that the closure or curtailment of one unit at NGS in 2020 would result not only in NO_X reductions, but also in reductions of other criteria and hazardous air pollutants, such as sulfur dioxide (SO_2), particulate matter, and mercury.

TABLE 3—SUMMARY OF EPA ANALYSIS OF TWG ALTERNATIVE[35]

		TWG Alternative: Maintain Emissions below 2009–2044 NO_X Cap using one of the following operating scenarios:			
		A1	A2	A3	B
Ownership Possibilities If:		LADWP and NV Energy exit without selling ownership interest or by selling to an existing NGS Participant.			LADWP or NV Energy exits by selling to a 3rd party, or LADWP or NV Energy do not exit NGS.
And:		Navajo Nation does not purchase ownership interest.	Navajo Nation purchases interest (up to 170 MW).	Navajo Nation purchases interest (up to 170 MW).	
And:			Owners increase capacity (does not trigger permit).	Owners do not increase capacity (triggers permit).	
Summary of Cap or Operating Scenarios.	*2009–2044 NO_X Cap = 494,899 tons:* By 7/1/2019, meet limit of 0.055 lb/MMBtu through installation of LNB/SOFA concurrently with SCR.	By 12/31/2019, close one unit. By 12/31/2030, meet NO_X limit of 0.07 lb/MMBtu on two units.	By 12/31/2019, close one unit. By 12/31/2019, increase net capacity by no more than 189 MW. By 12/31/2030, meet NO_X limit of 0.07 lb/MMBtu on two units.	Three units could remain open.. By 12/31/2019, curtail generation by at least 561 MW. By 12/31/2030, meet NO_X limit of 0.07 lb/MMBtu on two units.	Maintain total NO_X emissions below a 2009–2029 NO_X Cap (416,865 tons). Cap is equivalent to closure of one unit by 12/31/2019.

[33] The comment period for EPA's proposed BART determination and Supplemental Proposal will close in January 2013. EPA anticipates that a final rule that considers and responds to all comments cannot be completed until Spring 2014. Because a final rule is typically effective 60 days following publication in the **Federal Register**, EPA anticipates the effective date of the final rule will occur no earlier than mid-summer 2014.

[34] See also Spreadsheet titled ''Supplemental Better than BART Alternatives.xlsx'' in the docket for this proposed rulemaking.

[35] Graphical representation of these Alternatives against the 2009–2044 NO_X Cap are shown in Spreadsheet titled ''Supplemental Better than BART Alternatives.xlsx'' in the docket for this proposed rulemaking.

TABLE 3—SUMMARY OF EPA ANALYSIS OF TWG ALTERNATIVE [35]—Continued

Estimate of Total NO_X over 2009–2044	435,819 tons	461,816 tons	NGS must ensure total emissions remain below both Caps.

In order to better understand whether the three potential operating scenarios under Alternative A provide reasonable assurance that emissions from NGS will remain below the 2009–2044 NO_X Cap, EPA estimated annual NO_X emissions for each potential operating scenario.[36] These estimates were based on the specific requirements for each scenario and the average heat input and average emission rates for each unit operating with LNB/SOFA.[37] EPA used actual emission data, as reported to the EPA Clean Air Markets Program, for 2001–2012.[38] To estimate tons of NO_X emitted in the future, EPA calculated the product of annual heat input (in MMBtu/year) and the annual average NO_X emission rate (in lb/MMBtu). In Table 3, estimates for total NO_X emissions over 2009–2044 were calculated based on the average annual heat input over 2001–2012, and the average annual NO_X emission rate achieved over 2011–2012 (when all three units were operating with LNB/SOFA) for the 2013–2018 period, and 0.07 lb/MMBtu for the 2020–2044 period.

As shown in Table 3, estimates for total NO_X emissions over 2009–2044 for Alternatives A1, A2, and A3 are all below the 2009–2044 NO_X Cap. This indicates that under TWG Alternative A, NGS can be reasonably expected to remain below the 2009–2044 NO_X Cap. The TWG Alternative requires the operator of NGS to submit an annual report to EPA, which it must also make publicly available, that includes annual emissions of SO_2 and CO_2, and annual and cumulative emissions of NO_X. In addition, EPA is including a provision to require reporting of annual heat input at NGS to assess operation and utilization of capacity at NGS.

Consistent with 40 CFR 51.308(e), the enforceable 2009–2044 NO_X Cap will ensure that total emissions of NO_X are less than those that would be emitted under our proposed BART determination. The weight of evidence, including the operating scenarios and annual reporting requirements as discussed above, suggest that NGS can be reasonably expected to remain below the 2009–2044 NO_X Cap.

As indicated in Table 3, and as discussed previously, the operating scenario under TWG Alternative B does not specify the exact process that would be used to comply with the 2009–2044 NO_X Cap. To ensure that NO_X emission reductions are achieved under TWG Alternative B in a manner similar to TWG Alternative A1–A3, the TWG Alternative imposes a nested NO_X emission cap for the 2009–2029 period (the 2009–2029 NO_X Cap) that would apply in addition to the 2009–2044 NO_X Cap. Under TWG Alternative B, the 2009–2029 NO_X Cap would be equivalent to total NO_X emissions over 2009–2029 that would be achieved under TWG Alternative A1, i.e., closure of one unit by December 31, 2019. Thus, under TWG Alternative B, NGS must still reduce NO_X emissions over 2009–2029 and 2030–2044 in order to comply with the 2009–2029 and 2009–2044 NO_X Caps, but the operator would have flexibility to determine the timing and method of reducing emissions.

To evaluate TWG Alternative B, EPA estimated potential emission reduction timeframes that would be needed to comply with the 2009–2029 and 2009–2044 NO_X Caps assuming the owners of NGS elect to install SCR on all three units at NGS.[39] Using the average annual heat input over 2001–2012, and the average annual NO_X emission rate achieved over 2011–2012 (when all three units were operating with LNB/SOFA), if NGS achieves emission rates of 0.07 lb/MMBtu or below after installation of SCR, the owners of NGS would need to install SCR on one unit each in 2026, 2027, and 2028 in order to comply with the 2009–2029 and 2009–2044 NO_X Caps. If NGS achieves emission rates of 0.055 lb/MMBtu or below, the owners of NGS would need to install SCR on one unit each in 2028, 2029, and 2030 in order to comply with the 2009–2029 and 2009–2044 NO_X Caps. In addition to the option of installing SCR on each unit, under TWG Alternative B, the owners of NGS could elect to implement any operating scenario (including curtailment, installation of other technologies to reduce emissions of NO_X, or a combination of options or technologies) as long as the operational changes result in reduced emissions of NO_X sufficient to maintain emissions below the applicable NO_X Cap.

To ensure compliance, the annual reporting requirements that apply to TWG Alternative A would also apply under TWG Alternative B. In addition, if TWG Alternative B is triggered, the operator of NGS would be required to submit annual Emission Reduction Plans to EPA that would identify the potential emission reductions measures and operating scenarios to comply with the 2009–2029 or 2009–2044 NO_X Caps. Each potential operating scenario in each annual Emission Reduction Plan must show compliance with the applicable NO_X Cap.

Consistent with 40 CFR 51.308(e), the enforceable 2009–2029 and 2009–2044 NO_X Caps will ensure that total emission reductions of NO_X are greater than those that would be achieved under our proposed BART determination. The weight of evidence, including possible operating scenarios and the reporting requirements as discussed above, indicate that NGS can be reasonably expected to remain below the 2009–2029 and 2009–2044 NO_X Caps.

Based on our analysis of the operating scenarios under TWG Alternatives A1–A3 and B, EPA is proposing to determine that the TWG Alternative meets EPA's ''better than BART'' framework outlined in our February 5, 2013 proposed BART determination for NGS.

IV. EPA's Supplemental Proposal

In addition to our proposed BART determination and Alternative 1 for NGS dated February 5, 2013, in today's action, EPA is supplementing our proposal with the TWG Alternative submitted to EPA on July 26, 2013 as an additional ''better than BART'' Alternative. Because we are supplementing our February 5, 2013 proposed rulemaking with today's

[36] *Id.*

[37] Under EPA PSD permit AZ 08–01, November 20, 2008, Units 1–3 at NGS operate with modern LNB/SOFA with an emission limit of 0.24 lb/MMBtu. See documents within EPA–R09–OAR–2013–0009–0005.

[38] Id. See also *http://ampd.epa.gov/ampd/.*

[39] Although Alternative B does not specify how the caps will be maintained, installation of SCR on all units at NGS is a reasonable compliance option, and therefore, EPA is using this as an example for further examination of Alternative B. See spreadsheet, titled ''Supplemental Better than BART Alternatives.xlsx''.

proposal, after considering public comments, EPA may finalize provisions from either or both proposals, i.e., our proposed BART determination, proposed Alternative 1, or the TWG Alternative.

EPA is proposing to determine that the TWG Alternative ensures that total emissions of NO_X from NGS over 2009–2044 will remain below the total emissions from NGS over 2009–2044 that would have occurred under BART. In today's action, EPA is proposing to establish enforceable requirements to comply with the proposed 2009–2044 NO_X Cap, and if applicable, a 2009–2029 NO_X Cap, including annual reporting requirements related to heat input, emissions of SO_2 and CO_2, and annual and cumulative emissions of NO_X. In addition, if the final ownership outcome triggers the operating scenarios under Alternatives A1–A3, EPA is proposing to establish the emission reduction milestones under A1–A3 (closure of one unit or curtailment of electricity generation by December 31, 2019, and installation of SCR on two units by December 31, 2030) as enforceable requirements. If the final ownership outcome triggers Alternative B, EPA is proposing to require the owners of NGS to submit annual Emission Reduction Plans to EPA to achieve the NO_X emission reductions necessary to assure compliance with the 2009–2029 and 2009–2044 NO_X Caps. EPA is also proposing to require the owners of NGS to notify EPA no later than December 1, 2019, of the final ownership outcome and the resulting applicable operating scenario that it will implement. For the reasons outlined above, EPA is supplementing our February 5, 2013 proposed rulemaking to also propose the TWG Alternative as a ''better than BART'' Alternative that ensures greater reasonable progress towards the national visibility goal than BART.

EPA is accepting public comment concurrently on our February 5, 2013 proposed BART determination and proposed Alterative 1 and the TWG Alternative put forth in today's Supplemental Proposal. From November 12–15, 2013, EPA will be holding five open house and public hearing events throughout Arizona to accept written and oral comment on our proposed rulemaking and Supplemental Proposal. The comment period for our February 5, 2013 proposed rulemaking and today's Supplemental Proposal closes on January 6, 2014.

V. Statutory and Executive Order Reviews

A. Executive Order 12866: Regulatory Planning and Review and Executive Order 13563: Improving Regulation and Regulatory Review 13563

This action supplements our proposed source-specific Federal Implementation Plan for the Navajo Generating Station to propose and take comment on an additional Alternative to BART that was developed by and agreed upon by a group of seven stakeholders. Under the terms of Executive Order (EO) 12866 (58 FR 51735, October 4, 1993) and EO 13563 (76 FR 3821, January 21, 2011), because this proposed rule applies to only one facility, it is not a rule of general applicability. This proposed rule, therefore, is exempt from review under EO 12866 and EO 13563.

B. Paperwork Reduction Act

This action does not impose an information collection burden under the provisions of the Paperwork Reduction Act, 44 U.S.C. 3501 et seq. Burden is defined at 5 CFR 1320.3(b). Under the Paperwork Reduction Act, a ''collection of information'' is defined as a requirement for ''answers to * * * identical reporting or recordkeeping requirements imposed on ten or more persons * * *.'' 44 U.S.C. 3502(3)(A). Because the Supplemental Proposal applies to a single facility, Navajo Generating Station, the Paperwork Reduction Act does not apply.

C. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) generally requires an agency to prepare a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements under the Administrative Procedure Act or any other statute unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. Small entities include small businesses, small organizations, and small governmental jurisdictions.

For purposes of assessing the impacts of today's proposed rule on small entities, small entity is defined as: (1) a small business as defined by the Small Business Administration's (SBA) regulations at 13 CFR 121.201; (2) a small governmental jurisdiction that is a government of a city, county, town, school district or special district with a population of less than 50,000; and (3) a small organization that is any not-for-profit enterprise which is independently owned and operated and is not dominant in its field.

After considering the economic impacts of this proposed action on small entities, I certify that this proposed action will not have a significant economic impact on a substantial number of small entities. The Navajo Generating Station is not a small entity and the FIP for Navajo Generating Station being proposed today does not impose any compliance requirements on small entities. See Mid-Tex Electric Cooperative, Inc. v. FERC, 773 F.2d 327 (D.C. Cir. 1985). We continue to be interested in the potential impacts of the proposed rule and this Supplemental Proposal on small entities and welcome comments on issues related to such impacts.

D. Unfunded Mandates Reform Act (UMRA)

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), 2 U.S.C. 1531–1538, requires Federal agencies, unless otherwise prohibited by law, to assess the effects of their regulatory actions on State, local, and tribal governments and the private sector. Federal agencies must also develop a plan to provide notice to small governments that might be significantly or uniquely affected by any regulatory requirements. The plan must enable officials of affected small governments to have meaningful and timely input in the development of EPA regulatory proposals with significant Federal intergovernmental mandates and must inform, educate, and advise small governments on compliance with the regulatory requirements.

This rule does not contain a Federal mandate that may result in expenditures of $100 million or more for state, local, and tribal governments, in the aggregate, or the private sector in any one year. EPA anticipates the annual cost to the private sector of this Supplemental Proposal, which involves compliance with BART emission limits by two units, rather than three units, to be lower than the anticipated cost of EPA's proposed BART determination of $64 million per year (see Table 2 of EPA's proposed BART determination at 78 FR 8274, February 5, 2013). Thus, this Supplemental Proposal is not subject to the requirements of sections 202 or 205 of UMRA. This proposed rule will not impose direct compliance costs on state, local or tribal governments. This proposed action will, if finalized, reduce the emissions of NO_X from a single source, the Navajo Generating Station.

In developing this rule, EPA consulted with small governments pursuant to a plan established under section 203 of UMRA to address impacts

of regulatory requirements in the rule that might significantly or uniquely affect small governments. EPA put forth an Advanced Notice of Proposed Rulemaking on August 28, 2009 regarding our intention to propose a BART determination for NGS and the Four Corners Power Plant. We received comments from numerous small governments, including tribal governments, and governments of several towns in Arizona. This proposed rule will not impose direct compliance costs on any small governments. However, increased electricity and water costs associated with this proposed rule may indirectly affect small governments.

E. Executive Order 13132: Federalism

This action does not have federalism implications. It will not have substantial direct effects on the states, on the relationship between the national government and the states, or in the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132. This action proposes emission reductions of NO_X at a specific stationary source located in Indian country. Thus, Executive Order 13132 does not apply to this action.

F. Executive Order 13175: Consultation and Coordination With Indian Tribal Governments

Under Executive Order 13175 (65 FR 67249, November 9, 2000), EPA may not issue a regulation that has tribal implications, that imposes substantial direct compliance costs, and that is not required by statute, unless the federal government provides the funds necessary to pay the direct compliance costs incurred by tribal governments, or EPA consults with tribal officials early in the process of developing the proposed regulation and develops a tribal summary impact statement.

EPA has concluded that this proposed action will have tribal implications, and consequently EPA has consulted with tribal officials during the process of developing the proposed regulation and will continue to consult with tribal officials during the process to take final action. EPA notes that the TWG Alternative, on which this Supplemental Proposal is based, was developed by a group of seven stakeholders that included the Navajo Nation and the Gila River Indian Community. However, we also note that not all tribes that may be affected by this proposed alternative were among the stakeholders. Other tribes may have views on this alternative and EPA welcomes their comments. The proposed regulation will not pre-empt tribal law. The proposed regulation will also not impose *direct compliance* costs on a tribal government, because the direct compliance costs of this proposed rule, if finalized, will be borne by the owners of NGS. However, because several tribes located in Arizona rely directly or indirectly on NGS, there may be indirect impacts of this proposed rule on these tribes. The Navajo Nation and Hopi Tribe receive coal-related royalties, taxes and employment at NGS and the Kayenta Mine that contribute to their economies. Several tribes in Arizona have allocations of CAP water under existing water settlement agreements. Because of the inter-relationship of CAP and NGS, impacts to NGS may also impact CAP and the tribes that use CAP water or otherwise benefit from CAP according to Congressionally-approved water settlement agreements. The importance to tribes of continued operation of NGS and affordable water costs cannot be overemphasized. In Section II.B.ii of EPA's proposed BART determination dated February 5, 2013 (78 FR8274), EPA explains in detail the tribal information that we received and considered in this proposed rulemaking.

In addition to our consultation with tribes discussed in our February 5, 2013 proposed rulemaking, EPA has had additional meetings and conference calls with tribes at their request since the time we received the TWG Alternative, and during our process of evaluating the TWG Alternative. On August 22, 2013, we met with Governor Gregory Mendoza and other representatives from the Gila River Indian Community.[40] On August 28, 2013, EPA met with President Ben Shelly and other representatives from the Navajo Nation.[41] We held a conference call on September 13, 2013 with Chairman LeRoy Shingoitewa and another representative from the Hopi Tribe.[42] Chairman Shingoitewa also submitted a letter to EPA, dated August 19, 2013, expressing several concerns related to the TWG Alternative.[43] An updated timeline of all correspondence and consultation with tribes on NGS is included in the docket for this proposed rulemaking.[44]

EPA recognizes that the Navajo Nation and the Gila River Indian Community participated in the development of the TWG Agreement on NGS and were signatories on the Agreement. However, EPA also understands from discussions with President Shelly and Governor Mendoza that concerns, related to potential impacts to their respective tribes from BART and the TWG Alternative, still exist. EPA understands that Chairman Shingoitewa has numerous concerns related to the TWG Agreement and Alternative, including the exclusion of the Hopi Tribe from the TWG and the development of the TWG Agreement, and the extended timeframe for the installation of new air pollution controls at NGS under the TWG Alternative. EPA will continue to consult with Tribal officials during and following the public comment period on the proposed FIP.

G. Executive Order 13045: Protection of Children From Environmental Health Risks and Safety Risks

Executive Order 13045: Protection of Children from Environmental Health Risks and Safety Risks (62 FR 19885, April 23, 1997), applies to any rule that: (1) is determined to be economically significant as defined under Executive Order 12866, and (2) concerns an environmental health or safety risk that EPA has reason to believe may have a disproportionate effect on children. If the regulatory action meets both criteria, the Agency must evaluate the environmental health or safety effects of the planned rule on children, and explain why the planned regulation is preferable to other potentially effective and reasonably feasible alternatives considered by the Agency. This proposed rule is not subject to Executive Order 13045 because it requires emissions reductions of NO_X from a single stationary source. Because this proposed action only applies to a single source and is not a proposed rule of general applicability, it is not economically significant as defined under Executive Order 12866, and does not have a disproportionate effect on children. However, to the extent that the rule will reduce emissions of NO_X, which contribute to ozone and fine particulate matter formation as well as visibility impairment, the rule will have a beneficial effect on children's health by reducing air pollution that causes or

[40] See document number 0152 in the docket for the proposed rulemaking at EPA–R09–OAR–2013–0009.

[41] See document number 0150 in the docket for the proposed rulemaking at EPA–R09–OAR–2013–0009.

[42] See document number 0166 in the docket for the proposed rulemaking at EPA–R09–OAR–2013–0009.

[43] See document number 0134 in the docket for the proposed rulemaking at EPA–R09–OAR–2013–0009.

[44] See document titled ''Timeline of All Tribal Consultations on Navajo BART FIPs as of September 17 2013'' in the docket for this proposed rulemaking.

exacerbates childhood asthma and other respiratory issues.

H. Executive Order 13211: Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use

This action is not subject to Executive Order 13211 (66 FR 28355 (May 22, 2001)), because it is exempt under Executive Order 12866.

I. National Technology Transfer and Advancement Act

Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (NTTAA), Public Law 104–113, 12 (10) (15 U.S.C. 272 note) directs EPA to use voluntary consensus standards (VCS) in its regulatory activities unless to do so would be inconsistent with applicable law or otherwise impractical. VCS are technical standards (e.g., materials specifications, test methods, sampling procedures and business practices) that are developed or adopted by the VCS bodies. The NTTAA directs EPA to provide Congress, through annual reports to OMB, with explanations when the Agency decides not to use available and applicable VCS.

Consistent with the NTTAA, the Agency conducted a search to identify potentially applicable VCS. For the measurements listed below, there are a number of VCS that appear to have possible use in lieu of the EPA test methods and performance specifications (40 CFR Part 60, Appendices A and B) noted next to the measurement requirements. It would not be practical to specify these standards in the current proposed rulemaking due to a lack of sufficient data on equivalency and validation and because some are still under development. However, EPA's Office of Air Quality Planning and Standards is in the process of reviewing all available VCS for incorporation by reference into the test methods and performance specifications of 40 CFR Part 60, Appendices A and B. Any VCS so incorporated in a specified test method or performance specification would then be available for use in determining the emissions from this facility. This will be an ongoing process designed to incorporate suitable VCS as they become available.

J. Executive Order 12898: Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations

Executive Order 12898 (59 FR 7629, February 16, 1994), establishes federal executive policy on environmental justice. Its main provision directs federal agencies, to the greatest extent practicable and permitted by law, to make environmental justice part of their mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of their programs, policies, and activities on minority populations and low-income populations in the United States.

EPA has determined that this proposed rule, if finalized, will not have disproportionately high and adverse human health or environmental effects on minority or low-income populations because it increases the level of environmental protection for all affected populations without having any disproportionately high and adverse human health or environmental effects on any population, including any minority or low-income population. This proposed rule requires emissions reductions of NO_X from a single stationary source, Navajo Generating Station.

List of Subjects in 40 CFR Part 49

Environmental protection, Air pollution control, Indians, Intergovernmental relations, Nitrogen Dioxide.

Authority: 42 U.S.C. 7401 *et seq.*

Dated: September 25, 2013.

Jared Blumenfeld,

Regional Administrator, Region 9.

Title 40, chapter I of the Code of Federal Regulations is proposed to be amended as follows:

PART 49—[AMENDED]

■ 1. The authority citation for part 49 continues to read as follows:

Authority: 42 U.S.C. 7401, et seq.

■ 2. Section 49.5513 is amended by adding paragraph (j) to read as follows:

§ 49.5513 Federal Implementation Plan Provisions for Navajo Generating Station, Navajo Nation.

* * * * *

(j) (1) *Applicability.* Regional Haze Best Available Retrofit Technology limits for this plant are in addition to the requirements of paragraphs (a) through (i) of this section. The provisions of this paragraph (j) are severable, and if any provision of this paragraph (j), or the application of any provision of this paragraph (j) to any owner/operator or circumstance, is held invalid, the application of such provision to other owner/operators and other circumstances, and the remainder of this paragraph (j), shall not be affected thereby. Nothing in this paragraph (j) allows or authorizes any Unit to emit NO_X at a rate that exceeds its existing emission limit of 0.24 lb/MMBtu as established by EPA permit AZ 08–01 issued on November 20, 2008.

(2) *Definitions.* Terms not defined below shall have the meaning given to them in the Clean Air Act or EPA's regulations implementing the Clean Air Act and in paragraph (c) of this section. For purposes of this paragraph (j):

(i) *2009–2029 NO_X Cap* is no more than 416,865 tons of NO_X. This value is calculated based on the sum of annual emissions over January 1, 2009 to December 31, 2029, and closure of one unit by December 31, 2019.

(ii) *2009–2044 NO_X C*ap is no more than 494,899 tons of NO_X. This value is calculated based on the sum of annual emissions over January 1, 2009 to December 31, 2044, and compliance with a BART emission limit of 0.055 lb/MMBtu on each Unit by July 1, 2019.

(iii) *Boiler Operating Day* means a 24-hour period between 12 midnight and the following midnight during which any fuel is combusted at any time in the steam-generating unit. It is not necessary for fuel to be combusted the entire 24-hour period.

(iv) *Coal-Fired Unit* means any of Units 1, 2, or 3 at Navajo Generating Station.

(v) *Continuous Emission Monitoring System or CEMS* means the equipment required by 40 CFR Part 75 and this paragraph (j).

(vi) *Departing Participant* means either Los Angeles Department of Water and Power or Nevada Energy, also known as NV Energy or Nevada Power Company.

(vi) *Emission limitation or emission limit* means the federal emissions limitation required by this paragraph.

(vii) *Existing Participant* means the existing owners of NGS: Los Angeles Department of Water and Power; Nevada Energy, also known as NV Energy or Nevada Power Company; Salt River Project Agricultural Improvement and Power District; Arizona Public Service Company; and Tucson Electric Company, together with the United States, acting through the Bureau of Reclamation.

(ix) *lb* means pound(s).

(x) *Low-NO_X Burners and Separated Over-Fire Air or LNB/SOFA* means combustion controls installed on one Unit each over 2009–2011.

(xi) *Navajo Nation* means the Navajo Nation, a federally recognized Indian Tribe.

(xii) *NGS or Navajo Generating Station* means the steam electric generating station located on the Navajo Reservation near Page, Arizona, consisting of Units 1, 2, and 3, each 750

MW (nameplate rating), the switchyard facilities, and all facilities and structures used or related thereto.

(xiii) *NO_X* means nitrogen oxides expressed as nitrogen dioxide (NO_2).

(xiv) *Owner(s)/operator(s)* means any person(s) who own(s) or who operate(s), control(s), or supervise(s) one more of the units of the Navajo Generating Station.

(xv) *MMBtu* means million British thermal unit(s).

(xvi) *Operating hour* means any hour that fossil fuel is fired in the unit.

(xvii) *Unit* means any of Units 1, 2, or 3 at Navajo Generating Station.

(xviii) *Valid Data* means CEMs data that is not out of control as defined in 40 CFR Part 75.

(3) *BART Determination.* BART for NGS is a NO_X emission limit of 0.055 lb/MMBtu on each Unit with a compliance date of July 1, 2019, and is used to establish a cap in NO_X emissions, known as the 2009–2044 NO_X Cap. The owner/operator shall demonstrate BART compliance by ensuring that total NO_X emissions from NGS, over January 1, 2009 to December 31, 2044, do not exceed the 2009–2044 NO_X Cap. The owner/operator shall implement the applicable operating scenario, under paragraph (j)(3)(i), to ensure NO_X emission reductions sufficient to maintain total NO_X emissions below the 2009–2044 NO_X Cap.

(i) *Operating Scenarios to Comply with 2009–2044 NO_X Cap.*

(A) *Alternative A1.*

(1) By December 31, 2019, the owner/operator shall permanently cease operation of one coal-fired Unit.

(2) By December 31, 2030, the owner/operator shall comply with a NO_X emission limit of 0.07 lb/MMBtu on each of the two remaining coal-fired Units.

(B) *Alternative A2.*

(1) By December 31, 2019, the owner/operator shall permanently cease operation of one coal-fired Unit.

(2) By December 31, 2019, the owner/operator may elect to increase net generating capacity of the remaining two coal-fired Units by a combined total of no more than 189 MW. The actual increase in net generating capacity shall be limited by the sum of 19 MW and the ownership interest, in net MW capacity, purchased by the Navajo Nation by December 31, 2019. The owner/operator shall ensure that any increase in the net generating capacity is in compliance with all pre-construction permitting requirements, as applicable.

(3) By December 31, 2030, the owner/operator shall comply with a NO_X emission limit of 0.07 lb/MMBtu on each of the two remaining coal-fired Units.

(C) *Alternative A3.*

(1) By December 31, 2019, the owner/operator shall reduce the net generating capacity of NGS by no less than 561 MW. The actual reduction in net generating capacity of NGS shall be determined by the difference between 731 MW and the ownership interest, in net MW capacity, purchased by the Navajo Nation by December 31, 2019.

(2) By December 31, 2030, the owner/operator shall comply with a NO_X emission limit of 0.07 lb/MMBtu on two Units.

(D) *Alternative B.* In addition to the 2009–2044 NO_X Cap that applies between January 1, 2009 to December 31, 2044, during the January 1, 2009 to December 31, 2029 period, the owner/operator shall ensure compliance with the 2009–2029 NO_X Cap.

(ii) *Applicability of Alternatives.*

(A) Alternative A1 shall apply if both of the Departing Participants retire their ownership interests in NGS by December 31, 2019, and the Navajo Nation does not purchase an ownership share of NGS by December 31, 2019; or if both of the Departing Participants sell their ownership interests to Existing Participants, and the Navajo Nation does not purchase an ownership share of NGS by December 31, 2019; or if one of the Departing Participants retires its ownership interest and the other Departing Participant sells its ownership interest to an Existing Participant, and the Navajo Nation does not purchase an ownership share of NGS by December 31, 2019.

(B) Alternative A2 shall apply if both of the Departing Participants sell their ownership interests to Existing Participants, the Navajo Nation elects to purchase an ownership share of NGS by December 31, 2019, and the owner/operator elects to increase net generating capacity of the two remaining Units; or if one of the Departing Participants retires its ownership interest and the other Departing Participant sells its ownership interest to an Existing Participant, the Navajo Nation elects to purchase an ownership share of NGS by December 31, 2019, and the owner/operator elects to increase net generating capacity of the two remaining Units.

(C) Alternative A3 shall apply if both of the Departing Participants sell their ownership interests to Existing Participants, the Navajo Nation elects to purchase an ownership share of NGS by December 31, 2019, and the owner/operator does not elect to increase net generating capacity; or if one of the Departing Participants retires its ownership interest and the other Departing Participant sells its ownership interest to an Existing Participant, the Navajo Nation elects to purchase an ownership share of NGS by December 31, 2019, and the owner/operator does not elect to increase net generating capacity.

(D) Alternative B shall apply if, by December 31, 2019, any of the Departing Participants sell their ownership interests to a Party that is not an Existing Participant.

(4) *Reporting and Implementation Requirements for BART.*

(i) No later than December 1, 2019, the owner/operator must notify EPA of the applicable Alternative for ensuring compliance with the 2009–2044 NO_X Cap.

(ii) Beginning January 31, 2015, and annually thereafter until the earlier of December 22, 2044 or the date on which the owner/operator ceases conventional coal-fired generation at NGS, the owner/operator shall submit to the Regional Administrator, a report summarizing the annual heat input, the annual emissions of sulfur dioxide, carbon dioxide, and annual and cumulative emissions of NO_X from NGS for the previous full calendar year. The owner/operator shall make this report available to the public, either through a link on its Web site or directly on its Web site.

(iii) No later than December 31, 2020, the owner/operator shall submit an application to revise its existing Part 71 Operating Permit to incorporate the requirements and emission limits of the applicable Alternative to BART under paragraph (j)(3).

(iv) In addition to the requirements of paragraphs (j)(4)(i), (ii) and (iii), if Alternative B applies, the owner/operator shall submit annual Emission Reduction Plans to the Regional Administrator.

(A) No later than December 31, 2019 and annually thereafter through December 31, 2028, the owner/operator shall submit an Emission Reduction Plan containing anticipated year-by-year emissions covering the period from 2020 to 2029 that will assure that the operation of NGS will result in emissions of NO_X that do not exceed the 2009–2029 NO_X Cap. The Emission Reduction Plan may contain several potential operating scenarios and must set forth the past annual actual emissions and the projected emissions for each potential operating scenario. Each potential operating scenario must demonstrate compliance with the 2009–2029 NO_X Cap. The Emission Reduction Plan shall identify emission reduction measures that may include, but are not

limited to, the installation of advanced emission controls, a reduction in generation output, or other operating strategies determined by the owner/operator. The owner/operator may revise the potential operating scenarios set forth in the Emission Reduction Plan, provided the revised plan ensure that NO_X emissions remain below the 2009–2029 NO_X Cap.

(B) No later than December 31, 2029 and annually thereafter, the owner/operator shall submit an Emission Reduction Plan containing year-by-year emissions covering the period from January 1, 2030 to December 31, 2044 that will assure that the operation of NGS will result in emissions of NO_X that do not exceed the 2009–2044 NO_X Cap. The Emission Reduction Plan shall identify emission reduction measures that may include, but are not limited to, the installation of advanced emission controls, a reduction in generation output, or other operating strategies determined by the owner/operator. The owner/operator may revise the potential operating scenarios set forth in the Emission Reduction Plan, provided the revised plan ensure that NO_X emissions remain below the 2009–2044 NO_X Cap.

(5) *Continuous emission monitoring system (CEMS).*

(i) At all times, the owner/operator of each unit shall maintain, calibrate, and operate a CEMS, in full compliance with the requirements found at 40 CFR Part 75, to accurately measure NO_X, diluent, and stack gas volumetric flow rate from each unit. Valid data means data recorded when the CEMS is not out-of-control as defined by Part 75, as defined in paragraph (j)(2) of this section. All valid CEMS hourly data shall be used to determine compliance with the emission limitations for NO_X in paragraph (j)(3) of this section for each unit. If the CEMs data is not valid, that CEMs data shall be treated as missing data and not used to calculate the emission average. CEMs data does not need to be bias adjusted as defined in 40 CFR Part 75. Each required CEMS must obtain valid data for at least 90 percent of the unit operating hours, on an annual basis.

(ii) The owner/operator of each unit shall comply with the quality assurance procedures for CEMS found in 40 CFR Part 75. In addition to these Part 75 requirements, relative accuracy test audits shall be calculated for both the NO_X pounds per hour measurement and the heat input measurement. The calculation of NO_X pounds per hour and heat input relative accuracy shall be evaluated each time the CEMS undergo relative accuracy testing.

(6) *Compliance Determination for NO_X Emission Limits.*

(i) Compliance with the NO_X emission limits under paragraphs (j)(3)(i) shall be determined on a rolling average basis of thirty (30) Boiler Operating Days on a unit by unit basis. Compliance shall be calculated in accordance with the following procedure: (1) Sum the total pounds of NO_X emitted from the Unit during the current Boiler Operating Day and the previous twenty-nine (29) Boiler Operating Days; (2) sum the total heat input to the Unit in MMBtu during the current Boiler Operating Day and the previous twenty-nine (29) Boiler Operating Days; and (3) divide the total number of pounds of NO_X by the total heat input in MMBtu during the thirty (30) Boiler Operating Days. A new 30 Boiler Operating Day rolling average shall be calculated for each new Boiler Operating Day. Each 30 Boiler Operating Day rolling average shall include all emissions that occur during periods within any Boiler Operating Day, including emissions from startup, shutdown, and malfunction.

(ii) If a valid NO_X pounds per hour or heat input is not available for any hour for a unit, that heat input and NO_X pounds per hour shall not be used in the calculation for that 30 boiler operating day period.

(7) *Recordkeeping.* The owner or operator of each unit shall maintain the following records for at least five years:

(i) All CEMS data, including the date, place, and time of sampling or measurement; parameters sampled or measured; and results as required by Part 75 and as necessary to calculate each unit's pounds of NO_X and heat input for each hour.

(ii) Each calendar day rolling average group emission rates for NO_X calculated in accordance with paragraph (j)(6)(i) of this section.

(iii) Each unit's 30 Boiler Operating Day pounds of NO_X and heat input.

(iv) Records of quality assurance and quality control activities for emissions measuring systems including, but not limited to, any records required by 40 CFR Part 75.

(v) Records of the relative accuracy calculation of the NO_X lb/hr measurement and hourly heat input.

(vi) Records of all major maintenance activities conducted on emission units, air pollution control equipment, and CEMS.

(vii) Any other records required by 40 CFR Part 75.

(8) *Reporting.* All reports and notifications under this paragraph (j) shall be submitted to the Director, Navajo Environmental Protection Agency, P.O. Box 339, Window Rock, Arizona 86515, and to the Director of Enforcement Division, U.S. EPA Region IX, at 75 Hawthorne Street, San Francisco, CA 94105.

(i) The owner/operator shall notify EPA within two weeks after completion of installation of NO_X control technology on any of the units subject to this section.

(ii) Within 30 days after the first applicable compliance date in paragraph (j)(3) of this section and within 30 days of every second calendar quarter thereafter (i.e., semi-annually), the owner/operator shall submit a report that lists for each calendar day, calculated in accordance with paragraph (j)(6) of this section, total lb of NO_X and heat input (as used to calculate compliance per paragraph (j)(6), for each unit's last 30 boiler operating days. Included in this report shall be the results of the last relative accuracy test audit and the calculated relative accuracy for lb/hr NO_X and heat input performed 45 days prior to the end of that reporting period. The end of the year report shall also include the percent valid data for each NO_X, diluent, and flow monitor used in the calculations of compliance with paragraph (j)(6).

(9) *Enforcement.* Notwithstanding any other provision in this implementation plan, any credible evidence or information relevant as to whether the unit would have been in compliance with applicable requirements if the appropriate performance or compliance test had been performed, can be used to establish whether or not the owner or operator has violated or is in violation of any standard or applicable emission limit in the plan.

(10) *Equipment Operations.* At all times, including periods of startup, shutdown, and malfunction, the owner or operator shall, to the extent practicable, maintain and operate the unit including associated air pollution control equipment in a manner consistent with good air pollution control practices for minimizing emissions. Determination of whether acceptable operating and maintenance procedures are being used will be based on information available to the Regional Administrator, or their designee, which may include, but is not limited to, monitoring results, review of operating and maintenance procedures, and inspection of the unit.

(11) *Affirmative Defense.* The affirmative defense provisions of paragraphs (c)(1) and (g)(3) of this

section, related only to malfunctions, apply to this paragraph (j).

[FR Doc. 2013–24281 Filed 10–21–13; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R03–OAR–2013–0499; FRL- 9901–36-Region3]

Approval and Promulgation of Air Quality Implementation Plans; District of Columbia; Infrastructure Requirements for the 2008 Lead National Ambient Air Quality Standards and State Board Requirements

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: EPA proposes to approve the State Implementation Plan (SIP) revision submitted by the District of Columbia (hereafter ''the District'') pursuant to the Clean Air Act (CAA). Whenever new or revised national ambient air quality standards (NAAQS) are promulgated, the CAA requires states to submit a plan for the implementation, maintenance, and enforcement of such NAAQS. The plan is required to address basic program elements including, but not limited to, regulatory structure, monitoring, modeling, legal authority, and adequate resources necessary to assure attainment and maintenance of the NAAQS. These elements are referred to as infrastructure requirements. The District has made a submittal addressing the infrastructure requirements for the 2008 lead (Pb) NAAQS (''the infrastructure submittal'') and a separate submittal addressing requirements in relation to State Boards. This action is being taken under the CAA. In the Final Rules section of this **Federal Register**, EPA is approving the District's SIP submittals as a direct final rule without prior proposal because the Agency views these as noncontroversial submittals and anticipates no adverse comments. A more detailed description of the District's submittals and EPA's evaluation are included in a Technical Support Document (TSD) prepared in support of this rulemaking action. A copy of the TSD is available, upon request, from the EPA Regional Office listed in the **ADDRESSES** section of this document. If no adverse comments are received in response to this action, no further activity is contemplated. If EPA receives adverse comments, the direct final rule will be withdrawn and all public comments received will be addressed in a subsequent final rule based on this proposed rule. EPA will not institute a second comment period. Any parties interested in commenting on this action should do so at this time.

DATES: Comments must be received in writing by November 21, 2013.

ADDRESSES: Submit your comments, identified by Docket ID Number EPA–R03–OAR–2013–0499 by one of the following methods:

A. *www.regulations.gov.* Follow the on-line instructions for submitting comments.

B. *Email: fernandez.cristina@epa.gov.*

C. *Mail:* EPA–R03–OAR–2013–0499, Cristina Fernandez, Associate Director, Office of Air Program Planning, Mailcode 3AP30, U.S. Environmental Protection Agency, Region III, 1650 Arch Street, Philadelphia, Pennsylvania 19103.

D. *Hand Delivery:* At the previously-listed EPA Region III address. 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–R03–OAR–2013–0499. 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 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, 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 electronic docket are listed in the *www.regulations.gov* index. Although listed in the index, some information is not publicly available, i.e., CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically in *www.regulations.gov* or in hard copy during normal business hours at the Air Protection Division, U.S. Environmental Protection Agency, Region III, 1650 Arch Street, Philadelphia, Pennsylvania 19103. Copies of the State submittal are available at the District of Columbia Department of the Environment, Air Quality Division, 1200 1st Street NE., 5th floor, Washington, DC 20002.

FOR FURTHER INFORMATION CONTACT: Emlyn Vélez-Rosa, (215) 814–2038, or by email at *velez-rosa.emlyn@epa.gov.*

SUPPLEMENTARY INFORMATION: For further information, please see the information provided in the direct final action, with the same title, that is located in the ''Rules and Regulations'' section of this **Federal Register** publication.

Dated: September 13, 2013.

W.C. Early,

Acting Regional Administrator, Region III.

[FR Doc. 2013–24124 Filed 10–21–13; 8:45 am]

BILLING CODE 6560–50–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

[Docket No. FWS–ES–R8–2012–0075; 4500030113]

Endangered and Threatened Wildlife and Plants; 12-Month Finding on a Petition To List Ashy Storm-Petrel as an Endangered or Threatened Species

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of 12-month petition finding.

SUMMARY: We, the U.S. Fish and Wildlife Service, announce a 12-month finding on a petition to list the ashy storm-petrel (*Oceanodroma homochroa*) as an endangered or threatened species and to designate critical habitat under the Endangered Species Act of 1973, as amended (Act). After review of the best

available scientific and commercial information, we find that listing the ashy storm-petrel is not warranted at this time. However, we ask the public to submit to us any new information that becomes available concerning the threats to the ashy storm-petrel or its habitat at any time.

DATES: The finding announced in this document was made on October 22, 2013.

ADDRESSES: This finding is available on the Internet at *http://www.regulations.gov* at Docket Number FWS–R8–ES–2013–0075. Supporting documentation we used in preparing this finding is available for public inspection, by appointment, during normal business hours at the U.S. Fish and Wildlife Service, Bay–Delta Fish and Wildlife Office, 650 Capitol Mall, 8th Floor, Sacramento, CA 95814. Please submit any new information, materials, comments, or questions concerning this finding to the above address.

FOR FURTHER INFORMATION CONTACT: Mike Chotkowski, Field Supervisor, Bay–Delta Fish and Wildlife Office (see **ADDRESSES**); by telephone at 916–930–5603; or by facsimile 916–930–5654. If you use a telecommunications device for the deaf (TDD), please call the Federal Information Relay Service (FIRS) at 800–877–8339.

SUPPLEMENTARY INFORMATION:

Executive Summary

Why we need to publish a rule. Section 4(b)(3)(B) of the Act (16 U.S.C. 1531 *et seq.*) requires that, for any petition to revise the Federal Lists of Endangered and Threatened Wildlife and Plants that contains substantial scientific or commercial information that the petitioned action may be warranted, we make a finding within 12 months of the date of receipt of the petition. In this finding, we will determine that the petitioned action is: (1) Not warranted, (2) warranted, or (3) warranted, but the immediate proposal of a regulation implementing the petitioned action is precluded by other pending proposals to determine whether species are endangered or threatened, and expeditious progress is being made to add or remove qualified species from the Federal Lists of Endangered and Threatened Wildlife and Plants. Section 4(b)(3)(C) of the Act requires that we treat a petition for which the requested action is found to be warranted but precluded as though resubmitted on the date of such finding, that is, requiring a subsequent finding to be made within 12 months. We must publish these 12-month findings in the **Federal Register**.

The basis for our action. Under the Act, we can determine that a species is an endangered or threatened species based on whether we find that it is in danger of extinction throughout all or a significant portion of its range now (endangered) or likely to become endangered in the foreseeable future (threatened). As part of our analysis, we consider whether it is endangered or threatened because of the factors outlined in section 4(a)(1) of the Act.

Finding. We make a determination under the Act of not warranted for the ashy storm-petrel.

Previous Federal Actions

On October 16, 2007, we received a petition, dated October 15, 2007, from the Center for Biological Diversity, requesting that we list the ashy storm-petrel as a threatened or endangered species under the Act and that critical habitat be designated concurrently with listing. On May 15, 2008, the Service published in the **Federal Register** a 90-day finding on the petition to list the ashy storm-petrel as threatened or endangered, and the 90-day finding determined that the petition presented substantial scientific or commercial information indicating that the petitioned action may be warranted (73 FR 28080). On August 19, 2009, the Service announced its 12-month finding that found, after reviewing the best available scientific and commercial information, listing the ashy storm-petrel was not warranted (74 FR 41832). The Center for Biological Diversity challenged this decision in the District Court of the Northern District of California on October 27, 2010 (*Center for Biological Diversity* v. *Salazar, et al., No. cv10–4861–DMR (N.D. Cal.)).* This challenge was resolved by a September 16, 2011, Stipulation of Dismissal, in which the parties agreed to dismissal of the action based on the court approval of a settlement in which the Service agreed to submit a proposed rule or a not-warranted finding regarding the ashy storm-petrel to the **Federal Register** by the end of Fiscal Year (September 30) 2013 (*In re Endangered Species Act Section 4 Deadline Litig., Misc. Action No. 10–377 (EGS), MDL Docket No. 2165 (D.D.C.)).* We published a notice of initiation of status review and solicitation of new information for the ashy storm-petrel in the **Federal Register** on November 28, 2012 (77 FR 70987).

Background

This finding is based upon the Species Report for ashy storm-petrel, a scientific analysis of available information prepared by a team of Service biologists from the Service's Bay–Delta, Carlsbad, Ventura, and Arcata Field Offices, the Farallon National Wildlife Refuge, the Region 8 Office, and National Headquarters Office. The purpose of the Species Report is to provide the best available scientific and commercial information about the species so that we can evaluate whether or not the species warrants protection under the Act. In it, we compiled the best scientific and commercial data available concerning the status of ashy storm-petrel, including the past, present and future threats to this species. As such, the Species Report provides the scientific basis that informs our regulatory decision in this document, which involves the further application of standards within the Act and its regulations and policies. The Species Report (including all references) and other materials relating to this finding can be found on the Bay–Delta Fish and Wildlife Web site at: *http://www.fws.gov/sfbaydelta/* and at *http://www.regulations.gov* at Docket No. FWS–R8–ES–2012–0075.

The reader is directed to section IV of the Species Report for a more detailed discussion of the biology, taxonomy, life history, distribution, and current conditions of the ashy storm-petrel (Service 2013; *http://www.fws.gov/sfbaydelta/*). The Species Report evaluates the biological status of the bird and threats potentially affecting its continued existence.

The ashy storm-petrel (*Oceanodroma homochroa*) is a small seabird that ranges from about the California–Oregon Border to Islas San Benitos, Mexico. The 32 known breeding sites of the ashy storm-petrel stretch from Point Cabrillo, Mendocino County, California, to Islas Todos Santos Island, Ensenada, Mexico (Service 2013, p. 3). More than 90 percent of the population breeds in two population centers at South East (SE) Farallon Island and in the California Channel Islands (Service 2013, p. 3). Ashy storm-petrels occur at their breeding colonies nearly year-round and occur in greater numbers from February through October (Service 2013, p. 3). The ashy storm-petrel feeds at night on euphausiids, other krill, decapods, larval lanternfish, fish eggs, young squid, and spiny lobster (Service 2013, p. 7).

Summary of Biological Status and Threats

Section 4 of the Act (16 U.S.C. 1533) and implementing regulations (50 CFR 424) set forth procedures for adding species to, removing species from, and reclassifying species on the Federal

Lists of Endangered and Threatened Wildlife and Plants. Under section 4(a)(1) of the Act, a species may be determined to be endangered or threatened based on any of the following five factors:

(A) The present or threatened destruction, modification, or curtailment of its habitat or range;

(B) Overutilization for commercial, recreational, scientific, or educational purposes;

(C) Disease or predation;

(D) The inadequacy of existing regulatory mechanisms; or

(E) Other natural or manmade factors affecting its continued existence.

A species is an endangered species for purposes of the Act if it is in danger of extinction throughout all or a significant portion of its range, and is a threatened species if it is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range. For purposes of this analysis, we first evaluate the status of the species throughout all of its range, and then consider whether the species is in danger of extinction or likely to become so in any significant portion of its range.

In making this finding, information pertaining to the ashy storm-petrel in relation to the five factors provided in section 4(a)(1) of the Act is summarized below, based on the analysis of these issues contained in the Species Report. In considering what factors might constitute threats, we must look beyond the mere exposure of the species to the factor to determine whether the species responds to the factor in a way that causes actual impacts to the species. If there is exposure to a factor, but no response, or only a positive response, that factor is not a threat. If there is exposure and the species responds negatively, the factor may be a threat and we then attempt to determine the scope, severity, and impact of the potential threat. If the threat is significant, it may drive or contribute to the risk of extinction of the species such that the species warrants listing as endangered or threatened as those terms are defined by the Act. This does not necessarily require empirical proof of a threat. The combination of exposure and some corroborating evidence of how the species is likely impacted could suffice. The mere identification of factors that could impact a species negatively is not sufficient to compel a finding that listing is appropriate; we require evidence that these factors are operative threats that act on the species to the point that the species meets the definition of an endangered or threatened species under the Act.

Range and Population Size

The best available information does not show any differences between the current and historical range of the ashy storm-petrel (Service 2013, pp. 8–9). The known range of the ashy-storm petrel has expanded slightly in recent years, with the confirmation of breeding at new locations at the northern end of the breeding range. Ashy storm-petrels may have been present at these locations historically, but adequate surveys had not been done to determine presence. Therefore, we do not consider these new locations to be an expansion of the historical range. Thus, the Service considers the at-sea geographic distribution (marine range) of the ashy storm-petrel to include waters off the western coast of North America from latitude 42° N (approximately the California–Oregon State line) south to latitude 28° N (approximately Islas San Benitos, Mexico), and approximately 75 mi (120 km) out to sea from mainland and island coasts (Service 2013, p. 9).

The current total global (restricted to California and Mexico) population size of breeding ashy storm-petrels at all known locations is estimated at between 10,000 and 11,000 individuals (Service 2013, p. 16). We estimate a total current global population of breeding and nonbreeding individuals between about 18,700 and 20,600 birds (Service 2013, p. 16). These estimates account only for known population occurrences. Unconfirmed and potentially unknown locations are not included in the estimate; however, the existence of sizeable unknown populations (on the scale of SE Farallon or Channel Islands) is unlikely, given the considerable survey efforts that have occurred (Service 2013, p. 16).

Population size and productivity (nesting success) are two measures of population status, along with trends in those measures over time. Because over 90 percent of the estimated breeding population is restricted to SE Farallon Island and the Channel Islands, and most colony data are derived from those two locations, we will focus on those locations for population trends and productivity estimates. Research on productivity has been conducted only at SE Farallon Island and Santa Cruz Island (Service 2013, pp. 17).

We do not have any comparable colony size data for evaluating population trends before 1992, when standardized mist netting efforts began on SE Farallon Island (Service 2013, p. 22). The best data available are based on the mist net population index there, and show up and down variation from 1992 to about 2001. The Service's review of this data found a significant average increase in the ashy storm-petrel population index of 22.1 percent per year from 2000–2006, and a mean non-significant decrease in the ashy storm-petrel population index on SE Farallon Island of 7.19 percent per year from 2007 to 2012 (Service 2013, p. 21). We conclude that the population is currently experiencing fluctuations due to various factors, including avian predation. After assessing the best available scientific data, we have concluded that there is no consistent long-term trend in the species' population nesting on SE Farallon Island.

The Channel Islands population comprises an estimated 36 percent of the total ashy storm-petrel population (Service 2013, p. 26). We currently have no published studies of population trends on the Channel Islands. The best available scientific and commercial information consists of data collected using varying methods and incomplete analyses (Service 2013, p. 26). As a result, the available information does not allow us to conclude any trends for the Channel Islands population of the ashy storm-petrel. The Species Report has more detailed information on population trends and productivity for the ashy-storm petrel (Service 2013, pp. 16–28; *http://www.fws.gov/sfbaydelta/*).

Analysis Under Section 4(a)(1) of the Act

The Act requires that the Secretary determine whether a species is endangered or threatened because of any of the five factors enumerated in 16 U.S.C. 1533(a)(1). Our discussion of the threats categorized under each of these five factors is contained in the Species Report (Service 2013; *http://www.fws.gov/sfbaydelta/*). In the Species Report, we present detailed discussions of current and future threats to the ashy storm-petrel, and we considered how threats categorized under each of the five factors are affecting the species. For each threat, we describe the timing, scope, and severity. In the Species Report, we explain that the timing (immediacy) is recorded for threats, but it is not used in the calculation of threat impact. Additionally, threat impact is not calculated for threats where timing values are long-term future or past/historical. We describe the scope as the proportion of the ashy storm-petrel breeding occurrences that are reasonably expected to be affected by a threat within three generations, given continuation of current circumstances and trends. Within the scope of the threat, the severity is the level of

damage to ashy storm-petrel populations or breeding occurrences that is reasonably expected from the threat within three generations, given continuation of current circumstances and trends.

All potential threats currently acting upon the ashy storm-petrel or likely to affect the species in the foreseeable future (and consistent with the five listing factors identified above) are evaluated and addressed in the Species Report, and summarized in the following paragraphs. The reader is directed to section VI of the Species Report for a more detailed discussion of the threats summarized in this document (Service 2013; *http://www.fws.gov/sfbaydelta/*).

The Species Report evaluates the biological status of the bird and each of the potential threats under the five statutory factors affecting its continued existence. It was based upon the best available scientific and commercial data and the expert opinion of the Species Report team members. Based on the analysis and discussion contained therein, we conclude that climate change (ocean acidification, ocean warming, and sea level rise) (Factor A); invasive species (Factor A); human activities (Factor A); military activities (Factor A); overutilization for commercial, recreational, scientific, or educational purposes (Factor B); house mouse predation (Factor C); skunk predation (Factor C); barn owl predation (Factor C); common raven predation (Factor C); artificial light pollution (Factor E); oil pollution (Factor E); organochlorine contaminants (Factor E); and ingestion of plastics (Factor E) are potential threats that are having a negligible to slight impact on the ashy storm-petrel within the scope of the threat, both now and in the foreseeable future. These factors may have minor impacts on individuals in some locations, but they are not impacting the species as a whole. The full analyses of these possible threats is documented in the Species Report. Based on the analysis contained within the Species Report, we conclude that the best available scientific and commercial information does not indicate that these threats are causing a decline in the species or its habitat, either now or in the foreseeable future.

Predation Impacts

In our threat evaluation in the Species Report, we did find that burrowing owl predation (Factor C) and western gull predation (Factor C) are likely having slight to moderate impacts on the ashy storm-petrel within the scope of the threats. Burrowing owls have been known to frequent SE Farallon Island since at least the late 1880s; since systematic recording of burrowing owls began on SE Farallon Island in 2000, the highest abundance of burrowing owls has occurred in the years 2009–2012 (Service 2013, p. 46). From 2003 through 2010, predation by burrowing owls accounted for 40 percent of ashy storm-petrel predation, and this predation has surpassed predation by western gulls in recent years (Service 2013, p. 46). In the Species Report, we concluded that the timing of burrowing owl predation is ongoing and the scope is large because all individuals on SE Farallon Island are potentially exposed to the threat of burrowing owl predation (Service 2013, p. 47). Using data collected on SE Farallon Island in the period 2003–2012, we made a rough estimate of the effect that burrowing owls could have on ashy storm-petrels. Our calculations showed that around 10 percent of the ashy storm-petrel population could be eliminated over the next 40 years. This method used to calculate owl predation may underestimate the effects that owl predation has on petrels. Because the ashy storm-petrel population growth rate is sensitive to adult survival and it is likely that not all predated wings are found and included in the calculations, it is possible that population declines could be greater (Service 2013, p. 47). While this potential loss is considered of slight/moderate severity on the Farallon Islands, we conclude that, overall, the current best available scientific and commercial information does not indicate that burrowing owl predation is resulting in a downward trend to the species as a whole.

The Species Report further examined western gull predation on ashy storm-petrels at the Farallon Islands (Service 2013, pp. 48–49). The Farallon Islands hosts the world's largest western gull breeding population, although the population of western gulls on the islands has recently undergone a slight decline, numbering around 17,500 gulls (Service 2013, p. 48). Western gulls predated over 75 ashy storm-petrels per year on SE Farallon Island during the period 2003–2009, but predation by gulls has recently decreased to less than 60 individuals per year during the period 2009–2012, possibly due to the increase during that time of burrowing owl predation on petrels (Service 2013, p. 49). In the Species Report, we concluded that the timing of western gull predation is ongoing and the scope is large because all individuals on SE Farallon Island are potentially exposed to the threat of western gull predation (Service 2013, p. 47). Using data collected on SE Farallon Island from 2003 through 2012, we made a rough estimate of the effects that western gulls could have on ashy storm-petrels over the next 40 years. Our calculations show that around 10 percent of the ashy storm-petrel population could be eliminated (Service 2013, p. 49). However, because the ashy storm-petrel population growth rate is sensitive to adult survival and it is likely that not all predated wings are found and included in our calculations, it is possible that population declines could be greater. While this potential loss is considered of slight/moderate severity on the Farallon Islands, we conclude that, overall, the current best available scientific and commercial information does not indicate that western gull predation is resulting in a downward trend in the species population. In addition, the available scientific information does not indicate that the effects of burrowing owl predation and western gull predation are additive; as burrowing owl predation has increased on the SE Farallon Island, western gull predation has decreased, as shown in the Species Report.

In summary, the threats to ashy storm-petrel from burrowing owl predation and western gull predation at present and in the foreseeable future do not pose a threat to the long-term persistence of ashy storm-petrel. The threats operating individually do not place the species at immediate risk of extinction, nor do they appear likely to cause the ashy storm-petrel to become endangered within the foreseeable future through all or a significant portion of its range.

A number of conservation measures have taken place or are ongoing that minimize the impact on ashy storm-petrels from the potential threats listed above. These conservation measures are detailed in the Species Report (Service 2013; *http://www.fws.gov/sfbaydelta/*) and include an invasive species eradication program on the SE Farallon Island, human visitation reduction, survey monitoring restrictions, burrowing owl translocations, planning for mouse eradication on the SE Farallon Island, island spotted skunk removal, artificial nest site construction, artificial lighting restrictions, and oil pollution regulations.

Regulatory Protections

The Act requires that the Secretary assess available regulatory mechanisms in order to determine whether existing regulatory mechanisms are adequate to address threats to the species (Factor D). The Species Report includes a

discussion of applicable regulatory mechanisms (Service 2013, pp. 54–64). In it, the Service examines the applicable Federal, State, and international statutory and regulatory mechanisms to determine whether these mechanisms provide protections to ashy storm-petrel. As described in the Species Report, several Federal and State statutes provide protections to ashy storm-petrels by requiring certain actions by land managers. These actions protect habitat or address issues such as predation, military use, human visitation, and eliminating or reducing attractions, such as fixed high-intensity artificial light near petrel breeding sites and attraction lights on vessels.

Based on the analysis contained within the Species Report, we conclude that the best available scientific and commercial information does not indicate that the existing regulatory mechanisms are inadequate to address impacts from the identified potential threats.

Combinations of Potential Threats

When conducting our analysis about the potential threats affecting ashy storm-petrel, we also assess whether the species may be affected by a combination of factors. In the Species Report (Service 2013, pp. 74–75; *http://www.fws.gov/sfbaydelta/*), we identified multiple threats that may have interrelated impacts on the ashy storm-petrel or its habitat. In the northern portion of its range, the greatest threat to ashy storm-petrel populations is from avian predation (Factor C). On SE Farallon Island, burrowing owls and western gulls prey on ashy storm-petrels breeding on the island. Together, these two predators may be causing short-term population effects on the ashy storm-petrel population on the island. Invasive New Zealand spinach (Factor A) restricts access to ashy storm-petrel nest sites for a portion of the population during the height of the breeding season, which likely results in some ashy storm-petrels remaining at the entrance of crevice breeding sites for a longer period of time. This longer entrance time further increases vulnerability of ashy storm-petrels to avian predation from burrowing owls and western gulls (Factor C). However, the current best available scientific and commercial information does not show that these combined impacts are resulting in a long-term downward trend in the species population on the Farallon Islands.

Oceanic foraging habitat is expected to provide declining food resources for the ashy storm-petrel into the future. A number of oceanic threats, including warming sea temperatures and ocean acidification (Factor A), that will affect food resources available to the ashy storm-petrel throughout its range are expected to increase into the future. As the abundance of plastics continues to increase into the future, ingestion of plastics (Factor E) by seabirds will increase in unison with the effects of climate change to habitat (Factor A). Less food in the ocean due to warming sea temperatures and ocean acidification (Factor A) combined with artificial food consumption of plastics in the ocean (Factor E) will result in less nutritional food availability for the ashy storm-petrel. Lights from offshore energy platforms and squid fishing vessels will continue to attract ashy storm-petrels within their vicinity and can result in direct collisions and mortality (Factor E); moreover, ashy storm-petrels may be more vulnerable to predation by gulls after being attracted to artificial lights (Factor C), where they concentrate around lighted boats to feed on squid. The best available scientific and commercial information at this time does not indicate that less nutritional food availability will lead to more collisions with lights that result in mortality. Nor does it indicate that less food, combined with habitat changes due to climate change, will lead to increased vulnerability to predation, or otherwise result in losses to the population.

Sea level rise at the Channel Islands is predicted to inundate portions of sea caves, causing the future loss of nesting habitat in areas used by nesting petrels, potentially resulting in some storm-petrels not nesting, or reducing nesting populations in those caves (Factor A). In the event of future skunk predation causing reproductive failure at any one of the caves (Factor C), and sea level rise reducing habitat for nesting populations in caves (Factor A), the Channel Islands population could suffer direct losses of populations and future breeding ability, a loss exacerbated by the lingering presence of organochlorine contaminants that have resulted in thinning of eggshells and thus impacts to hatching success (Factor E). Mortality may result from collisions with artificial light at Offshore Energy Platforms near the Channel Islands (Factor E). The best available scientific and commercial information at this time does not indicate that sea level rise in combination with skunk predation or collisions with lights will result in a decline to the species. Although we cannot fully quantify these future effects on ashy storm-petrel populations, they may be negative and may exacerbate other threats such as avian predation (Factor C) or an oil spill (Factor E) in any location where the species aggregates. However, at this point in time, the best available scientific and commercial information does not indicate that these threats in combination will result in a decline to the species.

All or some of the potential threats could act in concert to result in cumulative stress on the ashy storm-petrel population. However, the best available scientific and commercial information currently does not indicate that these threats singularly or cumulatively are resulting or will in the future result in a substantial decline of the total population of the species or have large impacts to the ashy storm-petrel at the species level. Therefore, we do not consider the cumulative impact of these threats to the ashy storm-petrel to be substantial at this time, nor into the future.

Determination

As required in section 4(a)(1) of the Act, we conducted a review of the status of the ashy storm-petrel and assessed the five factors in consideration of whether the ashy storm-petrel is endangered or threatened throughout all of its range. We have carefully assessed the best scientific and commercial information available regarding the past, present, and future threats to the ashy storm-petrel. We reviewed information presented in the 2007 petition, information available in our files, our 2008 90-day and 2009 12-month findings in response to the petition, and other available published and unpublished information, including information submitted subsequent to our 2009 finding. We also consulted with species experts and land managers at the areas where ashy storm-petrels occur.

We evaluated each of the potential threats in the Species Report for the ashy storm-petrel, and we determined that climate change (ocean acidification, ocean warming, and sea level rise); invasive species; human activities; military activities; overutilization for commercial, recreational, scientific, or educational purposes; house mouse predation; skunk predation; barn owl predation; common raven predation; artificial light pollution; oil pollution; organochlorine contaminants; and ingestion of plastics are potential threats that are having a negligible to slight impact on the ashy storm-petrel within the scope of the threat. In addition, our Species Report evaluated existing regulatory mechanisms and did not reveal an inadequacy of existing

regulatory mechanisms for the ashy storm-petrel. In our threat evaluation in the Species Report, we did find that burrowing owl predation and western gull predation are likely having a slight to moderate impact on the ashy storm-petrel within the scope of the threats, but these threats do not rise to the level of warranting listing under the Act because this predation may reduce the numbers of ashy storm-petrels at SE Farallon Island, but not to a point that the overall status of the species would be affected. In addition, the historical range for ashy storm-petrel is the same as the current range, so there has not been a loss in the range of the species over time (Service 2013, p. 8). Finally, population trend data does not show that the ashy storm-petrel is in a long-term decline.

The Act defines an endangered species as any species that is ''in danger of extinction throughout all or a significant portion of its range'' and a threatened species as any species ''that is likely to become endangered throughout all or a significant portion of its range within the foreseeable future.'' Based on our analysis conducted in the Species Report and summarized in this finding, and using the best scientific and commercial information available, we find that the magnitude and imminence of threats do not indicate that the ashy storm-petrel is in danger of extinction (endangered), or likely to become endangered within the foreseeable future (threatened), throughout its range. As described in the Species Report, the average lifespan of the ashy storm-petrel is unknown and reproduction is known to commence by age 6 (Service 2013, p. 3). Assuming the average age of first breeding is 5.5 years and adult survivorship is 0.88, then an ashy storm-petrel generation time would be 12.8 years, based on a published method of calculating generation time for birds (Service 2013, p. 29). Using a standard 3-generation (past, present, and future) timeframe to assess risk (*http://intranet.iucn.org/webfiles/doc/SSC/RedList/RedListGuidelines.pdf.*), we calculated this to be approximately 40 years (13-year generation time multiplied by 3 generations, and rounded) (Service 2013, p. 29). However, the long-term potential threat of sea level rise due to climate change was assessed for 2030, 2050, and 2100 due to the temporal scope of existing climate model predictions (Service 2013, p. 29). For purposes of this finding, we have considered the foreseeable future for this species to consist of 40 years.

Therefore, based on our assessment of the best available scientific and commercial information, we find that listing the ashy storm-petrel throughout all or a significant portion of its range as a threatened or an endangered species is not warranted at this time.

Distinct Population Segment

Because we determine here that the ashy storm-petrel does not warrant listing throughout its range as an endangered or threatened species, we next assess whether the ashy storm-petrel is an endangered or threatened species throughout a portion of its range. We consider whether a distinct vertebrate population segment (DPS) or any significant portion of the ashy storm-petrel's range meets the definition of an endangered species or is likely to become endangered in the foreseeable future (threatened). Under the Service's Policy Regarding the Recognition of Distinct Vertebrate Population Segments Under the Endangered Species Act (61 FR 4722, February 7, 1996), three elements are considered in the decision concerning the establishment and classification of a possible DPS. These are applied similarly for additions to or removal from the Federal List of Endangered and Threatened Wildlife. These elements include:

(1) The discreteness of a population in relation to the remainder of the species to which it belongs;

(2) The significance of the population segment to the species to which it belongs; and

(3) The population segment's conservation status in relation to the Act's standards for listing, delisting, or reclassification (i.e., is the population segment endangered or threatened).

Under the DPS policy, a population segment of a vertebrate taxon may be considered discrete if it satisfies either one of the following conditions:

(1) It is markedly separated from other populations of the same taxon as a consequence of physical, physiological, ecological, or behavioral factors. Quantitative measures of genetic or morphological discontinuity may provide evidence of this separation.

(2) It is delimited by international governmental boundaries within which differences in control of exploitation, management of habitat, conservation status, or regulatory mechanisms exist that are significant in light of section 4(a)(1)(D) of the Act.

We determine, based on a review of the best available information, that there are no population segments of the ashy storm-petrel that meet the discreteness conditions of the 1996 DPS policy. As stated in the Species Report, ashy storm-petrels are known to regularly forage up to 220 miles (mi) (354 kilometers (km)) from their breeding grounds and one individual has been located 466 mi (750 km) from its capture site (Service 2013, p. 7; *http://www.fws.gov/sfbaydelta/*). No population of ashy storm-petrel is physically markedly separate from any other population because each population is within the dispersal distance of another population. Moreover, the populations are not markedly separate as a consequence of physiological, ecological, or behavioral factors. In addition, even though the ashy storm-petrel's range includes parts of Mexico, it is not delimited by international governmental boundaries within which differences in control of exploitation, management of habitat, conservation status, or regulatory mechanisms exist that are significant in light of section 4(a)(1)(D) of the Act. Therefore, we have determined that none of the populations meet the discreteness condition.

The DPS policy is clear that significance is analyzed only when a population segment has been identified as discrete. Since we found that no population segments meet the discreteness element, we need not conduct an evaluation of significance for the ashy storm-petrel.

Therefore, no population segments of the ashy storm-petrel qualify as a DPS under our policy and no population segments for the ashy storm-petrel are considered a listable entity under the Act.

Significant Portion of the Range

In determining whether a species is threatened or endangered in a significant portion of its range, we first identify any portions of the range of the species that warrant further consideration. The range of a species can theoretically be divided into portions an infinite number of ways. However, there is no purpose to analyzing portions of the range that are not reasonably likely to be both (1) significant and (2) threatened or endangered. To identify only those portions that warrant further consideration, we determine whether substantial information indicates that: (1) the portions may be significant, and (2) the species may be in danger of extinction there or likely to become so within the foreseeable future. In practice, a key part of this analysis is whether the threats are geographically concentrated in some way. If the threats to the species are essentially uniform throughout its range, no portion is likely to warrant further consideration. Moreover, if any concentration of threats applies only to portions of the species' range that are not significant,

such portions will not warrant further consideration.

If we identify portions that warrant further consideration, we then determine whether the species is threatened or endangered in these portions of its range. Depending on the biology of the species, its range, and the threats it faces, the Service may address either the significance question or the status question first. Thus, if the Service considers significance first and determines that a portion of the range is not significant, the Service need not determine whether the species is threatened or endangered there. Likewise, if the Service considers status first and determines that the species is not threatened or endangered in a portion of its range, the Service need not determine if that portion is significant. However, if the Service determines that both a portion of the range of a species is significant and the species is threatened or endangered there, the Service will specify that portion of the range as threatened or endangered under section 4(c)(1) of the ESA.

We evaluated the current range of the ashy storm-petrel to determine if there is any apparent geographic concentration of potential threats for the species. We examined potential threats from climate change (ocean acidification, ocean warming, and sea level rise); invasive species; human activities; military activities; overutilization for commercial, recreational, scientific, or educational purposes; burrowing owl, western gull, house mouse, skunk, barn owl, and common raven predation; artificial light pollution; oil pollution; organochlorine contaminants; and ingestion of plastics. While some threats are affecting the species in only a portion of its range (for example, gull predation at SE Farallon Island or sea level rise affecting sea cave nesting sites at the Channel Islands), these threats are not having substantial impacts to the populations of ashy storm-petrels at those sites and are not resulting in a decline of the species. Therefore, we found no concentration of threats that suggests that the ashy storm-petrel may be in danger of extinction in a portion of its range. In addition, the 32 known breeding sites of the ashy storm-petrel stretch from Mendocino County, California, to Ensenada, Mexico, and these breeding sites provide for representation, redundancy, and resiliency for the ashy storm-petrel. Therefore, we find that no portion of the range of ashy storm-petrel warrants further consideration of possible endangered or threatened status under the Act. No available information indicates that there has been a range contraction for ashy storm-petrel, and, therefore, we find that lost historical range does not constitute a significant portion of the range for this species.

Our review of the best available scientific and commercial information indicates that the ashy storm-petrel is not in danger of extinction (endangered) nor likely to become endangered within the foreseeable future (threatened), throughout all or a significant portion of its range. Therefore, we find that listing this species as an endangered or threatened species under the Act is not warranted at this time.

We request that you submit any new information concerning the status of, or threats to, the ashy storm-petrel to our Bay–Delta Fish and Wildlife Office (see **ADDRESSES** section) whenever it becomes available. New information will help us monitor this species and encourage its conservation. If an emergency situation develops for this species, we will act to provide immediate protection.

References Cited

A complete list of references cited in this finding is available on the Internet at *http://www.regulations.gov* and upon request from the Bay–Delta Fish and Wildlife Office (see **FOR FURTHER INFORMATION CONTACT**).

Authors

The primary authors of this finding are the staff members of the Pacific Southwest Regional Office and the Bay–Delta Fish and Wildlife Office (see **FOR FURTHER INFORMATION CONTACT**).

Authority

The authority for this section is section 4 of the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 *et seq.*).

Dated: September 25, 2013.

Signed:

Rowan Gould,

Acting Director, U.S. Fish and Wildlife Service.

[FR Doc. 2013–24170 Filed 10–21–13; 8:45 am]

BILLING CODE 4310–55–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

[Docket No. FWS–R4–ES–2013–0040; 4500030114]

RIN 1018–AZ79

Endangered and Threatened Wildlife and Plants; Designation of Critical Habitat for Agave eggersiana, Gonocalyx concolor, and Varronia rupicola

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Proposed rule.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service), propose to designate critical habitat for three Caribbean plants, *Agave eggersiana, Gonocalyx concolor,* and *Varronia rupicola,* under the Endangered Species Act of 1973, as amended (Act). The effect of this rule, if it is made final, would be to conserve habitat for these three Caribbean plants under the Act.

DATES: We will accept comments received or postmarked on or before December 23, 2013. Comments submitted electronically using the Federal eRulemaking Portal (see **ADDRESSES** section, below) must be received by 11:59 p.m. Eastern Time on the closing date. We must receive requests for public hearings, in writing, at the address shown in **FOR FURTHER INFORMATION CONTACT** by December 6, 2013.

ADDRESSES: You may submit comments by one of the following methods:

(1) *Electronically:* Go to the Federal Rulemaking Portal: *http://www.regulations.gov.* In the Search box, enter FWS–R4–ES–2013–0040, which is the docket number for this rulemaking. Then, in the Search panel on the left side of the screen, under the Document Type heading, click on the Proposed Rules link to locate this document. You may submit a comment by clicking on ''Comment Now!''

(2) *By hard copy:* Submit by U.S. mail or hand-delivery to: Public Comments Processing, Attn: FWS–R4–ES–2013–0040; Division of Policy and Directives Management; U.S. Fish and Wildlife Service; 4401 N. Fairfax Drive, MS 2042–PDM; Arlington, VA 22203.

We request that you send comments only by the methods described above. We will post all comments on *http://www.regulations.gov.* This generally means that we will post any personal information you provide us (see the

Information Requested section below for more information).

The coordinates or plot points or both from which the critical habitat maps are generated are included in the administrative record for this rulemaking and are available at *http://www.fws.gov/caribbean/es,* at *http://www.regulations.gov* at Docket No. FWS–R4–ES–2013–0040, and at the Caribbean Ecological Services Field Office (see **FOR FURTHER INFORMATION CONTACT**). Any additional tools or supporting information that we may develop for this rulemaking will also be available at the Fish and Wildlife Service Web site and Field Office set out above, and may also be included at *http://www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: Marelisa Rivera, Deputy Field Supervisor, U.S. Fish and Wildlife Service, Caribbean Ecological Services Field Office, P.O. Box 491, Road 301 Km. 5.1, Boquerón, PR 00622; by telephone (787) 851–7297; or by facsimile (787) 851–7440. Persons who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 800–877–8339.

SUPPLEMENTARY INFORMATION:

Executive Summary

Why we need to publish a rule. Under the Act, the Service shall designate critical habitat for any species or subspecies that is determined to be an endangered or threatened species, to the maximum extent prudent and determinable. Designations of critical habitat can only be completed by issuing a rule. Elsewhere in today's **Federal Register**, we propose to list *Agave eggersiana* and *Gonocalyx concolor* as endangered species, and *Varronia rupicola* as a threatened species, under the Act.

This rule consists of a proposed rule to designate critical habitat for *Agave eggersiana, Gonocalyx concolor,* and *Varronia rupicola* under the Act. Specifically, we propose to:

- Designate approximately 50.6 acres (ac) (20.5 hectares (ha)) of critical habitat for *A. eggersiana* in St. Croix, United States Virgin Islands (USVI).
- Designate approximately 198 ac (80.1 ha) for *G. concolor* in Puerto Rico.
- Designate approximately 6,547 ac (2,648 ha) for *V. rupicola* in southern Puerto Rico and Vieques Island.

The basis for our action. Under section 4(b)(2) of the Act, that the Secretary shall designate critical habitat on the basis of the best available scientific data after taking into consideration the economic impact, national security impact, and any other relevant impact of specifying any particular area as critical habitat. The Secretary may exclude an area from critical habitat if he determines that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat, unless she determines, based on the best scientific data available, that the failure to designate such area as critical habitat will result in the extinction of the species.

We will seek peer review. We are seeking comments from knowledgeable individuals with scientific expertise to review our analysis of the best available science and application of that science and to provide any additional scientific information to improve this proposed rule. Because we will consider all comments and information we receive during the comment period, our final designations may differ from this proposal.

Information Requested

We intend that any final action resulting from this proposed rule will be based on the best scientific and commercial data available and be as accurate and as effective as possible. Therefore, we request comments or information from the public, other concerned governmental agencies, Native American tribes, the scientific community, industry, or any other interested parties concerning this proposed rule. We particularly seek comments concerning:

(1) The reasons why we should or should not designate habitat as ''critical habitat'' under section 4 of the Act (16 U.S.C. 1531 *et seq.*), including whether there are threats to the species from human activity, the degree of which can be expected to increase due to the designation, and whether that increase in threats outweighs the benefit of designation such that the designation of critical habitat is not prudent.

(2) Specific information on:

(a) The amount and distribution of *Agave eggersiana, Gonocalyx concolor,* and *Varronia rupicola* (which we refer to collectively as the three Caribbean plants) and their habitat;

(b) What areas, that were occupied at the time of listing (or are currently occupied) and that contain features essential to the conservation of the species, should be included in the designation and why;

(c) Special management considerations or protection that may be needed in critical habitat areas we are proposing, including managing for the potential effects of climate change; and

(d) What areas not occupied at the time of listing are essential for the conservation of the species and why.

(3) Land use designations and current or planned activities in the areas occupied by the species or proposed to be designated as critical habitat, and possible impacts of these activities on this species and proposed critical habitat.

(4) Information on the projected and reasonably likely impacts of climate change on the three Caribbean plants and proposed critical habitat.

(5) Any foreseeable economic, national security, or other relevant impacts that may result from designating any area that may be included in the final designation. We are particularly interested in any impacts on small entities, and the benefits of including or excluding areas from the proposed designation that are subject to these impacts.

(6) Whether any specific areas we are proposing for critical habitat designation should be considered for exclusion under section 4(b)(2) of the Act, and whether the benefits of potentially excluding any specific area outweigh the benefits of including that area under section 4(b)(2) of the Act.

(7) Whether we could improve or modify our approach to designating critical habitat in any way to provide for greater public participation and understanding, or to better accommodate public concerns and comments.

Include sufficient information with your submission (such as scientific journal articles or other publications) to allow us to verify any scientific or commercial information you include.

Note that submissions merely stating support for or opposition to the action under consideration without providing supporting information, although noted, will not be considered in making a determination, as section 4(b)(2) of the Act directs that determinations as to whether to designated critical habitat for any listed species must be made ''on the basis of the best scientific and commercial data available.''

You may submit your comments and materials concerning this proposed rule by one of the methods listed in the **ADDRESSES** section. We request that you send comments only by the methods described in the **ADDRESSES** section. We will post your entire comment—including your personal identifying information—on *http://www.regulations.gov.* You may request at the top of your document that we withhold personal information such as your street address, phone number, or email address from public review;

however, we cannot guarantee that we will be able to do so.

Comments and materials we receive, as well as supporting documentation we used in preparing this proposed rule, will be available for public inspection on *http://www.regulations.gov,* or by appointment, during normal business hours, at the U.S. Fish and Wildlife Service, Caribbean Ecological Services Field Office (see **FOR FURTHER INFORMATION CONTACT**).

Previous Federal Actions

All previous Federal actions are described in the proposal to list the *Agave eggersiana* and *Gonocalyx concolor* as endangered species, and *Varronia rupicola* as a threatened species, which is published elsewhere in today's **Federal Register**.

Background

Critical habitat is defined in section 3 of the Act as:

(1) The specific areas within the geographical area occupied by the species, at the time it is listed in accordance with the Act, on which are found those physical or biological features:

(a) Essential to the conservation of the species, and

(b) Which may require special management considerations or protection; and

(2) Specific areas outside the geographical area occupied by the species at the time it is listed, upon a determination that such areas are essential for the conservation of the species.

Conservation, as defined under section 3 of the Act, means to use and the use of all methods and procedures that are necessary to bring an endangered or threatened species to the point at which the measures provided pursuant to the Act are no longer necessary. Such methods and procedures include, but are not limited to, all activities associated with scientific resources management such as research, census, law enforcement, habitat acquisition and maintenance, propagation, live trapping, and transplantation, and, in the extraordinary case where population pressures within a given ecosystem cannot be otherwise relieved, may include regulated taking.

Critical habitat receives protection under section 7 of the Act through the requirement that Federal agencies ensure, in consultation with the Service, that any action they authorize, fund, or carry out is not likely to result in the destruction or adverse modification of critical habitat. The designation of critical habitat does not affect land ownership or establish a refuge, wilderness, reserve, preserve, or other conservation area. Such designation does not allow the government or public to access private lands. Such designation does not require implementation of restoration, recovery, or enhancement measures by non-Federal landowners. Where a landowner requests Federal agency funding or authorization for an action that may affect a listed species or critical habitat, the consultation requirements of section 7(a)(2) of the Act would apply, but even in the event of a destruction or adverse modification finding, the obligation of the Federal action agency and the landowner is not to restore or recover the species, but to implement reasonable and prudent alternatives to avoid destruction or adverse modification of critical habitat.

Under the first prong of the Act's definition of critical habitat, areas within the geographical area occupied by the species at the time it was listed are included in a critical habitat designation if they contain physical or biological features (1) essential to the conservation of the species, and (2) which may require special management considerations or protection. For these areas, critical habitat designations identify, to the extent known using the best scientific and commercial data available, those physical or biological features essential to the conservation of the species (such as space, food, cover, and protected habitat). In identifying those physical or biological features within an area, we focus on the principal biological or physical constituent elements (primary constituent elements such as roost sites, nesting grounds, seasonal wetlands, water quality, tide, soil type) that are essential to the conservation of the species. Primary constituent elements are those specific elements of the physical or biological features that provide for a species' life-history processes and are essential to the conservation of the species.

Under the second prong of the Act's definition of critical habitat, we can designate critical habitat in areas outside the geographic area occupied by the species at the time it is listed, upon a determination that such areas are essential for the conservation of the species. For example, an area currently occupied by the species but that was not occupied at the time of listing may be essential to the conservation of the species and may be included in the critical habitat designation. We designate critical habitat in areas outside the geographic area occupied by a species only when a designation limited to its range would be inadequate to ensure the conservation of the species.

Section 4 of the Act requires that we designate critical habitat on the basis of the best scientific data available. Further, our Policy on Information Standards under the Endangered Species Act (published in the **Federal Register** on July 1, 1994 (59 FR 34271)), the Information Quality Act (section 515 of the Treasury and General Government Appropriations Act for Fiscal Year 2001 (Pub. L. 106–554; H.R. 5658)), and our associated Information Quality Guidelines, provide criteria, establish procedures, and provide guidance to ensure that our decisions are based on the best scientific data available. They require our biologists, to the extent consistent with the Act and with the use of the best scientific data available, to use primary and original sources of information as the basis for recommendations to designate critical habitat.

When we are determining which areas should be designated as critical habitat, our primary source of information is generally the information developed during the listing process for the species. Additional information sources may include the recovery plan for the species, articles in peer-reviewed journals, conservation plans developed by States and counties, scientific status surveys and studies, biological assessments, other unpublished materials, or experts' opinions or personal knowledge.

Habitat is dynamic, and species may move from one area to another over time. Climate change will be a particular challenge for biodiversity because the interaction of additional stressors associated with climate change and current stressors may push species beyond their ability to survive (Lovejoy 2005, pp. 325–326). The synergistic implications of climate change and habitat fragmentation are the most threatening facet of climate change for biodiversity (Hannah and Lovejoy 2005, p. 4). Current climate change predictions for terrestrial areas in the Northern Hemisphere indicate warmer air temperatures, more intense precipitation events, and increased summer continental drying (Field *et al.* 1999, pp. 1–3; Hayhoe *et al.* 2004, p. 12422; Cayan *et al.* 2005, p. 6; Intergovernmental Panel on Climate Change (IPCC) 2007, p. 1181). Climate change may lead to increased frequency and duration of severe storms and droughts (Golladay *et al.* 2004, p. 504; McLaughlin *et al.* 2002, p. 6074; Cook *et al.* 2004, p. 1015).

We recognize that critical habitat designated at a particular point in time may not include all of the habitat areas that we may later determine are necessary for the recovery of the species. For these reasons, a critical habitat designation does not signal that habitat outside the designated area is unimportant or may not be needed for recovery of the species. Areas that are important to the conservation of a listed species, both inside and outside the critical habitat designation, will continue to be subject to: (1) Conservation actions implemented under section 7(a)(1) of the Act, (2) regulatory protections afforded by the requirement in section 7(a)(2) of the Act for Federal agencies to ensure their actions are not likely to jeopardize the continued existence of any endangered or threatened species, and (3) section 9 of the Act's prohibitions on taking any individual of the species, including taking caused by actions that affect habitat. Federally funded or permitted projects affecting listed species outside their designated critical habitat areas may still result in jeopardy findings in some cases. Similarly, critical habitat designations made on the basis of the best available information at the time of designation will not control the direction and substance of future recovery plans, habitat conservation plans (HCPs), or other species conservation planning efforts if new information available at the time of these planning efforts calls for a different outcome.

Prudency Determination

Section 4(a)(3) of the Act, as amended, and its implementing regulations (50 CFR 424.12) require that, to the maximum extent prudent and determinable, the Secretary designate critical habitat at the time the species is determined to be an endangered or threatened species. Our regulations (50 CFR 424.12(a)(1)) state that the designation of critical habitat is not prudent when one or both of the following situations exist:

(1) The species is threatened by taking or other human activity, and identification of critical habitat can be expected to increase the degree of threat to the species, or

(2) Such designation of critical habitat would not be beneficial to the species.

There is currently no imminent threat of take attributed to collection or vandalism (see the discussion under Factor B in the proposed listing rule, which is published elsewhere in today's **Federal Register**) for *Gonocalyx concolor* and V*arronia rupicola.* Although there may be a possible immediate threat of take attributed to collection or vandalism for *Agave eggersiana,* the identification and mapping of critical habitat is not expected to intensify the threat to *A. eggersiana.* We have no evidence that collection or vandalism is a current threat to *A. eggersiana.* Even if we did, general agave locations are already published on the web, so publication of location information in connection with this proposed designation should not intensify such a threat.

In the absence of a finding that the designation of critical habitat would increase threats to a species, if there are any benefits to a critical habitat designation, then we may find that such designation is prudent. Here, the potential benefits of designation include: (1)Triggering consultation under section 7 of the Act, in new areas for actions in which there may be a Federal nexus where it would not otherwise occur because, for example, it is or has become unoccupied or the occupancy is in question; (2) focusing conservation activities on the most essential features and areas; (3) providing educational benefits to State or county governments or private entities; and (4) preventing people from causing inadvertent harm to the species.

Therefore, because we have determined that the designation of critical habitat would not likely increase the degree of threat to the species and may provide some measure of benefit, we find that designation of critical habitat is prudent for *Agave eggersiana, Gonocalyx concolor,* and *Varronia rupicola.*

Critical Habitat Determinability

Having determined that designation is prudent, under section 4(a)(3) of the Act, we must find whether critical habitat for the three Caribbean plants is determinable. Our regulations at 50 CFR 424.12(a)(2) state that critical habitat is not determinable if information sufficient to perform required analyses of the impacts of the designation is lacking, or the biological needs of the species are not sufficiently well known to permit identification of an area as critical habitat.

We reviewed the available information pertaining to the biological needs of the species and habitat characteristics where the species are located. This and other information represent the best scientific data available and have led us to conclude that the designation of critical habitat is determinable for *Agave eggersiana, Gonocalyx concolor,* and *Varronia rupicola.*

Physical or Biological Features

In accordance with section 3(5)(A)(i) and 4(b)(1)(A) of the Act and regulations at 50 CFR 424.12, in determining which areas within the geographic area occupied by the species at the time of listing to designate as critical habitat, we consider the physical or biological features (PBFs) that are essential to the conservation of the species and which may require special management considerations or protection. These include, but are not limited to:

(1) Space for individual and population growth and for normal behavior;

(2) Food, water, air, light, minerals, or other nutritional or physiological requirements;

(3) Cover or shelter;

(4) Sites for breeding, reproduction, or rearing (or development) of offspring; and

(5) Habitats that are protected from disturbance or are representative of the historical, geographic, and ecological distributions of a species.

We derive the specific physical or biological features required for the three Caribbean plants from studies and observations of the three species' habitat, ecology, and life history as described below. Unfortunately, little is known of the specific habitat requirements for the three Caribbean plants. To identify the physical and biological needs of the species, we have relied on current conditions at locations where the three species exist and the limited information available for these species.

Space for Individual and Population Growth and for Normal Behavior

Agave eggersiana

Agave eggersiana is endemic to the island of St. Croix, USVI. The species is found growing in the subtropical dry forest zone, which covers about 72 percent of the surface of St. Croix. The variables used to delineate any given life zone are defined by mean annual precipitation and mean annual bio-temperature (Ewel and Whitmore 1973, p. 2), and are characterized by an association of animals and plants (Mac *et al.* 1998, p. 317). Subtropical dry forests are lowland semi-deciduous and lowland drought deciduous forest. The vegetation in this life zone usually consists of a nearly continuous, single-layered canopy, with little ground cover. Tree heights usually do not exceed 49 feet (ft) (15 meters (m)) and crowns are typically broad, spreading, and flattened (Ewel and Whitmore 1973, p. 10).

Dry forest structure is greatly influenced by wind, salt spray and the presence of fresh water. Some of the native tree species that are common in subtropical dry forest in the USVI are *Bursera simaruba* (L.) Sarg. (gumbo limbo), *Amyris elemifera* L. (torch wood), *Capparis cynophallophora* L. (Jamaican caper), *Cordia rickseckeri* Millsp. (black manjack), *Pisonia subcordata* Sw. (water mampoo), *Plumeria alba* L. (white frangipani), and *Pictetia aculeata* (Vahl) Urban (fustic) (Brandeis and Oswalt, 2007, p. 13; Ewel and Whitmore 1973, p. 16; Chakroff 2010, p. 8).

Plant communities where *Agave eggersiana* occurs are coastal cliffs with sparse or no vegetation and coastal shrubland areas. The plant community in these areas is predominately native vegetation and either no competitive, nonnative, invasive plant species or such species in quantities low enough to have minimal effects on the survival of *A. eggersiana.* These communities and their associated native plant species are provided in the Status Assessment for *A. eggersiana* (see *Habitat* section of our proposed listing rule, which is published elsewhere in today's **Federal Register**).

Therefore, based on the above information, we identify the vegetation composition areas (e.g., dry coastal cliffs and dry shrubland) as an essential physical or biological feature for this species.

Gonocalyx concolor

Gonocalyx concolor is a Puerto Rican endemic plant species that has been found growing only in the elfin and ausubo (*Manilkara bidentata*) forests within the Carite Commonwealth Forest, which lies within the municipalities of Cayey, Patillas, and San Lorenzo in east-central Puerto Rico. Zonation of forests within montane habitats on tropical islands is condensed into a narrow altitudinal range (Weaver *et al.* 1986, p. 79). Both the elfin and ausubo forests are within the subtropical lower montane very wet forest life zone and have similar climate conditions (Ewel and Whitmore 1973, p. 32).

The elfin forest is found on exposed peaks and ridges of Cerro La Santa, above 2,900 ft (880 m) in elevation from sea level, occupying approximately 24.9 acres (ac) (10.1 hectares (ha)) in the Carite Commonwealth Forest (Silander *et al.* 1986, p. 178). The elfin forest vegetation is characterized by gnarled trees less than 7 meters tall, high basal area, small diameters, a large number of stems per unit area, and extremely slow growth rates (Ewel and Whitmore 1973, p. 45). The vegetation is commonly saturated with moisture, frequently enveloped in clouds, and both aerial and superficial roots are common (Weaver *et al.* 1986, p. 79). The plant association in this area is generally comprised by few species of native trees and native ferns, and is dense with epiphytes, including bromeliads and mosses (Weaver *et al.* 1986, p. 79). The native tree composition includes: *Tabebuia schumanniana* (roble colorado), *Tabebuia rigida* (roble de sierra), *Ocotea spathulata* (nemoca cimarrona), *Eugenia borinquensis* (guayabota), *Clusia minor* (cupey de monte), and *Prestoea acuminata* var. *montana* (sierra palm) (Weaver *et al.* 1986, p. 80; Silander *et al.* 1986, p. 191). Additionally, some areas were planted with *Eucalyptus robusta* (O. Monsegur, UPRM, unpublished data, 2006).

The ausubo forest is only found along the Rio Grande de Patillas River basin and intermittent streams between 2,000 ft (620 m) and 2,300 ft (720 m) of elevation (DNR 1976, p. 169); occupying approximately 179.2 ac (72.5 ha) in the Charco Azul area within the Carite Commonwealth Forest (Silander *et al.* 1986, p.190). The ausubo forest is characterized by evergreen vegetation, high species richness, rapid growth rate of successional trees, epiphytic ferns, bromeliads, and orchids (Ewel and Whitmore 1973, p. 32). The vegetation in this area is generally comprised of native trees (i.e., *Manilkara bidentata* (ausubo), *Dacryodes excelsa* (tabonuco), *Guarea guidonia* (guaraguao), and *Cyrilla racemiflora* (swamp titi)) (Francis and Lowe 2000, p. 345; DNER 2008, p. 2).

Gonocalyx concolor has been found growing on the canopy of the tallest tree areas, growing on tree trunks (epiphytic), clambering (using other vegetation as support), and laying on the litter in the forest floor (C. Pacheco and O. Monsegur, Service, unpublished report, 2013, p. 3). The life history of this species has not been studied; however, it seems that the elfin and the ausubo forests provide space for individuals and population growth of *G. concolor.* Furthermore, the climate in these forests appears to support the normal behavior, growth, and viability of *G. concolor* during most of its life stages; suggesting the species may be a dwell obligate of these types of habitat, as it has not been found elsewhere. Changes in temperature, humidity, and solar insolation result in changes in habitat condition and vegetation composition, with serious effects on *G. concolor.* (See the **Summary of Factors Affecting the Species** section of our proposed listing rule, which is published elsewhere in today's **Federal Register**).

Therefore, based on the above information, we identify the vegetation composition found in the elfin and the ausubo forests as an essential physical or biological feature for this species.

Varronia rupicola

Varronia rupicola is a Puerto Rican bank (biogeographical area) endemic that grows within the subtropical dry forest life zone overlying a limestone substrate (Ewel and Whitmore 1973, p. 72). The Puerto Rican bank is a geographical unit that includes the main island of Puerto Rico, Vieques, Culebra, the USVI (excluding St. Croix), and the Island of Anegada. In Puerto Rico, this life zone is mainly located on the south coast extending 74 miles (mi) (120 kilometers (km)) from the Municipality of Cabo Rojo to the Municipality of Guayama, and to the eastern of Puerto Rico, including the Island of Vieques (Ewel and Whitmore 1973, p. 72; Murphy and Lugo 1986, p. 89).

The species has been recorded in forested hills with open to relatively dense scrub and shrub lands 6.5 to 9.8 ft (2 to 3 m) in height; in low forest with canopy from 8 to 15 ft (3 to 5 m) high; and at the edge of a dense, low, coastal shrubland and forest. *Varronia rupicola* is associated with dry forest native vegetation dominated by *Gymnanthes lucida* (shiny oysterwood, or yaití), *Exostema caribaeum* (princewood, or albarillo), *Pisonia albida* (corcho), *Pictetia aculeata* (fustic, or tachuelo), *Thouinia portoricensis* (ceboruquillo, or serrazuela), *Coccoloba krugii* (whitewood), *Pilosocereus royenii* (Royen's tree cactus, or sebucán), *Bursera simaruba* (gumbo limbo, or almacigo), *Erithalis fruticosa* (black torch), *Guettarda krugii* (frogwood, or cucubano), *Tabebuia heterophylla* (pink trumpet tree, or roble), *Hypelate trifoliata* (inkwood), *Coccoloba diversifolia* (pigeonplum, or uvilla), *Cassine xylocarpa* (marbletree, or coscorrón), *Krugiodendron ferreum* (black ironwood, or palo de hierro), *Jacquinia berterii* (barkwood), *Bourreria succulenta* (strongbark, or palo de vaca), *Crossopetalum rhacoma* (maidenberry, or pico de paloma), *Antirhea acutata* (placa chiquitu, or quina), and *Amyris elemifera* (torchwood).

In the island of Anegada (British Virgin Islands), *Varronia rupicola* was found in open limestone pavement and sand dunes. During a recent study in this Island, the species was found in higher abundance (based on percentage occurrence across plots) on limestone, but also widespread within the sand dunes (Clubbe *et al.* 2004, p. 344).

Therefore, based on the above information, we identify remnants of scrubland and shrubland forest that occurs within the subtropical dry forest life zone overlying limestone substrate as an essential physical or biological feature for this species.

Food, Water, Air, Light, Minerals, or Other Nutritional or Physiological Requirements

Agave eggersiana

The island of St. Croix, USVI, is located in the Caribbean, where the warm sea stabilizes air temperatures and diurnal temperature changes approximate annual fluctuations. The mean annual temperature of the region at sea level is lower than 75 degrees Fahrenheit (°F) (24 degrees Celsius (°C)). This subtropical climate results from the location of St. Croix at the lower limit of the tropical region (Ewel and Whitmore 1973 p. 8; Mac *et al.* 1998, p. 315).

The island of St. Croix has easterly trade winds of 15 miles per hour (24 kilometers per hour) or more, which keep the humidity relatively low (Chakroff 2010, p. 7). This island is much drier than most of the Greater Antilles, averaging 40 inches (in) (102 centimeters (cm)) of rain in the west, and about 30 in (76 cm) in the east. Rain usually comes in the form of brief tropical showers. The wettest and hottest months are July to October. Hurricane season falls within these same months, with September being the most active for tropical storms. The USVI have been hit by four major hurricanes in recent years: Hugo (1989), Luis and Marilyn (1995), Lenny (1999), and Omar (2008) (Mac *et al.* 1998, p. 316; Chakroff 2010, p. 7; *http://www.srh.noaa.gov/sju/?n=mean_annual_precipitation2*). The average mid-island temperature is 78.8 °F (26 °C), with a variation of only 5 to 9 °F (3 to 5 °C) between the warmest and coolest months (Mac *et al.* 1998, p. 316). This type of climate regime regulates the dry forest structure conditions necessary for the establishment of the species.

Soils substrates supporting *Agave eggersiana* for anchoring or nutrient absorption vary depending on the habitat and location. The natural populations of *A. eggersiana* grow on top of various soil classifications. Cramer, Glynn, Hasselberg, Southgate, and Victory series are among the ones where the species can be found. The general description of the soils mentioned above are provided in the Status Assessment for *A. eggersiana* (see Habitat section of our proposed listing rule, which is published elsewhere in today's **Federal Register**). The soils are all well-drained, and although there are rainy months, the ground does not retain excess water and change the vegetation of the dry forest structure.

Therefore, based on the information above, we identify the dry climate regime that regulates the dry forest structure and the well-drained soils of Cramer, Glynn, Hasselberg, Southgate, and Victory series to be physical or biological features for this species.

Gonocalyx concolor

The variables used to delineate any given life zone are mean annual precipitation and mean annual temperature. The life zones and associations of which they are comprised only define the potential vegetation or range of vegetation types that might be found in an area (Ewel and Whitmore 1973, p. 5). The mean annual precipitation at the Carite Commonwealth Forest is 88.7 in (225.3 cm), with February to April the drier months (NOAA 2013, *http://www.srh.noaa.gov/sju/?n=climo_cayey*). The mean temperature is 72.3 °F (22.7 °C), varying from 68 °F (20 °C) in January to 73 °F (24 °C) in July (Silander *et al.* 1986, p.183).

The Carite Commonwealth Forest is underlain by volcanic-sedimentary rock (DNR 1976, p. 168). The forest topography is rough and highly dissected by intermittent streams, with steep slopes ranging from 20 to 60 percent. The forest's soil is primarily comprised by Los Guineos complex (Silander *et al.* 1986, p. 179). Los Guineos soils were formed from residuum gathering from sandstone parental material and consist of very deep, acidic, clayey, well-drained soils on side slopes of mountains (NRCS 2013, p. 11). This type of soil occupies more than 80 percent (5,860.1 ac (2,371.5 ha)) of the Carite Commonwealth Forest, at elevations from 1,900 ft (580 m) to 3,000 ft (900 m) from sea level (Silander *et al.* 1986, p. 179).

Therefore, based on the information above, we identify mean annual precipitation of 88.7 in (225.3 cm), mean annual temperature of 72.3 °F (22.7 °C), and Los Guineos type of soil (i.e., very deep, acidic, clayey, well-drained soils on side slopes of mountains) to be physical or biological features for this species.

Varronia rupicola

Like *Agave eggersiana, Varronia rupicola* occurs within the subtropical dry forest life zone (*sensu* Holdridge 1967). Moisture availability as a function of shallow soils plus low rainfall and its seasonality determines the forest productivity, growth characteristics, water loss, and physiognomy in subtropical dry forest life zones where temperature tends to be constant throughout the year (Lugo *et al.* 1978, p. 278). Average rainfall for the Guánica Forest (important area for the species in Puerto Rico) is 860 mm (Lugo *et al.* 1996, p. 2).

The majority of the suitable habitat and known populations of *Varronia rupicola* in Puerto Rico lie within the Ponce limestone formation, a Mid-Tertiary pink to white, fine-grain limestone (Lugo *et al.* 1996, p. 2). In Puerto Rico, this formation extends from the western end of the Guánica Commonwealth Forest, east toward the Municipality of Ponce (El Tuque). The soils at the Guánica Forest are described as shallow, alkaline, and derived from limestone rock (Molina and Lugo 2006, p. 355). According to Murphy and Lugo (1986, p. 56), these soils are nutrient-rich, but only a small fraction of the total phosphate and potassium is readily available. These soil factors increase the effects of low rainfall and its seasonality on the vegetation.

Therefore, based on the information above, we identify shallow and alkaline soils derived from limestone rock and an average rainfall of 34 in (86 cm) to be physical or biological features for this species.

Cover or Shelter

Agave eggersiana

Agave eggersiana occurs in open canopy and open understory habitats and thrives in areas of full sun exposure (O. Monsegur and M. Vargas, Service, pers. obs. 2010 and 2013). The coastal shrublands typically show a low canopy, ranging from 3.2 to 16.4 ft (1 to 5 m) (Moser *et al.* 2010, Appendix A, p. 8–11; O. Monsegur and M. Vargas, Service, pers. obs. 2013). In areas where native species remains dominant and nonnatives have not occupied the understory, these coastal shrublands provide suitable habitat for the natural recruitment of *A. eggersiana.* In addition, the bare rock of coastal cliffs seems to provide an ecological niche for *A. eggersiana.* Once the species gets established on cliff areas, it may become dominant as observed on the South Shore (Cane Garden) population. Therefore, based on the information above, we identify open cover habitats (e.g., open canopy or open understory) to be physical or biological features for this species.

Gonocalyx concolor

Very little is known about habitat parameters specifically relating to cover or shelter for *Gonocalyx concolor.* In remnants and late successional vegetation of elfin forest, the species is normally found growing as epiphytic and clambering on dead and live stand trees, and crawling over the forest floor (C. Pacheco and O. Monsegur, Service, unpublished data, 2013). In the ausubo forest, this species has been described growing only as epiphytic and clambering on dead and live stand trees (O. Monsegur, unpublished data, 2006). Both types of forest show a single canopy layer that seldom exceeds 22 ft (7 m) in height. Therefore, based on the information above, we identify the remnants and late successional vegetation of elfin and ausubo forests with a single canopy layer of about 22 ft (7 m) in height to be physical or biological features for this species.

Varronia rupicola

This species has been recorded in forested hills with open to relatively dense shrublands ranging between 6.5 to 9.8 ft (2 to 3 m) in height; in low forest with canopy from 8 to 15 ft (3 to 5 m) high; and at the edge of a dense, low, coastal shrubland and forest. On the island of Anegada, the species is located on open limestone pavement and sand dunes. Despite the species' preference for gaps, it remains associated to remnants of native forest.

In a recent study at Anegada, *Varronia rupicola* was found in higher abundance (based on percentage occurrence across plots) on limestone, but also widespread within the sand dunes (Clubbe *et al.* 2004, p. 344). This kind of forest structure provides protection against environmental variation and stochastic events, allowing the species to recover without compromising population numbers. The species is associated to remnants of native dry forest vegetation. At the Guánica Commonwealth Forest, the most abundant species are *Gymnanthes lucida, Exostema caribaeum, Pisonia albida, Pictetia aculeata, Thouinia portoricensis, Coccoloba krugii,* and *Pilosocereus royenii* (Murphy and Lugo 1986, p. 91). These species account for 50 percent of the importance value (abundance) within the forest and characterize the Deciduous Forest and Scrub Forest vegetation described by Murphy *et al.* (1995, p. 187). Other dominant species within the *V. rupicola* habitat include *Bursera simaruba, Erithalis fruticosa, Guettarda krugii, Tabebuia heterophylla, Hypelate trifoliata, Coccoloba diversifolia, Cassine xylocarpa, Krugiodendron ferreum, Jacquinia berterii, Bourreria succulenta, Crossopetalum rhacoma, Antirhea acutata,* and *Amyris elemifera* (Murphy and Lugo 1986, p. 91). The specie is also associated to a shrub layer dominated by *Croton humilis, Eupatorium sinuatum, Lantana reticulata,* and *Turnera diffusa.*

Therefore, based on the information above, we identify forested hills with open to relatively dense shrubland forest dominated by native species to be physical or biological features for this species.

Sites for Breeding, Reproduction, or Rearing (or Development) of Offspring

Agave eggersiana

Agave eggersiana dies after producing flowers (monocarpic life cycle) and produces a large flowering scape (massive inflorescence; a group or cluster of flowers arranged on a stem that is composed of a main branch or a complicated arrangement of branches) (Rogers 2000, p. 218). After flowering, the panicles (inflorescence) produce numerous small vegetative bulbs (bulbils) (Proctor and Acevedo-Rodríguez 2005, p. 118). The small vegetative bulbils will fall near the parental agave and attach to the ground on the coastal cliffs and dry coastal shrubland. Coastal cliffs, which include bare rock or sparse native vegetation, create an environment where the canopy is less than 1 meter in height, and allow the bulbils to compete for ground area. The dry coastal shrubland includes dry forest structures where the open canopy and open understory habitat also allows the bulbils to compete for ground area. These open canopy or open understory structures allow *A. eggersiana* good sun exposure where the species seems to thrive (for further discussion of these communities and their associated native plant species, seethe Status Assessment for *A. eggersiana* in the *Habitat* section of our proposed listing rule, published elsewhere in today's **Federal Register**). Therefore, based on the information above, we identify the vegetation communities in the coastal cliffs and dry coastal shrublands where *A. eggersiana* occurs to be physical or biological features for this species.

Gonocalyx concolor

The reproductive biology and ecology of *Gonocalyx concolor* have not been studied. We have no information available beyond the habitat where the species is found and its behavior in that habitat. However, as indicated above, it seems that the conditions of the elfin and ausubo forests support the normal behavior, growth, and viability of *G. concolor* during most of its life stages. Therefore, based on the information above, we identify the elfin and ausubo forests to be physical or biological features for this species.

Varronia rupicola

Varronia rupicola has been reported flowering and fruiting in December to January (Breckon and Kolterman 1996, p. 4), and in June–July (Monsegur and Breckon 2007, p. 1). Fruit production in the wild at the Guánica Commonwealth Forest and in the Municipality of Ponce seem to be high, and there is evidence of recruitment associated to the majority of the clusters of individuals (Monsegur, USFWS, pers. obs. 2013). Under greenhouse conditions, seed germination has been reported at no less than 67 percent (Wenger *et al.* 2010, p. 23). Germination in the wild has also been observed to be high, particularly on shrubs growing exposed to sunlight. However, there seems to be a high mortality (natural thinning) of seedlings, and only a few individuals make the transition to sapling stages (O. Monsegur, Service, pers. obs. 2013). Furthermore, despite the showy red fruits of *V. rupicola,* its dispersion seems to be limited by gravity, as the majority of the seedlings lie under the parent tree or downslope. The wide range of the species suggests a former animal disperser, probably a bird.

Material germinated in the Service greenhouse at Cabo Rojo National Wildlife Refuge flowered and produced fruits about 1 year after planted (O. Monsegur, Service, pers. obs. 2013). The rapid development of the species as reproductive individuals, and the finding of individuals along recently disturbed sites (i.e., new dirt roads) and natural forest gaps, may indicate that *Varronia rupicola* is an early colonizer (pioneer) species of dry coastal forest. The above information highlights the importance of open to relatively low dense shrubland forest (scrub forest and deciduous forest or shrubland) dominated by native species for the self-recruitment of the species and sustainability of the natural populations. As previously mentioned, moisture availability as a function of shallow soils, plus low rainfall and its seasonality, are the factors suggested as determining forest productivity, growth characteristics, water loss, and physiognomy. The diversity within the dry coastal native forest of Puerto Rico is explained by the wide diversity of habitats produced by the proximity of the limestone basement to the surface and the subsequent variation in soil

depth. These unique native forests provide the adequate and stable environmental conditions for the reproduction and natural recruitment of the species.

Therefore, based on the information above, we identify open to relatively dense shrubland forest (scrub forest and deciduous forest or shrubland) dominated by native species to be a physical or biological feature for this species.

Habitats Protected From Disturbance or Representative of the Historical, Geographic, and Ecological Distributions of the Species

Agave eggersiana

There are reports from Britton and Wilson (1923, p. 156) that *Agave eggersiana* occurred in the eastern dry areas in St. Croix. This area harbors dry forest conditions and native vegetation that provide suitable habitat for *A. eggersiana.* Most of that eastern end is currently owned and managed for conservation by the USVI Government and The Nature Conservancy. The upper slopes and steep areas of eastern St. Croix provide essential dry forest habitat conditions for the reintroduction and the recovery of the species. These forest harbors xeric native vegetation and forest structure that provides shelter, space for growing and breeding, and food and water resources necessary for the species. However, we do not have current evidence that *A. eggersiana* occurs in this area.

Since 2007, *Agave eggersiana* has been introduced within U.S. National Park Service (NPS) properties (i.e., Salt River National Park and Ecological Preserve, and Buck Island Reef Monument) that are outside the known historical range of the species. In addition, there is an intra-agency agreement under the Service's Coastal Program to restore habitat in the area and plant native flora in Salt River National Park and Ecological Preserve. *A. eggerisana* is one of the plants used as part of the native plant restoration agreement.

Therefore, based on the information above, we identify the dry forest conditions in the eastern side of St. Croix to be part of the physical or biological features for this species.

Gonocalyx concolor

The elfin and the ausubo forest where *Gonocalyx concolor* currently exists are owned by the Commonwealth of Puerto Rico. This land has been managed for conservation by the Puerto Rico Department of Natural and Environmental Resources (DNER) since 1975 (back then, Department of Natural Resources; DNR 1976, p. 169). Before 1975, the elfin forest area in Cerro La Santa (Carite Commonwealth Forest) was managed by the Commonwealth of Puerto Rico as a preferred site for the installation of telecommunication tower facilities for television and radio, and for military and governmental purposes. These types of activities may have caused disturbance to the habitat of *G. concolor,* because Cerro La Santa is one of the two known locations of the species. Although the Carite Commonwealth Forest is under local government protection, the area of Cerro La Santa is still vulnerable to habitat modification resulting from maintenance and potential expansion of existing telecommunication facilities. Therefore, based on the information above, we identify the elfin and ausubo forests found within the Carite Commonwealth Forest to be physical or biological features for this species.

Varronia rupicola

The species has been historically recorded from the geographical area comprising the Guánica Commonwealth Forest in southwestern Puerto Rico, and the area of the Vieques National Wildlife Refuge (NWR) in the island of Vieques, eastern Puerto Rico. The Guánica Forest was designated as a Commonwealth forest in 1917, by Governor Arthur Yager, and has been protected and managed since 1930 (Lugo *et al.* 1996, p. 2; Murphy and Lugo 1990, p. 15). It is now the largest Commonwealth-protected area over limestone substrate in Puerto Rico, with an estimated area of about 10,872 ac (4,400 ha) (Miguel Canals, DNER, pers. comm. 2009). The Guánica Commonwealth Forest is divided in two main contiguous areas: The east section, which includes the original forest area, and the west section, added after 1950 (Lugo *et al.* 1996, p. 2). This forest is considered one of the best examples of a subtropical dry forest in the world (Murphy and Lugo 1990, p. 15; Ewel and Whitmore 1973, p. 72). The Guánica Commonwealth Forest harbors remnants of native dry forest vegetation over limestone pavement, some of these considered as pristine forest. Since the forest have been protected and managed for over 90 years, native vegetation has recovered from previous deforestation for charcoal production. As a result of this, the forest harbors populations of several of the rarest plants endemic to the dry forest of Puerto Rico, and the presence of stands of invasive nonnatives remains associated to areas previously inhabited and along roads within the forest. However, it is important to notice that *Varronia rupicola* also occurs within privately owned lands outside the Guánica Commonwealth Forest, which makes it vulnerable to habitat destruction.

On Vieques Island, about 54 percent of the land is a National Wildlife Refuge managed by the Service (Vieques NWR CCP & EIS 2007, p. 2). Some areas within the refuge harbor suitable habitat for *Varronia rupicola,* providing protection to the species' habitat and probably to undetected populations (Vieques NWR CCP & EIS 2007, p. 2). However, only three patches of dry forest vegetation over limestone substrate that harbor *V. rupicola* populations have been currently identified in the island of Vieques and only two are located within the Vieques NWR. The remaining third patch belongs to the Commonwealth of Puerto Rico. These three natural areas are adjacent and represent the remnant of the prime habitat for the species in Vieques.

Therefore, based on the information above, we identify remnants of scrubland and shrubland forest that occurs within the subtropical dry forest life zone overlying limestone substrate to be physical or biological features for this species.

Primary Constituent Elements

Under the Act and its implementing regulations, we are required to identify the physical or biological features essential to the conservation of the three Caribbean plants in areas occupied at the time of listing, focusing on the features' primary constituent elements. We consider primary constituent elements (PCEs) to be the elements of physical or biological features that provide for a species' life-history processes and are essential to the conservation of the species.

Based on our current knowledge of the physical or biological features and habitat characteristics required to sustain the species' life-history processes, we determine the primary constituent elements specific for each of the three plants below:

Agave eggersiana

(1) Areas consisting of coastal cliffs and dry coastal shrublands.

(a) Coastal cliff habitat includes:

(i) Bare rock; and

(ii) Sparse vegetation.

(b) Dry coastal shrubland habitat includes:

(i) Dry forest structure; and

(ii) A plant community of predominately native vegetation.

(2) Well-drained soils from the series Cramer, Glynn, Hasselberg, Southgate, and Victory.

(3) Habitat of sufficient area to sustain viable populations in the coastal cliffs and dry coastal shrublands listed in PCEs (1) and (2), above.

Gonocalyx concolor

(1) Elfin forest at elevations over 2,900 ft (880 m) in Cerro La Santa, Puerto Rico, which includes:

(a) Forest with single canopy layer with trees seldom exceeding 22 ft (7 m) in height.

(b) Associated native vegetation dominated by species such as *Tabebuia schumanniana, Tabebuia rigida, Ocotea spathulata, Eugenia borinquensis, Clusia minor,* and *Prestoea acuminata* var. *montana,* native ferns, and dense cover with epiphytes, including bromeliads and mosses.

(2) Ausubo forest at elevations between 2,000 to 2,300 ft (620 to 720 m) in the Charco Azul, which includes:

(a) Forest with single canopy layer with trees exceeding 22 ft (7 m) in height.

(b) Plant association comprised by few species of native trees and associated native vegetation (e.g., *Manilkara bidentata, Dacryodes excelsa, Guarea guidonia,* and *Cyrilla racemiflora*), native ferns, and dense cover with epiphytes, including bromeliads and mosses.

(3) The type locations described in PCEs (1) and (2), above, for this species should have mean annual precipitation of 88.7 in (225.3 cm), mean annual temperature of 72.3 °F (22.7 °C), and Los Guineos type of soil (i.e., very deep, acidic, clayey, well-drained soils on side slopes of mountains).

Varronia rupicola

(1) Remnants of native shrubland and scrubland forest on limestone substrate within the subtropical dry forest life zone. Dry shrubland and scrubland forest includes:

(a) Shrubland vegetation with canopy from 6.5 to 9.8 ft (2 to 3 m) high;

(b) Limestone pavement;

(c) Associated native vegetation; and

(d) A shrub layer dominated by *Croton humilis, Eupatorium sinuatum, Lantana reticulata,* and *Turnera diffusa.*

(2) Semi-deciduous dry forest on limestone substrate within the subtropical dry forest life zone. Dry limestone semi-deciduous forest includes:

(a) Low forest with canopy from 8 to 15 ft (3 to 5 m) high;

(b) Limestone pavement;

(c) Associated dry forest native vegetation; and

(d) A shrub layer dominated by *Croton humilis, Eupatorium sinuatum, Lantana reticulata,* and *Turnera diffusa.*

(3) The type locations described in PCEs (1) and (2), above, for this species should have shallow and alkaline soils derived from limestone rock and an average rainfall of 34 in (86 cm).

Special Management Considerations or Protection

When designating critical habitat, we assess whether the specific areas within the geographic area occupied by the species at the time of listing contain features which are essential to the conservation of the species and which may require special management considerations or protection.

Agave eggersiana and Varronia rupicola

The primary threats to the PBFs that *Agave eggersiana* and *Varronia rupicola* depend on includes: (1) Habitat destruction and modification by development; (2) competition with nonnative plant species; (3) human-induced fire; and (4) hurricanes and storm surge. The majority of these threats can be addressed by special management considerations or protection, while others (e.g., hurricanes and storm surges) are beyond the control of land owners and managers.

Management activities that could ameliorate these threats include, but are not limited to, establishment of permanent conservation easements or land acquisition to protect the species and its habitat on private lands; establishment of conservation agreements on private, nongovernment, and government lands to protect the habitat; implementation of control of invasive, nonnative plant species to reduce competition and prevent habitat degradation; implementation of management practices to control fires; and creation or revision of management plans for the identification of the areas where current developments exist and to better guide the implementation of conservation measures for the species. For *Agave eggersiana,* precautions are needed to avoid inadvertent mowing and cutting of the species in the course of landscaping activities. In addition, for both *A. eggersiana* and *Varronia rupicola,* development of residential and tourism projects should avoid impacting these habitats directly or indirectly, and habitat fragmentation should be limited as much as possible to maintain connectivity between populations and to avoid habitat degradation due to the colonization by nonnative, invasive plants.

Gonocalyx concolor

The primary threats to the PBFs that *Gonocalyx concolor* depends on include: (1) Habitat destruction and modification by development of telecommunication towers and associated facilities on the mountain top of Cerro La Santa; (2) vegetation management; (3) hurricanes and tropical storms; (4) landslides; (5) invasive species; and (6) human-induced fire. The majority of these threats can be addressed by special management considerations or protection while others (e.g., hurricanes, landslides, and climate change) are beyond the control of land owners and managers.

Management activities that could ameliorate these threats include, but are not limited to, implementation of conservation measures with DNER to reduce threats to the species in the Carite Commonwealth Forest; minimization of habitat disturbance, fragmentation, and destruction resulting from maintenance of telecommunication facilities; prevention of fires; and controlling invasive plant species.

The reduction of all these threats for *Agave eggersiana, Gonocalyx concolor,* and *Varronia rupicola* will require the implementation of special management actions within each of the critical habitat areas identified in this proposed rule. All proposed critical habitat requires active management to address the ongoing threats listed above and those presented in the discussions of Factors A through E (see Summary of Factors Affecting the Species section of our proposed listing rule, which is published elsewhere in today's **Federal Register**).

Special management considerations or protection for the features essential to the conservation of the species within each critical habitat area will depend on the threats to the essential features in that critical habitat area. Accordingly, the description of each critical habitat unit below will include a discussion of the threats and the special management actions needed to address them.

Criteria Used To Identify Critical Habitat

As required by section 4(b)(2) of the Act, we use the best scientific data available to designate critical habitat. Sources of data for the three Caribbean species and their habitat include multiple databases maintained by universities and by State and Federal agencies from Puerto Rico and USVI, reports on assessments and surveys throughout the species' range, and assessments of current conditions of the three Caribbean species and their

habitat at known locations (e.g., Monsegur and Vargas, Service, pers. obs. 2013; Dalmida-Smith, DPNR 2010, Moser *et al.* 2010). We review available information pertaining to the habitat requirements of the species. In accordance with the Act and its implementing regulations at 50 CFR 424.12(e), we consider whether designating additional areas outside those currently occupied, as well as those that are currently occupied (i.e., occupied at the time of listing), is necessary to ensure the conservation of the species.

We are proposing to designate critical habitat in areas within the geographical area currently occupied by the three Caribbean plants (i.e., occupied at the time of proposed listing). All of these units are proposed for designation based on sufficient elements of physical and biological features being present to support known life-history processes of the species. We have defined occupied critical habitat as areas where the three Caribbean plants are currently found and that have the PCEs mentioned above at the time of listing. We used information from site visits to the species' habitats conducted by Service biologists, herbarium specimens, personal communications with researchers, and reports prepared by agencies and researchers to identify the specific locations occupied by the three species. We plotted all occurrence records of the three Caribbean plants on maps in geographic information system as points and polygons. Then, we used U.S. Geological Survey (USGS) topographic maps, aerial photographs, and U.S. Forest Service (USFS)—International Institute of Tropical Forestry (IITF) land cover layers to delineate the critical habitat units. Critical habitat units were then mapped using ArcMap version 10 (Environmental Systems Research Institute, Inc.), a Geographic Information Systems (GIS) program.

We are also proposing to designate specific areas outside the geographical area occupied by *Agave eggersiana* at the time of listing (areas reported as historical) and *Varronia rupicola,* because the current amount of habitat that is occupied is not sufficient for the recovery of the species; hence, we have determined that such areas are essential for their conservation. The justification for why unoccupied habitat is essential to the conservation of these species, and the methodology used to identify the best unoccupied areas for consideration of inclusion, is set forth below.

Small populations and plant species with limited distributions, like those of *Agave eggersiana* and *Gonocalyx concolor,* are vulnerable to relatively minor environmental disturbances (Frankham 2005, pp. 135–136), and are subject to the loss of genetic diversity from genetic drift (Ellstrand and Elam 1993, pp. 217–237; Leimu *et al.* 2006, pp. 942–952; Honnay and Jacquemyn, 2007, p. 824). Plant populations with lowered genetic diversity are more prone to local extinction (Barrett and Kohn 1991, pp. 4, 28). Smaller plant populations generally have lower genetic diversity, and lower genetic diversity may in turn lead to even smaller populations by decreasing the species' ability to adapt, thereby increasing the probability of population extinction (Newman and Pilson 1997, p. 360; Palstra and Ruzzante 2008, pp. 3428–3447). Because of the dangers associated with small populations or limited distributions, the recovery of many rare plant species includes the creation of new sites or reintroductions to ameliorate these effects. When proposing or designating critical habitat, we consider future recovery efforts and conservation of the species.

The habitat of these species must be conserved to fulfill their recovery. Furthermore, it is important to ensure there are enough individuals of the species to secure their survival into the future as well as to ensure the habitat (with all associated plant communities) is adequate for the species. At present, there are only approximately 300 known adult individuals of *Agave eggersiana,* 31 individuals of *Gonocalyx concolor,* 75 individuals of *Varronia rupicola,* and only few areas where the three species have been documented. Although at this moment we do not know how many individuals would suffice to safeguard these species, having limited populations in limited areas is detrimental to the species, and even more detrimental if threats are not ameliorated.

Determination of Critical Habitat Units

We are proposing four areas that are currently occupied and two areas that are currently unoccupied, but on which the species have been historically reported as critical habitat, for *Agave eggersiana;* two occupied areas for *Gonocalyx concolor;* and five occupied areas and two unoccupied areas for *Varronia rupicola.* We believe the proposed areas are essential to ensure the protection of habitat over a wide geographic area and to help ensure that catastrophic events, such as hurricanes, fires, and diseases, will not affect all populations simultaneously.

Areas Occupied at the Time of Listing

The proposed critical habitat designation focuses on occupied areas throughout the range of the three Caribbean species that have the necessary PCEs to allow for the maintenance and expansion of existing populations.

Agave eggersiana

We identified seven populations of *Agave eggersiana* in St. Croix, five to the south and two to the north. Three of the five populations in the south are found in proximate locations, as explained further. One proximate location includes South Shore, Cane Garden, and Vagthus Point, which are all located along the same beach, and for the purpose of this document we will discuss these populations as one location (hereafter Cane Garden) allowing area for the expansion of the populations. Manchenil Bay, Great Pond, and Protestant Cay will be discussed as the other three locations. Gallows Bay is not proposed as critical habitat, even though it is occupied by the species, because the area lacks the identified PCEs. There is no habitat available for either the establishment of other individuals or the expansion of the species, because it is located within a condominium project. This existing population is of one individual hanging on a cliff/hillside, and when it is time to reproduce, all the bulbils will fall to the road (asphalted road) and the bulbils will not be able to continue their growth. There is no suitable habitat in this area aside from where the plant is currently located.

Gonocalyx concolor

We identified two units that harbor the only three populations known of *Gonocalyx concolor:* Two populations at Cerro La Santa and another population at Charco Azul, both in the Carite Commonwealth Forest. At Cerro La Santa, the species is found at elevations between 2,890 to 2,950 ft (880 to 900 m) from sea level, associated to remnants of elfin forest vegetation and to late successional vegetation. The species shows a limited distribution in its habitat, occupying only 0.75 ac (0.3 ha) at Cerro La Santa (Pacheco and Monsegur, USFWS, unpublished data, 2013) and approximately 0.12 ac (0.05 ha) at Charco Azul (O. Monsegur, unpublished data, 2006).

Varronia rupicola

We identified five natural areas currently occupied by *Varronia rupicola* (Montalva, Guánica Commonwealth Forest, Montes de Barina, Peñon de Ponce, and Puerto Ferro). The species

has been consistently reported from these areas during the last decade, and all areas harbor remnants of native forest characterized by a high plant diversity and endemism. All of these areas harbor remnants of native shrubland/scrubland forest vegetation and semi-deciduous dry forest on limestone substrate, showing a unique forest structure that is not present elsewhere in Puerto Rico and that represent the habitat that contains the features necessary for the conservation of the species.

Areas Outside of the Geographic Range at the Time of Listing

For us to propose for designation areas not occupied by the three Caribbean species at the time of listing, we must demonstrate that these areas are essential to the conservation of the species. We are proposing to designate critical habitat outside of the geographic range at the time of listing for *Agave eggersiana* and *Varronia rupicola*.

Agave eggersiana

The east end of St. Croix is within the historical range of *Agave eggersiana* (Britton and Wilson 1923, p. 156), but it is not within the geographic range currently occupied by the species. To determine if this area is essential for the conservation *Agave eggersiana,* we considered: (1) The importance of the site to the overall status of the species to prevent extinction and to contribute to future recovery of *A. eggersiana;* (2) whether the areas contain the PCEs and PBFs; (3) whether the area could be restored to contain the necessary habitat to support *A. eggersiana;* and (4) whether a population of the species could be reestablished in that unoccupied area.

The easternmost area of St. Croix encompasses conservation areas managed by the USVI Government and The Nature Conservancy. In this area, we are proposing to designate two units (East End North and East End South). These areas may allow for important population expansion of *Agave eggersiana.* Furthermore, this area of land is a secluded location that would safeguard the species in the event of a catastrophic event such as a hurricane, or a threat such as a disease or pest (e.g., agave snout weevil (*Scyphophorus acupunctatus*)). These areas also contain all of the PCEs. Hence, we consider the areas as essential for the conservation of *A. eggersiana.*

Varronia rupicola

We propose the designation of two areas that are not currently occupied by the species. These two areas are known as Punta Negra and Cerro Playuela on the Island of Vieques and lie adjacent to an area currently occupied by the species (Puerto Ferro), forming a continuous habitat that provides an ecological niche for the species. They contain the dry coastal shrubland habitat PCEs and PBFs, including substrates, and associated native plants and forest structure. We consider these three contiguous peninsulas (Punta Negra, Cerro Playuela, and Puerto Ferro) as a single ecological unit, which are separated by two narrow water channels. The channels are not representative of a barrier for dispersion or expansion of the species. Furthermore, these forested areas provide shelter for potential pollinators and dispersers of *Varronia rupicola.* This kind of habitat does not occur elsewhere in Vieques, as most of the Island was deforested for agricultural practices, and further degraded by military practices. Therefore, Punta Negra and Cerro Playuela provide suitable habitat conditions for natural recruitment of *V. rupicola* and for the expansion of its populations. It is very likely that *V. rupicola* also occurs within Punta Negra and Cerro Playuela, and that ecological interactions and genetic flow between these areas and Puerto Ferro is occurring. The loss of this forest fragments may compromise the conservation of the genetic stock represented in that population. Hence, we consider Punta Negra and Cerro Playuela to be essential for the conservation of the genetic diversity of the species.

For *Agave eggersiana* and *Varronia rupicola,* the current amount of habitat that is occupied is not sufficient for the recovery of the species; therefore, we determined it essential to include additional unoccupied habitat units in this proposed critical habitat designation.

When determining proposed critical habitat boundaries, we made every effort to avoid including developed areas such as buildings and pavement, and other structures because such lands lack the physical or biological features for the three Caribbean species. The scale of the maps we prepared under the parameters for publication within the Code of Federal Regulations may not reflect the exclusion of such developed lands. Any such lands inadvertently left inside critical habitat boundaries shown on the maps of this proposed rule have been excluded by text in the proposed rule and are not proposed for designation as critical habitat. Therefore, if the critical habitat is finalized as proposed, a Federal action involving these lands would not trigger section 7 consultation with respect to critical habitat and the requirement of no adverse modification unless the specific action would affect the physical or biological features in the adjacent critical habitat.

The critical habitat designation is defined by the map or maps, as modified by any accompanying regulatory text, presented at the end of this document in the rule portion. We include more detailed information on the boundaries of the critical habitat designation in the preamble of this document. We will make the coordinates or plot points or both on which each map is based available to the public on *http://www.regulations.gov* at Docket No. FWS–R4–ES–2013–0040, on our Internet site at *http://www.fws.gov/caribbean/es,* and at the field office responsible for the designation (see **FOR FURTHER INFORMATION CONTACT,** above).

Proposed Critical Habitat Designation

Agave eggersiana

We are proposing to designate 50.6 ac (20.5 ha) in six units as critical habitat for *Agave eggersiana.* The critical habitat units described below constitute our best current assessment of areas that meet the definition of critical habitat for this species. The six units we propose as critical habitat are: (1) Cane Garden, (2) Manchenil, (3) Great Pond, (4) Protestant Cay, (5) East End South, and (6) East End North. Table 1 shows the proposed critical habitat units, land ownership, and approximate extent of the proposed critical habitat for *A. eggersiana.*

TABLE 1—AGAVE EGGERSIANA PROPOSED CRITICAL HABITAT UNITS

Unit	Occupied at time of listing?	Land ownership	Hectares	Acres
1. Cane Garden	Yes	Private	2.8	6.9
2. Manchenil	Yes	Private	0.61	1.5
3. Great Pond	Yes	Government	0.32	0.8

TABLE 1—AGAVE EGGERSIANA PROPOSED CRITICAL HABITAT UNITS—Continued

Unit	Occupied at time of listing?	Land ownership	Hectares	Acres
4. Protestant Cay	Yes	Government, but leased to private	0.16	0.4
5. East End South	No	Private	7.7	19
6. East End North	No	Government	8.9	22
Total			20.5	50.6

Note: Area sizes may not sum due to rounding.

Below, we present brief descriptions of all units and reasons why these units meet the definition of critical habitat for *Agave eggersiana*.

Unit 1: Cane Garden

Unit 1 consists of 6.9 ac (2.8 ha) of privately owned lands located at Estate Cane Garden and Estate Peters Mindle, Christiansted, St. Croix, USVI. This unit is located in the south-central portion of the island, approximately 0.17 mi (0.27 km) south of Road 62 and approximately 0.2 mi (0.3 km) northeast of Vagthus Point, along the northeast coast of Canegarden Bay and south of a private trail. It is within the geographical area occupied at the time of listing. This unit contains all the PCEs. The PCEs in this unit may require special considerations to address threats of nonnative plant species, effects of hurricanes (i.e., storm surge and erosion), and habitat modification (e.g., trails expansion).

Unit 2: Manchenil

Unit 2 consists of 1.5 ac (0.61 ha) of privately owned lands located at Estate Granard, Christiansted, St. Croix, USVI. This unit is located in the south-central portion of the island, approximately 0.50 mi (0.82 km) south of Road 62 and approximately 0.02 mi (0.03 km) east of South Shore Road, along the northeast coast of Manchenil Bay. It is within the geographical area occupied at the time of listing. This unit contains all the PCEs. The PCEs in this unit may require special considerations to address threats of fires, nonnative plant species, effects of hurricanes (i.e., storm surge), and habitat modification.

Unit 3: Great Pond

Unit 3 consists of 0.8 ac (0.32 ha) of government-owned land located at Estate Great Pond, Christiansted, St. Croix, USVI. This unit is located in the south of the island, approximately 6.5 ft (2 m) south of Road 62 and east of the entrance of East End Marine Park offices. It is within the geographical area occupied at the time of listing. This unit contains all the PCEs. The PCEs in this unit may require special considerations to address threats of fire, nonnative plant species, and habitat modification (i.e., landscaping).

Unit 4: Protestant Cay

Unit 4 consists of 0.4 ac (0.16 ha) of government-owned lands that are leased to a private party and are located at Protestant Cay, St. Croix, USVI. The Cay is located approximately 0.33 km (0.20 mi) north of Christiansted town. The unit is located on the northeast side of the Cay. It is within the geographical area occupied at the time of listing. This unit contains all the PCEs. The PCEs in this unit may require special considerations to address threats of nonnative plant species, effects of hurricanes (i.e., storm surge and erosion), and habitat modification (i.e., hotel landscaping and maintenance).

The Protestant Cay unit is also currently designated as critical habitat for the St. Croix ground lizard (*Ameiva polops*) (42 FR 47840, September 22, 1977).

Unit 5: East End South

Unit 5 consists of 19 ac (7.7 ha) of located at Estate Jack's Bay and Estate Isaac's Bay, Christiansted, St. Croix, USVI. This unit is located south of the eastern end portion of the island, approximately 0.93 mi (1.5 km) southwest of Point Udall, approximately 0.02 mi (0.04 km) east of Point Road, along the north coast of Jack's Bay, and south of a Jack's and Issac's Bay Preserve trail. It is owned by The Nature Conservancy and managed as conservation land. This unit is not occupied at the time of listing. However, it is part of the historical range of the species. This unit is essential for the conservation of the species because it contains the PCEs and because its designation would safeguard other established populations in case of any stochastic event that occurs within habitats currently occupied by the species.

Unit 6: East End North

Unit 6 consists of 22 ac (8.9 ha) of government-owned land located at Estate Cotton Garden, Christiansted, St. Croix, USVI. This unit is located north of the eastern end portion of the island, approximately 0.86 mi (1.4 km) northwest of Point Udall, north of Road 82 along the eastern coast of Cotton Garden Bay and western coast of Boiler Bay. This unit is not occupied at the time of listing. However, it is part of the historical range of the species. This unit is essential for the conservation of the species because it contains the PCEs and because its designation would safeguard other established populations in case of any stochastic event that occurs within habitats currently occupied by the species.

Gonocalyx concolor

We are proposing to designate approximately198 ac (80.1 ha) in two units as critical habitat for the *Gonocalyx concolor*. The critical habitat units described below constitute our best current assessment of areas that meet the definition of critical habitat for this species. The two units we propose as critical habitat are: (1) Cerro La Santa; and (2) Charco Azul. Both units fall within the Carite Commonwealth Forest, land owned by the Commonwealth of Puerto Rico and managed for conservation by the Puerto Rico DNER. Table 2 shows the proposed critical habitat units, land ownership, and approximate extent of the proposed critical habitat for *G. concolor*.

TABLE 2—GONOCALYX CONCOLOR PROPOSED CRITICAL HABITAT UNITS

Unit	Occupied at time of listing?	Land ownership	Hectares	Acres
1. Cerro La Santa	Yes	Commonwealth of Puerto Rico	7.6	18.8

TABLE 2—GONOCALYX CONCOLOR PROPOSED CRITICAL HABITAT UNITS—Continued

Unit	Occupied at time of listing?	Land ownership	Hectares	Acres
2. Charco Azul	Yes	Commonwealth of Puerto Rico	72.5	179.2
Total			80.1	198

Note: Area sizes may not sum due to rounding.

Below, we present brief descriptions of all units and reasons why these units meet the definition of critical habitat for *Gonocalyx. concolor.*

Unit 1: Cerro La Santa

Unit 1 consists of 18.8 ac (7.6 ha) of elfin forest located on exposed peaks and ridges of Cerro La Santa, above 2,890 ft (880 m) in elevation from sea level. This unit is located in the Sierra de Cayey on Road PR 184, Km 27.1 in Espino Ward, between the Municipalities of Cayey and San Lorenzo. This unit is within the geographical area occupied by the species at the time of listing. This unit contains all PCEs. The PCEs in this unit may require special considerations to address threats of habitat modification resulting from maintenance and potential expansion of existing telecommunication facilities, human-induced fires, invasive species, and degradation of forest quality.

Unit 2: Charco Azul

Unit 2 consists of 179.2 ac (72.5 ha) of ausubo forest located along the Rio Grande de Patillas River basin between 2,030 ft (620 m) and 2,330 ft (720 m) in elevation from sea level. This unit is approximately 2.0 mi (3.2 km) southeast of Unit 1. This unit is within the geographical area occupied by the species at the time of listing. This unit contains all PCEs. The PCEs in this unit may require special considerations and protection to address threats of habitat modification resulting from human-induced fires, invasive species, and degradation of forest quality.

Varronia rupicola

We are proposing to designate 6,547 ac (2,648 ha) in seven units as critical habitat for *Varronia rupicola*. The critical habitats described below constitute our best current assessment of areas that meet the definition of critical habitat for this species. The seven units are: (1) Montalva, (2) Guánica Commonwealth Forest, (3) Montes de Barina, (4) Peñon de Ponce, (5) Punta Negra, (6) Puerto Ferro, and (7) Cerro Playuela. Table 3 shows the proposed critical habitat units, land ownership, and approximate extent of the proposed critical habitat for *V. rupicola*.

TABLE 3—VARRONIA RUPICOLA PROPOSED CRITICAL HABITAT UNITS

Unit	Occupied at time of listing?	Land ownership	Hectares	Acres
1. Montalva	Yes	Commonwealth of Puerto Rico	401	992
2. Guánica Commonwealth Forest	Yes	Commonwealth of Puerto Rico	236	584
3. Montes de Barina	Yes	Private	810	2,002
4. Peñon de Ponce	Yes	Private	880	2,174
5. Punta Negra	No	Commonwealth of Puerto Rico	117	291
6. Puerto Ferro	Yes	Federal Government (FWS)	154	381
7. Cerro Playuela	No	Federal Government (FWS)	50	123
Total			2,648	6,547

Note: Area sizes may not sum due to rounding.

Below, we present brief descriptions of all units and reasons why these units meet the definition of critical habitat for *Varronia rupicola*.

Unit 1: Montalva

Unit 1 consists of 992 ac (401 ha) of Commonwealth-owned lands located at Montalva Ward in the Municipality of Guánica, Puerto Rico. This unit is located just south of State Highway PR 324 and the Town of Guánica, and includes Cerro Montalva. It is within the geographical area occupied by the species at the time of listing. Due to the marginal agricultural value, these forests were minimally impacted by other land use practices (e.g., charcoal production and ranching). Therefore, the prime and essential habitat for the species has maintained its unique features, such as the dry coastal shrubland habitat's PCEs and PBFs, including suitable climate, substrates, and associated native plants and forest structure. Despite its conservation status the habitat has been affected by human-induced fires and maintenance of access roads and rights-of-way. The PCEs in this unit may require special considerations to address threats of nonnative plant species, human-induced fires, hurricanes, and habitat modification (e.g., urban development).

Unit 2: Guánica Commonwealth Forest

Unit 2 consists of 584 ac (236 ha) of Commonwealth-owned lands located within Carenero, Barina, and Boca Wards in the municipalities of Guánica, Yauco, and Guayanilla, Puerto Rico. This unit is located within the core of the east section of the Guánica Commonwealth Forest. The forested habitat in this unit was minimally impacted by other land use practices like charcoal production and ranching due to its marginal agricultural value; hence, it has maintained its unique features. It is within the geographical area occupied by the species at the time of listing and contains the dry coastal shrubland habitat's PCEs and PBFs, including suitable climate, substrates, and associated native plants and forest structure. Despite its conservation status, the habitat has been affected by human-induced fires and maintenance of access roads and rights-of-way. The PCEs in this unit may require special considerations to address threats of nonnative plant species, human-induced fires, hurricanes, and habitat

modification (e.g., urban development and right-of-way maintenance).

Unit 3: Montes de Barina

Unit 3 consists of 2,002 ac (810 ha) of privately owned lands primarily located along Indios Ward in the municipality of Guayanilla. A small section of this unit falls within the Cambalache Ward in Yauco, Puerto Rico. This unit is located just south of State Highway PR 2. The forested habitat in this unit was minimally impacted by other land use practices like charcoal production and ranching due to its marginal agricultural value; hence, it has maintained its unique features. The unit is within the geographical area occupied by the species at the time of listing and contains the dry coastal shrubland habitat's PCEs and PBFs, including suitable climate, substrates, and associated native plants and forest structure. The PCEs in this unit may require special considerations to address threats of nonnative plant species, human-induced fires, hurricanes, and habitat modification (e.g., urban development).

Unit 4: Peñon de Ponce

Unit 4 consists of 2,174 ac (880 ha) of privately owned lands located along Encarnación and Canas Wards in the municipalities of Peñuelas and Ponce, Puerto Rico. This unit is located just north of State Highway PR 2 in the area known as Punta Cucharas. The forested habitat in this unit was minimally impacted by other land use practices like charcoal production and ranching due to its marginal agricultural value; hence, it has maintained its unique features. It is within the geographical area occupied by the species at the time of listing and contains the dry coastal shrubland habitat's PCEs and PBFs, including suitable climate, substrates, and associated native plants and forest structure. The PCEs in this unit may require special considerations to address threats of nonnative plant species, human-induced fires, hurricanes, and habitat modification (e.g., urban development).

Unit 5: Punta Negra

Unit 5 is a small peninsula that consists of 291 ac (117 ha) of Commonwealth-owned lands located within Puerto Ferro Ward on the island of Vieques, Puerto Rico. This unit is located about 1.5 mi (2.5 km) east of the town of Esperanza and west of Puerto Ferro, Vieques National Wildlife Refuge (NWR). This natural area is managed by the Puerto Rico DNER as part of the Puerto Mosquito Natural Reserve. The forested habitat in this unit was minimally impacted by other land use practices like charcoal production and ranching due to its marginal agricultural value; hence, it has maintained its unique features. It is adjacent to an area currently occupied by the species (Unit 6), forming a continuous habitat and contains the dry coastal shrubland habitat's PCEs and PBFs, including suitable climate, substrates, and associated native plants and forest structure. However, there is no specific record of the species within this unit. We consider Units 5, 6, and 7 to be a single ecological unit. The species is expected to occur within this area and ecological interactions and genetic flow between this area and Unit 6 may be essential for the recovery of the species. It was not included as a single unit with Units 6 and 7 because these peninsulas are united by a narrow mangrove forest that does not provide habitat for the species. The PCEs in this unit may require special considerations to address threats of nonnative plant species, human-induced fires, and hurricanes.

Unit 6: Puerto Ferro

Unit 6 is a small peninsula that consists of 381 ac (154 ha) of federally owned lands managed by the Service as the Vieques NWR, and is located within the Puerto Ferro Ward on the island of Vieques, Puerto Rico. This unit is located about 4 km (2.5 mi) east of the town of Esperanza. It is located just between Unit 5 and Unit 7, forming a continuous habitat and contains the dry coastal shrubland habitat's PCEs and PBFs, and therefore we consider Units 5, 6, and 7 to be a single ecological unit. The forested habitat in this unit was minimally impacted by other land use practices like charcoal production and ranching due to its marginal agricultural value; hence, it has maintained its unique features. It is within the geographical area occupied by the species at the time of listing and contains the dry coastal shrubland's habitat PCEs and PBFs, including suitable climate, substrates, and associated native plants and forest structure. The species occurs within this area and ecological interactions and genetic flow between this area and the adjacent habitat (Unit 5 and Unit 7) may be essential for the recovery of the species. It was not included as a single unit with Units 5 and 7 because these peninsulas are united by a narrow mangrove forest that does not provide habitat for the species. The PCEs in this unit may require special considerations to address threats of nonnative plant species, human-induced fires, and hurricanes.

Unit 7: Cerro Playuela

Unit 7 is a small peninsula that consists of 123 ac (50 ha) of federally owned lands managed by the Service as the Vieques NWR, and is located within Puerto Ferro Ward on the island of Vieques, Puerto Rico. This unit is located about 0.5 km (0.31 mi) south of the former airport of Campamento García (Vieques NWR). The forested habitat in this unit was minimally impacted by other land use practices like charcoal production and ranching due to its marginal agricultural value; hence, it has maintained its unique features. It is adjacent to an area currently occupied by the species (Unit 6), forming a continuous habitat, and contains the dry coastal shrubland habitat's PCEs and PBFs, including suitable climate, substrates, and associated native plants and forest structure. However, there is no specific record of the species within this unit. We consider Units 5, 6, and 7 to be a single ecological unit. The species is expected to occur within this area and ecological interactions and genetic flow between this area and Unit 6 may be essential for the recovery of the species. It was not included as a single unit with Units 5 and 6 because these peninsulas are united by a narrow mangrove forest that does not provide habitat for the species. The PCEs in this unit may require special considerations to address threats of nonnative plant species, human-induced fires, and hurricanes.

Effects of Critical Habitat Designation

Section 7 Consultation

Section 7(a)(2) of the Act requires Federal agencies, including the Service, to ensure that any action they fund, authorize, or carry out is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of designated critical habitat of such species. In addition, section 7(a)(4) of the Act requires Federal agencies to confer with the Service on any agency action which is likely to jeopardize the continued existence of any species proposed to be listed under the Act or result in the destruction or adverse modification of proposed critical habitat.

Decisions by the 5th and 9th Circuit Courts of Appeals have invalidated our regulatory definition of ''destruction or adverse modification'' (50 CFR 402.02) (see *Gifford Pinchot Task Force* v. *U.S. Fish and Wildlife Service,* 378 F.3d 1059 (9th Cir. 2004) and *Sierra Club* v. *U.S. Fish and Wildlife Service et al.,* 245 F.3d 434 (5th Cir. 2001)), and we do not rely

on this regulatory definition when analyzing whether an action is likely to destroy or adversely modify critical habitat. Under the provisions of the Act, we determine destruction or adverse modification on the basis of whether, with implementation of the proposed Federal action, the affected critical habitat would continue to serve its intended conservation role for the species.

If a Federal action may affect a listed species or its critical habitat, the responsible Federal agency (action agency) must enter into consultation with us. Examples of actions that are subject to the section 7 consultation process are actions on State, tribal, local, or private lands that require a Federal permit (such as a permit from the U.S. Army Corps of Engineers under section 404 of the Clean Water Act (33 U.S.C. 1251 *et seq.*) or a permit from the Service under section 10 of the Act) or that involve some other Federal action (such as funding from the Federal Highway Administration, Federal Aviation Administration, or the Federal Emergency Management Agency). Federal actions not affecting listed species or critical habitat, and actions on State, tribal, local, or private lands that are not federally funded or authorized, do not require section 7 consultation.

As a result of section 7 consultation, we document compliance with the requirements of section 7(a)(2) through our issuance of:

(1) A concurrence letter for Federal actions that may affect, but are not likely to adversely affect, listed species or critical habitat; or

(2) A biological opinion for Federal actions that may affect and are likely to adversely affect listed species or critical habitat.

When we issue a biological opinion concluding that a project is likely to jeopardize the continued existence of a listed species and/or destroy or adversely modify critical habitat, we provide reasonable and prudent alternatives to the project, if any are identifiable, that would avoid the likelihood of jeopardy and/or destruction or adverse modification of critical habitat. We define ''reasonable and prudent alternatives'' (at 50 CFR 402.02) as alternative actions identified during consultation that:

(1) Can be implemented in a manner consistent with the intended purpose of the action,

(2) Can be implemented consistent with the scope of the Federal agency's legal authority and jurisdiction,

(3) Are economically and technologically feasible, and

(4) Would, in the Director's opinion, avoid the likelihood of jeopardizing the continued existence of the listed species and/or avoid the likelihood of destroying or adversely modifying critical habitat.

Reasonable and prudent alternatives can vary from slight project modifications to extensive redesign or relocation of the project. Costs associated with implementing a reasonable and prudent alternative are similarly variable.

Regulations at 50 CFR 402.16 require Federal agencies to reinitiate consultation on previously reviewed actions in instances where we have listed a new species or subsequently designated critical habitat that may be affected and the Federal agency has retained discretionary involvement or control over the action (or the agency's discretionary involvement or control is authorized by law). Consequently, Federal agencies sometimes may need to request reinitiation of consultation with us on actions for which formal consultation has been completed, if those actions with discretionary involvement or control may affect subsequently listed species or designated critical habitat.

Application of the ''Adverse Modification'' Standard

The key factor related to the adverse modification determination is whether, with implementation of the proposed Federal action, the affected critical habitat would continue to serve its intended conservation role for the species. Activities that may destroy or adversely modify critical habitat are those that alter the physical or biological features to an extent that appreciably reduces the conservation value of critical habitat for *Agave eggersiana, Gonocalyx concolor,* and *Varronia rupicola.* As discussed above, the role of critical habitat is to support life-history needs of the species and provide for the conservation of the species.

Section 4(b)(8) of the Act requires us to briefly evaluate and describe, in any proposed or final regulation that designates critical habitat, activities involving a Federal action that may destroy or adversely modify such habitat, or that may be affected by such designation.

Activities that may affect critical habitat, when carried out, funded, or authorized by a Federal agency, should result in consultation for *Agave eggersiana, Gonocalyx concolor,* and *Varronia rupicola.* These activities include, but are not limited to:

(1) Actions that would appreciably degrade or destroy the physical or biological features for the species. Such activities could include, but are not limited to, clearing or cutting native live trees and shrubs (e.g., bulldozing, vegetation pruning, construction, road building, maintenance of rights-of-way for powerlines, and herbicide application). These activities could pose a risk of take by fire to the survival of *Agave eggersiana, Gonocalyx concolor,* and *Varronia rupicola.*

(2) Actions that would introduce or encourage the spread of nonnative plant species that would significantly alter vegetation structure. Such activities may include, but are not limited to, residential and commercial development and road construction. These activities can affect the growth, reproduction, and survival of *Agave eggersiana, Gonocalyx concolor,* and *Varronia rupicola.*

(3) Actions that would significantly alter the structure and function of the elfin forest or the ausubo forest within the Carite Commonwealth Forest. Removal of vegetation could alter or eliminate the microclimate (e.g., change in temperature and humidity levels) and may allow invasion of competitor species and thereby negatively affect the habitat necessary for all life stages of the *Gonocalyx concolor.*

Exemptions

Application of Section 4(a)(3) of the Act

The Sikes Act Improvement Act of 1997 (Sikes Act) (16 U.S.C. 670a) required each military installation that includes land and water suitable for the conservation and management of natural resources to complete an integrated natural resources management plan (INRMP) by November 17, 2001. An INRMP integrates implementation of the military mission of the installation with stewardship of the natural resources found on the base. Each INRMP includes:

(1) An assessment of the ecological needs on the installation, including the need to provide for the conservation of listed species;

(2) A statement of goals and priorities;

(3) A detailed description of management actions to be implemented to provide for these ecological needs; and

(4) A monitoring and adaptive management plan.

Among other things, each INRMP must, to the extent appropriate and applicable, provide for fish and wildlife management; fish and wildlife habitat enhancement or modification; wetland

protection, enhancement, and restoration where necessary to support fish and wildlife; and enforcement of applicable natural resource laws.

The National Defense Authorization Act for Fiscal Year 2004 (Pub. L. 108–136) amended the Act to limit areas eligible for designation as critical habitat. Specifically, section 4(a)(3)(B)(i) of the Act (16 U.S.C. 1533(a)(3)(B)(i)) now provides: ''The Secretary shall not designate as critical habitat any lands or other geographic areas owned or controlled by the Department of Defense, or designated for its use, that are subject to an integrated natural resources management plan prepared under section 101 of the Sikes Act (16 U.S.C. 670a), if the Secretary determines in writing that such plan provides a benefit to the species for which critical habitat is proposed for designation.''

There are no Department of Defense lands within the proposed critical habitat designation for *Agave eggersiana, Gonocalyx concolor,* or *Varronia rupicola.*

Exclusions

Application of Section 4(b)(2) of the Act

Section 4(b)(2) of the Act states that the Secretary shall designate and make revisions to critical habitat on the basis of the best available scientific data after taking into consideration the economic impact, national security impact, and any other relevant impact of specifying any particular area as critical habitat. The Secretary may exclude an area from critical habitat if he determines that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat, unless he determines, based on the best scientific data available, that the failure to designate such area as critical habitat will result in the extinction of the species. In making that determination, the statute on its face, as well as the legislative history, are clear that the Secretary has broad discretion regarding which factor(s) to use and how much weight to give to any factor.

Under section 4(b)(2) of the Act, we may exclude an area from designated critical habitat based on economic impacts, impacts on national security, or any other relevant impacts. In considering whether to exclude a particular area from the designation, we identify the benefits of including the area in the designation, identify the benefits of excluding the area from the designation, and evaluate whether the benefits of exclusion outweigh the benefits of inclusion. If the analysis indicates that the benefits of exclusion outweigh the benefits of inclusion, the Secretary may exercise her discretion to exclude the area only if such exclusion would not result in the extinction of the species.

Economic Impacts

Under section 4(b)(2) of the Act, we consider the economic impacts of specifying any particular area as critical habitat. In order to consider economic impacts, we are preparing an analysis of the economic impacts of the proposed critical habitat designation and related factors.

We will announce the availability of the draft economic analysis as soon as it is completed, at which time we will seek public review and comment. At that time, copies of the draft economic analysis will be available for downloading from the Internet at the Federal eRulemaking Portal at *http://www.regulations.gov* under Docket No. FWS–R4–ES–2013–0040, or by contacting the Caribbean Ecological Services Field Office directly (see **FOR FURTHER INFORMATION CONTACT**). During the development of a final designation, we will consider economic impacts based on information in our economic analysis, public comments, and other new information, and areas may be excluded from the final critical habitat designation under section 4(b)(2) of the Act and our implementing regulations at 50 CFR 424.19.

National Security Impacts

Under section 4(b)(2) of the Act, we consider whether there are lands where a national security impact might exist. As discussed above, we have determined that the lands within the proposed designation of critical habitat for *Agave eggersiana, Gonocalyx concolor,* and *Varronia rupicola* are not owned or managed by the Department of Defense, and, therefore, we anticipate no impact on national security. Consequently, the Secretary is not intending to exercise her discretion to exclude any areas from the final designation based on impacts on national security.

Other Relevant Impacts

Under section 4(b)(2) of the Act, we consider any other relevant impacts, in addition to economic impacts and impacts on national security. We consider a number of factors, including whether the landowners have developed any HCPs or other management plans for the area, or whether there are conservation partnerships that would be encouraged by designation of, or exclusion from, critical habitat. In addition, we look at any tribal issues, and consider the government-to-government relationship of the United States with tribal entities. We also consider any social impacts that might occur because of the designation.

In preparing this proposal, we have determined that there are currently no HCPs or other management plans for *Agave eggersiana, Gonocalyx concolor,* or *Varronia rupicola.* The proposed designation does not include any tribal lands or trust resources. We anticipate no impact on tribal lands, partnerships, or HCPs from this proposed critical habitat designation. Accordingly, the Secretary does not intend to exercise his discretion to exclude any areas from the final designation based on other relevant impacts.

Peer Review

In accordance with our joint policy on peer review published in the **Federal Register** on July 1, 1994 (59 FR 34270), we will seek the expert opinions of at least three appropriate and independent specialists regarding this proposed rule. The purpose of peer review is to ensure that our critical habitat designations are based on scientifically sound data, assumptions, and analyses. We have invited these peer reviewers to comment during this public comment period.

We will consider all comments and information we receive during this comment period on this proposed rule during our preparation of a final determination. Accordingly, the final determination may differ from this proposal.

Public Hearings

Section 4(b)(5) of the Act provides for one or more public hearings on this proposal, if requested. Requests must be received within 45 days after the date of publication of this proposed rule in the **Federal Register**. Such requests must be sent to the address shown in the **FOR FURTHER INFORMATION CONTACT** section. We will schedule public hearings on this proposal, if any are requested, and announce the dates, times, and places of those hearings, as well as how to obtain reasonable accommodations, in the **Federal Register** and local newspapers at least 15 days before the hearing.

Required Determinations

Regulatory Planning and Review—Executive Orders 12866 and 13563

Executive Order 12866 provides that the Office of Information and Regulatory Affairs will review all significant rules. The Office of Information and Regulatory Affairs has determined that this rule is not significant.

Executive Order 13563 reaffirms the principles of Executive Order 12866

while calling for improvements in the nation's regulatory system to promote predictability, to reduce uncertainty, and to use the best, most innovative, and least burdensome tools for achieving regulatory ends. The executive order directs agencies to consider regulatory approaches that reduce burdens and maintain flexibility and freedom of choice for the public where these approaches are relevant, feasible, and consistent with regulatory objectives. Executive Order 13563 emphasizes further that regulations must be based on the best available science and that the rulemaking process must allow for public participation and an open exchange of ideas. We have developed this rule in a manner consistent with these requirements.

Regulatory Flexibility Act (5 U.S.C. 601 et seq.)

Under the Regulatory Flexibility Act (RFA; 5 U.S.C. 601 *et seq.*) as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA) of 1996 (5 U.S.C. 801 *et seq.*), whenever an agency must publish a notice of rulemaking for any proposed or final rule, it must prepare and make available for public comment a regulatory flexibility analysis that describes the effects of the rule on small entities (small businesses, small organizations, and small government jurisdictions). However, no regulatory flexibility analysis is required if the head of the agency certifies the rule will not have a significant economic impact on a substantial number of small entities. The SBREFA amended the RFA to require Federal agencies to provide a certification statement of the factual basis for certifying that the rule will not have a significant economic impact on a substantial number of small entities.

According to the Small Business Administration, small entities include small organizations such as independent nonprofit organizations; small governmental jurisdictions, including school boards and city and town governments that serve fewer than 50,000 residents; and small businesses (13 CFR 121.201). Small businesses include such businesses as manufacturing and mining concerns with fewer than 500 employees, wholesale trade entities with fewer than 100 employees, retail and service businesses with less than $5 million in annual sales, general and heavy construction businesses with less than $27.5 million in annual business, special trade contractors doing less than $11.5 million in annual business, and forestry and logging operations with fewer than 500 employees and annual business less than $7 million. To determine whether small entities may be affected, we will consider the types of activities that might trigger regulatory impacts under this designation as well as types of project modifications that may result. In general, the term ''significant economic impact'' is meant to apply to a typical small business firm's business operations.

Importantly, the incremental impacts of a rule must be both significant and substantial to prevent certification of the rule under the RFA and to require the preparation of an initial regulatory flexibility analysis. If a substantial number of small entities are affected by the proposed critical habitat designation, but the per-entity economic impact is not significant, the Service may certify. Likewise, if the per-entity economic impact is likely to be significant, but the number of affected entities is not substantial, the Service may also certify.

Under the RFA, as amended, and following recent court decisions, Federal agencies are only required to evaluate the potential incremental impacts of rulemaking on those entities directly regulated by the rulemaking itself, and not the potential impacts to indirectly affected entities. The regulatory mechanism through which critical habitat protections are realized is section 7 of the Act, which requires Federal agencies, in consultation with the Service, to ensure that any action authorized, funded, or carried by the agency is not likely to adversely modify critical habitat. Therefore, only Federal action agencies are directly subject to the specific regulatory requirement (avoiding destruction and adverse modification) imposed by critical habitat designation. Under these circumstances, it is our position that only Federal action agencies would be directly regulated by this designation. Therefore, because Federal agencies are not small entities, the Service certifies that the proposed critical habitat rule will not have a significant economic impact on a substantial number of small entities.

In conclusion, based on our interpretation of directly regulated entities under the RFA and relevant case law, this designation of critical habitat will only directly regulate Federal agencies, which are not by definition small business entities. As such, we certify that, if promulgated, this designation of critical habitat will not have a significant economic impact on a substantial number of small business entities. Therefore, an initial regulatory flexibility analysis is not required.

Energy Supply, Distribution, or Use—Executive Order 13211

Executive Order 13211 (Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use) requires agencies to prepare Statements of Energy Effects when undertaking certain actions. Within one of the units, vegetation maintenance will occur along the edges of an existing road that remains accessible for power line maintenance. We do not anticipate any effects to critical habitat from this activity. Therefore, we do not expect the designation of this proposed critical habitat to significantly affect energy supplies, distribution, or use. Thus, this action is not a significant energy action, and no Statement of Energy Effects is required. However, we will further evaluate this issue as we conduct our economic analysis, and review and revise this assessment as warranted.

Unfunded Mandates Reform Act (2 U.S.C. 1501 et seq.)

In accordance with the Unfunded Mandates Reform Act (2 U.S.C. 1501 *et seq.*), we make the following findings:

(1) This proposed rule would not produce a Federal mandate. In general, a Federal mandate is a provision in legislation, statute, or regulation that would impose an enforceable duty upon State, local, or tribal governments, or the private sector, and includes both ''Federal intergovernmental mandates'' and ''Federal private sector mandates.'' These terms are defined in 2 U.S.C. 658(5)–(7). ''Federal intergovernmental mandate'' includes a regulation that ''would impose an enforceable duty upon State, local, or tribal governments'' with two exceptions. It excludes ''a condition of Federal assistance.'' It also excludes ''a duty arising from participation in a voluntary Federal program,'' unless the regulation ''relates to a then-existing Federal program under which $500,000,000 or more is provided annually to State, local, and tribal governments under entitlement authority,'' if the provision would ''increase the stringency of conditions of assistance'' or ''place caps upon, or otherwise decrease, the Federal Government's responsibility to provide funding,'' and the State, local, or tribal governments ''lack authority'' to adjust accordingly. At the time of enactment, these entitlement programs were: Medicaid; Aid to Families with Dependent Children work programs; Child Nutrition; Food Stamps; Social Services Block Grants; Vocational Rehabilitation State Grants; Foster Care, Adoption Assistance, and Independent

Living; Family Support Welfare Services; and Child Support Enforcement. ''Federal private sector mandate'' includes a regulation that ''would impose an enforceable duty upon the private sector, except (i) a condition of Federal assistance or (ii) a duty arising from participation in a voluntary Federal program.''

The designation of critical habitat does not impose a legally binding duty on non-Federal Government entities or private parties. Under the Act, the only regulatory effect is that Federal agencies must ensure that their actions do not destroy or adversely modify critical habitat under section 7. While non-Federal entities that receive Federal funding, assistance, or permits, or that otherwise require approval or authorization from a Federal agency for an action, may be indirectly impacted by the designation of critical habitat, the legally binding duty to avoid destruction or adverse modification of critical habitat rests squarely on the Federal agency. Furthermore, to the extent that non-Federal entities are indirectly impacted because they receive Federal assistance or participate in a voluntary Federal aid program, the Unfunded Mandates Reform Act would not apply, nor would critical habitat shift the costs of the large entitlement programs listed above onto State governments.

(2) We lack the available economic information to determine if a Small Government Agency Plan is required. Therefore, we defer this finding until completion of the draft economic analysis is prepared under section 4(b)(2) of the Act.

Takings—Executive Order 12630

In accordance with Executive Order 12630 (Government Actions and Interference with Constitutionally Protected Private Property Rights), we will analyze the potential takings implications of designating critical habitat for *Agave eggersiana, Gonocalyx concolor,* and *Varronia rupicola* in a takings implications assessment. The draft economic analysis will provide the foundation for us to use in preparing a takings implication assessment. Critical habitat designation does not affect landowner actions that do not require Federal funding or permits, nor does it preclude development of habitat conservation programs or issuance of incidental take permits to permit actions that do require Federal funding or permits to go forward.

Federalism—Executive Order 13132

In accordance with Executive Order 13132 (Federalism), this proposed rule does not have significant Federalism effects. A federalism impact summary statement is not required. In keeping with Department of the Interior and Department of Commerce policy, we requested information from, and coordinated development of, this proposed critical habitat designation with appropriate State resource agencies in St. Croix, USVI, and Puerto Rico. The designation of critical habitat in areas currently occupied by the *Agave eggersiana, Gonocalyx concolor, and Varronia rupicola* imposes no additional restrictions to those currently in place and, therefore, has little incremental impact on State and local governments and their activities. The designation may have some benefit to these governments because the areas that contain the physical or biological features essential to the conservation of the species are more clearly defined, and the elements of the features of the habitat necessary to the conservation of the species are specifically identified. This information does not alter where and what federally sponsored activities may occur. However, it may assist local governments in long-range planning (rather than having them wait for case-by-case section 7 consultations to occur).

Where State and local governments require approval or authorization from a Federal agency for actions that may affect critical habitat, consultation under section 7(a)(2) would be required. While non-Federal entities that receive Federal funding, assistance, or permits, or that otherwise require approval or authorization from a Federal agency for an action, may be indirectly impacted by the designation of critical habitat, the legally binding duty to avoid destruction or adverse modification of critical habitat rests squarely on the Federal agency.

Civil Justice Reform—Executive Order 12988

In accordance with Executive Order 12988 (Civil Justice Reform), the Office of the Solicitor has determined that this rule does not unduly burden the judicial system and that it meets the requirements of sections 3(a) and 3(b)(2) of the Order. We are proposing to designate critical habitat in accordance with the provisions of the Act. To assist the public in understanding the habitat needs of the species, the rule identifies the elements of physical or biological features essential to the conservation of the species. The areas of proposed critical habitat are presented on maps, and the rule provides several options for the interested public to obtain more detailed location information, if desired.

Paperwork Reduction Act of 1995 (44 U.S.C. 3501 et seq.)

This rule does not contain any new collections of information that require approval by OMB under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*). This rule will not impose recordkeeping or reporting requirements on State or local governments, individuals, businesses, or organizations. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number.

National Environmental Policy Act (42 U.S.C. 4321 et seq.)

It is our position that, outside the jurisdiction of the U.S. Court of Appeals for the Tenth Circuit, we do not need to prepare environmental analyses pursuant to the National Environmental Policy Act in connection with designating critical habitat under the Endangered Species Act. We published a notice outlining our reasons for this determination in the **Federal Register** on October 25, 1983 (48 FR 49244). This position was upheld by the U.S. Court of Appeals for the Ninth Circuit (*Douglas County* v. *Babbitt,* 48 F.3d 1495 (9th Cir. 1995), cert. denied 516 U.S. 1042 (1996)).

Government-to-Government Relationship With Tribes

In accordance with the President's memorandum of April 29, 1994 (Government-to-Government Relations with Native American Tribal Governments; 59 FR 22951), Executive Order 13175 (Consultation and Coordination with Indian Tribal Governments), and the Department of the Interior's manual at 512 DM 2, we readily acknowledge our responsibility to communicate meaningfully with recognized Federal Tribes on a government-to-government basis. In accordance with Secretarial Order 3206 of June 5, 1997 (American Indian Tribal Rights, Federal-Tribal Trust Responsibilities, and the Endangered Species Act), we readily acknowledge our responsibilities to work directly with tribes in developing programs for healthy ecosystems, to acknowledge that tribal lands are not subject to the same controls as Federal public lands, to remain sensitive to Indian culture, and to make information available to tribes.

As discussed above, there are no tribal lands in Puerto Rico or St. Croix, USVI.

Clarity of the Rule

We are required by Executive Orders 12866 and 12988 and by the Presidential Memorandum of June 1,

1998, to write all rules in plain language. This means that each rule we publish must:

(1) Be logically organized;

(2) Use the active voice to address readers directly;

(3) Use clear language rather than jargon;

(4) Be divided into short sections and sentences; and

(5) Use lists and tables wherever possible.

If you feel that we have not met these requirements, send us comments by one of the methods listed in the **ADDRESSES** section. To better help us revise the rule, your comments should be as specific as possible. For example, you should tell us the numbers of the sections or paragraphs that are unclearly written, which sections or sentences are too long, the sections where you feel lists or tables would be useful, etc.

References Cited

A complete list of references cited in this rulemaking is available on the Internet at *http://www.regulations.gov* under Docket No. FWS–R4–ES–2013–0040 and upon request from the Caribbean Ecological Services Field Office (see **FOR FURTHER INFORMATION CONTACT**).

Authors

The primary authors of this proposed rule are the staff members of the Caribbean Ecological Services Field Office.

List of Subjects in 50 CFR Part 17

Endangered and threatened species, Exports, Imports, Reporting and recordkeeping requirements, Transportation.

Proposed Regulation Promulgation

Accordingly, we propose to amend part 17, subchapter B of chapter I, title 50 of the Code of Federal Regulations, as set forth below:

PART 17—[AMENDED]

■ 1. The authority citation for part 17 continues to read as follows:

Authority: 16 U.S.C. 1361–1407; 1531–1544; 4201–4245, unless otherwise noted.

■ 2. In § 17.96, amend paragraph (a) as follows:

■ a. By adding entries for Family Agavaceae, Family Boraginaceae, and Family Ericaceae, in alphabetical order;

■ b. By adding an entry for *Agave eggersiana* in alphabetical order under Family Agavaceae;

■ c. By adding an entry for *Gonocalyx concolor* in alphabetical order under Family Ericaceae; and

■ d. By adding an entry for *Varronia rupicola* in alphabetical order under Family Boraginaceae.

The additions read as follows:

§ 17.96 Critical habitat—plants.

(a) *Flowering plants.*

Family Agavaceae: *Agave eggersiana*

(1) Critical habitat units are depicted for St. Croix, USVI, on the maps in this entry.

(2) Within these areas, the primary constituent elements of the physical or biological features essential to the conservation of *Agave eggersiana* consist of these components:

(i) Areas consisting of coastal cliffs and dry coastal shrublands.

(A) Coastal cliff habitat includes:

(*1*) Bare rock; and

(*2*) Sparse vegetation.

(B) Dry coastal shrubland habitat includes:

(*1*) Dry forest structure; and

(*2*) A plant community of predominately native vegetation.

(ii) Well-drained soils from the series Cramer, Glynn, Hasselberg, Southgate, and Victory.

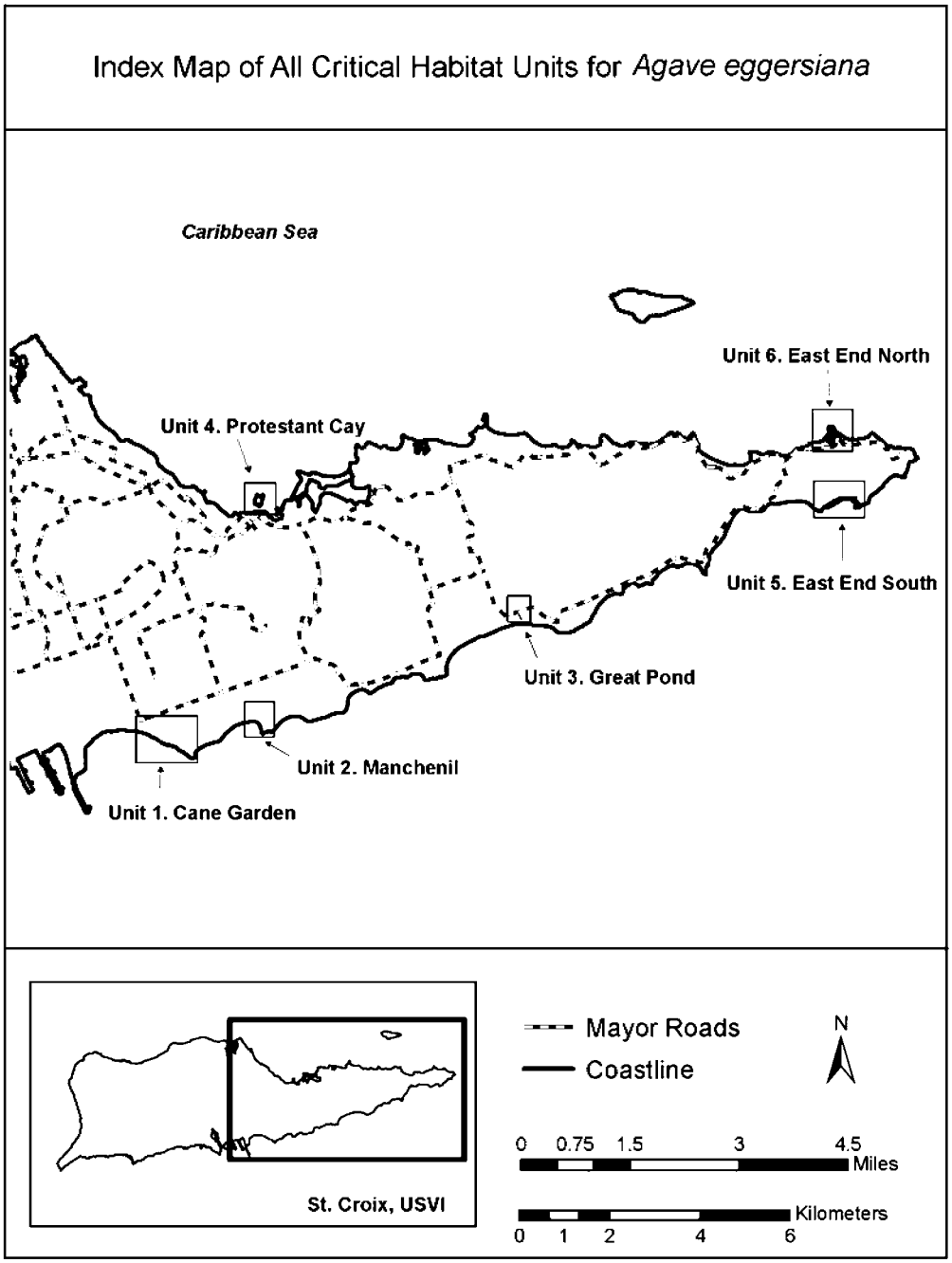
(iii) Habitat of sufficient area to sustain viable populations in the coastal cliffs and dry coastal shrublands described in paragraphs (2)(i)(A) and (2)(i)(B) of this entry.

(3) Critical habitat does not include manmade structures (such as bridges, docks, aqueducts, and paved areas) and the land on which they are located existing within the legal boundaries on the effective date of this rule.

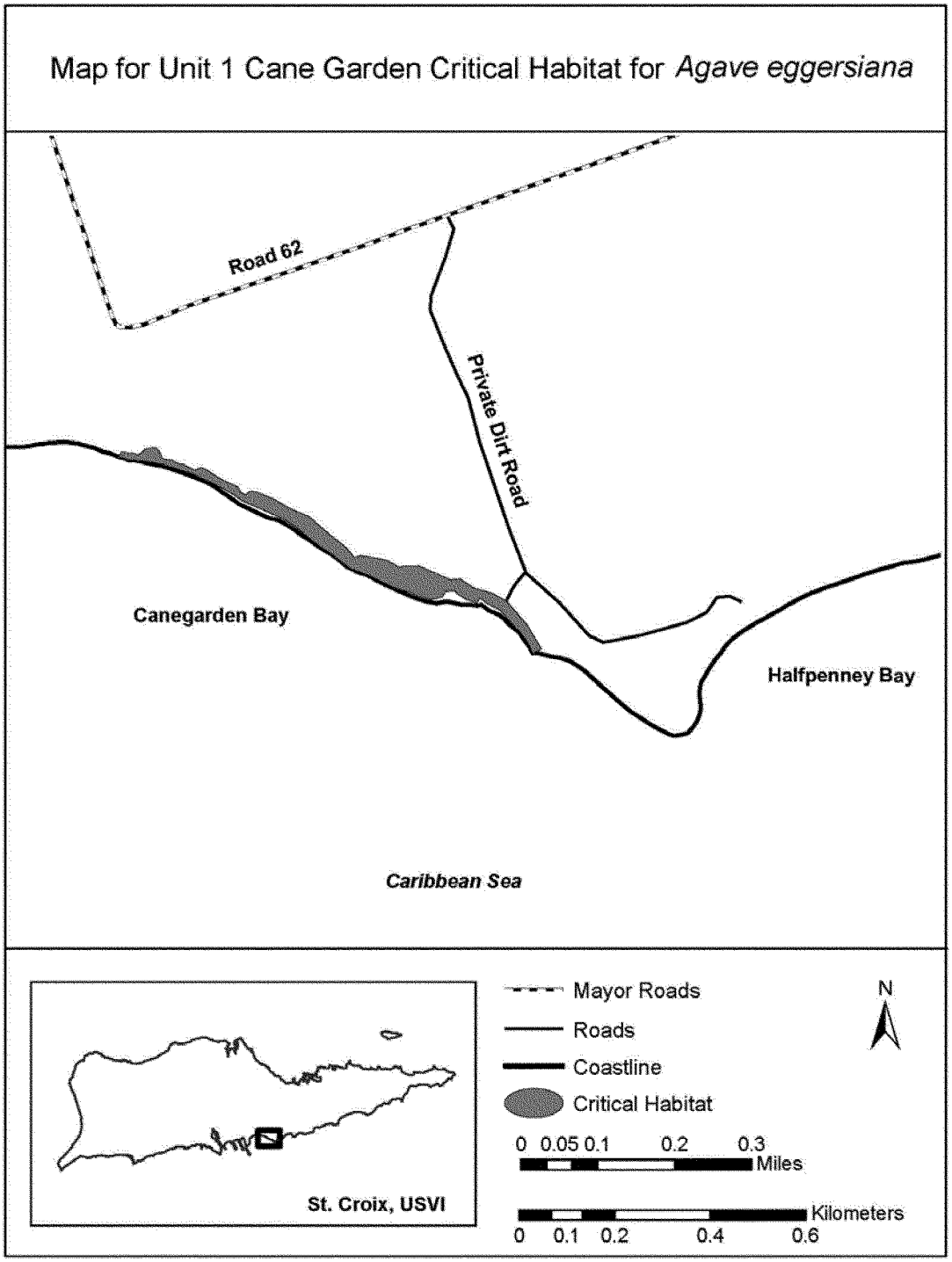
(4) *Critical habitat map units.* Data layers defining map units were created on a base of an aerial image (USCOE) and USFS–IITF Landcover GAP raster. Critical habitat units were then mapped using Universal Transverse Mercator (UTM) North American Datum (NAD) 1983 Zone 20 N coordinates. The maps in this entry, as modified by any accompanying regulatory text, establish the boundaries of the critical habitat designation. The coordinates or plot points or both on which each map is based are available to the public at the Service's Internet site at *http://www.fws.gov/caribbean/es,* at *http://www.regulations.gov* at Docket No. FWS–R4–ES–2013–0040, and at the field office responsible for this designation. You may obtain field office location information by contacting one of the Service regional offices, the addresses of which are listed at 50 CFR 2.2.

(5) Index map of critical habitat units for *Agave eggersiana* follows:

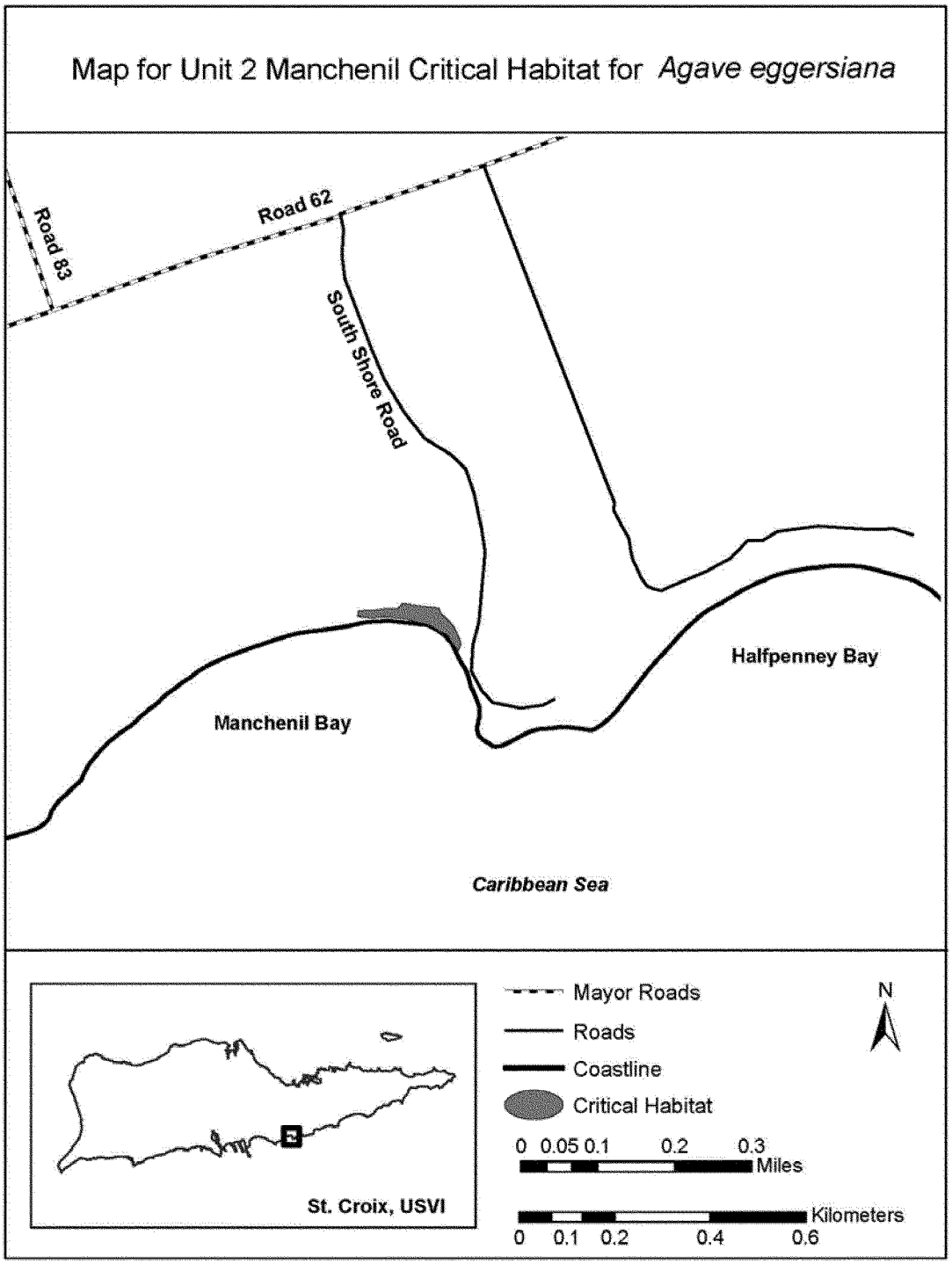
BILLING CODE 4310–55–P


Index Map of All Critical Habitat Units for *Agave eggersiana*
Caribbean Sea
Unit 6. East End North
Unit 4. Protestant Cay
Unit 5. East End South
Unit 3. Great Pond
Unit 2. Manchenil
Unit 1. Cane Garden
St. Croix, USVI
Mayor Roads
Coastline
N
0 0.75 1.5 3 4.5
Miles
Kilometers
0 1 2 4 6

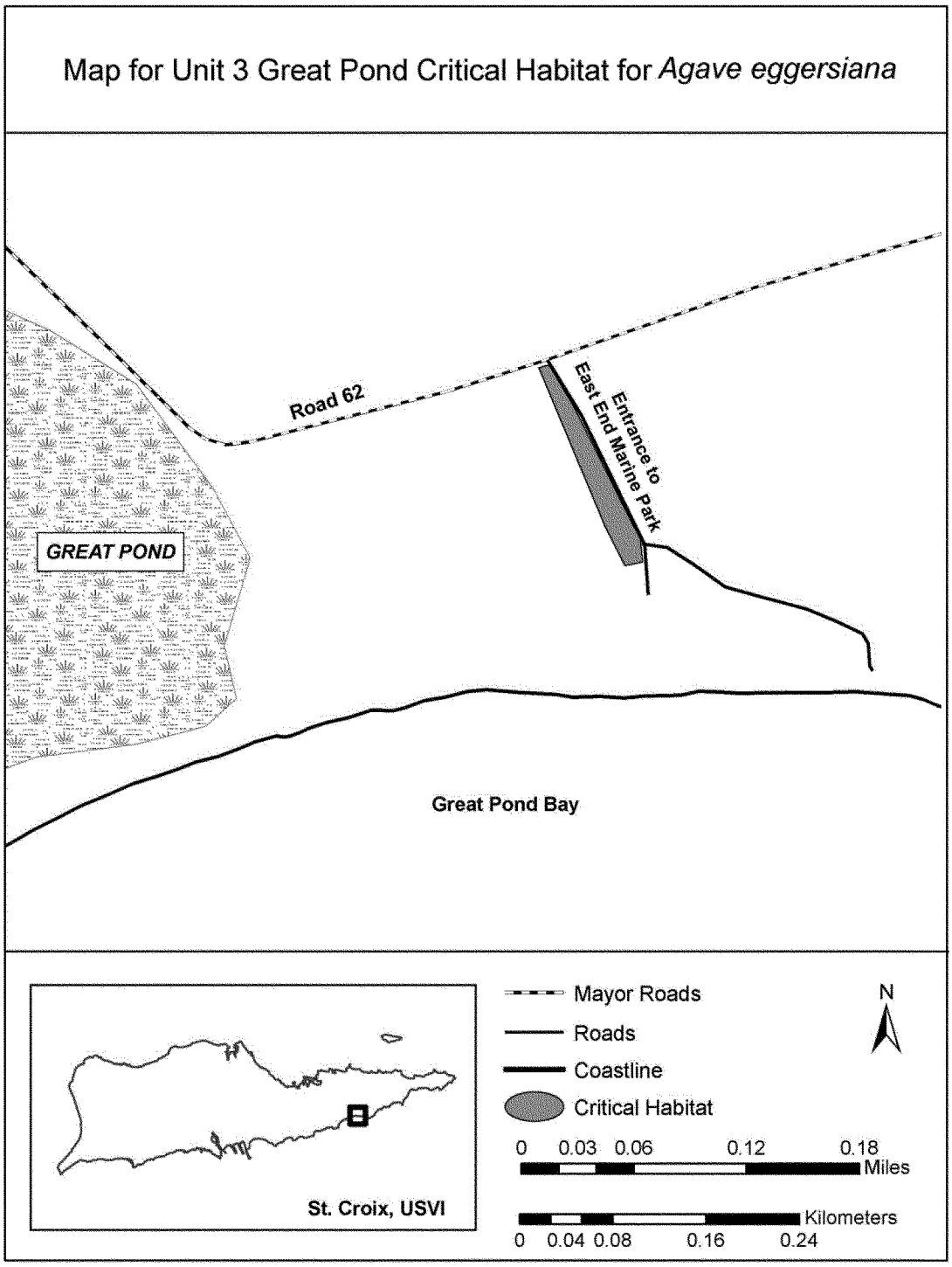
(6) Unit 1: Cane Garden, Estate Canegarden and Estate Peters Mindle, Christiansted, St. Croix, USVI. Map of Unit 1 follows:



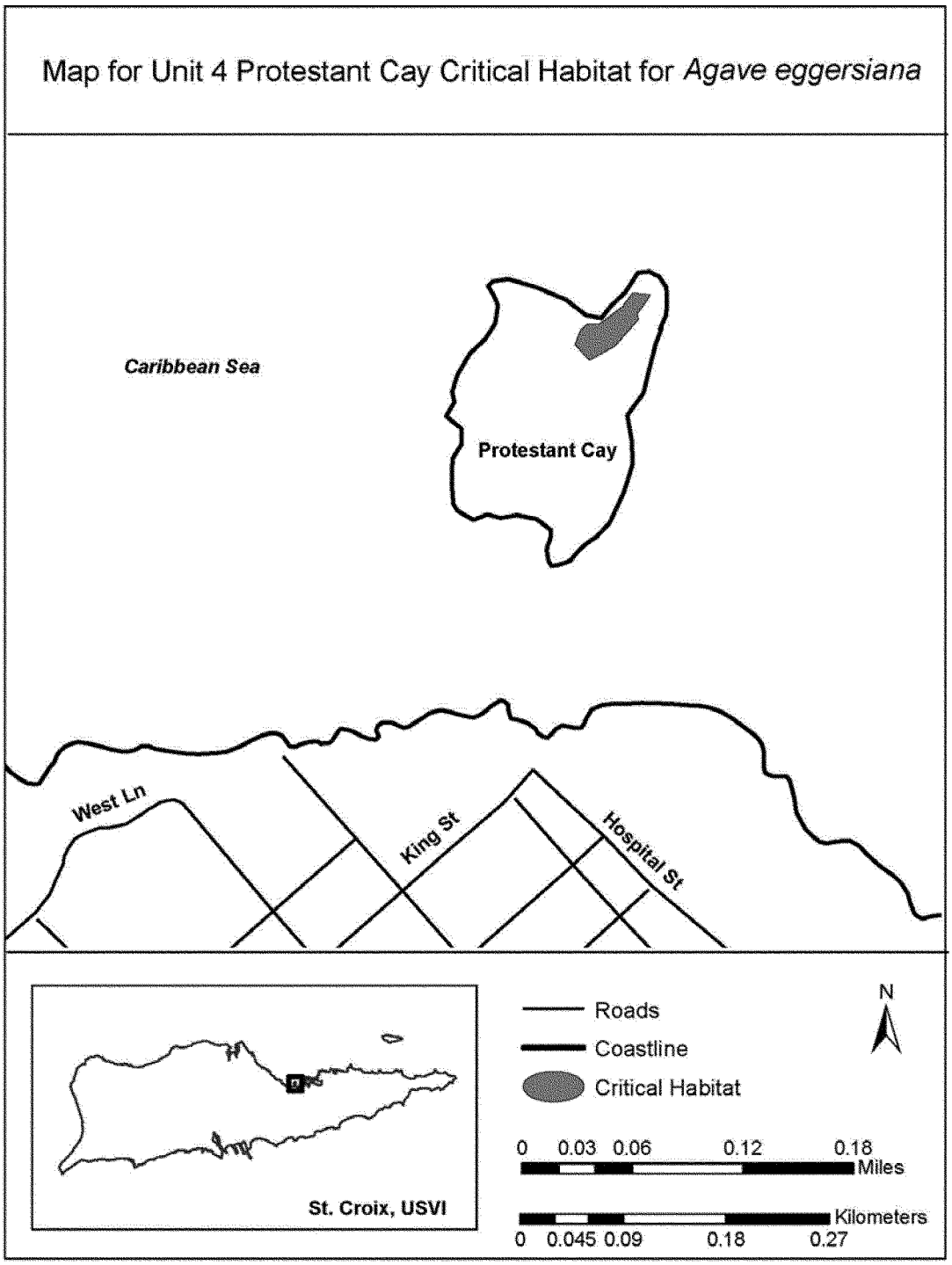
(7) Unit 2: Manchenil, Estate Granard, Christiansted, St. Croix, USVI. Map of Unit 2 follows:



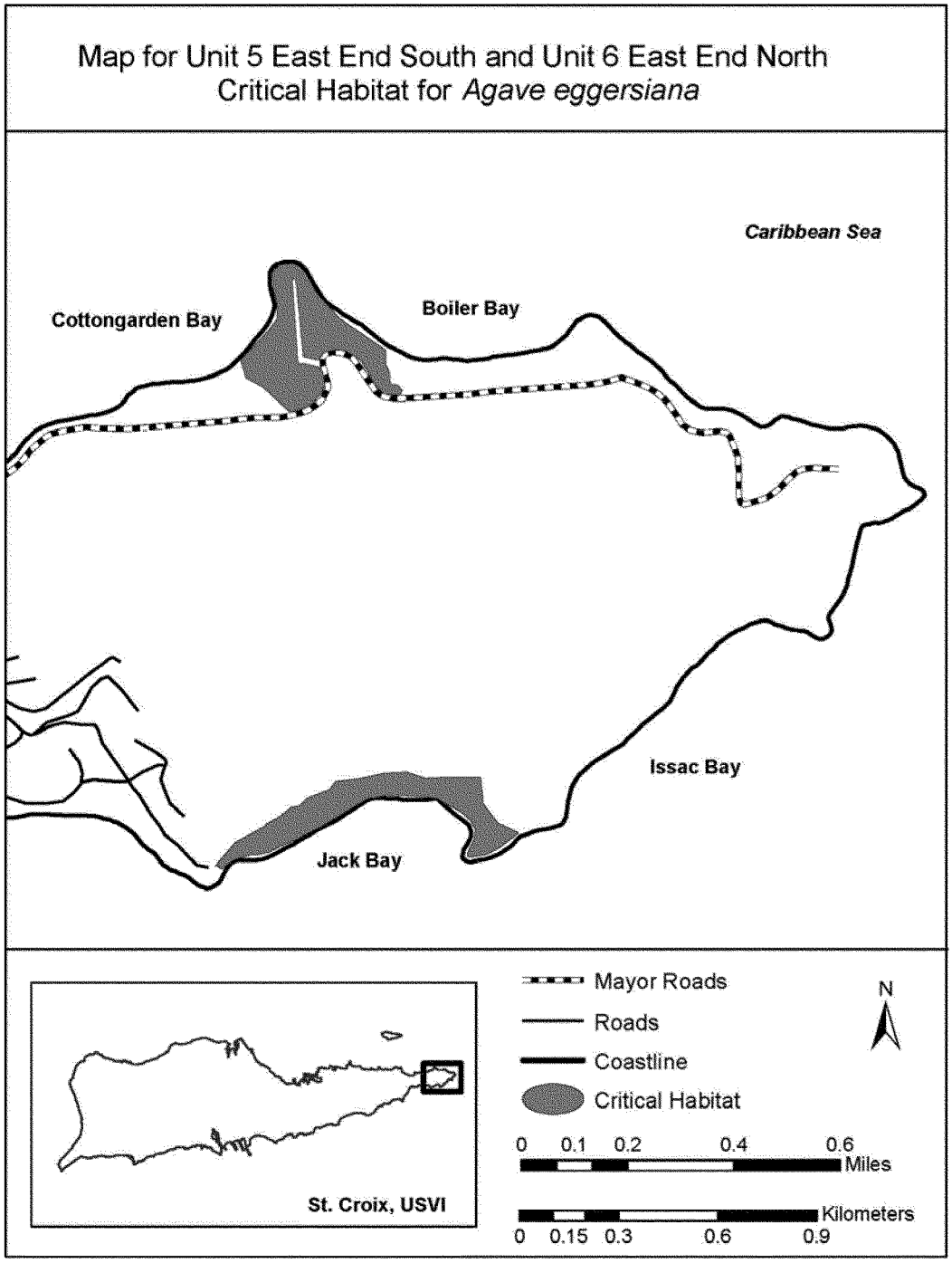
(8) Unit 3: Great Pond, Estate Great Pond, Christiansted, St. Croix, USVI. Map of Unit 3 follows:



(9) Unit 4: Protestant Cay, Protestant Cay, St. Croix, USVI. Map of Unit 4 follows:



(10) Unit 5: East End South, Estate Jack's Bay and Estate Issac's Bay, Christiansted, St. Croix, USVI. Map of Units 5 and 6 follows:



(11) Unit 6: East End North, Estate Cotton Garden, Christiansted, St. Croix, USVI. Map of Unit 6 is provided at paragraph (10) of this entry.

* * * * *

Family Boraginaceae: *Varronia rupicola*

(1) Critical habitat units are depicted for the municipalities of Guánica, Yauco, Guayanilla, Peñuelas, Ponce, and Vieques, Commonwealth of Puerto Rico, on the maps in this entry.

(2) Within these areas, the primary constituent elements of the physical or biological features essential to the conservation of *Varronia rupicola* consist of the following components:

(i) Remnants of native shrubland and scrubland forest on limestone substrate within the subtropical dry forest life zone. Dry shrubland and scrubland forest includes:

(A) Shrubland vegetation with canopy from 6.5 to 9.8 ft (2 to 3 m) high;

(B) Limestone pavement;

(C) Associated native vegetation; and

(D) A shrub layer dominated by *Croton humilis, Eupatorium sinuatum, Lantana reticulata,* and *Turnera diffusa.*

(ii) Semi-deciduous dry forest on limestone substrate within the subtropical dry forest life zone. Dry limestone semi-deciduous forest includes:

(A) Low forest with canopy from 8 to 15 ft (3 to 5 m) high;

(B) Limestone pavement;

(C) Associated dry forest native vegetation; and

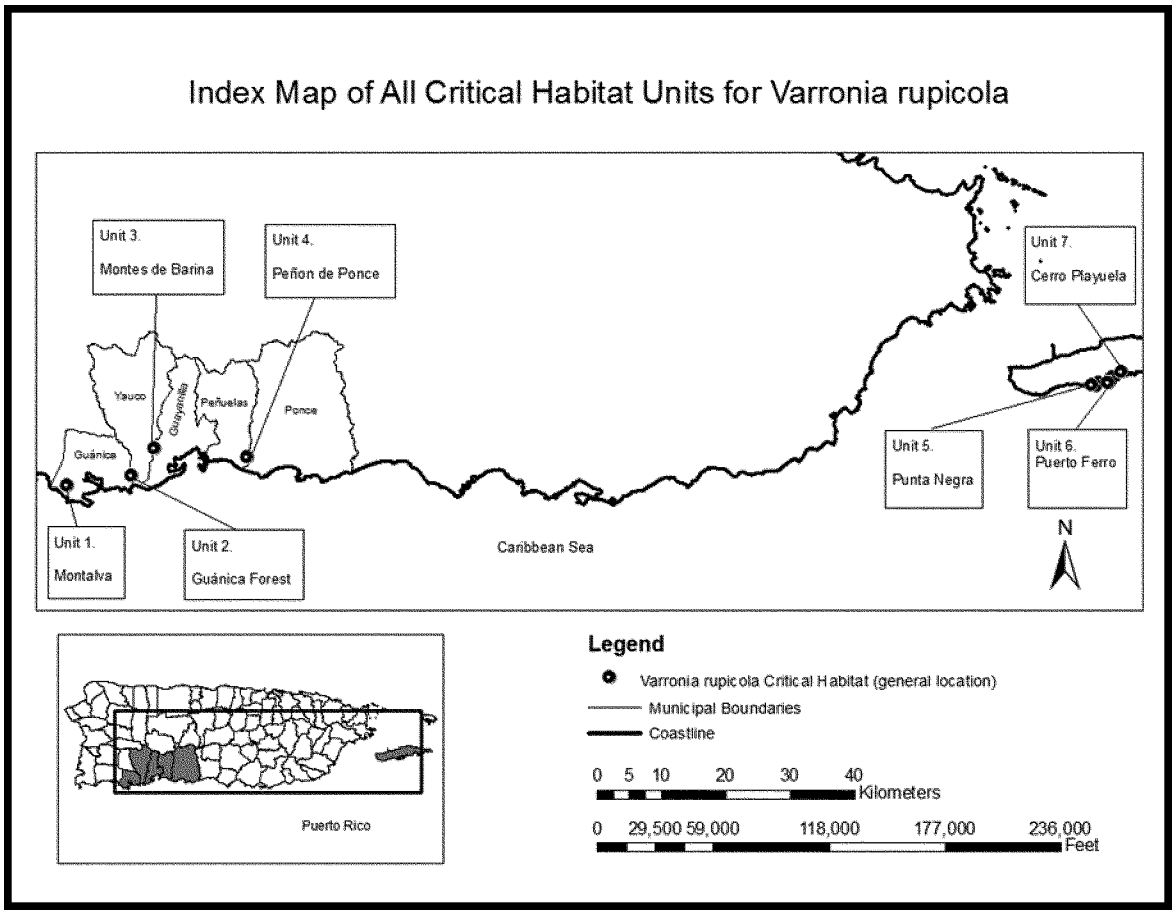
(D) A shrub layer dominated by *Croton humilis, Eupatorium sinuatum, Lantana reticulata,* and *Turnera diffusa.*

(iii) The type locations described paragraphs (2)(i) and (2)(ii) of this entry for this species should have shallow and alkaline soils derived from limestone rock and an average rainfall of 34 in (86 cm).

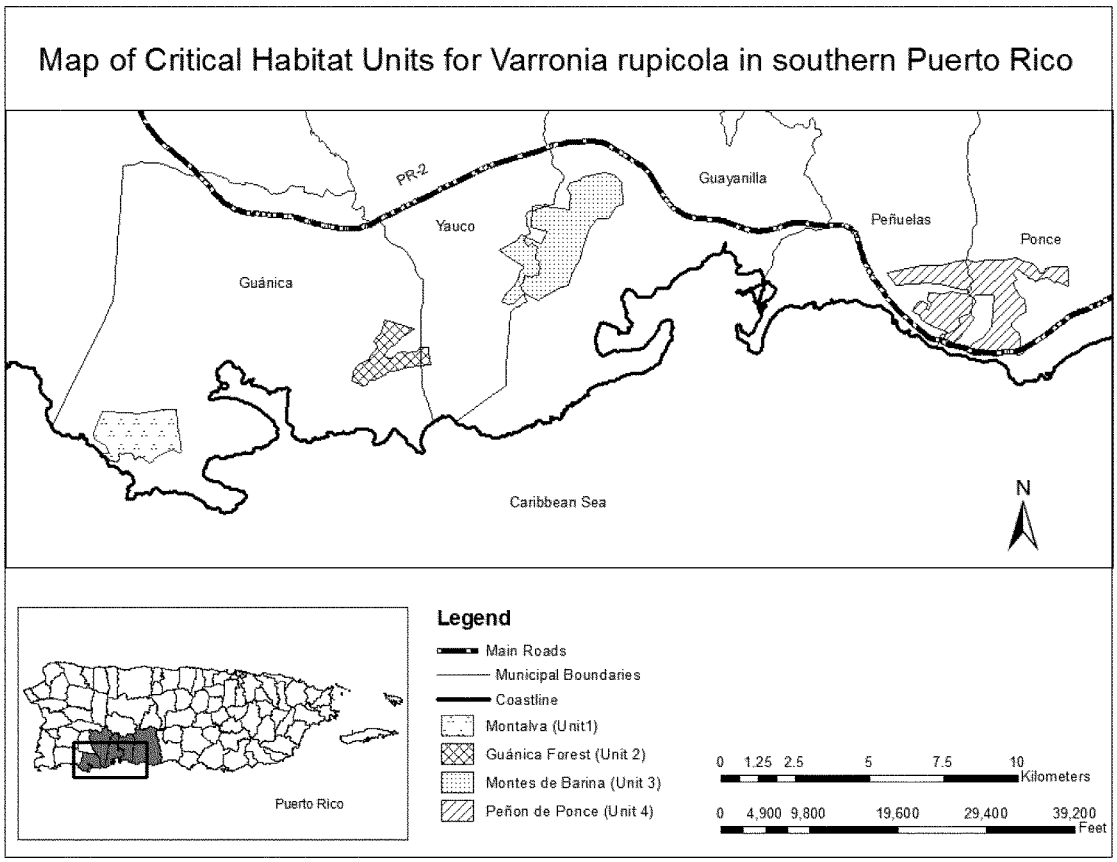
(3) Critical habitat does not include manmade structures (such as houses, bridges, aqueducts, and paved areas) and the land on which they are located existing within the legal boundaries on the effective date of this rule.

(4) *Critical habitat map units.* Data layers defining map units were created on a base of an aerial image (ESRI image Basemap) and USFS–IITF Landcover GAP raster. Critical habitat units were then mapped using the Geographic Coordinate System-World Geodetic System (WGS) 1984 datum. The maps in this entry, as modified by any accompanying regulatory text, establish the boundaries of the critical habitat designation. The coordinates or plot points or both on which each map is based are available to the public at the Service's Internet site, *http://www.fws.gov/caribbean/es,* at *http://www.regulations.gov* at Docket No. FWS–R4–ES–2013–0040, and at the field office responsible for this designation. You may obtain field office location information by contacting one of the Service regional offices, the addresses of which are listed at 50 CFR 2.2.

(5) Index map of critical habitat units for *Varronia rupicola* follows:



(6) Unit 1: Montalva, municipality of Guánica, Puerto Rico. Map of Units 1, 2, 3, and 4 follows:

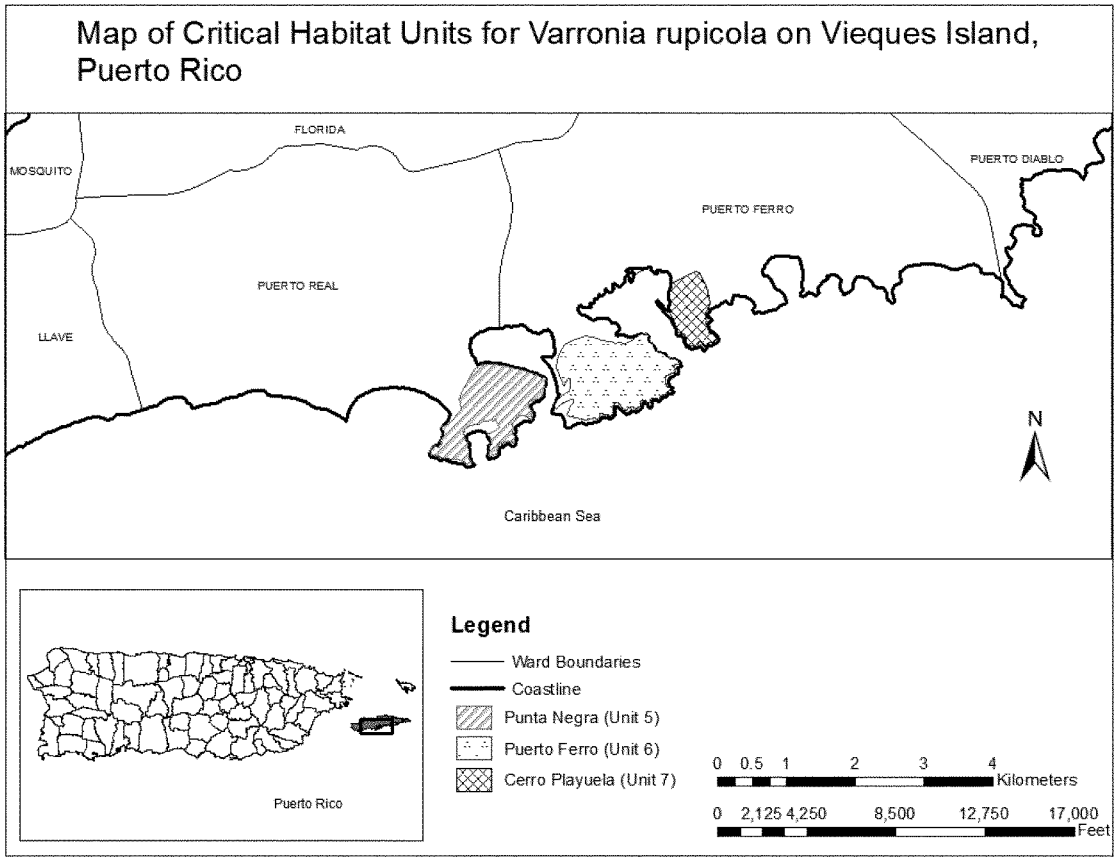


(7) Unit 2: Guánica Commonwealth Forest, municipalities of Guánica and Yauco, Puerto Rico. Map of Unit 2 is provided at paragraph (6) of this entry.

(8) Unit 3: Montes de Barina, municipalities of Yauco and Guayanilla, Puerto Rico. Map of Unit 3 is provided at paragraph (6) of this entry.

(9) Unit 4: Peñon de Ponce, municipalities of Peñuelas and Ponce, Puerto Rico. Map of Unit 4 is provided at paragraph (6) of this entry.

(10) Unit 5: Punta Negra, municipality of Vieques, Puerto Rico. Map of Units 5, 6, and 7 follows:



(11) Unit 6: Puerto Ferro, municipality of Vieques, Puerto Rico. Map of Unit 6 is provided at paragraph (10) of this entry.

(12) Unit 7: Cerro Playuela, municipality of Vieques, Puerto Rico. Map of Unit 7 is provided at paragraph (10) of this entry.

* * * * *

Family Ericaceae: Gonocalyx concolor

(1) Critical habitat units are depicted for the municipalities of Cayey, San Lorenzo, and Patillas, Commonwealth of Puerto Rico, on the maps in this entry.

(2) Within these areas, the primary constituent elements of the physical or biological features essential to the conservation of *Gonocalyx concolor* consist of these components:

(i) Elfin forest at elevations over 2,900 ft (880 m) in Cerro La Santa, Puerto Rico, which includes:

(A) Forest with single canopy layer with trees seldom exceeding 22 ft (7 m) in height.

(B) Associated native vegetation dominated by species such as *Tabebuia schumanniana, Tabebuia rigida, Ocotea spathulata, Eugenia borinquensis, Clusia minor,* and *Prestoea acuminata* var. *montana,* native ferns, and dense cover with epiphytes, including bromeliads and mosses.

(ii) Ausubo forest at elevations between 2,000 to 2,300 ft (620 to 720 m) in the Charco Azul, which includes:

(A) Forest with single canopy layer with trees exceeding 22 ft (7 m) in height.

(B) Plant association comprised by few species of native trees and associated native vegetation (e.g., *Manilkara bidentata, Dacryodes excelsa, Guarea guidonia,* and *Cyrilla racemiflora*), native ferns, and dense cover with epiphytes, including bromeliads and mosses.

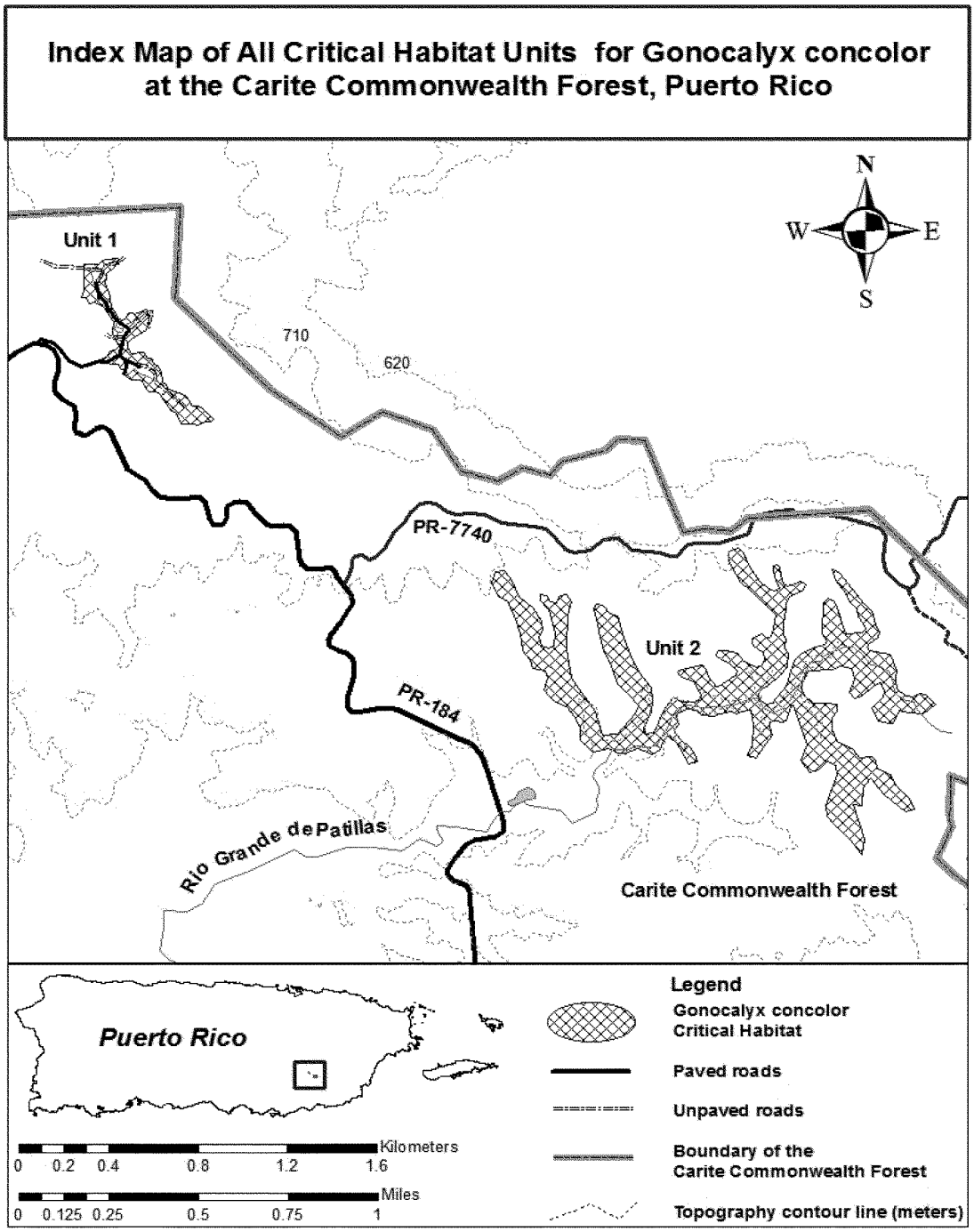
(iii) The type locations described in paragraphs (2)(i) and (2)(ii) of this entry for this species should have mean annual precipitation of 88.7 in (225.3 cm), mean annual temperature of 72.3 °F (22.7 °C), and Los Guineos type of soil (i.e., very deep, acidic, clayey, well-drained soils on side slopes of mountains).

(3) Critical habitat does not include manmade structures (such as bridges, docks, and aqueducts) and the land on which they are located existing within the legal boundaries on the effective date of this rule.

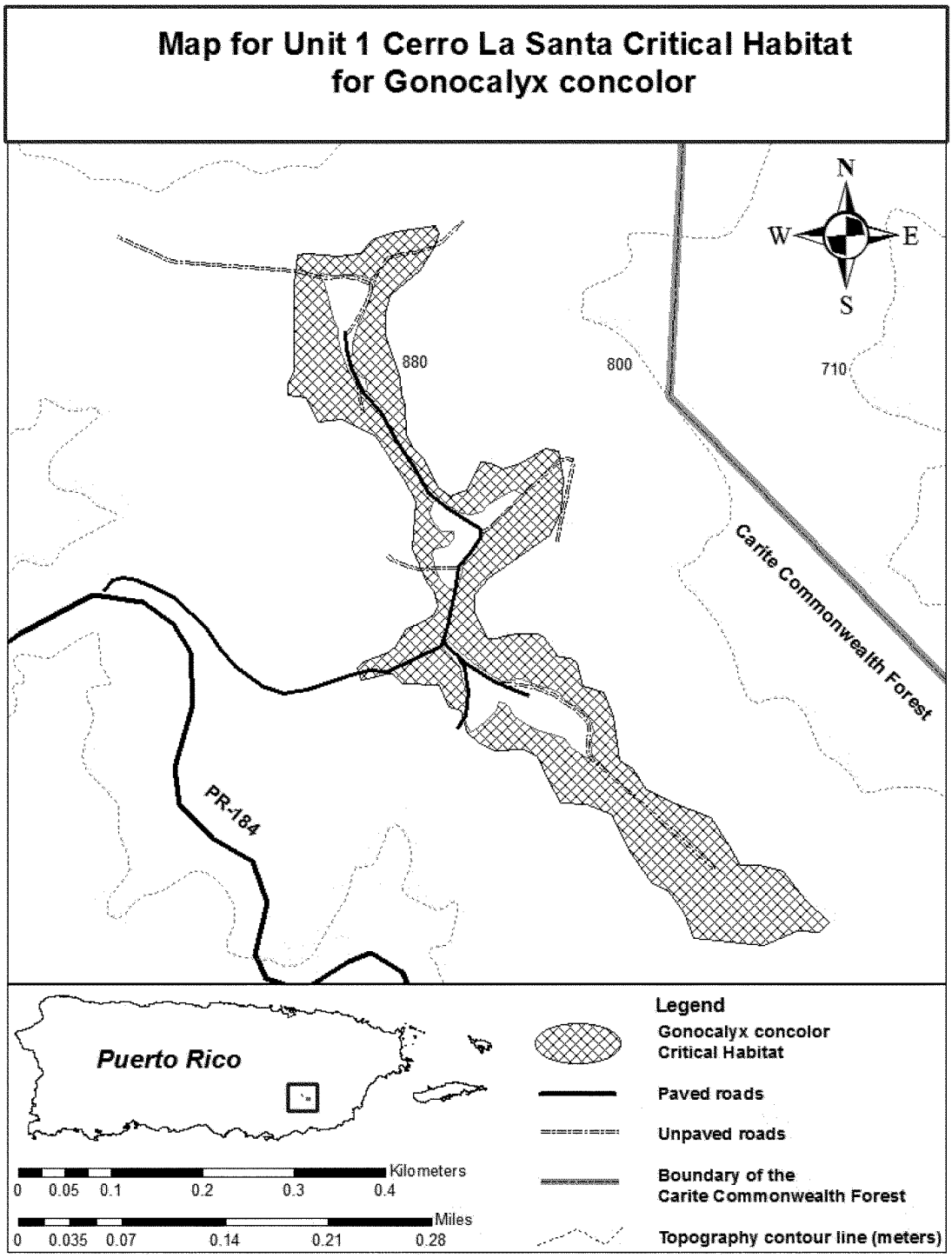
(4) *Critical habitat map units.* Data layers defining map units were created on a base of U.S. Geological Survey digital ortho-photo quarter-quadrangles, and critical habitat units were then mapped using aerial photos (ArcGis) to limits of the boundaries of the elfin forest and ausubo forest. Critical habitat units were then mapped using ArcMap version 10 (Environmental Systems Research Institute, Inc.), a Geographic Information Systems program. The maps in this entry, as modified by any accompanying regulatory text, establish the boundaries of the critical habitat designation. The coordinates or plot points or both on which each map is

based are available to the public at the Service's Internet site at *http://www.fws.gov/caribbean/es,* at *http://www.regulations.gov* at Docket No. FWS–R4–ES–2013–0040, and at the field office responsible for this designation. You may obtain field office location information by contacting one of the Service regional offices, the addresses of which are listed at 50 CFR 2.2.

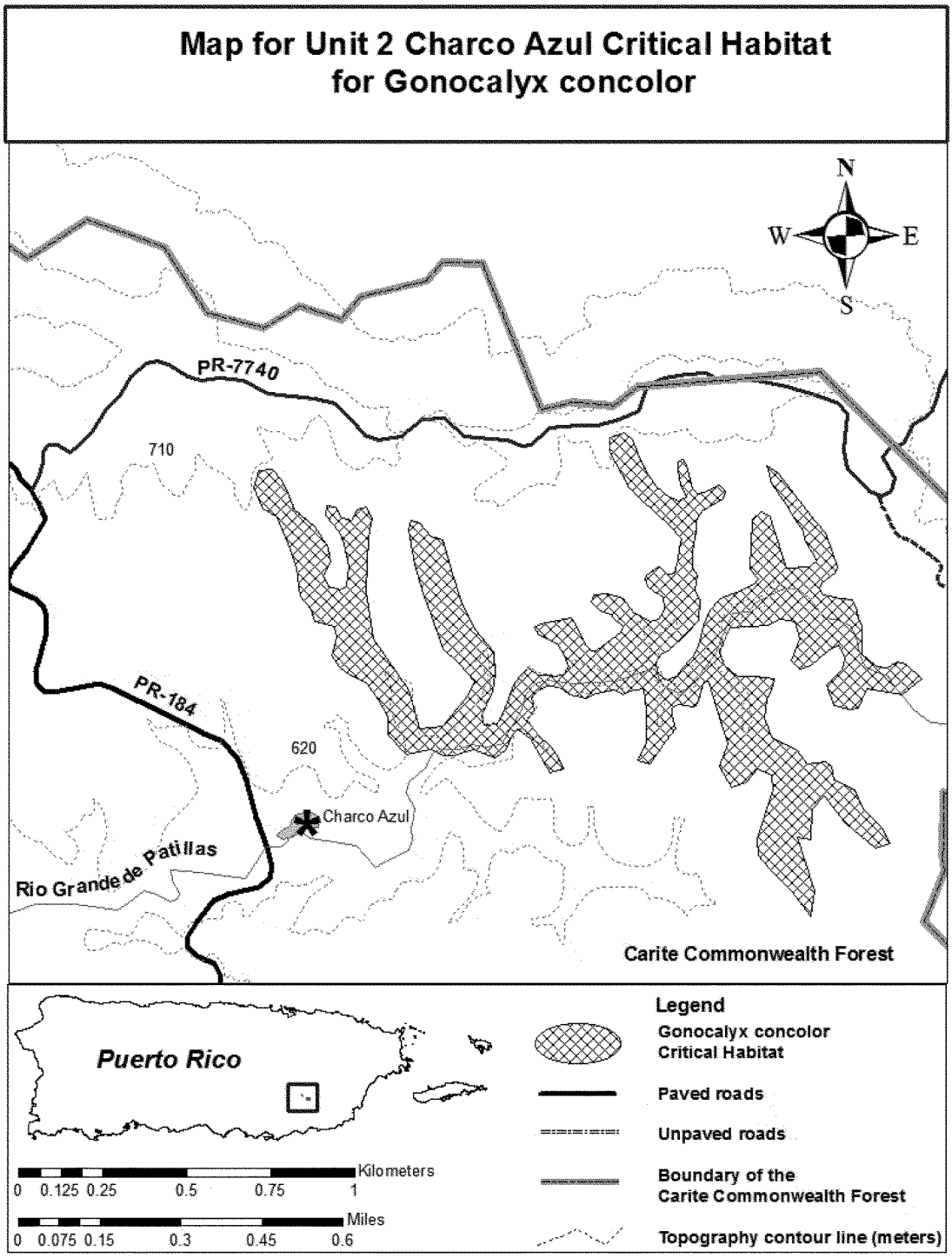
(5) Index map of critical habitat units for *Gonocalyx concolor* follows:



(6) Unit 1: Cerro La Santa, Carite Commonwealth Forest, Puerto Rico. Map of Unit 1 follows:



(7) Unit 2: Charco Azul, Carite Commonwealth Forest, Puerto Rico. Map of Unit 2 follows:



* * * * *

Dated: September 9, 2013.

Rachel Jacobson,

Principal Deputy Assistant Secretary for Fish Wildlife and Parks.

[FR Doc. 2013–24169 Filed 10–3–13; 8:45 am]

BILLING CODE 4310–55–C

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

[Docket No. FWS–R4–ES–2013–0103; 4500030113]

RIN 1018–AZ10

Endangered and Threatened Wildlife and Plants; Endangered Status for Agave eggersiana and Gonocalyx concolor, and Threatened Status for Varronia rupicola

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Proposed rule.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service), propose to list *Agave eggersiana* (no common name) and *Gonocalyx concolor* (no common name) as endangered species, and *Varronia rupicola* (no common name) as a threatened species under the Endangered Species Act of 1973, as amended (Act). These three plants are endemic to the Caribbean. The effect of this regulation, if finalized, would be to conserve *A. eggersiana, G. concolor,* and *V. rupicola* under the Act.

DATES: We will accept comments received or postmarked on or before December 23, 2013. Comments submitted electronically using the Federal eRulemaking Portal (see **ADDRESSES** section, below) must be received by 11:59 p.m. Eastern Time on the closing date. We must receive requests for public hearings, in writing, at the address shown in **FOR FURTHER INFORMATION CONTACT** by December 6, 2013.

ADDRESSES: You may submit comments by one of the following methods:

(1) *Electronically:* Go to the Federal eRulemaking Portal: *http://www.regulations.gov.* In the Search box, enter FWS–R4–ES–2013–0103, which is the docket number for this rulemaking. Then, in the Search panel on the left side of the screen, under the Document Type heading, click on the Proposed Rules link to locate this document. You may submit a comment by clicking on ''Comment Now!''

(2) *By hard copy:* Submit by U.S. mail or hand-delivery to: Public Comments Processing, Attn: FWS–R4–ES–2013–0103; Division of Policy and Directives Management; U.S. Fish and Wildlife Service; 4401 N. Fairfax Drive, MS 2042–PDM; Arlington, VA 22203.

We request that you send comments only by the methods described above. We will post all comments on *http://www.regulations.gov.* This generally means that we will post any personal information you provide us (see the Information Requested section below for more information).

FOR FURTHER INFORMATION CONTACT: Marelisa Rivera, Deputy Field Supervisor, U.S. Fish and Wildlife Service, Caribbean Ecological Services Field Office, P.O. Box 491, Road 301 Km. 5.1, Boquerón, PR 00622; by telephone 787–851–7297; or by facsimile 787–851–7440. Persons who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 800–877–8339.

SUPPLEMENTARY INFORMATION:

Executive Summary

Why we need to publish a rule. Under the Act, if we intend to list a species as endangered or threatened throughout all or a significant portion of its range, we are required to promptly publish a proposal in the **Federal Register** and make a final determination on our proposal within 1 year. Listing a species as an endangered or threatened species can only be completed by issuing a rule. *Agave eggersiana, Gonocalyx concolor,* and *Varronia rupicola* are candidate species for which we have on file sufficient information on biological vulnerability and threats to support preparation of a listing proposal, but for which development of a listing proposal has until now been precluded by other higher priority listing activities.

This rule consists of a proposed rule to list *Agave eggersiana* and *Gonocalyx concolor* as endangered, and *Varronia rupicola* as threatened. This proposed rule reassesses all available information regarding the status of and threats to *A. eggersiana, G. concolor,* and *V. rupicola.* Elsewhere in today's **Federal Register**, we propose to designate critical habitat for *A. eggersiana, G. concolor,* and *V. rupicola* under the Act.

The basis for our action. Under the Act, we may determine that a species is an endangered or threatened species based on any of five factors: (A) The present or threatened destruction, modification, or curtailment of its habitat or range; (B) overutilization for commercial, recreational, scientific, or educational purposes; (C) disease or predation; (D) the inadequacy of existing regulatory mechanisms; or (E) other natural or manmade factors affecting its continued existence.

We have determined that listing is warranted for these species, which are currently at risk throughout all of their respective ranges due to threats related to:

- *A. eggersiana*—potential future development for residential, urban, and tourist use; agriculture use; dropping of debris; competing nonnative plants; fires; predation; and disease cause by insects (weevils).
- *G. concolor*—installation or expansion of telecommunication towers, road improvement, vegetation management, and small number of individuals and populations.
- *V. rupicola*—loss of habitat due to urban development, right-of-way development and maintenance, deforestation, and hurricanes; and inadequate existing regulatory mechanisms (lack of enforcement).

We will seek peer review. We are seeking comments from knowledgeable individuals with scientific expertise to review our analysis of the best available science and application of that science and to provide any additional information to improve this proposed rule. Because we will consider all comments and information we receive during the comment period, our final determinations may differ from this proposal.

Information Requested

We intend that any final action resulting from this proposed rule will be based on the best scientific and commercial data available and be as accurate and as effective as possible. Therefore, we request comments or information from other concerned governmental agencies, Native American tribes, the scientific community, industry, or any other interested parties concerning this proposed rule. We particularly seek comments concerning:

(1) The biology, range, and population trends of *A. eggersiana, G. concolor,* and *V. rupicola,* including:

(a) Habitat requirements for feeding, reproducing, and sheltering;

(b) Genetics and taxonomy;

(c) Historical and current range, including distribution patterns;

(d) Historical and current population levels, and current and projected trends; and

(e) Past and ongoing conservation measures for these species, their habitat, or both.

(2) The factors that are the basis for making a listing determination for these

species under section 4(a) of the Act, which are:

(a) The present or threatened destruction, modification, or curtailment of their habitat or range;

(b) Overutilization for commercial, recreational, scientific, or educational purposes;

(c) Disease or predation;

(d) The inadequacy of existing regulatory mechanisms; or

(e) Other natural or manmade factors affecting their continued existence.

(3) Biological, commercial trade, or other relevant data concerning any threats (or lack thereof) to these species and existing regulations that may be addressing those threats.

(4) Additional information concerning the historical and current status, range, distribution, and population size of these species, including the locations of any additional populations of these species.

(5) Any information on the biological or ecological requirements of the species and ongoing conservation measures for the species and their habitats.

Please include sufficient information with your submission (such as scientific journal articles or other publications) to allow us to verify any scientific or commercial information you include.

Please note that submissions merely stating support for or opposition to the action under consideration without providing supporting information, although noted, will not be considered in making a determination, as section 4(b)(1)(A) of the Act directs that determinations as to whether any species is an endangered or threatened species must be made ''solely on the basis of the best scientific and commercial data available.''

You may submit your comments and materials concerning this proposed rule by one of the methods listed in the **ADDRESSES** section. We request that you send comments only by the methods described in the **ADDRESSES** section.

If you submit information via *http://www.regulations.gov,* your entire submission—including any personal identifying information—will be posted on the Web site. If your submission is made via a hardcopy that includes personal identifying information, you may request at the top of your document that we withhold this information from public review. However, we cannot guarantee that we will be able to do so. We will post all hardcopy submissions on *http://www.regulations.gov.* Please include sufficient information with your comments to allow us to verify any scientific or commercial information you include.

Comments and materials we receive, as well as supporting documentation we used in preparing this proposed rule, will be available for public inspection on *http://www.regulations.gov,* or by appointment, during normal business hours, at the U.S. Fish and Wildlife Service, Caribbean Ecological Services Field Office (see **FOR FURTHER INFORMATION CONTACT**).

Previous Federal Actions

Through February 1996

On December 15, 1980, *Agave eggersiana, Gonocalyx concolor,* and *Varronia rupicola* (as *Cordia rupicola*) were identified as Category 2 candidate species in the candidate notice of review (CNOR) published in the **Federal Register** (45 FR 82480). A Category 2 species was one for which the Service had information that proposing as endangered or threatened may be appropriate but for which sufficient information was not currently available to support a proposed rule. None of the three species was mentioned in the November 28, 1983, CNOR (48 FR 53640), but all three again were named as Category 2 candidate species in the September 27, 1985, CNOR (50 FR 39526). They all remained Category 2 candidate species in the February 21, 1990 (55 FR 6184), and September 30, 1993 (58 FR 51144), CNORs. Designation of Category 2 species was discontinued in the February 28, 1996, CNOR (61 FR 7596). The 1996 CNOR redefined candidates to include only species for which we have information needed to propose them for listing, and as a result, *A. eggersiana, G. concolor,* and *V. rupicola* were removed from the candidate list.

After February 1996: *Agave eggersiana*

On November 21, 1996, we received a petition from the U.S. Virgin Islands Department of Planning and Natural Resources (DPNR) requesting that we list *Agave eggersiana* as endangered. On November 16, 1998, we published in the **Federal Register** (63 FR 63659) our finding that the petition to list *A. eggersiana* presented substantial information indicating that the requested action may be warranted, and we initiated a status review on the plant.

On September 1, 2004, the Center for Biological Diversity (CBD) filed a lawsuit against the Department of the Interior and the Service alleging that the Service failed to publish a 12-month finding for *Agave eggersiana* (*Center for Biological Diversity* v. *Norton,* Civil Action No. 1:04–CV–2553 CAP). In a stipulated settlement agreement resolving that case, signed April 27, 2005, we agreed to submit our 12-month finding for *A. eggersiana* to the **Federal Register** by February 28, 2006. On March 7, 2006, we published our 12-month finding (71 FR 11367) that listing of *A. eggersiana* was not warranted. On September 9, 2008, CBD filed a complaint that challenged our 12-month finding (*Center for Biological Diversity* v. *Hamilton,* Case No. 1:08–cv–02830–CAP). In a settlement agreement approved by the Court on August 21, 2009, the Service agreed to submit to the **Federal Register** a new 12-month finding for *A. eggersiana.* On September 22, 2010, we published in the **Federal Register** (75 FR 57720) a finding that listing *A. eggersiana* was warranted, but precluded by higher priority actions to amend the Lists of Endangered and Threatened Wildlife and Plants.

Agave eggersiana was named a candidate species with a listing priority number (LPN) of 8 in the CNORs published on November 10, 2010 (75 FR 69222), October 26, 2011 (76 FR 66370), and November 21, 2012 (77 FR 69993). An LPN of 8 was assigned to *Agave eggersiana* because the species faced threats of moderate magnitude that were imminent.

After February 1996: *Gonocalyx concolor* and *Varronia rupicola*

On October 25, 1999, we published in the **Federal Register** a CNOR (64 FR 57535) that added *Gonocalyx concolor* and *Varronia rupicola* (as *Cordia rupicola*) to the list of candidate species with LPNs of 5 and 2, respectively. *Gonocalyx concolor* was assigned an LPN of 5 because it faced threats that were high in magnitude but nonimminent. *Varronia rupicola* (as *Cordia rupicola*) was assigned an LPN of 2 because it faced threats of a high magnitude that were imminent. These two plants retained their respective LPN assignments in the CNORs published on October 30, 2001 (66 FR 54808), June 13, 2002 (67 FR 40657), May 4, 2004 (69 FR 24876), May 11, 2005 (70 FR 24870), and September 12, 2006 (71 FR 53756).

In the CNOR published on December 6, 2007 (72 FR 69034), *Varronia rupicola* (as *Cordia rupicola*) was assigned an LPN of 5, because its threats were determined to be nonimminent. In the 2007 CNOR, *Gonocalyx concolor* retained its LPN of 5. Both plants retained an LPN of 5 in the CNORs published on December 10, 2008 (73 FR 75176), November 9, 2009 (74 FR 57804), November 10, 2010 (75 FR 69222), October 26, 2011 (76 FR 66370), and November 21, 2012 (77 FR 69993).

On May 11, 2004, we received a petition from the CBD (CBD 2004, pp.

66–69) requesting that *G. concolor* and *V. rupicola* be listed as an endangered species under the Act. No new information was provided in the petition.

Species Information

Taxonomy and Description

Agave eggersiana

Agave eggersiana is a flowering plant of the family Agavaceae (century plant family) endemic to the island of St. Croix in the U.S. Virgin Islands (USVI). This species was originally described in 1913, by William Trelease from material collected on St. Croix, and is distinguished from other members of the Agavaceae family by its acaulescent (without an evident leafy stem), non-suckering growth habit (vegetative reproduction that does not form offshoots around its base), and its fleshy, nearly straight leaves with small marginal prickles of 0.04 inches (in) (0.1 centimeters (cm)) long that are nearly straight (Britton and Wilson 1923, p. 156; Proctor and Acevedo-Rodríguez 2005, p. 118). Its flowers are deep yellow and 2.0 to 2.34 in (5 to 6 cm) long. After flowering, the panicles (inflorescence) produce numerous small vegetative bulbs (bulbils), from which the species can be propagated (Proctor and Acevedo-Rodríguez 2005, p. 118). *Agave eggersiana* is not known to produce fruit, and like other *Agave* species, is monocarpic, meaning the plant dies after producing the spike or inflorescence. Furthermore, based on observations of cultivated plants, *A. eggersiana* requires at least 10 to 15 years to develop as a mature individual and to produce an inflorescence (David Hamada, St. George Village Botanical Garden, pers. comm., 2010).

Gonocalyx concolor

Gonocalyx concolor was described in 1970, as a new species of the genus *Gonocalyx,* family Ericaceae, for Puerto Rico (Nevling 1970, p. 221). *Gonocalyx* is a neotropical genus comprised of 10 species, ranging from Costa Rica to North Colombia, and the Caribbean (Dominican Republic, Puerto Rico, Dominica, and Guadalupe) (Luteyn and Pedraza-Peñalosa 2011, p. 1). Two of the species are considered endemic to Puerto Rico: *G. concolor* and *G. portoricensis* (Lioger and Martorell 2000, p. 151). These two species are derived from common ancestral stock; hence there is great similarity in many details and in aspect, as well as geographic proximity (Nevling 1970, p. 223).

Although *G. concolor* is similar to *G. portoricensis,* differences in distribution and flower morphology indicate that they are well-differentiated species (Nevling 1970, p. 224). The flower of *G. portoricensis* is pendent with light green calyx, and the corolla tube is whitish to pinkish; *G. portoricensis* is insect-pollinated flower (Proctor 1992, p. 3). *Gonocalyx concolor* differs from *G. portoricensis* in its vivid red, semipendent flowers, which apparently are hummingbird pollinated, and in its range (Nevling 1970, p. 224). *Gonocalyx concolor* is a small evergreen shrub, mainly epiphytic (grow on the trunks of trees) or clambering (use other vegetation as support), which may reach 15 feet (ft) (4.7 meters (m)) in length (Acevedo 2005, p. 227). The leaves are simple, alternate, entire, and coriaceous (leathery). The leaf blade is ovate, broadly elliptic, or nearly orbicular; 0.5 to 1.2 in (1.5 to 3 cm) long; and 0.5 to 0.9 in (1.3 to 2.3 cm) broad. The leaf base is apiculate (ending in a short sharp point) and obtuse to acute at the apex, and is rounded at the base; the leaf's upper surface is glabrous (smooth or hairless) above, with scattered large trichomes (papilliform hairs) beneath. The leaf venation is 5-pli (the leaf venation is 1 central vein and 4 secondary veins bending toward apex) from the base (secondary veins bending toward apex), outer set marginal, inner set submarginal and better developed. The mid-vein is immersed above and emerged beneath, and lateral venation is inconspicuous. The leaf margin is entire or flat, except for few inconspicuous, rounded projections toward the apex. The leaf lower surface is pale green and shiny. The petiole (the stalk attaching the leaf blade to the stem) is approximately 0.07 to 0.09 in (0.18 to 0.21 cm) long. The stems are highly branched, slender, cylindrical, and dark brown in color. The twigs are pubescent (covered with fine short hairs). Young leaves and branches are brilliantly rose-colored, but become green with age.

Flowers are bisexual, 5-merous (floral part in multiples of 5 in each whorl), regular, and uniformly vivid red. Flowers are borne solitary on auxillary brachyblast (short shoot), and are semipendent (hanging or suspended). Pedicel is terete (cylindrical and tapering), 0.35 to 0.43 in (0.89 to 1.1 cm) long, red, fringed with trichomes at the summit, bibracteolate (2 bracts subtending the flower within an inflorescence) near the base, and articulate with calyx. The corolla (the part of a flower that consists of the separate or fused petals and constitutes the inner whorl of the perianth) tube is carnose (of a fleshy consistence), campanulate (shape like a bell), and about 0.5 to 0.6 in (1.3 to 1.5 cm) in length and 0.2 to 0.3 in (0.5 cm to 0.8 cm) in diameter.

Fruit is a bright red berry with many seeds inside (Lioger 1995, p. 105). No additional information regarding fruit production is available.

Varronia rupicola

Varronia was traditionally lumped into the genus *Cordia,* a group of about 250 or more species of trees and shrubs of tropical and subtropical regions. *Varronia* was recently recognized as a monophyletic genera based on vegetative, floral, and pollen morphology (Miller and Gottschling 2007, p. 163). *Varronia* comprises multi-stemmed shrubs with condensed inflorescence and evenly serrate leaves (Sánchez de Stapf 2010, p. 133). *Varronia* is currently represented in the West Indies by about 66 valid species (Acevedo-Rodríguez and Strong 2012, p. 170). Axelrod (2011, p. 427) recognized seven species found in Puerto Rico, with *V. bellonis* and *V. wagnerorum* being endemic to the island, and *V. rupicola* extending to the island of Anegada, British Virgin Islands.

Varronia rupicola is a large shrub reaching up to 16 ft (5 m) in height. The alternate leaves are ovate to elliptic, 0.8 to 3.5 in (2 to 9 cm) long with an acute apex, rounded to obtuse at the base, and chartaceous (papery). Leaves margins are whole or crenate (scalloped or notched). The upper surface of the leaf is rigidly scabrous (having a rough surface) and puberulous (densely covered by hairs) underneath, with strigose (having straight hairs) petioles ranging from 0.1 to 0.4 in (0.2 to 1.0 cm) long. Flowers are in solitary globular heads of 20 (grouped into a globose terminal structure), and about 0.4 in (1.0 cm) in diameter. The corolla is white and 0.3 in (0.8 cm) long, and the fruit is a one-seeded, red drupe about 0.2 in (0.5 cm) long (Proctor 1991, p. 65; Lioger 1995, p. 313).

Habitat

Agave eggersiana

Agave eggersiana is currently known from coastal cliffs with sparse vegetation and dry coastal shrubland vegetation communities within the subtropical dry forest life zone of St. Croix, USVI (Ewel and Whitmore 1973, p. 72). In St. Croix, the average rainfall is about 30 in (76 cm) and 40 in (102 cm) in the east and west sides of the island, respectively (Ewel and Whitmore 1973 p. 8; Mac *et al.* 1998, p. 315). The wettest and hottest months are from July to October. The average mid island temperature is 78.8 degrees

Fahrenheit (°F) (26 degrees Celsius (°C), with a variation of only 5 to 9 °F (3 to 5 °C) between the warmest and coolest months (Mac *et al.* 1998, p. 316).

The coastal cliffs where *Agave eggersiana* occurs are dominated by rocky formations and areas with less than 10 percent vegetative cover. These coastal cliffs are exposed to extremes of wind, salt spray, and low moisture, and they are usually sparsely vegetated with a canopy less than 1 meter in height (Gibney *et al.* 2000, p. 7; Moser *et al.* 2010, Appendix A–11). Dry coastal shrubland vegetation is common to the drier parts of the island of St. Croix: east and south shores, and low-elevation locations. In some places, dry coastal shrubland vegetation may extend as far up as 902 ft (275 m) on south-facing slopes. Cacti and agave are common though scattered, while vegetation height can range from 3.2 to 32.8 ft (1 to 10 m). The taller forms may consist of a canopy layer of larger individuals under slightly more moist conditions. The shorter forms are common to very exposed locations such as the east sides of headlands on the south shores in the island (Gibney *et al.* 2000, p. 6; Moser *et al.* 2010, Appendix A–8). Other species of vegetation associated with these areas are: *Sesuvium portulacastrum* (sea purslane*), Laguncularia racemosa* (white mangrove), *Bucida buceras* (black olive), *Hippomane mancinella* (manchineel), *Jacquinia arborea* (barbasco), *Opuntia stricta* (prickly pear, *Pilosocereus royenii* (Royen's tree, *Suriana maritima* (bay cedar), *Bursera simaruba* (gumbo limbo, *Canavalia rosea* (seaside bean), *Caesalpinia bonduc* (gray nicker), *Capparis flexuosa* (falseteeth), *Scaevola plumieri* (ink berry), *Oplonia spinosa* (prickly bush), *Capparis indica* (linguam), *Adelia ricinella* (wild lime), *Crossopetalum rhacoma* (maidenberry, *Heteropterys purpurea* (bull withe), *Pisonia subcordata* (mampoo), *Exostema caribaeum* (Caribbean princewood, *Cordia dentata* (white manjack), and *Coccoloba uvifera* (seagrape) (O. Monsegur and M. Vargas, Service, unpubl. data 2013; Lioger and Martorell 2000, pp. 50–205).

The natural populations of *Agave eggesiana* grow on top of various soil classifications, including Cramer, Glynn, Hasselberg, Southgate, and Victory. The Cramer and Southgate series consists of shallow, well-drained soils on summits and side slopes of volcanic hills and mountains. These soils formed in material weathered from extrusive igneous bedrock or only from igneous bedrock. The Hesselberg series consists of shallow, well-drained soils on marine terraces. These soils formed in alkaline, clay sediments. The Glynn series consists of very deep, well-drained soils on alluvial fans and terraces. These soils formed in stratified alluvial sediments weathered from basic igneous rock. The Victory series consists of moderately deep, well-drained soils on summits and side slopes of volcanic hills and mountains. These soils formed in material weathered from extrusive igneous bedrock (USDA–NRCS 2013, *http://websoilsurvey.nrcs.usda.gov*).

Gonocalyx concolor

Gonocalyx concolor has been described as endemic from the elfin forest type at Cerro La Santa and from the ausubo (*Manilkara bidentata*) forest type at Charco Azul, both within the lower montane (an altitudinal zone in mountainous region characterized by distinctive flora and forest structure) very wet forest life zone in the Carite Commonwealth Forest (Ewel and Whitmore 1973, p. 41). The Carite Commonwealth Forest comprises approximately 6,694.9 acres (ac) (2,709.3 hectares (ha)), and the elevation ranges from 2,030 to 3,950 ft (620 to 900 m) (DNR 1976, p. 169). This forest has been managed for conservation since 1975 (DNER 2008, p. 1). The mean annual precipitation at the Carite Commonwealth Forest is 88.7 in (225 cm), with February to April the drier months (NOAA 2013, *http://www.srh.noaa.gov/sju/?n=climo_cayey*).

The mean temperature is 22.7 °C (72.3 °F), varying from 20 °C (68 °F) in January to 24 °C (73.4 °F) in July (Silander *et al.* 1986, p. 183).

Both the elfin and ausubo forests have similar climate conditions (Ewel and Whitmore 1973, p. 32). The elfin forest, also referred to as dwarf or cloud-forest, is found on exposed peaks and ridges of Cerro La Santa, above 2,890 ft (880 m) in elevation from sea level, occupying approximately 10.1 ha (24.9 ac) in the Carite Commonwealth Forest (Silander *et al.* 1986, p. 178). The elfin forest vegetation is characterized by gnarled trees less than 7 meters tall, high basal area, small diameters, a large number of stems per unit area, and extremely slow growth rates (Ewel and Whitmore 1973, p. 45). The vegetation is commonly saturated with moisture and frequently enveloped in clouds, and both aerial and superficial roots are common (Weaver *et al.* 1986, p. 79). The plant association in this area is generally comprised by few species of native trees, native ferns and dense covered with epiphytes including bromeliads and mosses (Weaver *et al.* 1986, p. 79). The native tree composition includes: *Tabebuia schumanniana* (roble colorado), *Tabebuia rigida* (roble de sierra), *Ocotea spathulata* (nemoca cimarrona), *Eugenia borinquensis* (guayabota), *Clusia minor* (cupey de monte), and *Prestoea acuminata* var. *montana* (sierra palm) (Weaver *et al.* 1986, p. 80; Silander *et al.* 1986, p. 191). Additionally, some areas were planted with *Eucalyptus robusta* (swamp mahogany) (O. Monsegur, UPRM, unpubl. report, 2006, p. 1).

The ausubo forest is only found along the Río Grande de Patillas River basin and intermittent streams between 2,034 ft (620 m) and 2,329.4 ft (720 m) of elevation (DNR 1976, p. 169), and occupying approximately 72.5 ha (179.2 ac) in the Charco Azul area (Silander *et al.* 1986, p. 190). The ausubo forest is characterized by evergreen vegetation, high species richness, rapid growth rate of successional trees, epiphytic ferns, bromeliads, and orchids (Ewel and Whitmore 1973, p. 32). The vegetation in this area is generally comprised of native trees (i.e., *Manilkara bidentata* (ausubo), *Dacryodes excelsa* (tabonuco), *Guarea guidonia* (guaraguao), and *Cyrilla racemiflora* (swamp titi) (Francis and Lowe 2000, p. 345; DNER 2008, p. 2). *Gonocalyx concolor* grows epiphytic and clambering on dead and live stand trees within this type of forest (O. Monsegur, UPRM, unpubl. report, 2006, p. 2).

Varronia rupicola

Varronia rupicola has been described from southwestern Puerto Rico, Vieques Island, and Anegada Island. All these sites lie within the subtropical dry forest life zone overlying a limestone substrate (Ewel and Whitmore 1973, p. 72). Subtropical dry forest life zones receive a mean annual rainfall ranging from 24 to 40 in (61 to 101 cm). The vegetation in this life zone is deciduous on most soils, with tree species dropping leaves during the dry season. The vegetation usually consists of a nearly continuous, single-layered canopy, with little ground cover. The leaves of dry forest species are succulent or coriaceous, and species with spines and thorns are common. Tree heights usually do not exceed 49 ft (15 m), and crowns are typically broad, spreading, and flattened (Ewel and Whitmore 1973, p. 72).

Varronia rupicola has been recorded in forested hills with open to relatively dense shrublands and scrublands 6.5 to 9.8 ft (2 to 3 m) in height; in low forest with canopy from 8 to 15 ft (3 to 5 m) high; and at the edge of a dense, low coastal shrubland forest. On the island of Anegada, *V. rupicola* was found in open limestone pavement and sand dunes. Woody species associated to *V. rupicola*'s prime habitat in southern Puerto Rico (Guánica Commonwealth

Forest) include: *Gymnanthes lucida* (shiny oysterwood, or yaití), *Exostema caribaeum* (princewood, or albarillo), *Pisonia albida* (corcho), *Pictetia aculeata* (fustic, or tachuelo), *Thouinia portoricensis* (ceboruquillo, or serrazuela), *Coccoloba krugii* (whitewood), *Pilosocereus royenii* (Royen's tree cactus, or sebucán), *Bursera simaruba* (gumbo limbo, or almacigo), *Erithalis fruticosa* (black torch), *Guettarda krugii* (frogwood, or cucubano), *Tabebuia heterophylla* (pink trumpet tree, or roble), *Hypelate trifoliata* (inkwood), *Coccoloba diversifolia* (pigeonplum, or uvilla), *Cassine xylocarpa* (marbletree, or coscorrón), *Krugiodendron ferreum* (black ironwood, or palo de hierro), *Jacquinia berterii* (barkwood), *Bourreria succulenta* (strongbark, or palo de vaca), *Crossopetalum rhacoma* (maidenberry, or pico de paloma), *Antirhea acutata* (placa chiquitu, or quina), and *Amyris elemifera* (torchwood) (Murphy and Lugo 1986, p. 91). The populations of *V. rupicola* in Puerto Rico are also found in close proximity to populations of the endangered plants *Eugenia woodburyana* (no common name) and *Trichilia triacantha* (bariaco), and other rare plants such as *Myrtus bellonis* (no common name), *Passiflora bilobata* (twolobe passionflower), and *Nashia inaguensis* (pineapple verbena) (Breckon and Kolterman 1996, p. 4; Monsegur and Breckon 2007, p. 1). On Anegada, the species is located in open limestone pavement and sand dunes. In a comprehensive study of the vegetation of Anegada, *V. rupicola* was found in higher abundance (based on percentage occurrence across plots) on limestone but also widespread within the sand dunes (Clubbe *et al.* 2004, p. 344). Occurrence of the species on sand dunes on Anegada may explain the new record of the species in the northern coast (Tortuguero Lagoon) of Puerto Rico within an area that is characterized by the presence of white sands soils (O. Monsegur, Service, pers. obs., 2013).

Life History

Agave eggersiana

Based on the information currently available to us, there is no published information describing the ecology and genetics of *Agave eggersiana.* Although samples from individuals in the Gallows Bay area have been collected for genetic analysis (Ray, VFR, pers. comm., 2010), the Service is unaware if the samples were analyzed and results have been published. No further information is available regarding the ecology of the species beyond the demographic trends discussed above.

Gonocalyx concolor

Gonocalyx concolor has been observed flowering in December, January, February, and April (Nevling 1970, p. 224). Preliminary studies of the species' reproductive biology indicate that the plant is predominantly outcrossed, and that outcrossed flowers produce twice the number of seeds than self-pollinated flowers (S. Flores, Universidad del Turabo, pers. comm. 1996). The low number of individuals per population may suggest that *Gonocalyx concolor* has highly specialized ecological requirements to grow and that production of viable seeds rarely occurs (C. Pacheco, Service, pers. obs., 2013). Although a number of authors have reported the species on flower and fruit, no one has observed recruitment. Currently, no information about reproductive capacity, dispersion, or habitat requirements is available for *G. concolor.*

Varronia rupicola

Studies on the distribution, abundance, and reproductive biology of *Varronia rupicola* have been conducted by scientists from the University of Puerto Rico, Mayagüez Campus (Breckon and Kolterman 1996, p. 6; Monsegur and Breckon 2007, p. 13). These authors reported the species flowering and fruiting in December through January (Breckon and Kolterman 1996, p. 4), and in June through July (Monsegur and Breckon 2007, p. 1). From February to April, all plants observed were sterile. Fruit production in the populations from the Guánica Commonwealth Forest and the municipality of Ponce seem to be high, and there is evidence of recruitment associated to the majority of the clusters of individuals (O. Monsegur, Service, pers. obs., 2013). Under greenhouse conditions, seed germination has been reported as not less than 67 percent (Wenger *et al.* 2010). Germination in the wild has also been observed to be high (O. Monsegur, Service, pers. obs., 2013). However, apparently there is also a high mortality of seedlings, and only few individuals make the transition (natural thinning) to sapling stages (O. Monsegur, Service, pers. obs., 2013). Monsegur and Breckon (2007, p. 2) reported numerous seedlings (>140) and various saplings in the Guánica Commonwealth Forest. However, seedling recruitment on Vieques Island seems to be low, as it has not been recorded during recent assessments (Monsegur and Breckon 2007, p. 7; Hamilton, KEW, pers. comm., 2013). Despite the showy red fruits of *Varronia rupicola,* its dispersion seems to be almost limited by gravity, as the majority of the seedlings lie under the parent tree or downslope (O. Monsegur, Service, pers. obs. 2013). The wide range of the species suggests a former animal disperser (probably a bird). Patterns of plant-animal interactions were probably altered due to the previous extensive deforestation of the island of Puerto Rico. Some observations of seed dispersal by an undetermined vector have been reported from Anegada (Hamilton, KEW, pers. comm., 2013). If not extinct, possible dispersers may have altered their foraging behavior and now do not feed on the fruits of *V. rupicola.* Recent observations in Puerto Rico indicate that flowers of *V. rupicola* are visited by several insect species, including *Apis mellifera* (honey bee) and *Electrostrymon angelia* (fulvous hairstreak, a butterfly) (O. Monsegur, Service, pers. obs. 2013).

Varronia rupicola material germinated in the greenhouse at Cabo Rojo National Wildlife Refuge in Cabo Rojo were flowering and producing fruits in about 1 year after germination (O. Monsegur, Service, pers. obs., 2013). The rapid reproductive development of the species and the finding of individuals along recently disturbed sites (new dirt roads) and natural forest gaps (openings) may indicate that *V. rupicola* is an early colonizer or pioneer species.

Historical Range

Agave eggersiana

Historically, *Agave eggersiana* was reported from the north coast in Christiansted, St. Croix, and along the south coast of the island (Proctor and Acevedo-Rodríguez 2005, p. 118). Britton and Wilson (1923, p. 156) reported the species from hillsides and plains in the eastern dry districts of St. Croix, but did not provide population estimates. In addition, it was reported that *A. eggersiana* was cultivated on St. Croix and St. Thomas for ornament (Trelease 1913, p. 28; Britton and Wilson 1923, p. 156; Proctor and Acevedo-Rodríguez 2005, p. 118). Information provided (Kojis and Boulon, DPNR, pers. comm., 1996) specified that the species was last observed growing in the wild around 1984 to 1986 on St. Croix. In 2003, DPNR stated that the species was believed to be extinct (Plaskett, DPNR, pers. comm. 2003; Dalmida-Smith, DPNR, pers. comm., 2010). Proctor and Acevedo-Rodríguez (2005, p. 118) provided a general description of *A. eggersiana* and state that the species appeared to be extinct in the wild.

However, no citations or survey information were provided to support this statement. Subsequently, in 2010, DPNR provided information based on field visits and reported the existence of several populations of *A. eggersiana* on St. Croix (Dalmida-Smith, DPNR, pers. comm., 2010).

Historically, land use intensity increased by colonial exploitation since the 15th century (Chakroff 2010, p. 6). Sugarcane was the main crop on the island and dominated the economy for nearly 200 years (Shaw 1933, p. 414). Apparently, the former land use of the areas used for sugar cane cultivation resulted in degradation of the species' habitat and nearly extirpated the species from the wild. Sugarcane is no longer cultivated commercially on the island, the majority of the areas formerly used for sugarcane plantations are currently grasslands, and early secondary forests are dominated by the nonnative tree *Leucaena leucocephala* (white leadtree).

Gonocalyx concolor

Gonocalyx concolor was first discovered on Cerro La Santa at an elevation of approximately 2,962 ft (903 m) in the Carite Commonwealth Forest, east-central Puerto Rico (Nevling 1970, p. 221). In 1993, Dr. Frank Axelrod found a second population of this species close to the Charco Azul recreational area, also in the Carite Commonwealth Forest (Axelrod 1993, UPR herbarium voucher 6643). This population is located at an approximate elevation of 2,070 ft (630 m) in the ausubo forest, which lies within the basin of the Río Grande de Patillas, approximately 2 mi (3.2 km) southeast from Cerro La Santa. Later, in December 2006, Omar Monsegur (former student from the University of Puerto Rico) visited the known localities describing three populations of *Gonocalyx concolor* in the Carite Commonwealth Forest: two at Cerro La Santa, and another at Charco Azul (O. Monsegur, UPRM, unpubl. report, 2006, p.1). Dr. Samuel Flores (pers. comm., 1996), professor at the Turabo University in Puerto Rico, anecdotally reported the species from El Yunque National Forest in the Luquillo Mountains, northeastern Puerto Rico. Despite of Service efforts to locate the species in El Yunque National Forest, it has not been found. Therefore, this record has not been confirmed.

Varronia rupicola

Varronia rupicola was first discovered by the German botanical collector Paul Sintenis in July 1886, in the Los Indios Ward, located between the Barinas ward in Yauco and the municipality of Guayanilla, Puerto Rico. It was later found in Guánica, Puerto Rico, in 1887, and again in 1943 and 1959 (Proctor 1991, p. 66). The species was thought to be endemic to Puerto Rico, until it was collected by George Proctor in May 1987, at the west end of the island of Anegada, British Virgin Islands (Proctor 1991, p. 66). Proctor (1994, p. 54) also reported a specimen from Punta Jálova on Vieques Island, Puerto Rico. This report was based on a specimen collected by Woodbury, possibly around 1978. Surveys conducted by Breckon and Kolterman in 1995 located the species at a site called El Peñón in the municipality of Peñuelas (Breckon and Kolterman 1996, p. 6). In 2003, three individuals of *V. rupicola* were found adjacent to the entrance of El Fuerte Trail within the Guánica Commonwealth Forest (M. Canals, DNER, pers. comm., 2004). In 2005, an individual of *V. rupicola* was found on Lighthouse Peninsula, Vieques Island (Breckon and Kolterman 2005, p. 1). This area is located within the Vieques Island National Wildlife Refuge.

Current Range

Agave eggersiana

Agave eggersiana is currently found on the north and south coasts of St. Croix, USVI. Seven populations support approximately 313 adult plants and more than 316 juveniles. It is uncertain if these populations are natural (individuals that come from wild populations) or if these populations consist of individuals that escaped from landscaping. However, characteristics, such as growing mixed with native vegetation, evidence of natural recruitment, and the presence of different size classes, suggest these are remnants of wild populations.

The current distribution of populations of *Agave eggersiana* on St. Croix that are presumed to be wild is as follows:

a. North coast—(1) Gallows Bay with an estimate of 2 individuals; and (2) Protestant Cay with an estimated 40 individuals.

b. South coast—(3) Manchenil Bay with an estimated 8 individuals; (4) West side of Vagthus point with a single individual; (5) Great Pond with approximately 65 individuals; (6) South Shore with an estimate of 182 individuals; and (7) Cane Garden Bay with 15 individuals.

Most of the sites have juvenile individuals except for Gallows Bay and Vagthus Point (Table 1).

TABLE 1—(PRESUMED) WILD POPULATIONS OF AGAVE EGGERSIANA

Population	Area/ location	Estate	Ownership	Number of individuals (adults/juveniles)
South Shore	South Coast	Cane Garden	Private	182/231
Cane Garden Bay	South Coast	Cane Garden	Private	15/27
Manchenil Bay	South Coast	Granard	Private	8/58
Protestant Cay	North Coast	Protestant Cay	Government but leased to private party.	40/Undetermined
Gallows Bay	North Coast	Mount Welcome	Private	2/0
West Vagthus Point	South Coast	Peters Minde	Private	1/0
Great Pond	South Coast	Great Pond	Government	65/Undetermined
Total				313/316+

Sources: O. Monsegur and M. Vargas, Service, unpubl. data, 2010 and 2013; Dalmida- Smith, DPNR, pers. comm., 2010; David Hamada, SGVBG, pers. comm., 2010; Plaskett, DPNR, pers. comm., 2003.

In addition, there are introduced individuals located at Salt River National Park and Ecological Preserve (SARI) with an estimate of 90 individuals (mostly juveniles); Buck Island National Monument with an estimate of 11 individuals; and Ruth Island with 1 individual (O. Monsegur and M. Vargas, Service, pers. obs., 2010 and 2013; Dalmita-Smith, DPNR, pers. comm., 2010).

Gonocalyx concolor

Currently, *Gonocalyx concolor* is known from three populations: two at Cerro La Santa and another at Charco Azul, both in the Carite Commonwealth Forest (Pacheco and Monsegur, Service, unpubl. report, 2013, p. 2). The species shows a limited distribution in its habitat, occupying only 0.75 ac (0.3 ha) at Cerro La Santa (Pacheco and Monsegur Service, unpubl. report, 2013, p. 3) and approximately 0.12 ac (0.05 ha) at Charco Azul (O. Monsegur, UPRM, unpubl. report, 2006, p.2). The individuals reported from El Yunque National Forest are apparently no longer extant. According to Luis Rivera, Tropical Vegetation Specialist, the U.S. Forest Service does not have records of the species in El Yunque National Forest (L. Rivera, USFS, pers. comm., 2013). Despite the availability of habitat, the Service considers that the report from El Yunque National Forest may be a misidentification of material from *G. portoricensis.*

In 1992, Dr. George R. Proctor conducted a status review of the species estimating its population at Cerro La Santa at around 35 individuals (Proctor 1992, p. 4). Later, Dr. Samuel Flores (professor from the Turabo University) visited the same area and estimated its population at around 172 individuals (S. Flores, pers. comm., 2009). In December 2006, Omar Monsegur (graduate student from the University of Puerto Rico, Mayagüez Campus) estimated approximately 25 individuals at Cerro La Santa and 4 individuals at Charco Azul (O. Monsegur, UPRM, unpubl. report, 2006, p. 1). In 2013, Service biologists, Carlos Pacheco and Omar Monsegur, visited the population at Cerro La Santa and estimated the *G. concolor* population at around 27 individuals (Pacheco and Monsegur, USFWS, unpubl. report, 2013, p. 3).

Varronia rupicola

Varronia rupicola is currently known from at least seven main localities in Puerto Rico (Table 2) and several localities from the island of Anegada. Monsegur and Breckon (2007, p. 1) visited the historical localities in Puerto Rico and provided updated information about the status and distribution of the species. The distribution of *V. rupicola* in the Guánica Commonwealth Forest extents to at least six small populations or subpopulations within the east section of the forest. Another population was located on the west unit of the Guánica Commonwealth Forest by Alcides Morales (Sociedad Ornitologica Puertoriqueña, Inc., pers. comm., 2012). This is the westernmost recorded distribution for the species.

From the municipality of Peñuelas, Monsegur and Breckon (2007, p. 6) found a single individual in a ravine area on the west side of El Peñón site. This seems to be part of the same population identified by Breckon and Kolterman in 1995. In addition, the Service confirmed the presence of about eight clusters of the species in an area just north of the Ponce Holiday Inn in the municipality of Ponce (O. Monsegur, Service, and J. Sustache, DNER, unpubl. Data, 2013).

TABLE 2—STATUS OF CURRENTLY KNOWN POPULATIONS OF VARRONIA RUPICOLA

Localities	Number of reproductive individuals	Number of saplings	Number of seedlings	Total of plants
El Peñón (Peñuelas)	16	0	0	16
Guánica Commonwealth Forest (East)	34	30	142	206
Guánica Commonwealth Forest (West) (Montalva)	1	0	0	1
Puerto Ferro (Vieques NWR)	6	0	0	6
Yauco (Montes de Barina)	2	0	0	2
Ponce (Holiday Inn)	17	4	120	141
Tortuguero Lagoon (DNER)	1	0	0	1
Total	77	34	262	373

Another recorded site for *Varronia rupicola* lies within a privately owned property located at Montes de Barinas in the municipality of Yauco (C. Pacheco, Service, pers. comm., 2011). The species was also reported by Alcides Morales (Sociedad Ornitologica Puertoriqueña, Inc., pers. comm., 2012) from a nearby property known as Finca Catalá. This property is adjacent to the locality reported by Pacheco on 2011. These reports overlap with the general area where this specimen was collected by Paul Sintenis in 1886.

There is new information suggesting the existence of one population within the Tortuguero Lagoon in northern Puerto Rico (Beverly Yoshioka, Service, pers. comm., 2013). This will be the first record for the species in the northern coast of Puerto Rico. The finding of this new locality is supported by the existence of the species on a similar habitat in the Island of Anegada (British Virgin Islands). *Varronia rupicola* is also found in the northwest section of Anegada, where it is reported as common (Clubbe *et al.,* 2004, p. 344; McGowan *et al.,* 2006, p. 5).

Summary of Factors Affecting the Species

Section 4 of the Act (16 U.S.C. 1533), and its implementing regulations at 50 CFR part 424, set forth the procedures for adding species to the Federal Lists of Endangered and Threatened Wildlife and Plants. Under section 4(a)(1) of the Act, we may list a species based on any of the following five factors: (A) The present or threatened destruction, modification, or curtailment of its habitat or range; (B) overutilization for commercial, recreational, scientific, or educational purposes; (C) disease or predation; (D) the inadequacy of existing regulatory mechanisms; and (E) other natural or manmade factors affecting its continued existence. Listing actions may be warranted based on any of the above threat factors, singly or in combination. Each of these factors is discussed below.

Factor A. The Present or Threatened Destruction, Modification, or Curtailment of Its Habitat or Range

Agave eggersiana

The *Agave eggersiana* population found in Great Pond is the only one located in a conservation area. The remaining populations occur within privately owned lands and are threatened by development, or are growing in areas that are already developed and managed as tourism and residential projects and that will not support the continued existence of the plants. Based on information reported by the University of the Virgin Islands'

Conservation Data Center (USVI–CLWUP 2004), at least three of the populations (i.e., Protestant Cay, Gallows Bay, and Manchenil Bay) lie within areas identified by DPNR as high-density land use areas, and thus have a higher susceptibility to development in the near future. The coastal areas that harbor suitable habitat for the species are currently subject to urban and tourist development (O. Monsegur and M. Vargas, Service, pers. obs., 2010 and 2013). At least two proposed development projects have been identified within suitable habitat for the species (i.e., C&R Robin, LLC, and Seven Hills Beach Resort and Casino) (Weiss, CBD, pers. comm., 2010). Current information regarding the status of these development projects is not available to the Service.

The population at Protestant Cay has been affected by construction and management activities associated with the current use of the area, i.e., the disposal of garden debris from a hotel in the species' known habitat (O. Monsegur and M. Vargas, Service, pers. obs., 2010). As *Agave eggersiana* relies on asexual reproduction, the species depends on the bulbils becoming established. Covering the bulbils with debris may result in subsequent mortality of the bulbils and lack of natural recruitment, thus affecting the long-term survival of this population. Moreover, individuals located on the edges of the population are pruned as part of the gardens' maintenance. This practice may result in mortality or mutilation of individuals because the species is monopodial (single growth axis). The population at Protestant Cay is also threatened by competition with nonnative plant species. In this case, habitat modifications from urban development (e.g., road) and garden maintenance have created conditions for the establishment of invasive, nonnative species. Also, the undeveloped habitat on the cay is being rapidly colonized by nonnative species (see Factor E discussion, below). *A. eggersiana* plants also seem to be stressed by competition with nonnative plants.

Another modification of habitat in the area was a sand ramp constructed in 2011, on the northeast side of the cay (T. Cummins and W. Coles, DPNR, pers comm., 2011; R. Platenberg and T. Cummins, DPNR, pers. comm., 2012; Zegarra, Service, pers. comm., 2012). It was documented that at least five individuals of *Agave eggersiana* were crushed or otherwise impacted by the excavation work (R. Platenberg and T. Cummins, DPNR, pers. comm., 2012).

The individuals located at Gallows Bay are within a developed residential complex that has the potential for future expansion, and thus may affect *Agave eggersiana* (O. Monsegur and M. Vargas, Service, pers. obs., 2010 and 2013). Moreover, the Gallows Bay area does not contain additional habitat to allow for population expansion. Remaining forested areas surrounding this location are characterized by an abundance of nonnative species. The small pockets that could be colonized by bulbils are occupied by *Sansevieria cylindrica* (African spear), a nonnative plant species that tends to form a complete cover of the understory (see Factor E discussion, below).

The area from Cane Garden Bay to Manchenil Bay on the south coast of St. Croix harbors four of the known natural populations of *Agave eggersiana* (Manchenil Bay, Vagthus Point, Cane Garden, and South Shore). According to DPNR personnel (Valiulis, pers. comm., 2010), these areas are advertised by realtors for tourism and residential development. Furthermore, the areas along the south coast that have not been developed are used for cattle or hay production, minimizing the recovery of native vegetation and, therefore, the habitat for *A. eggersiana* (O. Monsegur and M. Vargas, Service, pers. obs., 2010 and 2013). The development of tourist and residential projects in these coastal areas may result in the extirpation of some populations or, at the least, will reduce the chances of the populations to expand or to colonize other areas. The effects of development projects are exacerbated by the low potential for natural recruitment due to the small number of populations and individuals.

The population of Great Pond is located between the entrance road of the East End Marine Park office and a private property currently advertised for sale. The population seems to be healthy based on the presence of different size plants and evidence of recent flowering events. However, the area near the population is mowed, and the access road limits the expansion of the population. Furthermore, the property adjacent to the population is privately owned and currently for sale (O. Monsegur and M. Vargas, Service, pers. obs., 2010 and 2013). The possible use of the area for additional residential or tourist development may affect the *Agave eggersiana* population. Owners will likely manage their properties as landscapes, which could lead to land clearing, additional mowing, other maintenance activities, and the introduction of nonnative plants. Moreover, the abundance of grasslands and the dominance of the nonnative plant *Megathyrsus maximus* (guinea grass) make the population of *A. eggersiana* susceptible to human-induced fires (addressed under Factor E, below).

Gonocalyx concolor

Habitat destruction and modification have been identified by species expert as the main threat to *Gonocalyx concolor* (Proctor 1992, p. 3; O. Monsegur, UPRM, unpubl. data, 2006; C. Pacheco and O. Monsegur, Service, unpubl. report, 2013, p. 3). In 1974, the Commonwealth of Puerto Rico granted special use permits for the construction of telecommunications facilities, and governmental and recreational facilities, within *G. concolor* habitat, affecting approximately 107 ac (43.5 ha) of lower montane very wet forest (Silander *et al.* 1986, p. 178). Currently known populations of *G. concolor* at Cerro La Santa are found in remnants of elfin forest vegetation located adjacent (less than 246 ft (75 m)) from telecommunication facilities, and at the edges (less than 9.8 ft (3 m)) of the road that provide access to the telecommunication facilities (C. Pacheco and O. Monsegur, Service, unpubl. report, 2013, p. 3). Below we discuss the three factors that may affect the current habitat or range of *G. concolor:* (1) Installation of telecommunication towers; (2) road improvement; and (3) vegetation management.

Land-use history of Cerro La Santa has shown that installation of telecommunication facilities for television, radio, and cellular communication, and for military and governmental purposes, has adversely impacted *Gonocalyx concolor* habitat (Silander *et al.,* 1986, p. 178), and although not documented, presumably has directly affected individuals of the species. George Proctor (1992, p. 3) stated that the construction of a paved road and gigantic telecommunication towers on the summit ridge of Cerro La Santa destroyed much of the natural population of this species. Currently, the telecommunication tower and its associated facilities (i.e., access roads, security fences, guy wires) occupy approximately 6.1 ac (2.5 ha) of the elfin forest in Cerro La Santa; this is habitat that the species may have occupied in the past (C. Pacheco and O. Monsegur, Service, unpubl. report, 2013, p. 3). Although the populations at Cerro La Santa are located within a Commonwealth forest, this area is subjected to development for expansion of telecommunication infrastructure because permits to build new communication facilities or expand currently existing ones within or near Commonwealth forests are prevalent

(DNER 2004a, p. 2). Expansion of the existing telecommunication facilities may result in loss of 27 individuals of *G. concolor* and their habitat. In Puerto Rico, towers for cellular communication, radio, television, and military and governmental purposes have represented a threat to those plant species that happen to occur only on mountaintops. The proliferation of these antennas has increased with the advent of cellular phone and related technologies. While the towers themselves may not occupy a very large area, construction activities, access roads, and other facilities have a much wider impact, resulting in the elimination of potential habitat for the species.

For the above reasons, we determined that installation of additional communications towers or expansion of the existing one at Cerro La Santa is a threat to *Gonocalyx concolor* by direct mortality and due to permanent loss, fragmentation, or alteration of its habitat.

Construction of a new access road and improvement of the existing access road to the existing communication facilities have been identified as a factor that could directly (destruction of individuals) or indirectly (slope instability and habitat degradation) reduce the number *Gonocalyx concolor* and its habitat at Cerro La Santa (Proctor 1992, p. 3; C. Pacheco and O. Monsegur, Service, unpubl. report, 2013, p. 3). Further, expanding the road that provides access to the telecommunication facilities may negatively affect the species' habitat and could result in loss of 11 mature individuals of *G. concolor* (C. Pacheco and O. Monsegur, Service, unpubl. report, 2013, p. 3). Additionally, clearing the native vegetation along the road may facilitate and accelerate colonization of invasive vegetation towards *G. concolor* habitat (see Factor E discussion, below). Destruction or modification of this kind of habitat may be irreversible. Therefore, the microhabitat conditions necessary for the recovery of the species may be lost if the habitat is modified for the expansion of the existing telecommunications facilities or construction of new communication facilities.

Vegetation management around the existing telecommunication towers and associated facilities and along the existing power lines that energize these facilities is a threat to *Gonocalyx concolor* and its habitat (C. Pacheco and O. Monsegur, Service, unpubl. report, 2013, p. 3). Telecommunication companies periodically remove vegetation along the access roads, around the security fences, and under the guy wires (tensors) that are anchored in the forest. Additionally, maintenance staff of the Puerto Rico Energy and Power Authority (PREPA) periodically trim and clear the vegetation under the existing power lines that provide energy to the telecommunication facilities and adjacent communities. Presently, the Puerto Rico Department of Natural and Environmental Resources (DNER) is aware of the presence of *G. concolor* and the need to implement conservation measures for the species in Cerro La Santa. The existing telecommunication facilities and PREPA usually have a restricted perimeter delimiting the area that can be mowed and trimmed. However, maintenance activities outside of the perimeter have been conducted without the coordination with the forest manager, affecting the forest vegetation and *G. concolor* habitat (Hecsor Serrano-Delgado, DNER, pers. comm., 2013; O. Monsegur, UPRM, unpubl. report, 2006, p.1). In 2006, Omar Monsegur documented damages to an individual of *G. concolor* caused by vegetation removal activities outside of the fences (O. Monsegur, UPRM, unpubl. report, 2006, p.1). Additionally, clearing the native vegetation along the access roads, around the telecommunication facilities, and under the power lines may facilitate and accelerate colonization of invasive vegetation in *G. concolor* habitat. See Factor E, below, for further discussion on invasive species.

Even though the population dynamics of the species are poorly known, we understand that the impacts discussed above could be detrimental to the species as a whole. Clearing of vegetation may result in direct impacts (cutting of individuals) or indirect impacts (by opening forest gaps that can serve as corridors for invasive species) to the species. Vegetation management and maintenance of communication towers and facilities are a threat to *Gonocalyx concolor* due to changes in microclimate (a local atmospheric zone where the climate differs from the surrounding area) and plant species composition. Also, vegetation management around the existing facilities and along the access roads may be a direct and indirect threat to the *G. concolor* because it may alter the habitat condition, allowing invasive plants to colonize the area, and may result in direct physical damage to the species.

Varronia rupicola

The species' rarity and restricted distribution make it vulnerable to habitat destruction and modification. About 50 percent of known *Varronia rupicola* individuals in Puerto Rico occur on private lands (i.e., Yauco, Peñuelas, and Ponce) in areas subject to urban development. Moreover, the habitat at Peñuelas and Ponce may remain underestimated in relation to the presence of the species as the area has not been extensively explored. The habitat in the municipalities of Peñuelas and Ponce has been severely fragmented for urban development (i.e., housing projects, hotels, jails, landfills, rock quarries, and Puerto Rico Highway Number 2 (PR 2)). The habitat has been further fragmented by the use of these forested areas by PREPA as a right-of-way for power lines, and additional habitat was impacted for a former proposed gas pipeline (Gasoducto Sur). At least 1,200 ac (485 ha) of prime dry forest habitat from Guánica to Ponce are currently proposed for urban and industrial developments, which are evaluated by the Puerto Rico planning board (*http://www.jp.gobierno.pr*). These include the areas where the Ponce populations were recently located by Service staff. Future projects may threaten these populations with fragmentation, and possibly extirpate currently known individuals. Despite the species' biology suggesting its ability to colonize disturbed areas, it is very likely that once the habitat is fragmented. *V. rupicola* will be outcompeted by nonnative plant species (see Factor E discussion).

In Peñuelas, the species is found in an area that is currently under urban development. Breckon and Kolterman (1996) reported a healthy population of *Varronia rupicola* in this area located at El Peñón de Ponce (Municipality of Peñuelas), which is part of a residential development called ''Urbanización El Peñón.'' At this site, *V. rupicola* plants grows within residential lots, and although the lots are large in size, current and ongoing construction and deforestation (some lots have been completely cleared for house construction) threaten this population. In 2007, Monsegur and Breckon (2007, p. 6) reported that one individual plant adjacent to ''Urbanización El Peñon'' was eliminated by the improvement of PR 2. The authors reported that vegetation was removed and the area was bulldozed, apparently as part of a project to control run-off from the ravine.

In Yauco, the species occurs within private properties that may be subject to urban development (*http://www.jp.gobierno.pr*). In fact, urban development has encroached remnants of native dry forest areas, resulting in the isolation or disjunction of populations of rare plants, hence,

reducing suitable habitat for the species. These areas are also threatened by deforestation for agricultural practices such as raising cattle, cattle grazing, and for the extraction of fence posts (O. Monsegur, Service, pers. obs., 2005). The known population at Yauco was observed at the edge of an existing dirt road. Therefore, any road expansion may result in the extirpation of individuals, habitat modification, and intrusion of nonnative plants.

In the Guánica Commonwealth Forest and the Vieques Island National Wildlife Refuge (NWR), *Varronia rupicola* is found at the edge of trails and roads, making the species prone to be affected by management activities (e.g., widening of trails, road repairs). Additionally, several individuals of *V. rupicola* are found underneath power lines of PREPA at the Guánica Commonwealth Forest, where they are threatened by maintenance activities such as cutting or the use of herbicides. PREPA has the right to access the power lines for maintenance and service in case of emergencies. Damage to individual plants caused by maintenance activities has been observed in the past (O. Monsegur, Service, pers. obs., 2009). This makes a significant part of the Guánica populations prone to extirpation despite the existence of regulatory mechanisms (see Factor D discussion, below).

Furthermore, despite being a National Wildlife Refuge, the Vieques site (Puerto Ferro) is considered as an active ammunition site due to the previous use of Vieques Island as a bombing range by the U.S. Navy (*http://public.lantops-ir.org/sites/public/vieques/default.aspx*). Although there are no current plans to conduct vegetation removal to investigate the ammunitions in Puerto Ferro (F. Lopez, Service, pers. comm., 2013), the investigation process at Vieques has proved to be dynamic and there is a possibility that clearing of native vegetation will be required to conduct removal of ammunitions in the future.

Varronia rupicola is also found in the western half of Anegada Island, and the population appears to be healthy. However, despite efforts to maintain biodiversity and promote conservation on Anegada, *V. rupicola,* along with other rare plant species and their preferred limestone habitat, faces threats of future habitat fragmentation, habitat modification, and invasive species (Pollard and Clubbe 2003, p. 5; McGowan *et al.,* 2006, p. 4). Anegada is under heavy pressure for residential and tourism development (McGowan *et al.,* 2006, p. 4), resulting in improvement and construction of roads, which increase habitat loss and fragmentation.

About half of known populations and suitable habitat are within privately owned land, which is being modified or proposed to be modified for urban development. These activities are expected to continue.

Conservation Efforts To Reduce the Present or Threatened Destruction, Modification, or Curtailment of Its Habitat or Range

Agave eggersiana

Efforts to re-establish locally endangered plant species to the wild are occurring within properties managed by the National Park Service (NPS) (SARI and Buck Island Reef National Monument) on St. Croix. The intent of NPS is to increase production of the species' progeny around the island, which started in 2007, by planting seven individuals of *Agave eggersiana* (NPS, unpubl. data, 2007). Also, an intra-agency agreement between the Service and NPS, in cooperation with the Florida and Caribbean Exotic Plant Management Team, was established in 2007, to control nonnative, invasive plants and restore coastal landscape. The agreement was to restore approximately 15 acres (6.1 ha) of SARI coastal wetlands and uplands. The agreement also included planting *A. eggersiana* among other native flora. Currently, there are more than 100 juvenile plants on NPS lands. However, there is the need to continue monitoring these plants to document their long-term survival and recruitment, and to adaptively manage the population.

Other efforts include the evaluation of the status of the natural populations by Service staff. In 2010 and 2013, Service biologists visited St. Croix and found *Agave eggersiana* planted at the Lagoon Picnic Area, a public beach that seems to be under a reforestation effort funded by the Antilitter and Beautification Commission. The site harbors about 220 plants that are part of the landscape. Although the Service has no information on the reforestation project, it seems to be a good effort for the protection of coastal habitat and as an outreach effort towards the protection of the species.

Gonocalyx concolor

Gonocalyx concolor populations occur on public lands managed for conservation by the Puerto Rico DNER. The DNER develop a management plan for all Commonwealth Forests in 1976; however, specific measures to protect this species are not included in the plan (DNR 1976, pp. 168–181). Currently, activities to be conducted within Commonwealth Forest are generally scrutinized, and measures to minimize or avoid impacts to species protected by DNER and Federal agencies are recommended and implemented (see Factor D discussion). However, authorized activities, such as vegetation clearing around communication towers, under power lines, and along roads,have been documented, resulting in loss of individuals and the species' habitat.

Varronia rupicola

The Service's Caribbean Ecological Service Field Office (CESFO) has evaluated federally funded projects or federally related projects requiring federal permits that lie within the species' range. As part of the evaluation, the Service recommends surveys to identify populations and recommends conservation measures to protect the species. However, residential projects without Federal nexuses are not submitted to the Service for evaluation.

Summary of Factor A

Agave eggersiana

The threats of possible construction and developments, and the current management of the habitat of the populations, may further limit the species. Direct consequences can be expected as impacting (harming) the individuals (e.g., cutting or mowing), while indirect consequences can be expected to create a habitat disturbance where nonnative plants can overpower *Agave eggersiana.* Currently, there continue to be impacts on various populations that are expected to continue into the future.

Gonocalyx concolor

The species' rarity and restricted distribution makes it vulnerable to habitat destruction and modification. The scope of these factors is exacerbated because the most significant portion of the known population occurs adjacent to telecommunication facilities and at the edge of the existing access road. The activities related to these facilities are expected to continue into the future. Therefore, they are likely to have significant impact on *Gonocalyx concolor.*

Varronia rupicola

Degradation of habitat represents a threat to *Varronia rupicola.* About half of the known populations of *V. rupicola* and its suitable habitat are within privately owned land, which is being modified or is proposed to be modified for urban development. In addition, habitat fragmentation by clearing of vegetation, road constructions, and

right-of-way maintenance (cutting plants and used of herbicides) can limit the species' survivability where these activities create the conditions for nonnative plants to outcompete *V. rupicola.* We expect that this threat would continue into the future.

Factor B. Overutilization for Commercial, Recreational, Scientific, or Educational Purposes

Agave eggersiana

Agave eggersiana has been reported as a cultivar since it was described as a species in 1913 (Trelease 1913, p. 28). Historically, the majority of *A. eggersiana* found on St. Croix and St. Thomas were from landscaped areas (Britton and Wilson 1923, p. 156; Plaskett, DPNR, pers. comm., 2003; Kojis and Boulon, DPNR, pers. comm., 1996; Proctor and Acevedo-Rodríguez 2005, p. 118; Acevedo-Rodríguez, pers. comm., 2005). Currently, the species is distributed by the St. George Botanical Garden and the St. Croix Environmental Association for conservation and private landscaping purposes. In fact, it is an ornamental species commonly used on the island of St. Croix. Recent declines in the number of individuals at one population along the coast of Manchenil Bay are thought to be due to collection for ornamental purposes (Dalmida-Smith, DPNR, pers. comm., 2010; Valiulis, DPNR, pers. comm., 2010). At present, we do not have evidence to confirm this threat. However, when Service biologists visited the island in 2010 and 2013, they observed that *A. eggersiana* continues to be used as a landscape species.

Current evidence suggests that the wild and cultivated populations of *Agave eggersiana* have minimum genetic variation. Data suggest that cultivated individuals could be used as genetic stock to aid in the long-term survival of this species. However, most cultivated populations are groomed and do not allow natural recruitment. Therefore, we are concerned about possible collection of individuals from natural populations for landscaping. The rarity and low numbers of individuals for this agave may result in a high ornamental value. The limited reproduction of the plant, which reproduces only once every 10 to 15 years (D. Hamada, SGVBG, pers. comm., 2010), may lead people to collect individuals from the wild and thus lower the recruitment of those limited populations and risk the continued survival of the species.

Gonocalyx concolor

Gonocalyx concolor is not a commercially valuable species or a species sought after for recreational or educational purposes. However, the species is recognized by its rarity and restricted range, making it more attractive to collectors and scientists. Collection could be a significant threat to the species due to the few remaining populations, small population size, restricted range, remoteness of occupied habitat, and the potential for collection to occur at any time. Because little is known about *G. concolor* (i.e., abundance, distribution, habitat requirement, and phenology), any collection of seedlings, saplings, flowers, fruits, or parts of the individual without appropriated evaluation of its effect on the species could adversely affect the status of the population. Even limited collection from the remaining population could have deleterious effects on reproductive and genetic viability of the species and could contribute to its extinction (José Sustache, DNER, pers. comm., 2013). Although we consider collection to be a potential threat to this species, we do not have information indicating that the species is being collected for commercial, recreational, scientific or educational purposes.

Varronia rupicola

There is scientific interest in *Varronia rupicola* from local and external botanists. In fact, there is ongoing research by personnel from the Royal Botanic Gardens (KEW) related to the reproductive biology, propagation, and genetics of this species, including the populations from United States and British territories (entire Puerto Rican platform). However, the current available information on the species does not suggest that overutilization for commercial, recreational, scientific, or educational purposes has contributed to a decline of *V. rupicola.* This research is the only known use of the species, and it is strictly for scientific purposes. Therefore, despite its rarity, we do not have any evidence that suggests this threat is negatively impacting *V. rupicola.*

Conservation Efforts To Reduce Overutilization for Commercial, Recreational, Scientific, or Educational Purposes

Agave eggersiana

At present, the Service is unaware of any conservation efforts to reduce overutilization for commercial, recreational, scientific, or educational purposes of *Agave eggersiana,* except for the existing regulatory mechanisms that protect the species. However, although *A. eggersiana* is protected by Act No. 5665, the USVI law that provides protection to indigenous, endangered, and threatened fish, wildlife, and plants in the Territory, the use of the species for landscaping continues to be a practice. This law prohibits the collection of endangered species. However, we do not have information about enforcement mechanisms to avoid the use of this plant for landscaping (see Factor D discussion, below).

Gonocalyx concolor and Varronia rupicola

The Carite and Guánica Commonwealth Forests are managed for conservation by the Puerto Rico DNER, and collection of any plant in these lands is regulated by Commonwealth Law No. 133. Currently, there are permits to collect plants in the Carite and Guánica Commonwealth Forests. However, such permits are issued by DNER after determining that proposed actions will not negatively affect the species (José Sustache, DNER, pers. comm., 2013; see Factor D discussion, below). If this proposed rule is adopted, collection of *Varronia rupicola* at the Vieques National Wildlife Refuge will require a special use permit and section 7 consultation (see Factor D discussion, below).

Summary of Factor B

Agave eggersiana is recognized as an ornamental plant, and is locally distributed by botanical gardens (St. George Village Botanical Garden) and the St. Croix Environmental Association to residents for use in private gardens. Therefore, we consider collection to be a threat to the species due to the few remaining natural populations. Overcollection from natural populations may compromise the natural recruitment and the recovery of *Agave eggersiana.* We do not believe that overcollection is a threat to *Gonocalyx concolor* or *Varronia rupicola.*

Factor C. Disease or Predation

Agave eggersiana

The genus *Agave* is widely affected by the agave snout weevil (*Scyphophorus acupunctatus*). This weevil has a wide distribution that includes the Greater Antilles (i.e., Cuba, Jamaica, Hispaniola, and Puerto Rico) (Vaurie 1971, p. 4; Setliff and Anderson 2011, p. 1). The larvae of this weevil feed on the starchy base of the plant, increasing the risk of infestation by pathogens such as a virus or fungus, later resulting in the death of the plant (Vaurie 1971, p. 4). At this

time, there is no information about the occurrence of the agave snout weevil within St. Croix. However, it has been documented to be found on adjacent islands such as St. Thomas and Water Island (USVI—*http://www.uvi.edu/community/cooperative-extension-service/agriculture-and-natural-resources/integrated-pest-management.aspx*).

Although we do not have evidence on the agave snout weevil's presence on St. Croix, due to the low number of natural populations of *Agave eggersiana* and the abundance of vectors (i.e., nonnative agaves planted in gardens), we consider that the weevil's arrival to this island is forthcoming. The agave snout weevil's presence on nearby islands is a concern especially where there is constant traffic (commuting) among islands with local and international trade. This could potentially increase the risk of this weevil to arrive and infest the island at any time. Moreover, the island of St. Croix harbors other types of *Agave,* which could potentially become stepping stones for the weevil to spread around and affect the few and limited populations of *A. eggersiana.*

Service biologists documented that a small number of individuals of *Agave eggersiana* were observed with scarring along the borders of some leaves (O. Monsegur and M. Vargas, Service, pers. obs., 2010). It appears that an insect or arthropod larva may feed on these leaves. However, the exact cause and the consequences of the scarring remain unknown. Nevertheless, this is important and should be monitored, as it might be an indicator of a recently arrived pest to St. Croix.

On Mona Island, Puerto Rico, feral pigs are known to uproot juveniles and destroy the root system of *Agave sisalana* (sisal) to feed on the root system or to use them as a water source (J. Saliva, Service, pers. obs, 1983 and 1996.). As introduced pigs, donkeys, and goats have been reported on St. Croix, we cannot disregard the possible predation of *Agave eggersiana,* particularly young plants, by these feral animals. The absence of evidence of predation by these species might be the result of the low number of individuals of *A. eggersiana,* their isolation, and the proximity of some of these populations to human-inhabited areas. Nonetheless, at this time there is no evidence that donkeys, pigs, or goats constitute a direct threat to *A. eggersiana.*

Gonocalyx concolor and *Varronia rupicola*

No insect pest or predation of individuals of *Gonocalyx concolor* or *Varronia rupicola* has been documented in the wild. Minor to moderate infestation by glasshouse whitefly (*Trialeurodes vaporariorum*) was observed on cultivated material of *V. rupicola* at the Royal Botanical Garden, KEW (Wenger *et al.* 2010). However, this was suspected to be the result of the proximity of the *V. rupicola* material to a species that is highly susceptible to this insect pest.

Due to the low number of individuals and populations of these species, disease and predation could certainly be threats. However, we have no further information indicating that disease or predation are a current threat to *Gonocalyx concolor* or *Varronia rupicola.* We do not consider disease or predation to be a threat to either of the two species.

Conservation Efforts To Reduce Disease or Predation

Agave eggersiana, Gonocalyx concolor, and *Varronia rupicola*

Based on the information available, we have no evidence of conservation efforts to prevent or reduce adverse effects due to disease or predation. So far, the only species that could be potentially affected by an insect pest is *Agave eggersiana.* However, to our knowledge, no conservation measure has been implemented in this regard.

Summary of Factor C

Predation (scaring) has been observed in some individuals of *Agave eggersiana,* but there is no direct evidence that the severity of this stressor has affected the species. However, disease caused by the agave snout weevil could potentially affect *A. eggersiana* at a population level. Thus, based on our analysis of the best available scientific and commercial available data, we find that disease may be a significant stressor to the overall status of *A. eggersiana* by affecting the long-term survival of the species.

We have no information indicating that disease or predation is a current threat to *Gonocalyx concolor* or *Varronia rupicola.*

Factor D. The Inadequacy of Existing Regulatory Mechanisms

Under this factor, we examine whether existing regulatory mechanisms are inadequate to address the threats to *Agave eggersiana, Gonocalyx concolor,* and *Varronia rupicola* discussed under other factors. Section 4(b)(1)(A) of the Act requires the Service to take into account, ''those efforts, if any, being made by any State or foreign nation, or any political subdivision of a State or foreign nation, to protect such species. . . .'' In relation to Factor D under the Act, we interpret this language to require the Service to consider relevant Federal, State, and Tribal laws and regulations, and other such mechanisms that may minimize any of the threats we describe in threat analyses under the other four factors, or otherwise enhance conservation of the species. We give strongest weight to statutes and their implementing regulations and to management direction that stems from those laws and regulations. An example would be State governmental actions enforced under a State statute or constitution, or Federal action under statute.

Having evaluated the significance of the threat as mitigated by any such conservation efforts, we analyze under Factor D the extent to which existing regulatory mechanisms are inadequate to address the specific threats to the species. Regulatory mechanisms, if they exist, may reduce or eliminate the impacts from one or more identified threats. In this section, we review existing State and Federal regulatory mechanisms to determine whether they effectively reduce or remove threats to *Agave eggersiana, Gonocalyx concolor,* and *Varronia rupicola.*

Agave eggersiana

Territory

The Territory of the U.S. Virgin Islands currently considers *Agave eggersiana* as endangered under the Virgin Islands Indigenous and Endangered Species Act (Law No. 5665) (V.I. Code, Title 12, Chapter 2). This law, signed in 1990, amended an existing regulation (Bill No. 18–0403) to provide for the protection of endangered and threatened wildlife and plants by prohibiting the take, injury, or possession of indigenous plants. As we mentioned above, *A. eggersiana* is currently being used for private landscaping on St. Croix. At present, we do not have information about the sources of the individuals used for such purposes. However, we are concerned about the removal of individuals from natural populations for landscaping. Based on the number of individuals currently used for private gardens and the landscape practices in private areas, such as pruning and mowing of populations, we believe that protection provisions under local regulation may not be appropriately enforced. Rothenberger *et al.* (2008, p. 68) indicated that the lack of management and enforcement capacity continues to be a significant challenge for the USVI, because enforcement agencies are chronically understaffed and territorial resource management offices experience

significant staff turnover, particularly during administration changes.

Based on the above, although there is a regulatory mechanism that protects *Agave eggersiana* on St. Croix, we consider that the enforcement of the mechanism is inadequate.

Gonocalyx concolor and *Varronia rupicola*

Federal

One of the currently known populations of *Varronia rupicola* lies within the Vieques NWR (Puerto Ferro population). Collecting and managing plant material (including seeds) within a national wildlife refuge are regulated and require a permit from the refuge manager (FWS Form 3–1383–R). The National Wildlife Refuge System Administration Act of 1966 (16 U.S.C. 668dd–668ee, as amended by the National Wildlife Refuge System Improvement Act of 1997) provides guidance for management and public use of the refuge system.

Commonwealth

In 1999, the Commonwealth of Puerto Rico approved the Law No. 241, also known as New Wildlife Law of Puerto Rico (''Nueva Ley de Vida Silvestre de Puerto Rico''). The purpose of this law is to protect, conserve, and enhance both native and migratory wildlife species, including plants; declare all wildlife species within its jurisdiction as property of Puerto Rico; and regulate permits, hunting activities, and nonnative species, among others. However, as we mentioned above under the Factor A discussion, some individuals of *Gonocalyx concolor* and *Varronia rupicola* have been pruned, and in some cases eliminated, as result of unauthorized activities such as vegetation removal within the Commonwealth Forest (O. Monsegur, UPRM, unpubl. report, 2006, p. 1) and within privately owned lands (Monsegur and Breckon 2007, p. 6). Therefore, we believe that protection provisions under the Law No. 241 are not being appropriately enforced.

In 1998, the Commonwealth of Puerto Rico approved the Commonwealth Law No. 150, known as Puerto Rico Natural Heritage Law (Ley del Programa de Patrimonio Natural de Puerto Rico). The purpose of the Law No. 150 is to create the DNER Natural Heritage Program. This program has the responsibility to identify and designate as critical elements some rare, threatened, or endangered species that should be considered for conservation, because of their contribution to biodiversity and because of their importance to the natural heritage (DNR 1988, p.1). Currently, *Gonocalyx concolor* and *Varronia rupicola* are considered as critical elements by the DNER Natural Heritage Program. The Law No. 150 does not provide penalties for actions that may adversely affect critical elements; however, the law triggers other Commonwealth laws and regulations, such as Law No. 133 and Regulation No. 6769 (see below), that provide protection to critical elements.

The Carite and Guánica Commonwealth Forests are protected by Law No. 133 (12 L.P.R.A. sec. 191), 1975, as amended, known as the Puerto Rico Forest Law (''Ley de Bosques de Puerto Rico''), as amended in 2000. Section 8(A) of Law No. 133 prohibits cutting, killing, destroying, uprooting, extracting, or in any way damaging any tree or vegetation within a Commonwealth forest without authorization of the Secretary of the DNER. Although management plans for Commonwealth forests include the protection and conservation of species classified under DNER regulations as critical element, endangered, or threatened, on occasions the location of such species in the forests makes enforcement of these regulations a difficult task. As previously mentioned, *Gonocalyx concolor* and *Varronia rupicola* are located adjacent to trails, near access roads, and below power lines, where they are susceptible to maintenance practices. According to DNER forest managers, on several occasions, coordination between forest personnel and field staff from PREPA has not been effective to avoid damaging species protected by Commonwealth laws, including *V. rupicola* and *G. concolor* (M. Canals, DNER, pers. comm. 2008; H. Serrano-Delgado, DNER, pers. comm. 2013).

In 2004, the Commonwealth of Puerto Rico adopted Regulation No. 6769, Regulation of Special Permits for the Use of Communications and Buildings Associated to Electronic Systems of Communication within Commonwealth Forests in Puerto Rico (''Reglamento de Permisos Especiales para Uso de Comunicaciones y Edificaciones Asosiadas a Sistemas Electrónicos de comunicación en los Bosques Estatales''), which provides guidance for the installation and maintenance of telecommunication facilities within Commonwealth forests and for the protection of natural resources. Article 7(d) of this regulation states that during installation, operation, and maintenance of telecommunication facilities, conservation measures should be taken to avoid or minimize impacts on species protected by DNER and Federal agencies (DNER 2004a, p. 13). However, individuals of *Gonocalyx concolor* have been affected by maintenance activities of existing communication facilities, making implementation of this regulation a challenging task (see discussion under Factor A, above, and Factor E, below).

In 2004, DNER approved Regulation 6766 to regulate the management of threatened and endangered species in the Commonwealth of Puerto Rico (''Reglamento para Regir el Manejo de las Especies Vulnerables y en Peligro de Extinción en el Estado Libre Asociado de Puerto Rico''). Article 2.06 of Regulation 6766 prohibits collecting, cutting, and removing, among other activities, listed plants within the jurisdiction of Puerto Rico. *Gonocalyx concolor* and *Varronia rupicola* are not included in the list of protected species under Regulation 6766. However, as indicated above, Law No. 241 provides protection to all wildlife species (including plants) under Commonwealth jurisdiction, even those on private lands.

Local Ordinances

On the island of Anegada, there are various conservation and education efforts taking place for the protection of rare plant and animal species (Wenger *et al.* 2010, p. 8). However, we are unaware of any formal regulatory mechanism for protecting *Varronia rupicola.* On November 3, 1999, a portion of western Anegada (2,646 ac (1,071 ha)) was designated as a Ramsar site and added to the List of Wetlands of International Importance (Western Salt Ponds of Anegada). A portion of the preferred limestone habitat of *V. rupicola* lies within this site, which is owned by the British government. Although this designation does not necessarily provide legal protection status, the purpose of Ramsar sites is to ensure the perpetuation of ecological functions of those sites by means of a wise-use approach.

Summary of Factor D

Agave eggersiana, Gonocalyx concolor, and *Varronia rupicola* and their habitats are partially protected by Federal, Commonwealth, Territory, and local regulations. However, after evaluating the information available on the implementation of the existing laws, we determined those regulatory mechanisms do not provide adequate protection to the species. The enforcement of existing laws has not been effective, because harming or injuring (mowing or pruning) *Agave eggersiana* has been reported. In addition, the implementation and

enforcement of effective measures to protect individuals of *V. rupicola* located adjacent to existing trails and below power lines within Commonwealth forests have not been effective. The same problem has occurred with *G. concolor* during maintenance of communication towers. Additionally, it is important to note that enforcement on private lands continues to be a challenge, as accidental damage or extirpation of individuals has occurred due to lack of knowledge of the species by private landowners.

Factor E. Other Natural or Manmade Factors Affecting Their Continued Existence

Invasive Species

Invasive plant species can affect native ecosystems at three levels: the genetic level, where the number of individuals of native species can be reduced below the minimum necessary for persistence; the species diversity level, where the number of species present and their distribution can be reduced; and the ecosystem level, where the functioning of the ecosystem can be changed (Rippey *et al.* 2002, p. 170). Nonnative species can be very aggressive and compete with native species for sunlight, nutrients, water, and ground cover. Once established, these nonnative species typically dominate the landscape, and the novel forest is characterized by a decrease in the number of endemics (Lugo and Helmer 2003, p. 145). The impacts of invasive species are among the greatest threat to the persistence of native rare species and their habitats (Thomson 2005, p. 615).

Varronia rupicola and *Agave eggersiana*

Although invasive plant species have not been documented as a current threat to *Varronia rupicola,* they may become so in the future. Studies conducted within the Guánica Commonwealth Forest indicate that some nonnative tree species (e.g., *Leucaena leucocephala*) can persist as a dominant canopy species for at least 80 years (Wolfe 2009, p. 2). The same is expected to occur with nonnative grass species (e.g., *Megathyrsus maximus*). These invasive species may invade recently disturbed (naturally or by human impacts) areas and occupy the suitable habitat of *V. rupicola.* Despite the quality and overall diversity of the habitat that harbors *V. rupicola* populations in the southern coast of Puerto Rico, recent developments and habitat fragmentation have served as corridor for invasive species (e.g., right-of-way for the former Gasoducto Sur; O. Monsegur, Service, pers. obs., 2013). On the island of Anegada, numerous invasive plants have been documented in the town of The Settlement, three of which have been observed moving towards natural habitats (McGowan *et al.* 2006, p. 4), further promoting the risk of wildfires that can affect *V. rupicola.*

With respect to *Agave eggersiana,* the populations at Protestant Cay, Gallows Bay, and Great Pond are surrounded by dense stands of different species of *Sansevieria,* an herb native to Africa. This invasive species seems to be occupying the ecological niche adjacent to known populations of *A. eggersiana* (O. Monsegur, Service, pers. obs., 2013). This invasive species can constrain the number of individuals of *A. eggersiana* and reduce the species' limited populations even more.

Gonocalyx concolor

Invasive, native plants, such as the ferns *Gleichenella pectinata* and *Sticherus bifidus,* may invade and alter diverse native communities, often resulting in plant monocultures that support few wildlife species (Walker *et al.* 2010, p. 627). These ferns can colonize disturbed areas faster than other native plants and may grow into dense mats, thereby excluding native plants (Walker *et al.* 2010, p. 634). Additionally, the mats formed by these species serve as fuel for fires and, in fact, seems to be fire-tolerant. The invasive, nonnative grass *Pennisetum purpureum* (elephant grass) is a fire-adapted species that, in dense growth, can suppress most grasses, herbs, and tree seedlings (J. K. Francis, ITF, internet data, 2013).

These invasive ferns and grass are currently found occupying areas disturbed by fire, landslides, and road construction in Cerro La Santa, and have the potential to affect *Gonocalyx concolor* by increasing fire incidences, microclimate, and nutrient cycling of the habitat on which this species depends. At present, we have no information about the competitive abilities of *G. concolor* in such a situation. Therefore, the effect of invasive species within the *G. concolor* habitat should be considered a threat to the species.

Human-Induced Fires

Fire is not a natural event in subtropical dry or moist forests in Puerto Rico and the U. S. Virgin Islands. The vegetation in the Caribbean is not adapted to fires, because this disturbance does not naturally occur on these islands (Brandeis and Woodall 2008, p. 557; Santiago-García *et al.* 2008, p. 604). Human-induced fires could modify the landscape by promoting nonnative trees and grasses, and by diminishing the seed bank of native species (Brandeis and Woodall 2008, p. 557). In some cases, fires may maintain extensive areas of young forest and grasslands, slowing the recovery of ecosysems and, therefore, impairing the delivery of ecosystem services (Brandeis and Woodall 2008, p. 557). For example, the nonnative *Megathyrsus maximus* is well adapted to fires and typically colonizes areas that were previously covered by native vegetation. Furthermore, the presence of this species increases the amount of fuel and the intensity of fires. Therefore, damage caused by fires to the ecosystems, particularly to juvenile plants, might be irreversible.

Varronia rupicola and *Agave eggersiana*

Human-induced fires may lead to destruction of the native vegetation seed bank and may create conditions favorable for the establishment of nonnative plant species adapted to fires (e.g., *Leucaena leucocephala* and *Megathyrsus maximus*) that may outcompete *Varronia rupicola* and *Agave eggersiana.* Furthermore, the presence of *M. maximus* and other grass species increases the amount of fuel and the intensity of fires that may affect endemic populations. Seedling mortality after fires is related to the differences on fuel loads and the different fire intensities (Santiago-García *et al.* 2008, p. 607). The *V. rupicola* populations that occur along the municipalities of Yauco, Peñuelas, and Ponce are susceptible to forest fires, particularly on private lands where fires are accidentally or deliberately ignited. Evidence of recent fires within the habitat and adjacent to known populations of *V. rupicola* in Peñuelas and Ponce have been observed by Service biologist Omar Monsegur (2011 and 2013). *Varronia rupicola* populations within the Guánica Commonwealth Forest may be protected, as this conservation area has an active fire control program (M. Canals, DNER, pers. comm. 2008). Nonetheless, Miguel Canals, Guánica Commonwealth Forest Manager, indicates that fires still occur in the forest, particularly on the periphery along roads (Canals, DNER, pers. comm. 2008). Moreover, accidental fires have been reported below the PREPA power lines adjacent to known populations of *V. rupicola.*

On the island of St. Croix, human-induced fires are also frequently reported, and most of them appear to have been originated close to existing roads (Chakroff 2010, p. 41). Estate

Granard, Estate Jack's Bay, and Estate Isaacs Bay are among the areas identified as fire hotspots (Chakroff 2010, p. 42). One of the extant populations of *Agave eggersiana* is found on Estate Granard, and Jack's Bay and Isaacs Bay Estates are within the historical range for the species. In fact, from 2006 to 2009, there were between 1 and 6 fires in these estates (Chakroff 2010, p. 42). Human-induced fires particularly threaten the *A. eggersiana* population at Great Pond due to the abundance of nonnative grasses in this area. Service's personnel in St. Croix just documented a wild fire affecting the population of *Catesbaea melanocarpa* (Claudia Lombard, Service, pers. comm. 2013). This population is located less than 0.3 mi (0.5 km) from the *A. eggersiana* population at Manchenil Bay.

Gonocalyx concolor

Human-induced fire is also a current threat to *Gonocalyx concolor* at Cerro La Santa. Areas adjacent to (less than 33 ft (10 m) from) a population of this species have been affected by such fires (O. Monsegur, UPRM, unpubl. data, 2006). Fire effects could accelerate the colonization of invasive plants and change the vegetation composition of Cerro La Santa (see discussion under Factor A, above). Currently, *Pennisetum purpureum,* a nonnative grass, is occupying these areas, making them vulnerable to human-induced fires. During the dry season (March through May), the fern *Gleichenella pectinata,* and other fern species that have colonized landslides and roadsides, form dense mats of dry material that serve as fuel for fires. Although Cerro La Santa is located in the wet forest, fires still occur in the area, particularly along roads, during the dry season (C. Pacheco, USFWS, pers. obs. 2013). Due to the small size of *G. concolor* populations and their proximity to areas susceptible to human-induced fires, the Service considers habitat modification by fires as a threat to the species.

Hurricanes and Climate Change

The islands of the Caribbean are frequently affected by hurricanes. The U.S. Virgin Islands have been hit by five major hurricanes in recent years: Hugo (1989), Luis and Marilyn (1995), Lenny (1999), and Omar (2008). Examples of the visible effects of hurricanes on the ecosystem include massive defoliation, snapped and wind-thrown trees, large debris accumulations, landslides, debris flows, altered stream channels, and transformed beaches (Lugo 2008, p. 368). Successional responses to hurricanes can influence the structure and composition of plant communities in the Caribbean islands (Van Bloem *et al.* 2003, p. 137; Van Bloem *et al.* 2005, p. 572; Van Bloem *et al.* 2006, p. 517; Lugo 2000, p. 245). Hurricanes can produce sudden and massive tree mortality, which is variable among species (Lugo 2000, p. 245). As endemics to the Caribbean, *Varronia rupicola, Agave eggersiana,* and *Gonocalyx concolor* would be expected to be well adapted to tropical storms and the prevailing environmental conditions in this geographical area. However, the resilience of rare and endangered native species populations may be limited or constricted by the reduced number of populations and individuals, making the populations vulnerable to stochastic events.

Varronia rupicola and *Agave eggersiana*

The reduced number and small size of *Varronia rupicola* and *Agave eggersiana* populations in Puerto Rico and St. Croix, respectively, make these species susceptible to hurricanes impacts (e.g., extirpation). In the case of *A. eggersiana,* the impacts may be exacerbated by the reproductive biology of the species (i.e., the species depends on asexual reproduction, plants dying after flowering, and limited dispersal of bulbils). Therefore, impacts to a population may compromise its natural recruitment. In addition, for *V. rupicola,* a severe hurricane could result in extensive defoliation and could cause stem damage.

Populations of *Varronia rupicola* may be threatened by climate change, which is predicted to increase the frequency and strength of tropical storms and can cause severe droughts (Hopkinson *et al.* 2008, p. 260). Rather than assessing climate change as a single threat, we examined the potential consequences to species and their habitats that arise from changes in environmental conditions associated with various aspects of climate change. For example, climate-related changes to habitats or conditions that exceed the physiological tolerances of a species, occurring individually or in combination, may affect the status of a species. In fact, vulnerability to climate change impacts is a function of sensitivity, exposure, and adaptive capacity of species (IPCC 2007, p. 89; Glick and Stein 2010, p. 19). For instance, severe droughts may compromise seedling recruitment, as they may result in deaths of small plants, or may compromise the viability of seeds. Despite the wide distribution of *V. rupicola* and the number of populations, the number of individuals per population may be too low to sustain a positive recruitment of individuals. This may explain the low number of intermediate-sized, nonreproductive individuals of *V. rupicola* observed in Guánica and Ponce, when compared to the high numbers of young seedlings (Omar A. Monsegur, Service, pers. obs. 2013).

On the island of Anegada, climate-induced sea-level rise could lead to the extirpation of *Varronia rupicola.* The preferred habitat of this species on that island is in lower elevations, and more than 40 percent of the island is less than 9.8 ft (3 m) above sea level (Wenger *et al.* 2010, p. 8). Similarly, *Agave eggersiana* occurs very close to beach areas in coastal areas. At least two *A. eggersiana* populations are located on a coastal cliff, susceptible to coastal erosion and landslides. Therefore, we believe that cyclonic surges and coastal erosion associated with hurricanes may significantly affect the populations located along the coastal areas of St. Croix (i.e., Manchenil Bay, South Shore, Cane Garden, Vagthus Point, and Protestant Cay), due to their proximity to cliffs and the shoreline.

Gonocalyx concolor

The limited distribution and low number of populations (3) and individuals (172 historically reported) of this species may exacerbate its vulnerability to natural events such as hurricanes and landslides, and compromise its continued existence. Damage to higher elevation forested habitat is usually greater during hurricane events (Weaver 2008, p. 150). *Gonocalyx concolor* is extremely vulnerable due to its habitat requirements and the fact that it is usually found growing on the canopy of the tallest trees in Cerro La Santa and Charco Azul. The species is usually associated to old trees with abundant vines and epiphytes that provide horizontal structure for the colonization of the species (probably a habitat requirement for the germination of seeds). Hurricane winds often lead to tree defoliation, loss of small and large branches, and uprooting, resulting in damage to adjacent trees and understory vegetation. As a result, gaps are produced in the vegetation, causing temporary changes in the understory microclimate due to high light levels and temperature (Walker *et al.* 2010, p. 626). Therefore, damage to the forest canopy may result in a direct impact to individuals of *G. concolor* that may fall to the ground and probably be outcompeted by pioneer plant species that get established during early successional stages after hurricanes.

The recovery of elfin forest vegetation after hurricanes is usually slow, and the

early regeneration process is dominated by a few species (Weaver 2008, p. 150). Furthermore, in the absence of knowledge of the reproductive capacity and ecological requirements of *Gonocalyx concolor,* it is difficult to predict its recovery after natural events such as hurricanes and tropical storms, particularly when the frequency and intensity of these weather events is expected to increase with climate change.

The habitat where *Gonocalyx concolor* occurs is susceptible to landslides during rain events mostly associated with tropical storms and hurricanes. Sometimes rainfall reaches 24 in (60 cm) in a single storm event, causing floods and interacting with topography and geologic substrate to induce mass wasting events (e.g., landslides; Lugo 2000, p. 246). In 1998, during Hurricane Georges, a landslide adversely affected approximately 2 ac (0.8 ha) of elfin forest at Cerro La Santa (Hecsor Serrano-Delgado, DNER, pers. comm. 2013). A massive landslide in the area where the species occurs would not only take out individuals of *G. concolor,* but would also modify the habitat necessary for the species and lead to conditions favoring the establishment of invasive and weedy vegetation that may permanently modify the habitat and outcompete *G. concolor* (see invasive species discussion under Factor E, above). As documented during Hurricane Georges, and based on the current conditions of the habitat at Cerro La Santa and Charco Azul, landslides are a current threat to this species. As with *Agave eggersiana* and *Varronia rupicola* (see discussion above), overall impact and the cumulative effects of climate change are also expected to have long-term adverse effects on *G. concolor. Gonocalyx concolor* is considered a species with very specific ecological requirements and that occupies biological islands (i.e., dwarf forests on high elevations of Puerto Rico). Thus, predicted changes on the structure of the vegetation due to climate change may result in the irreversible extirpation of the prime habitat for the species.

Low Reproductive Capacity, Highly Specialized Ecological Requirements, and Genetic Variation

Gonocalyx concolor and *Agave eggersiana*

Small and isolated populations of rare plants often display reduced fitness as reduced reproductive output, seedling performance, or pollen viability (Holmes *et al.* 2008, p. 1031). In the case of *Gonocalyx concolor,* little is known about its reproductive capacity, recruitment, and genetic variation. The low number of individuals per population of a monoecious species (both sexes in the same flower), like *G. concolor,* suggests it has highly specialized ecological requirements, production of viable seeds rarely occurs, or there is a pollinator limitation. Despite the ongoing monitoring of the known population of *G. concolor,* no seedling recruitment has been observed in the wild. Knowing the phenology of a plant showing limited distribution is important in understanding the species' biology and ecology, such as the timing of flowering, fruiting, germination and subsequent growth, and accumulation of biomass in the field (Ruml and Vulic 2005, p. 218). Additionally, given the extremely limited geographic distribution of *G. concolor,* it is likely that its genetic variability is low.

In the case of *Agave eggersiana,* its reproductive biology is characterized by its dependence on asexual reproduction (i.e., bulbils). Current evidence suggests that the wild and cultivated populations of *A. eggersiana* have minimum genetic variation. This would result in the loss of alleles by random genetic drift, which would limit the species' ability to respond to changes in the environment (Honnay and Jacquemyn, 2007, p. 824).

Conservation Efforts To Reduce Other Natural or Manmade Factors Affecting Their Continued Existence

Varronia rupicola

The staff from the Royal Botanical Garden (KEW) has developed a germination and cultivation protocol for *Varronia rupicola.* KEW is also conducting studies to determine the genetic variation within and among known populations, and the species' reproductive biology and population ecology, to develop a management plan for the species (Hamilton, KEW, pers. comm. 2012). Further preliminary germination experiments have been conducted in Puerto Rico at the nurseries of the Guánica Commonwealth Forest and the Cabo Rojo National Wildlife Refuge. The Service is not aware of any conservations measure for *Agave eggersiana* or *Gonocalyx concolor.*

Summary of Factor E

Agave eggersiana

Based on the above information and due to the reduced number of populations and individuals, we believe that *Agave eggersiana* is currently threatened by natural or manmade factors, including hurricanes, fires, and competition with nonnative species. Climate change may exacerbate these habitat threats by increasing the frequency of fires, droughts, and hurricanes, but to an unknown extent.

Gonocalyx concolor

The primary threats to *Gonocalyx concolor* are its limited distribution and highly specialized ecological requirements. Other potential threats include low reproductive capacity, possible low genetic variation, effects of vegetation management, hurricanes and landslides, human-induced fire, and climate change. *G. concolor* is susceptible to hurricanes, landslides, and human-induced fire because it is confined to geographically small areas. Invasive species and climate change are potential threats that may be expected in the future. *G. concolor* could be negatively affected by the increasing intensity and frequency of hurricanes and tropical storms, environmental effects resulting from changing climatic patterns. Any disturbance of vegetation along the road and around the telecommunication facilities (including landslides) where the species is found may directly impact individuals and create conditions favorable for the establishment of invasive species that may alter (modify) *G. concolor* habitat.

Varronia rupicola

Varronia rupicola is threatened primarily by human-induced fires within its prime habitat. Habitat modification by urban development has promoted the invasion of its habitat by nonnative plant species (e.g., grasses) that are typically fire-adapted and, therefore, increase the chances of fires by providing a higher fuel load in the ecosystem. Evidence of recent fires has been documented within the municipalities of Peñuelas and Ponce in areas close to *V. rupicola,* threatening these natural populations. Overall, nonnative plants and fires may result in extirpation of populations of *V. rupicola* by killing individuals, limiting natural recruitment, or permanently modifying habitat and conditions necessary for the species' establishment. Furthermore, due to the species' limited numbers and distribution, hurricanes may extirpate entire populations, and in the case of a highly fragmented habitat, hurricanes may further promote the invasion of forest gaps by nonnative plant species rather than native pioneers. Similarly, severe droughts resulting from climate change may compromise the survival of seedlings and diminish natural recruitment within wild populations.

Cumulative Effects: Factors A through E

Agave eggersiana

The limited distributions and small population sizes of *Agave eggersiana* make this species very susceptible to further habitat loss (Factor A), diseases (Factor C), and competition with nonnative species (Factor E). Hurricanes, human-induced fires, and climate changes (Factor E) exacerbate current threats to the species. Furthermore, although the species is protected by territorial law, enforcement still is a challenge (Factor D), risking the continued survival of the species. While these threats may act in isolation, it is very likely that two or more of these stressors (e.g., habitat loss and diseases) act simultaneously or in combination, resulting in cumulative impacts to populations of *A. eggersiana.*

Gonocalyx concolor

The rarity and specialized ecological requirements of *Gonocalyx concolor* (Factor E) make this species extremely vulnerable to habitat destruction or modification (Factor A), and to other natural or manmade factors, such as low reproductive capacity, possible low genetic variation, invasive species, hurricanes, landslides, human-induced fires, and climate change, particularly because it is confined to small geographical areas (Factor E). Furthermore, implementation and enforcement of effective measures to protect *G. concolor* have not prevented impacts to the species (Factor D). Although the above mentioned threats may act in isolation, it is very likely that two or more of these stressors act simultaneously or in combination (e.g., hurricanes and landslides; fires and invasion of nonnative plant species), resulting in cumulative impacts to populations of *G. concolor,* challenging its recovery.

Varronia rupicola

Varronia rupicola has a somewhat extended distribution in southern Puerto Rico. However, the species is represented by small and fragmented populations, and about half of them occur within private lands subject to urban development, making the species prone to destruction, modification, or curtailment of its habitat (Factor A). Moreover, other natural or manmade factors such as invasive species, human-induced fires, hurricanes, and climate change (Factor E) also pose threats to *V. rupicola.* Furthermore, implementation and enforcement of regulatory mechanisms to protect the species have not been effective, particularly because enforcement on private lands continues to be a challenge (Factor D). Therefore, it is very likely that cumulative effects of these threats (e.g., poorly implemented regulatory mechanisms and habitat destruction) result in limitation, or even local extirpation, of *V. rupicola* populations.

Proposed Determination

Agave eggersiana

Agave eggersiana is highly threatened by limited habitat and habitat loss (e.g., construction of roads, and residential and tourist developments and landscaping (Factor A)) and the potential for a disease to wipe out the limited populations (Factor C). In addition, agave is threatened by a high possibility of commercial collection for ornamental uses (Factor B), and competition with invasive, nonnative plants, as well as hurricanes and human-induced fires, which are further exacerbated by climate change (Factor E). Due to lack of enforcement, existing regulatory mechanisms are not adequately reducing these threats (Factor D). All of these threats currently occur rangewide and are likely to continue into the foreseeable future at a medium to high intensity.

Based on our evaluation of the best available scientific and commercial information on the species, the significant threats affecting *Agave eggersiana* and its habitat, as well as future potential threats, we have determined the species is in danger of extinction throughout all of its range. As a result, we find that *A. eggersiana* meets the definition of an endangered species. We find that a threatened species status is not appropriate for *A. eggersiana* because the species is very limited in numbers and in populations, and because threats are current and ongoing, occurring rangewide, and expected to continue into the future.

Gonocalyx concolor

Gonocalyx concolor has a very limited distribution. According to our assessment, this species is threatened by habitat destruction or modification (Factor A) associated with maintenance and potential expansion of telecommunication facilities, and to other natural or manmade factors (i.e., low reproductive capacity, possible low genetic variation, invasive species, hurricanes, landslides, human-induced fires, and climate change (Factor E)). Due ineffective implementation and enforcement, existing regulatory mechanisms are not adequately reducing these threats (Factor D). All of these threats currently occur rangewide and are likely to continue into the foreseeable future at a medium to high intensity.

Based on our evaluation of the best available scientific and commercial information on the species, the significant threats affecting *Gonocalyx concolor* and its habitat, as well as future potential threats, we have determined the species is currently in danger of extinction throughout all of its range. As a result, we find that *G. concolor* meets the definition of an endangered species. We find that a threatened species status is not appropriate for *G. concolor* because the species is already very limited in numbers and distribution (i.e., it has a contracted range), and the threats are current and ongoing, occurring rangewide, and expected to continue into the future.

Varronia rupicola

Current evidence indicates that the majority of suitable habitat and known populations of *Varronia rupicola* lie within private lands in southern Puerto Rico (i.e., Yauco, Peñuelas, and Ponce). These lands are subject to habitat destruction or modification where impacts to habitat and populations have been documented. Furthermore, populations located within the Guánica Commonwealth Forest have been affected by management practices, such as trail and power lines maintenance (Factor A). Habitat destruction further results in the intrusion of nonnative plant species that have the potential to outcompete *V. rupicola* and create favorable conditions for fire (Factor E). Furthermore, implementation and enforcement of regulatory mechanisms to protect the species have not been effective in reducing these threats, particularly because enforcement on private lands continues to be a challenge (Factor D). Some of these threats are occurring presently at a moderate level, and are likely to increase in the foreseeable future to a high intensity.

We have carefully assessed the best scientific and commercial information available regarding the past, present, and future threats to *Varronia rupicola,* and have determined that the species meets the definition of a threatened species throughout all of its range. We find that an endangered species status is not appropriate for *V. rupicola* because the species is not currently in danger of extinction, but likely will be in the future. It has a wide distribution throughout the Puerto Rican bank (geographical unit that includes the main island of Puerto Rico, Vieques, Culebra, the USVI (excluding St. Croix) and the island of Anegada)), has no

germination problems, develops as reproductive individuals in a relatively short time period (1 to 2 years under nursery conditions), and is the subject of propagation and conservation protocols in development by the staff of the Royal Botanical Garden (KEW). Therefore, the Service considers that *V. rupicola* is a species with a high recovery potential that meets the definition of a threatened species.

Significant Portion of the Range

The Act defines an endangered species as any species that is ''in danger of extinction throughout all or a significant portion of its range'' and a threatened species as any species ''that is likely to become endangered throughout all or a significant portion of its range within the foreseeable future.'' A major part of the analysis of ''significant portion of the range'' requires considering whether the threats to the species are geographically concentrated in any way. If the threats are essentially uniform throughout the species' range, then no portion is likely to warrant further consideration.

Based on the threats to *Agave eggersiana* and *Gonocalyx concolor* throughout their entire known ranges, we find that these species currently are in danger of extinction throughout all of their ranges, based on the severity and scope of the threats described above. As previously discussed, *A. eggersiana* and *G. concolor* are proposed for listing as endangered species, rather than threatened species, because the major threats are occurring now, and additional threats will impact them in the near term. The potential impacts to the species would be severe given their limited known distribution, the small population sizes at the remaining sites, and the small area occupied by most of the populations. Because the threats acting over the three species extend throughout their entire ranges, it is unnecessary to determine if the species are in danger of extinction throughout a significant portion of their ranges. We find that the threats to *Varronia rupicola* are a result of future development and lack of regulatory mechanisms. These impacts are not occurring now. Therefore, on the basis of the best available scientific and commercial information, we propose listing *A. eggersiana* and *G. concolor* as endangered species, and *V. rupicola* as threatened species, throughout their ranges in accordance with sections 3(6) (endangered), 3(20) (threatened), and 4(a)(1) of the Act.

Available Conservation Measures

Conservation measures provided to species listed as endangered or threatened under the Act include recognition, recovery actions, requirements for Federal protection, and prohibitions against certain practices. Recognition through listing the species, results in public awareness and conservation by Federal, State, Tribal, and local agencies; private organizations; and individuals. The Act encourages cooperation with the States and requires that recovery actions be carried out for all listed species. The protection required by Federal agencies and the prohibitions against certain activities are discussed, in part, below.

The primary purpose of the Act is the conservation of endangered and threatened species and the ecosystems upon which they depend. The ultimate goal of such conservation efforts is the recovery of these listed species, so that they no longer need the protective measures of the Act. Subsection 4(f) of the Act requires the Service to develop and implement recovery plans for the conservation of endangered and threatened species. The recovery planning process involves the identification of actions that are necessary to halt or reverse the species' decline by addressing the threats to its survival and recovery. The goal of this process is to restore listed species to a point where they are secure, self-sustaining, and functioning components of their ecosystems.

Recovery planning includes the development of a recovery outline shortly after a species is listed and preparation of a draft and final recovery plan. The recovery outline guides the immediate implementation of urgent recovery actions and describes the process to be used to develop a recovery plan. Revisions of the plan may be done to address continuing or new threats to the species, as new substantive information becomes available. The recovery plan identifies site-specific management actions that set a trigger for review of the five factors that control whether a species remains endangered or may be downlisted or delisted, and methods for monitoring recovery progress. Recovery plans also establish a framework for agencies to coordinate their recovery efforts and provide estimates of the cost of implementing recovery tasks. Recovery teams (composed of species experts, Federal and State agencies, nongovernmental organizations, and stakeholders) are often established to develop recovery plans. When completed, the recovery outline, draft recovery plan, and the final recovery plan will be available on our Web site (*http://www.fws.gov/endangered*), or from our Caribbean Ecological Services Field Office (see **FOR FURTHER INFORMATION CONTACT**).

Implementation of recovery actions generally requires the participation of a broad range of partners, including other Federal agencies, States, Tribes, nongovernmental organizations, businesses, and private landowners. Examples of recovery actions include habitat restoration (e.g., restoration of native vegetation), research, captive propagation and reintroduction, and outreach and education. The recovery of many listed species cannot be accomplished solely on Federal lands because their range may occur primarily or solely on non-Federal lands. To achieve recovery of these species requires cooperative conservation efforts on private and Commonwealth and Territory lands.

If these species are listed, funding for recovery actions will be available from a variety of sources, including Federal budgets, State programs, and cost share grants for non-Federal landowners, the academic community, and nongovernmental organizations. In addition, pursuant to section 6 of the Act, the Territory of the U.S. Virgin Islands and the Commonwealth of Puerto Rico would be eligible for Federal funds to implement management actions that promote the protection or recovery of *Agave eggersiana, Gonocalyx concolor, and Varronia rupicola.* Information on our grant programs that are available to aid species recovery can be found at: *http://www.fws.gov/grants.*

Although *Agave eggersiana, Gonocalyx concolor,* and *Varronia rupicola* are only proposed for listing under the Act at this time, please let us know if you are interested in participating in recovery efforts for this species. Additionally, we invite you to submit any new information on this species whenever it becomes available and any information you may have for recovery planning purposes (see **FOR FURTHER INFORMATION CONTACT**).

Section 7(a) of the Act requires Federal agencies to evaluate their actions with respect to any species that is proposed or listed as an endangered or threatened species and with respect to its critical habitat, if any is designated. Regulations implementing this interagency cooperation provision of the Act are codified at 50 CFR part 402. Section 7(a)(4) of the Act requires Federal agencies to confer with the Service on any action that is likely to jeopardize the continued existence of a species proposed for listing or result in

destruction or adverse modification of proposed critical habitat. If a species is listed subsequently, section 7(a)(2) of the Act requires Federal agencies to ensure that activities they authorize, fund, or carry out are not likely to jeopardize the continued existence of the species or destroy or adversely modify its critical habitat. If a Federal action may affect a listed species or its critical habitat, the responsible Federal agency must enter into formal consultation with the Service.

Federal agency actions within the species' habitat that may require conference or consultation or both as described in the preceding paragraph include management and any other landscape-altering activities on Federal lands administered by the U.S. Fish and Wildlife Service (Vieques National Wildlife Refuge), and National Park Service (SARI and Buck Islands Monument); issuance of section 404 Clean Water Act (33 U.S.C. 1251 *et seq.*) permits by the U.S. Army Corps of Engineers; and construction and maintenance of roads or highways by the Federal Highway Administration.

The Act and its implementing regulations set forth a series of general prohibitions and exceptions that apply to endangered and threatened plants. The prohibitions of section 9(a)(2) of the Act, codified at 50 CFR 17.61, apply to endangered plants. These prohibitions, in part, make it illegal for any person subject to the jurisdiction of the United States to import or export, transport in interstate or foreign commerce in the course of a commercial activity, sell or offer for sale in interstate or foreign commerce, or remove and reduce the species to possession from areas under Federal jurisdiction. In addition, for plants listed as endangered, the Act prohibits the malicious damage or destruction on areas under Federal jurisdiction and the removal, cutting, digging up, or damaging or destroying of such plants in knowing violation of any State law or regulation, including State criminal trespass law. It is also unlawful to violate any regulation pertaining to plant species listed as endangered or threatened (section 9(a)(2)(E) of the Act).

We may issue permits to carry out otherwise prohibited activities involving endangered and threatened species under certain circumstances. Regulations governing permits are codified at 50 CFR 17.62 for endangered plants, and at 17.72 for threatened plants. With regard to endangered plants, a permit must be issued for the following purposes: for scientific purposes or to enhance the propagation or survival of the species.

It is our policy, as published in the **Federal Register** on July 1, 1994 (59 FR 34272), to identify to the maximum extent practicable at the time a species is listed, those activities that would or would not constitute a violation of section 9 of the Act. The intent of this policy is to increase public awareness of the effect of a proposed listing on proposed and ongoing activities within the range of species proposed for listing. The following activities could potentially result in a violation of section 9 of the Act; this list is not comprehensive:

(1) Unauthorized collecting, handling, possessing, selling, delivering, carrying, or transporting of *Agave eggersiana, Gonocalyx concolor,* or *Varronia rupicola,* including import or export across State lines and international boundaries, except for properly documented antique specimens of these taxa at least 100 years old, as defined by section 10(h)(1) of the Act;

(2) Introduction of nonnative species that compete with or prey upon *Agave eggersiana,* such as the introduction of the nonnative agave snout weevil to the island of St. Croix, USVI; and

(3) The unauthorized release of biological control agents that attack any life stage of *Agave eggersiana, Gonocalyx concolor,* or *Varronia rupicola.*

Questions regarding whether specific activities would constitute a violation of section 9 of the Act should be directed to the Caribbean Ecological Services Field Office (see **FOR FURTHER INFORMATION CONTACT**).

Peer Review

In accordance with our joint policy on peer review published in the **Federal Register** on July 1, 1994 (59 FR 34270), we will seek the expert opinions of at least three appropriate and independent specialists regarding this proposed rule. The purpose of peer review is to ensure that our listing determination is based on scientifically sound data, assumptions, and analyses. We have invited these peer reviewers to comment during this public comment period.

We will consider all comments and information we receive during the comment period on this proposed rule during our preparation of a final determination. Accordingly, the final decision may differ from this proposal.

Public Hearings

Section 4(b)(5) of the Act provides for one or more public hearings on this proposal, if requested. Requests must be received within 45 days after the date of publication of this proposed rule in the **Federal Register**. Such requests must be sent to the address shown in the **FOR FURTHER INFORMATION CONTACT** section. We will schedule public hearings on this proposal, if any are requested, and announce the dates, times, and places of those hearings, as well as how to obtain reasonable accommodations, in the **Federal Register** and local newspapers at least 15 days before the hearing.

Required Determinations

Clarity of the Rule

We are required by Executive Orders 12866 and 12988 and by the Presidential Memorandum of June 1, 1998, to write all rules in plain language. This means that each rule we publish must:

(1) Be logically organized;

(2) Use the active voice to address readers directly;

(3) Use clear language rather than jargon;

(4) Be divided into short sections and sentences; and

(5) Use lists and tables wherever possible.

If you feel that we have not met these requirements, send us comments by one of the methods listed in the **ADDRESSES** section. To better help us revise the rule, your comments should be as specific as possible. For example, you should tell us the numbers of the sections or paragraphs that are unclearly written, which sections or sentences are too long, the sections where you feel lists or tables would be useful, etc.

National Environmental Policy Act (42 U.S.C. 4321 et seq.)

We have determined that environmental assessments and environmental impact statements, as defined under the authority of the National Environmental Policy Act (NEPA), need not be prepared in connection with listing a species as an endangered or threatened species under the Endangered Species Act. We published a notice outlining our reasons for this determination in the **Federal Register** on October 25, 1983 (48 FR 49244).

References Cited

A complete list of references cited in this rulemaking is available on the Internet at *http://www.regulations.gov* and upon request from the Caribbean Ecological Services Field Office (see **FOR FURTHER INFORMATION CONTACT**).

Authors

The primary authors of this proposed rule are the staff members of the Caribbean Ecological Services Field Office.

List of Subjects in 50 CFR Part 17

Endangered and threatened species, Exports, Imports, Reporting and recordkeeping requirements, Transportation.

Proposed Regulation Promulgation

Accordingly, we propose to amend part 17, subchapter B of chapter I, title 50 of the Code of Federal Regulations, as set forth below:

PART 17—[AMENDED]

■ 1. The authority citation for part 17 continues to read as follows:

Authority: 16 U.S.C. 1361–1407; 1531–1544; 4201–4245, unless otherwise noted.

■ 2. Amend § 17.12(h) by adding entries for *Agave eggersiana, Gonocalyx concolor,* and *Varronia rupicola,* in alphabetical order under FLOWERING PLANTS, to the List of Endangered and Threatened Plants to read as follows:

§ 17.12 Endangered and threatened plants.

* * * * *

(h) * * *

Species		Historic range	Family	Status	When listed	Critical habitat	Special rules
Scientific name	Common name						
FLOWERING PLANTS							
*	*	*	*	*	*	*	
Agave eggersiana	None	U.S.A. (VI)	Agavaceae	E		NA	NA
*	*	*	*	*	*	*	
Gonocalyx concolor	None	U.S.A. (PR)	Ericaceae	E		NA	NA
*	*	*	*	*	*	*	
Varronia rupicola	None	U.S.A. (PR); British VI.	Boraginaceae	T		NA	NA
*	*	*	*	*	*	*	

* * * * *

Dated: September 3, 2013.

Rowan W. Gould,

Acting Director, U.S. Fish and Wildlife Service.

[FR Doc. 2013–22742 Filed 10–3–13; 8:45 am]

BILLING CODE 4310–55–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 622

[Docket No. 130710605–3605–01]

RIN 0648–BD41

Fisheries of the Caribbean, Gulf of Mexico, and South Atlantic; Shrimp Fishery of the Gulf of Mexico; Establish Funding Responsibilities for the Electronic Logbook Program

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

ACTION: Proposed changes to management measures; request for comments.

SUMMARY: NMFS proposes to establish funding responsibilities for an upgrade to the shrimp electronic logbook (ELB) program as described in a framework action to the Fishery Management Plan for the Shrimp Fishery of the Gulf of Mexico (FMP), as prepared by the Gulf of Mexico (Gulf) Fishery Management Council (Council). Newer and more efficient ELB units have been purchased by NMFS for the Gulf shrimp fleet and are available for installation on Gulf shrimp vessels. If the framework action is implemented, the proposed changes to the management measures would include establishing a cost-sharing program to fund the ELB program. The proposed changes would require NMFS to pay for the software development, data storage, effort estimation analysis, and archival activities for the new ELB units, and vessel permit holders in the Gulf shrimp fishery to pay for installation and maintenance of the new ELB units and for the data transmission from the ELB units to a NOAA server. The purpose of the proposed changes is to ensure that management of the shrimp fishery is based upon the best scientific information available and that bycatch is minimized to the extent practicable.

DATES: Written comments must be received on or before November 6, 2013.

ADDRESSES: You may submit comments on the proposed changes to the management measures, identified by ''NOAA–NMFS–2013–0127'' by any of the following methods:

- *Electronic Submission:* Submit all electronic public comments via the Federal e-Rulemaking Portal. Go to *www.regulations.gov/#!docketDetail;D=NOAA-NMFS-2013-0127,* click the ''Comment Now!'' icon, complete the required fields, and enter or attach your comments.
- *Mail:* Submit written comments to Susan Gerhart, Southeast Regional Office, NMFS, 263 13th Avenue South, St. Petersburg, FL 33701.

Instructions: Comments sent by any other method, to any other address or individual, or received after the end of the comment period, may not be considered by NMFS. All comments received are a part of the public record and will generally be posted for public viewing on *www.regulations.gov* without change. All personal identifying information (*e.g.,* name, address, etc.), confidential business information, or otherwise sensitive information submitted voluntarily by the sender will be publicly accessible. NMFS will accept anonymous comments (enter ''N/A'' in the required fields if you wish to remain anonymous). Attachments to electronic comments will be accepted in Microsoft Word, Excel, or Adobe PDF file formats only.

Electronic copies of the framework action, which includes a Regulatory Flexibility Act analysis and a regulatory impact review, may be obtained from the Southeast Regional Office Web site at *http://sero.nmfs.noaa.gov/sustainable_fisheries/gulf_fisheries/shrimp/index.html.*

Comments regarding the burden-hour estimates or other aspects of the collection-of-information requirements contained in the proposed changes to the management measures may be submitted in writing to Anik Clemens, Southeast Regional Office, NMFS, 263 13th Avenue South, St. Petersburg, FL

33701; and OMB, by email at *OIRA Submission@omb.eop.gov,* or by fax to 202–395–7285.

FOR FURTHER INFORMATION CONTACT: Susan Gerhart, Southeast Regional Office, NMFS, telephone: 727–824–5305; email: *Susan.Gerhart@noaa.gov.*

SUPPLEMENTARY INFORMATION: The shrimp fishery of the Gulf is managed under the FMP. The FMP was prepared by the Council and is implemented through regulations at 50 CFR part 622 under the authority of the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act).

Background

The final rule implementing Amendment 13 to the FMP, which published on September 26, 2006 (71 FR 56039), established the requirement for an ELB program for the Gulf shrimp fishery. The program is administered by NMFS and is a cost-effective way to accurately determine the amount and location of effort occurring in the shrimp fishery in the Gulf exclusive economic zone (EEZ). Current regulations require vessels to participate in the ELB program, if selected by the NMFS Science and Research Director (SRD).

The ELB program provides data on Gulf shrimp fishing effort that are critical to both the Council and NMFS in performing annual assessments of the status of shrimp stocks. The ELB program is also a key component in the Council's red snapper rebuilding plan because accurate estimates of juvenile red snapper mortality attributable to the shrimp fishery are essential data for red snapper stock assessments. Accurate estimates of shrimp fishing effort from the ELB program are also used to generate mortality estimates on a number of other species captured as bycatch in the shrimp fishery. In particular, the effort information from the ELB program is used to estimate and monitor incidental sea turtle takes.

Currently, NMFS funds the deployment of ELB units on approximately 500 shrimp vessels, roughly one-third of the offshore fleet. The previous contract expired on March 31, 2013; a new contract with the Gulf States Marine Fisheries Commission extended the services and will expire December 31, 2013. The contract for the current ELB program will lapse because funding is not available at this time. NMFS recently purchased newer and more efficient ELB units and they are now available for installation. To continue the ELB program, additional funding is needed regardless of the equipment used. Therefore, the Council voted for a framework action to require vessel permit holders in the Gulf shrimp fishery to share in the cost of the ELB program. If additional funding becomes available, the current ELB units could be continued to be used for multiple years to allow a smoother transition to the new ELB units, and sharing the costs of the ELB program with the shrimp fishery may not be necessary.

Cost-Sharing for the Gulf Shrimp ELB Program

NMFS purchased the new ELB units for each of the vessel permit holders in the Gulf shrimp fishery through the NMFS vessel monitoring system (VMS) program, an estimated one-time cost of $1,100,000 for 1,500 vessels. If the cost-sharing program is implemented, NMFS would pay for the software development, data storage, effort estimation analysis, and archival activities, which are estimated to cost approximately $313,791 annually. Vessel owners would pay for installation and maintenance of the new ELB units and the data transmission from the ELB units to a NOAA server. The initial installation cost would be approximately $200 per vessel, and the annual wireless provider contract (data transmission) cost is estimated to be $720 per vessel. This division of costs between NMFS and the shrimp fishery is similar to the Gulf reef fish VMS program, and other cost sharing data reporting programs within NMFS throughout the U.S.

NMFS initially sent a letter to each vessel permit holder in the Gulf shrimp fishery outlining the upgraded ELB program. This letter included the timeline and process for installation of the new ELB units.

If the cost-sharing program is implemented, NMFS will, in a subsequent letter, inform vessel owners that they have been selected to participate in this program, and that they have a total of 90 days to comply with the regulations to install and activate their new ELB units including 30 days to activate a wireless account and 60 days to install the new ELB unit after it has been shipped by NMFS and received by the vessel owner. These vessel owners must contact Verizon Wireless, the wireless provider, by email at *VZWGulfCoastELB@VerizonWireless.com,* or by phone: 888–211–3258, to initiate service for the new ELB unit.

No Changes to Regulatory Text

The framework action and the proposed changes would not require any changes to the current regulatory text within § 622.51(a), ''Commercial vessel owners and operators,'' regarding the requirements for the Gulf shrimp ELB program. This is because the current regulations specify that the SRD will select the vessel owners who will participate in the ELB program and how the ELB program is administered, and this would not change in this rulemaking. The proposed changes would revise the funding responsibilities for the ELB program, which are described in the FMP; however, the regulatory text would not change. The changes to the management measures are being proposed pursuant to section 304(b)(1)(A) of the Magnuson-Stevens Act.

Classification

Pursuant to section 304(b)(1)(A) of the Magnuson-Stevens Act, the NMFS Assistant Administrator has determined that the framework action is consistent with FMP, other provisions of the Magnuson-Stevens Act, and other applicable law, subject to further consideration after public comment.

The proposed changes to the management measures have been determined to be not significant for purposes of Executive Order 12866.

NMFS prepared an Initial Regulatory Flexibility Analysis (IRFA) for the proposed changes to the management measures, as required by section 603 of the Regulatory Flexibility Act, 5 U.S.C. 603. The IRFA describes the economic impact that the proposed changes, if implemented, would have on small entities. A description of the action, why it is being considered, and the objectives of and legal basis for this action are contained in the preamble. A copy of the full analysis is available from the NMFS (see **ADDRESSES**). A summary of the IRFA follows.

The Magnuson-Stevens Act provides the statutory basis for the proposed changes to the management measures. No duplicative, overlapping, or conflicting Federal rules have been identified.

The ELB program for the Gulf shrimp fishery, established through the final rule to implement Amendment 13 to the FMP in 2006, required selected vessels to carry ELB units. The proposed changes to the management measures would require selected vessels to carry new ELB units that are more modern and technologically advanced. From the standpoint of technical and professional skills needed, the new ELB units do not materially differ from the current ELB units. In fact, the new ELB units would no longer require a technician to meet vessels to pull and program the memory card. Data collected by ELB units would

be automatically transmitted to NMFS servers via a cellular phone connection activated when the vessel is within non-roaming cellular range. A key feature introduced by the proposed changes is that the vessel permit holders in the Gulf shrimp fishery would share the cost of the ELB program, whereas currently all costs of the ELB program are borne by the government. Each federally permitted shrimp vessel would be responsible for the one-time cost of installing the ELB unit ($200) and the annual cost of data transmission ($720) through a contract with the service provider. The vessel permit holders would also be responsible for the cost of repairing or replacing the ELB unit. The replacement of one ELB unit is estimated at about $425.

NMFS expects the proposed changes to the management measures to directly affect commercial fishermen with valid or renewable Federal Gulf shrimp permits for harvesting penaied shrimp in the Gulf Exclusive Economic Zone (EEZ). The Small Business Administration has established small entity size criteria for all major industry sectors in the United States, including fish harvesters. A business involved in fish harvesting is classified as a small business if independently owned and operated, is not dominant in its field of operation (including its affiliates), and its combined annual receipts are not in excess of $19.0 million from finfish fishing (NAICS code 114111), or $5.0 million from shellfish fishing (NAICS code 114112), or $7 million from other marine fishing (NAICS code 114119) for all of its affiliated operations worldwide. For for-hire vessels, all qualifiers apply except that the annual receipts threshold is $7.0 million (NAICS code 713990, recreational industries).

The Federal Gulf shrimp permit has been placed under a moratorium since 2007. At the start of the moratorium, 1,915 vessels qualified and received Gulf shrimp permits. Over time, the number of permitted shrimp vessels declined, and in 2012 there were 1,582 such permitted vessels. According to the Southeast Regional Office Web site, the Constituency Services Branch (Permits) unofficially listed 1,431 holders of Gulf shrimp permits as of June 25, 2013.

During 2006 through 2010, an average of 4,582 vessels fished for shrimp in the Gulf EEZ and state waters, of which 20 percent held Gulf shrimp permits. Despite being fewer in number, vessels with Gulf shrimp permits accounted for an average of 67 percent of total shrimp landings and 77 percent of total ex-vessel revenues. Of all vessels with Gulf shrimp permits, 73 percent were active and 27 percent were inactive (*i.e.,* did not commercially fish).

During 2006 through 2010, an average permitted shrimp vessel generated revenues from commercial fishing ranging from around $205,000 to $244,000. An average active permitted vessel had revenues from commercial fishing ranging from around $233,000 to $274,000. As may be expected, revenues from commercial fishing for an average inactive permitted vessel were practically none.

Based on the revenue figures above, all permitted shrimp vessels are expected to be directly affected by the proposed changes to the management measures and are determined for the purpose of this analysis to be small business entities.

Because all directly affected entities have been determined, for the purpose of this analysis, to be small entities, NMFS determined that the proposed action would affect a substantial number of small entities.

Because NMFS determined that all entities expected to be affected by the proposed changes to the management measures are small entities, the issue of disproportional effects on small versus large entities does not arise in the present case.

The vessel permit holders' share of the cost of the ELB program consists of a one-time cost of installing the ELB unit, an annual cost of transmitting data from the ELB unit to NMFS servers, and a periodic cost of repairing or replacing defective ELB units. On a per vessel basis, the installation cost is $200 and the annual data transmission cost is $720. In the event of equipment failure, the cost of repair could run from a small amount to $425, which is the cost of replacing an ELB unit.

During 2006 through 2010, an average permitted shrimp vessel had negative net operating revenues in all years, except 2009. Its net profits (*i.e.,* net operating revenues plus net receipts from non-operating activities, such as government payments) were positive in 2006 ($2,961), 2009 ($1,238), and 2010 ($94,279). However, it should be noted that the 2010 profits came mainly from earnings associated with the Deepwater Horizon MC252 (DWH) oil spill in the form of damage claims and revenues from the vessel's participation in BP's clean-up program. Without these oil spill related revenues, net profits in 2010 would have been negative $2,480.

For active permitted shrimp vessels, net operating revenues were negative in all years during 2006 through 2010. In addition, profits in all years were negative, except in 2010. Again, the positive net profits in 2010 were due to revenues associated with the DWH oil spill. The situation is worse for inactive permitted shrimp vessels, with net revenues and profits (except for 2010) being more negative than those of active permitted shrimp vessels. The average inactive permitted shrimp vessel had higher net profit in 2010 than the average active permitted shrimp vessel.

The cost of the ELB program would impose a significant impact on the profits of an average permitted shrimp vessel. The effects would be even more significant for vessels that are not active in the fishery. It is noted that there are some vessels that are substantially more profitable than the average vessel, and thus would be able to absorb the per vessel cost of the ELB program. However, there are other vessels that are only slightly more profitable than the average vessel, and very likely the impacts on their profits would be significant.

The following discussion analyzes the alternatives that were not selected as preferred by the Council.

The proposed action would continue the ELB program. Being adjudged and proven to be very effective in collecting shrimp effort data in the Gulf EEZ, continuation of the ELB program has been deemed necessary so that NMFS could effectively carry out its mandate to base conservation and management measures on the best scientific information available and to minimize bycatch to the extent practicable. Therefore, no other alternative to collect shrimp effort data was considered.

However, three alternatives, including the preferred alternative, were considered for funding the ELB program. As noted above, the preferred alternative would provide for cost sharing between NMFS and the vessel permit holders in the Gulf shrimp fishery. The second alternative would require NMFS to bear the entire cost of the ELB program. NMFS has recognized the vital role the ELB program has played in estimating shrimp effort in the Gulf, but due to tight budget constraints, NMFS cannot fully fund the ELB program. The third alternative would require the vessel permit holders to fund the entire cost of the ELB program. For several years now, the Gulf shrimp industry has been in relatively dire financial condition, thus the Gulf shrimp fishery indicated that funding the entire cost of the ELB would not be possible.

Notwithstanding any other provision of law, no person is required to respond to, nor shall a person be subject to a penalty for failure to comply with, a collection-of-information subject to the requirements of the Paperwork

Reduction Act (PRA), unless that collection-of-information displays a currently valid Office of Management and Budget (OMB) control number.

The proposed changes to the management measures contain collection-of-information requirements subject to the PRA. NMFS estimates the requirement for the Gulf shrimp fishery to share in the costs of the new ELB units, which includes installation ($200) and data transmission ($720), to average 1 hour and $920 per response for the first year. After the first year, NMFS estimates the requirement for vessel permit holders in the Gulf shrimp fishery to share in the costs of the new ELB units, which includes data transmission, to average 1 hour and $720 per response. These estimates of the public reporting burden include the time for reviewing instructions, gathering and maintaining the data needed, and completing and reviewing the collection-of-information.

These requirements have been submitted to OMB for approval. NMFS seeks public comment regarding: Whether this proposed collection-of-information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; the accuracy of the burden estimate; ways to enhance the quality, utility, and clarity of the information to be collected; and ways to minimize the burden of the collection-of-information, including through the use of automated collection techniques or other forms of information technology. Send comments regarding the burden estimate or any other aspect of the collection-of-information requirement, including suggestions for reducing the burden, to NMFS and to OMB (see **ADDRESSES**).

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

Dated: September 30, 2013.

Alan D. Risenhoover,

Director, Office of Sustainable Fisheries, performing the functions and duties of the Deputy Assistant Administrator for Regulatory Programs, National Marine Fisheries Service.

[FR Doc. 2013–24266 Filed 10–21–13; 8:45 am]

BILLING CODE 3510–22–P

Notices

Federal Register

Vol. 78, No. 204

Tuesday, October 22, 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

Submission for OMB Review; Comment Request

September 30, 2013.

The Department of Agriculture has submitted the following information collection requirement(s) to Office of Management and Budget (OMB) for review and clearance under the Paperwork Reduction Act of 1995, Public Law 104–13. Comments regarding (a) whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (b) the accuracy of the agency's estimate of burden including the validity of the methodology and assumptions used; (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 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 should be addressed to: Desk Officer for Agriculture, Office of Information and Regulatory Affairs, Office of Management and Budget, New Executive Office Building, 725—17th Street NW., Washington, DC 20502. Commenters are encouraged to submit their comments to OMB via email to: *OIRA_Submission@omb.eop.gov* or fax (202) 395–5806 and to Departmental Clearance Office, USDA, OCIO, Mail Stop 7602, Washington, DC 20250–7602. Comments regarding these information collections are best assured of having their full effect if received within 30 days of this notification. Copies of the submission(s) may be obtained by calling (202) 720–8681.

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

Rural Utilities Service

Title: Broadband Grant Program.

OMB Control Number: 0572–0127.

Summary of Collection: Congress has recognized the need to facilitate the deployment of broadband service to unserved rural areas. The provision to broadband transmission service is vital to the economic development, education, health, and safety of rural Americans. The Consolidated Appropriations Act, 2004 (Title III, Pub. L. 108–199, Stat. 3), 7 CFR 1739 Subpart A, as amended, authorizes the Rural Development, Rural Utilities Service to administer the Community Connect Grant Program for the provision of broadband transmission service in rural America. Grant authority is utilized to deploy broadband infrastructure to extremely rural, lower income communities on a ''community-oriented connectivity'' basis.

Need and Use of the Information: The Rural Development Utilities Programs (RUS) gives priority to rural areas that it believes have the greatest need for broadband transmission services. This broadband access is intended to promote economic development and provide enhanced educational and health care opportunities. RUS will provide financial assistance to eligible entities that are proposing to deploy broadband transmission service in rural communities where such service does not currently exist and who will connect the critical community facilities including the local schools, libraries, hospitals, police, fire and rescue services and who will operate a community center that provides free and open access to residents.

Description of Respondents: Business or other for-profit; Not-for-profit institutions; State, Local and Tribal Governments.

Number of Respondents: 90.

Frequency of Responses: Reporting; On occasion.

Total Burden Hours: 14,442.

Charlene Parker,

Departmental Information Collection Clearance Officer.

[FR Doc. 2013–24571 Filed 10–21–13; 8:45 am]

BILLING CODE P

DEPARTMENT OF COMMERCE

Foreign-Trade Zones Board

[B–54–2013]

Foreign-Trade Zone 39—Dallas-Fort Worth, Texas; Authorization of Production Activity; Lasko Products, Inc. (Household Electric Fans); Fort Worth, Texas

On May 21, 2013, Lasko Products, Inc., submitted a notification of proposed production activity to the Foreign-Trade Zones (FTZ) Board for its facilities within FTZ 39—Sites 16, 17, and 18, in Fort Worth, Texas.

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 33808–33809, 6–5–2013). 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: September 30, 2013.

Andrew McGilvray,

Executive Secretary.

[FR Doc. 2013–24715 Filed 10–21–13; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–557–815, A–549–830, A–552–816]

Welded Stainless Pressure Pipe From Malaysia, Thailand, and the Socialist Republic of Vietnam: Postponement of Preliminary Determinations of Antidumping Duty Investigations

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

DATES: October 22, 2013.

FOR FURTHER INFORMATION CONTACT: Charles Riggle (Malaysia), Brandon

Farlander (Thailand), or Drew Jackson (Socialist Republic of Vietnam), AD/CVD Operations, Office 4, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue NW., Washington, DC 20230, telephone: (202) 482–0650, (202) 482–0182, or (202) 482–4406, respectively.

SUPPLEMENTARY INFORMATION:

Postponement of Preliminary Determinations

On June 12, 2013, the Department of Commerce (the ''Department'') published a notice of initiation of antidumping duty investigations of welded stainless pressure pipe from Malaysia, Thailand, and the Socialist Republic of Vietnam.[1] The notice of initiation stated that the Department, in accordance with section 733(b)(1)(A) of the Tariff Act of 1930, as amended (the ''Act''), and 19 CFR 351.205(b)(1), would issue its preliminary determinations for these investigations, unless postponed, no later than 140 days after the date of the initiation. The preliminary determinations of these antidumping duty investigations are currently due no later than October 23, 2013.

On September 19, 2013, more than 25-days before the scheduled preliminary determination, Bristol Metals, Felker Brothers, and Outokumpu Stainless Pipe (''Petitioners''), pursuant to section 733(c)(1)(A) of the Act and 19 CFR 351.205(e), made a timely request for a 50-day postponement of the preliminary determinations in these investigations.[2] On September 24, 2013, Petitioners amended their request, citing the need for additional time. Specifically, in the investigations of merchandise from Malaysia and Thailand, Petitioners noted that they planned to pursue an allegation of sales below cost of production and more time is needed for such an investigation, while in the investigation of merchandise from the Socialist Republic of Vietnam, they noted that the normal value analysis is complicated, involving issues regarding the factors of production and selection of surrogate values.[3]

The Department has found no compelling reasons to deny the request and, therefore, in accordance with section 733(c)(1)(A) of the Act, the Department is postponing the deadline for the preliminary determinations to no later than 190 days after the date on which it initiated these investigations. Therefore, the new deadline for issuing these preliminary determinations is December 12, 2013.

This notice is issued and published pursuant to section 733(c)(2) of the Act and 19 CFR 351.205(f)(1).

Dated: September 30, 2013.

Paul Piquado,

Assistant Secretary for Import Administration.

[FR Doc. 2013–24709 Filed 10–21–13; 8:45 am]

BILLING CODE 3510–DS–P

[1] *See Welded Stainless Pressure Pipe From Malaysia, Thailand, and the Socialist Republic of Vietnam: Initiation of Antidumping Duty Investigations,* 78 FR 35253 (June 12, 2013).

[2] *See* Letters from Petitioners to the Secretary of Commerce, ''Welded Stainless Steel Pressure Pipe From Malaysia: Request for Extension of Preliminary Determination,'' ''Welded Stainless Steel Pressure Pipe From Thailand: Request for Extension of Preliminary Determination,'' and ''Welded Stainless Steel Pressure Pipe From Vietnam: Request for Extension of Preliminary Determination,'' dated September 19, 2013.

[3] *See* Letters from Petitioners to the Secretary of Commerce, ''Welded Stainless Steel Pressure Pipe From Malaysia: Amended Request for Extension of Preliminary Determination,'' ''Welded Stainless Steel Pressure Pipe From Thailand: Amended Request for Extension of Preliminary Determination,'' and ''Welded Stainless Steel Pressure Pipe From Vietnam: Amended Request for Extension of Preliminary Determination,'' dated September 24, 2013.

DEPARTMENT OF COMMERCE

International Trade Administration

[C–533–844]

Certain Lined Paper Products From India: Preliminary Results of Countervailing Duty Administrative Review; Calendar Year 2011

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

SUMMARY: The Department of Commerce (the Department) is conducting an administrative review of the countervailing duty (CVD) order on certain lined paper products from India. The period of review (POR) is January 1, 2011, through December 31, 2011, and the review covers one producer/exporter of the subject merchandise, A.R. Printing & Packaging India Pvt. Ltd. (AR Printing). We have preliminarily determined that AR Printing received countervailable subsidies during the POR. Interested parties are invited to comment on these preliminary results.

DATES: *Effective Date:* October 22, 2013.

FOR FURTHER INFORMATION CONTACT: Patricia M. Tran, AD/CVD Operations, Office 8, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue NW., Washington, DC 20230; telephone (202) 482–1503.

Scope of the Order

The merchandise subject to the *Lined Paper Order*[1] is certain lined paper products. The products are currently classifiable under the Harmonized Tariff Schedule of the United States (HTSUS) item numbers: 4811.90.9035, 4811.90.9080, 4820.30.0040, 4810.22.5044, 4811.90.9050, 4811.90.9090, 4820.10.2010, 4820.10.2020, 4820.10.2030, 4820.10.2040, 4820.10.2050, 4820.10.2060, and 4820.10.4000. Although the HTSUS numbers are provided for convenience and Customs purposes, the written product description, available in the *Lined Paper Order,* remains dispositive.[2]

The Preliminary Decision Memorandum is a public document and is on file electronically via Import Administration's Antidumping and Countervailing Duty Centralized Electronic Service System (IA ACCESS). IA ACCESS is available to registered users at *http://iaaccess.trade.gov* and in the Central Records Unit, room 7046 of the main Department of Commerce building. In addition, a complete version of the Preliminary Decision Memorandum can be accessed directly on the internet at *http://www.trade.gov/ia/*. The signed Preliminary Decision Memorandum and the electronic version of the Preliminary Decision Memorandum are identical in content.

Methodology

The Department has conducted this review in accordance with section 751(a)(1)(A) of the Tariff Act of 1930, as amended (the Act). For each of the subsidy programs found countervailable, we preliminarily determine that there is a subsidy, *i.e.,* a government-provided financial contribution that gives rise to a benefit to the recipient, and that the subsidy is specific. *See* sections 771(5)(B) and (D)

[1] *See Notice of Amended Final Determination of Sales at Less Than Fair Value: Certain Lined Paper Products from the People's Republic of China; Notice of Antidumping Duty Orders: Certain Lined Paper Products from India, Indonesia and the People's Republic of China; and Notice of Countervailing Duty Orders: Certain Lined Paper Products from India and Indonesia,* 71 FR 56949 (September 28, 2006) (*Lined Paper Order*).

[2] *See* ''Decision Memorandum for Preliminary Results of the Countervailing Duty Administrative Review: Certain Lined Paper Products from India,'' from Christian Marsh, Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations to Paul Piquado, Assistant Secretary for Import Administration, dated concurrently with this notice (Preliminary Decision Memorandum) for a complete description of the scope of the *Lined Paper Order.*

of the Act regarding financial contribution; section 771(5)(E) of the Act regarding benefit; and, section 771(5A) of the Act regarding specificity. For a full description of the methodology underlying all of the Department's preliminary conclusions, *see* Preliminary Decision Memorandum.

Preliminary Results of Review

The Department has preliminarily determined that the following net subsidy rates exist for the period January 1, 2011, through December 31, 2011:

Company	Net subsidy rate
A.R. Printing & Packaging India Pvt. Ltd..	2.94 percent *ad valorem*.

Disclosure and Public Comment

The Department will disclose to parties to this proceeding the calculations performed in reaching the preliminary results within five days of the date of publication of these preliminary results.[3] Interested parties may submit written arguments (case briefs) within 30 days of publication of the preliminary results and rebuttal comments (rebuttal briefs) within five days after the time limit for filing the case briefs.[4] Pursuant to 19 CFR 351.309(d)(2), rebuttal briefs must be limited to issues raised in the case briefs. Parties who submit arguments are requested to submit with the argument: (1) Statement of the issue; (2) a brief summary of the argument; and (3) a table of authorities.

Interested parties who wish to request a hearing, or to participate if one is requested, must submit a written request to the Assistant Secretary for Import Administration, U.S. Department of Commerce, within 30 days after the date of publication of this notice.[5] Requests should contain the party's name, address, and telephone number, the number of participants, and a list of the issues to be discussed. If a request for a hearing is made, we will inform parties of the scheduled date for the hearing, which will be held at the U.S. Department of Commerce, 14th Street and Constitution Avenue NW., Washington, DC 20230, at a time and location to be determined.[6] Parties should confirm by telephone the date, time, and location of the hearing.

Parties are reminded that briefs and hearing requests are to be filed electronically using IA ACCESS and that electronically filed documents must be received successfully in their entirety by 5:00 p.m. Eastern Time on the due date.

Unless the deadline is extended pursuant to section 751(a)(3)(A) of the Act, the Department will issue the final results of this administrative review, including the results of our analysis of the issues raised by parties in their comments, within 120 days after issuance of these preliminary results.

Assessment Rates

Upon issuance of the final results, the Department shall determine, and U.S. Customs and Border Protection (CBP) shall assess, countervailing duties on all appropriate entries covered by this review. We intend to issue instructions to CBP 15 days after publication of the final results of this review.

Cash Deposit Instructions

The Department also intends to instruct CBP to collect cash deposits of estimated countervailing duties for the respondent in the amount of the net subsidy rate calculated for calendar year 2011 on all shipments of subject merchandise entered, or withdrawn from warehouse, for consumption on or after the date of publication of the final results of this review. For all non-reviewed firms, we will instruct CBP to collect cash deposits of estimated countervailing duties at the most recent company-specific or all-others rate applicable to the company. These cash deposit requirements, when imposed, shall remain in effect until further notice.

This administrative review and notice are in accordance with sections 751(a)(1) and 777(i)(1) of the Act and 19 CFR 351.213.

Dated: September 30, 2013.

Paul Piquado,

Assistant Secretary for Import Administration.

Appendix I

List of Topics Discussed in the Preliminary Decision Memorandum:

I. Summary
II. Background
III. Scope of the Order
IV. Subsidies Valuation Information
  A. Allocation Period
  B. Attribution
  C. Benchmarks for Loans and Discount Rates
V. Analysis of Programs
  A. Programs Preliminarily Determined to be Countervailable
  1. Pre- and Post-Shipment Export Financing
  2. Duty-Free Import of Capital Goods and Raw Materials for Export Oriented Units (EOUs)
VI. Conclusion

[FR Doc. 2013–24711 Filed 10–21–13; 8:45 am]

BILLING CODE 3510–DS–P

[3] *See* 19 CFR 351.224(b).

[4] *See* 19 CFR 351.309(c)(1)(ii) and 351.309(d)(1).

[5] *See* 19 CFR 351.310(c).

[6] *See* 19 CFR 351.310.

DEPARTMENT OF COMMERCE

International Trade Administration

[Application No. 89–5A018]

Export Trade Certificate of Review

ACTION: Notice of Application to amend the Export Trade Certificate of Review Issued to Outdoor Power Equipment Institute, Inc. (Application No. 89–5A018).

SUMMARY: The Office of Competition and Economic Analysis (''OCEA'') of the International Trade Administration, Department of Commerce, has received an application to amend an Export Trade Certificate of Review (''Certificate''). This notice summarizes the proposed amendment and requests comments relevant to whether the amended Certificate should be issued.

FOR FURTHER INFORMATION CONTACT: Joseph Flynn, Director, Office of Competition and Economic Analysis, International Trade Administration, (202) 482–5131 (this is not a toll-free number) or email at *etca@trade.gov.*

SUPPLEMENTARY INFORMATION: Title III of the Export Trading Company Act of 1982 (15 U.S.C. 4001–21) authorizes the Secretary of Commerce to issue Export Trade Certificates of Review. An Export Trade Certificate of Review protects the holder and the members identified in the Certificate from State and Federal government antitrust actions and from private treble damage antitrust actions for the export conduct specified in the Certificate and carried out in compliance with its terms and conditions. Section 302(b)(1) of the Export Trading Company Act of 1982 and 15 CFR 325.6(a) require the Secretary to publish a notice in the **Federal Register** identifying the applicant and summarizing its proposed export conduct.

Request for Public Comments

Interested parties may submit written comments relevant to the determination whether an amended Certificate should be issued. If the comments include any privileged or confidential business information, it must be clearly marked and a nonconfidential version of the comments (identified as such) should be included. Any comments not marked as privileged or confidential business

information will be deemed to be nonconfidential.

An original and five (5) copies, plus two (2) copies of the nonconfidential version, should be submitted no later than 20 days after the date of this notice to: Export Trading Company Affairs, International Trade Administration, U.S. Department of Commerce, Room 7025–X, Washington, DC 20230.

Information submitted by any person is exempt from disclosure under the Freedom of Information Act (5 U.S.C. 552). However, nonconfidential versions of the comments will be made available to the applicant if necessary for determining whether or not to issue the Certificate. Comments should refer to this application as ''Export Trade Certificate of Review, application number 89–5A018.''

The Outdoor Power Equipment Institute, Inc. original Certificate was issued on March 19, 1990 (55 FR 11041, March 26, 1990). A summary of the current application for an amendment follows.

Summary of the Application

Applicant: Outdoor Power Equipment Institute, Inc. (''OPEI''), 141 South Patrick Street Alexandria, VA 22314.

Contact: Grace W. Kim, Attorney, Telephone (202) 342–8872

Application No.: 89–5A018.

Date Deemed Submitted: September 30, 2013.

Proposed Amendment: OPEI seeks to amend its Certificate to:

1. Remove the following member companies from OPEI's Certificate: Dixon Industries, Inc., Garden Way, Inc., Hoffco, Inc., Howard Price Turf Equipment, Ingersoll Equipment Company, Kut-Kwick Corporation, Maxim Manufacturing Corporation, Ransomes, Inc., Simplicity Manufacturing, Inc., Solo Incorporated, Southland Mower Company, Yazoo Manufacturing Company, Inc.

2. Change the names of the following OPEI members: Deere & Company dba Worldwide Lawn & Grounds Care Division, Moline, IL to Deere & Company (Moline, IL), Honda Power Equipment Manufacturing, Inc. to American Honda Motor Company Power Equipment Division (Alpharetta, GA), and Textron, Inc., dba Bunton, a division of Jacobsen, a division of Textron, Inc., Louisville, KY to Textron, Inc.

OPEI's proposed amendment of its Export Trade Certificate of Review would result in the following membership list:

1. American Honda Motor Company Power Equipment Division (Alpharetta, GA)
2. Ariens Company (Brillion, WI)
3. Briggs & Stratton Corporation (Wauwatosa, WI).
4. Deere & Company (Moline, IL)
5. Excel Industries, Inc. (Hesston, KS)
6. Magic Circle Corporation d/b/a Dixie Chopper (Coatesville, IN)
7. Maxim Manufacturing Corporation (Sebastopol, MS)
8. MTD Products, Inc. (Valley City, OH)
9. Scag Power Equipment, Inc. (Mayville, WI)
10. Textron, Inc. (Louisville, KY)
11. Toro Company (The) (Minneapolis, MN)

Dated: September 30, 2013.

Joseph Flynn,

Director, Office of Competition and Economic Analysis.

[FR Doc. 2013–24322 Filed 10–21–13; 8:45 am]

BILLING CODE 3510–DR–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XC911

Fisheries of the Gulf of Mexico and South Atlantic; Southeast Data, Assessment, and Review (SEDAR); Public Meeting

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

ACTION: Notice of SEDAR 38 data webinar for Gulf of Mexico and South Atlantic King Mackerel.

SUMMARY: The SEDAR assessment of the Gulf of Mexico and South Atlantic King Mackerel will consist of several workshops and a series of webinars. See **SUPPLEMENTARY INFORMATION**.

DATES: The SEDAR 38 data webinar will be held on Wednesday, November 6, 2013 from 10 a.m. until 1 p.m. eastern standard time (EST).

ADDRESSES: *Meeting address:* The meeting will be held via webinar. The webinar is open to members of the public. Those interested in participating should contact Julie A. Neer at SEDAR (see **FOR FURTHER INFORMATION CONTACT** below) to request an invitation providing webinar access information. Please request webinar invitations at least 24 hours in advance of the webinar.

SEDAR address: 4055 Faber Place Drive, Suite 201, N. Charleston, SC 29405.

FOR FURTHER INFORMATION CONTACT: Julie A. Neer, SEDAR Coordinator; telephone: (843) 571–4366; email: *julie.neer@safmc.net.*

SUPPLEMENTARY INFORMATION: The Gulf of Mexico, South Atlantic, and Caribbean Fishery Management Councils, in conjunction with NOAA Fisheries and the Atlantic and Gulf States Marine Fisheries Commissions, have implemented the Southeast Data, Assessment and Review (SEDAR) process, a multi-step method for determining the status of fish stocks in the Southeast Region. SEDAR is a multi-step process including: (1) Data Workshop; (2) Assessment Workshop and a series of Assessment webinars; and (3) Review Workshop. The product of the Data Workshop is a report which compiles and evaluates potential datasets and recommends which datasets are appropriate for assessment analyses. The assessment workshop and webinars produce a report which describes the fisheries, evaluates the status of the stock, estimates biological benchmarks, projects future population conditions, and recommends research and monitoring needs. The assessment is independently peer reviewed at the Review Workshop. The product of the Review Workshop is a Consensus Summary documenting panel opinions regarding the strengths and weaknesses of the stock assessment and input data. Participants for SEDAR Workshops are appointed by the Gulf of Mexico, South Atlantic, and Caribbean Fishery Management Councils and NOAA Fisheries Southeast Regional Office, Highly Migratory Species Management Division, and Southeast Fisheries Science Center. Participants include: data collectors and database managers; stock assessment scientists, biologists, and researchers; constituency representatives including fishermen, environmentalists, and non-governmental organizations (NGOs); international experts; and staff of Councils, Commissions, and state and federal agencies.

The items of discussion during the data webinar are as follows:

1. Participants will present summary data and will discuss data needs and treatments.

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 identified 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 intent to take final action to address the emergency.

Special Accommodations

This meeting is accessible to people with disabilities. Requests for auxiliary aids should be directed to the SEDAR office (see **ADDRESSES**) at least 10 business days prior to the meeting.

Note: The times and sequence specified in this agenda are subject to change.

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

Dated: October 17, 2013.

Tracey L. Thompson,

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

[FR Doc. 2013–24586 Filed 10–21–13; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XC913

Fisheries of the South Atlantic; South Atlantic Fishery Management Council; Public Meeting

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

ACTION: Notice of meeting of the South Atlantic Fishery Management Council's Habitat and Environmental Protection (Habitat) Advisory Panel (AP).

SUMMARY: The South Atlantic Fishery Management Council (Council) will hold a meeting of its Habitat AP in St. Petersburg, FL. The meeting is open to the public.

DATES: The meeting will be held from 8:30 a.m. until 4:30 p.m. on Tuesday, November 5, 2013 and from 8:30 a.m. until 4:30 p.m. on Wednesday, November 6, 2013.

ADDRESSES: *Meeting address:* The meeting will be held at the Florida Fish and Wildlife Research Institute, 100 Eighth Avenue SE., St. Petersburg, FL 33701–5020; telephone: (727) 450–6200 Ext. 104.

Council address: South Atlantic Fishery Management Council, 4055 Faber Place Drive, Suite 201, N. Charleston, SC 29405.

FOR FURTHER INFORMATION CONTACT: Kim Iverson, Public Information Officer, South Atlantic Fishery Management Council, 4055 Faber Place Drive, Suite 201, N. Charleston, SC 29405; telephone: (843) 571–4366 or toll free (866) SAFMC–10; fax: (843) 769–4520; email: *kim.iverson@safmc.net*.

SUPPLEMENTARY INFORMATION: The Habitat AP will work on development of the Council's Essential Fish Habitat Policy Statements and receive training on the use of the Regional Habitat and Ecosystem Mapping Atlas and other online information systems. The AP will receive an update on regional habitat and ecosystem modelling efforts and discuss necessary updates to the Council's Fishery Ecosystem Plan for 2014. The AP will provide recommendations to the Council for consideration.

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 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 auxiliary aids should be directed to the council office (see **ADDRESSES**) 3 days prior to the meeting.

Note: The times and sequence specified in this agenda are subject to change.

Dated: October 17, 2013.

Tracey L. Thompson,

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

[FR Doc. 2013–24587 Filed 10–21–13; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XC923

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) will hold public meeting of its ABC Control Rule Working Group (ABC WG).

DATES: The meeting of the ABC Control Rule Working Group will be on Friday, November 8, 2013 and it will be held at the Doubletree by Hilton in Danvers, MA starting at 10 a.m. Additional meetings may be held between November 4, 2013 and January 31, 2014. Specific information about the dates, times and places for this meeting will be posted on the Council's Web site, *http://nefmc.org/*.

FOR FURTHER INFORMATION CONTACT: Thomas A. Nies, Executive Director, New England Fishery Management Council; telephone: (978) 465–0492.

SUPPLEMENTARY INFORMATION: The ABC Control Rule Working Group will continue to prepare a work plan regarding how the New England Fishery Management Council (Council) may proceed in developing ABC (acceptable biological catch) control rules that incorporate a risk policy. The goal of the work plan will be to enable the Council to consider/approve a process for developing the risk policy as a 2014 Council priority. The work plan will be considered during the Council's discussion of 2014 management priorities (November 2013 Council meeting).

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: October 17, 2013.

Tracey L. Thompson,

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

[FR Doc. 2013–24679 Filed 10–21–13; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

Gulf of Mexico Fishery Management Council; Public Meeting

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

ACTION: Notice of a public meeting of the Gulf of Mexico Fishery Management Council.

SUMMARY: The Gulf of Mexico Fishery Management Council (Council) will hold a meeting of the Ad Hoc Red Snapper Individual Fishing Quota (IFQ) Advisory Panel.

DATES: The meeting will be held 9 a.m. until 5 p.m. on Tuesday, November 5 and 9 a.m. until 12 noon Wednesday, November 6, 2013.

ADDRESSES: *Meeting address:* The meeting will be held at the Council

office, 2203 North Lois Avenue, Suite 1100, Tampa, FL 33607.

Council address: Gulf of Mexico Fishery Management Council, 2203 North Lois Avenue, Suite 1100, Tampa, FL 33607.

FOR FURTHER INFORMATION CONTACT: Dr. Assane Diagne, Economist, Gulf of Mexico Fishery Management Council; telephone: (813) 348–1630; fax: (813) 348–1711; email: *assane.diagne@gulfcouncil.org.*

SUPPLEMENTARY INFORMATION: The items of discussion on the meeting agenda are as follows:

Ad Hoc Red Snapper Individual Fishing Quotas (IFQ) Agenda, Tuesday, November 5, 2013, 9 a.m. Until 5 p.m.

1. Adoption of Agenda
2. Election of Chair and Vice-Chair
3. Council's Charge to the Panel
4. Summary of Reef Fish Amendment 26—Red Snapper IFQ Program
5. Recommendations and Conclusions of the 5-year Review
6. Summary of Administrative Changes

Ad Hoc Red Snapper Individual Fishing Quotas (IFQ) Agenda, Wednesday, November 6, 2013, 9 a.m. Until 12 Noon

1. Red Snapper IFQ Program and Referendum Requirements
2. Recommended Modifications to the IFQ Program
3. Other Business

For meeting materials see folder ''Ad Hoc Red Snapper IFQ AP 11–2013'' on the Gulf Council ftp server: *http://ftp.gulfcouncil.org?user=anonymous;* or by calling (813) 348–1630.

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 identified 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 Kathy Pereira at the Council Office (see **ADDRESSES**), at least 5 working days prior to the meeting.

Note: The times and sequence specified in this agenda are subject to change.

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

Dated: October 17, 2013.

Tracey L. Thompson,

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

[FR Doc. 2013–24686 Filed 10–21–13; 8:45 am]

BILLING CODE 3510–22–P

CONSUMER PRODUCT SAFETY COMMISSION

Sunshine Act Meeting

TIME AND DATE: Tuesday, October 22, 2013, 10 a.m.–12 p.m.

PLACE: Hearing Room 420, Bethesda Towers, 4330 East-West Highway, Bethesda, Maryland.

STATUS: Commission Meeting—Open to the Public

MATTERS TO BE CONSIDERED

Hearing: Magnet Sets NPR—Oral Presentations

A live webcast of the Meeting can be viewed at *www.cpsc.gov/live.*

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: October 17, 2013.

Todd A. Stevenson,

Secretary.

[FR Doc. 2013–24707 Filed 10–18–13; 11:15 am]

BILLING CODE 6355–01–P

DEPARTMENT OF DEFENSE

Office of the Secretary

[Transmittal Nos. 13–53]

36(b)(1) Arms Sales Notification

AGENCY: Defense Security Cooperation Agency, Department of Defense.

ACTION: Notice.

SUMMARY: The Department of Defense is publishing the unclassified text of a section 36(b)(1) arms sales notification. This is published to fulfill the requirements of section 155 of Public Law 104–164 dated July 21, 1996.

FOR FURTHER INFORMATION CONTACT: Ms. B. English, DSCA/DBO/CFM, (703) 601–3740.

The following is a copy of a letter to the Speaker of the House of Representatives, Transmittals 13–53 with attached transmittal and policy justification.

Dated: October 17, 2013.

Aaron Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

BILLING CODE 5001–06–P

DEFENSE SECURITY COOPERATION AGENCY
201 12TH STREET SOUTH, STE 203
ARLINGTON, VA 22202-5408

OCT 11 2013

The Honorable John A. Boehner
Speaker of the House
U.S. House of Representatives
Washington, DC 20515

Dear Mr. Speaker:

Pursuant to the reporting requirements of Section 36(b)(1) of the Arms Export Control Act, as amended, we are forwarding herewith Transmittal No. 13-53, concerning the Department of the Army's proposed Letter(s) of Offer and Acceptance to Saudi Arabia for support services estimated to cost $90 million. After this letter is delivered to your office, we plan to issue a press statement to notify the public of this proposed sale.

Sincerely,

FOR J.W. Rixey
Vice Admiral, USN
Director

Enclosures:
1. Transmittal
2. Policy Justification
3. Regional Balance (Classified Document Provided Under Separate Cover)

BILLING CODE 5001–06–C

Transmittal No. 13–53

Notice of Proposed Issuance of Letter of Offer Pursuant to Section 36(b)(1) of the Arms Export Control Act, as amended

(i) *Prospective Purchaser:* Kingdom of Saudi Arabia, Ministry of Defense

(ii) *Total Estimated Value:*

Major Defense Equipment	$ 0 million
Other	$ 90 million
TOTAL	$ 90 million

(iii) *Description and Quantity or Quantities of Articles or Services under Consideration for Purchase:* Provides support services to include technical assistance and advisory support to the Kingdom of Saudi Arabia Ministry of Defense for three years, through the U.S. Military Training Mission (USMTM) in Riyadh, Saudi Arabia.

(iv) *Military Department:* U.S. Army (ABS, Amendment 01)

(v) *Prior Related Cases, if any:*

FMS Case ABR–$26M—12Mar12

FMS Case ABQ–$24M—23Mar11

(vi) *Sales Commission, Fee, etc., Paid, Offered, or Agreed to be Paid:* None

(vii) *Sensitivity of Technology Contained in the Defense Article or Defense Services Proposed to be Sold:* None.

(viii) *Date Report Delivered to Congress:* 11 October 2013

* as defined in Section 47(6) of the Arms Export Control Act.

POLICY JUSTIFICATION

Kingdom of Saudi Arabia—Support Services

The Government of Saudi Arabia has requested a possible sale of support services to its Ministry of Defense for

three years. The U.S. Military Training Mission (USMTM) in Riyadh, Saudi Arabia is the Security Cooperation Organization (SCO) responsible for identifying, planning, and executing U.S. security cooperation training and advisory support for the Kingdom of Saudi Arabia's Ministry of Defense. The estimated cost is $90 million.

This proposed sale will contribute to the foreign policy and national security of the United States by helping to improve the security of a friendly country that has been and continues to be an important force for political stability in the Middle East.

This proposed sale will provide the continuation of USMTM services to Saudi Arabia. The proposed sale conveys the U.S.'s continued commitment to Saudi Arabia's security and strengthens our strategic partnership.

The proposed sale will not alter the basic military balance in the region.

There is no prime contractor associated with this proposed sale. There are no known offset agreements in connection with this potential sale.

Implementation of this proposed sale will not require the permanent assignment of any U.S. Government or contractor representatives to Saudi Arabia. Support teams will travel to the country on a temporary basis.

There will be no adverse impact on U.S. defense readiness as a result of this proposed sale.

[FR Doc. 2013–24624 Filed 10–21–13; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Office of the Secretary

[Transmittal Nos. 13–43]

36(b)(1) Arms Sales Notification

AGENCY: Department of Defense, Defense Security Cooperation Agency.

ACTION: Notice.

SUMMARY: The Department of Defense is publishing the unclassified text of a section 36(b)(1) arms sales notification. This is published to fulfill the requirements of section 155 of Public Law 104–164 dated July 21, 1996.

FOR FURTHER INFORMATION CONTACT: Ms. B. English, DSCA/DBO/CFM, (703) 601–3740.

The following is a copy of a letter to the Speaker of the House of Representatives, Transmittal 13–43 with attached transmittal, policy justification, and Sensitivity of Technology.

Dated: October 17, 2013.

Aaron Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

BILLING CODE 5001–06–P

DEFENSE SECURITY COOPERATION AGENCY
201 12TH STREET SOUTH, STE 203
ARLINGTON, VA 22202-5408

SEP 26 2013

The Honorable John A. Boehner
Speaker of the House
U.S. House of Representatives
Washington, DC 20515

Dear Mr. Speaker:

Pursuant to the reporting requirements of Section 36(b)(1) of the Arms Export Control Act, as amended, we are forwarding herewith Transmittal No. 13-43, concerning the Air Force's proposed Letter(s) of Offer and Acceptance to Japan for defense articles and services estimated to cost $950 million. After this letter is delivered to your office, we plan to issue a press statement to notify the public of this proposed sale.

Sincerely,

For J. W. Rixey
Vice Admiral, USN
Director

Enclosures:
1. Transmittal
2. Policy Justification
3. Sensitivity of Technology

BILLING CODE 5001–06–C

Transmittal No. 13–43

Notice of Proposed Issuance of Letter of Offer Pursuant to Section 36(b)(1) of the Arms Export Control Act, as amended

(i) *Prospective Purchaser:* Government of Japan

(ii) *Total Estimated Value:*

Major Defense Equipment*	$355 million
Other	$595 million
TOTAL	$950 million

(iii) *Description and Quantity or Quantities of Articles or Services under Consideration for Purchase:* E–767 Airborne Warning and Control System (AWACS) Mission Computing Upgrade (MCU) that includes 4 Electronic Support Measure (ESM) Systems, 8 AN/UPX–40 Next Generation Identify Friend or Foe (NGIFF), 8 AN/APX–119 IFF Transponder, and 4 KIV–77 Cryptographic Computers. Also included are design and kit production, support and test equipment, provisioning, spare and repair parts, personnel training and training equipment, publications and technical documentation, U.S. Government and contractor engineering and technical support, installation and checkout, and other related elements of program support.

(iv) *Military Department:* Air Force (QED)

(v) *Prior Related Cases, if any:* N/A

(vi) *Sales Commission, Fee, etc., Paid, Offered, or Agreed to be Paid:* None

(vii) *Sensitivity of Technology Contained in the Defense Article or*

Defense Services Proposed to be Sold: See Attached Annex

(viii) *Date Report Delivered to Congress:* 26 September 2013

* As defined in Section 47(6) of the Arms Export Control Act.

POLICY JUSTIFICATION

Japan—Airborne Warning and Control System (AWACS) Mission Computing Upgrade (MCU)

The Government of Japan has requested a possible sale of an E–767 Airborne Warning and Control System (AWACS) Mission Computing Upgrade (MCU) that includes 4 Electronic Support Measure (ESM) Systems, 8 AN/UPX–40 Next Generation Identify Friend or Foe (NGIFF), 8 AN/APX–119 IFF Transponder, and 4 KIV–77 Cryptographic Computers. Also included are design and kit production, support and test equipment, provisioning, spare and repair parts, personnel training and training equipment, publications and technical documentation, U.S. Government and contractor engineering and technical support, installation and checkout, and other related elements of program support. The estimated cost is $950 million.

This proposed sale will contribute to the foreign policy and national security of the United States. Japan is one of the major political and economic powers in East Asia and the Western Pacific and a key ally of the United States in ensuring the peace and stability of this region. The U.S. Government shares bases and facilities in Japan. This proposed sale is consistent with U.S. objectives and the 1960 Treaty of Mutual Cooperation and Security.

The proposed sale will provide Japan with an upgraded AWACS command and control capability. This upgrade will allow Japan's AWACS fleet to be more compatible with the U.S. Air Force AWACS fleet baseline and provide for greater interoperability. Japan will use this enhanced capability to provide for its self-defense.

The proposed sale of this equipment and support will not alter the basic military balance in the region.

The principal contractor will be Boeing Integrated Defense Systems in Seattle, Washington. There are no known offset agreements proposed in connection with this potential sale.

Implementation of this proposed sale will require multiple trips to Japan involving U.S. Government and contractor representatives for modification kit installations, testing, technical reviews/support, and training over a period of eight years.

There will be no adverse impact on U.S. defense readiness as a result of this proposed sale.

Transmittal No. 13–43

Notice of Proposed Issuance of Letter of Offer Pursuant to Section 36(b)(1) Of the Arms Export Control Act

Annex

Item No. vii

(vii) *Sensitivity of Technology:*

This sale will involve the release of sensitive technology to Japan.

1. The E–767 AWACS MCU is based on the US AWACS Block 40/45 upgrade. The new mission computing system, with Commercial Off-the-Shelf (COTS) equipment, significantly enhances the surveillance, identification, situational awareness and battle management capabilities of the AWACS. It will also provide on/off-board, multi-source integration that produces ''one-target/one-track'' automatic track initiation and combat ID, improved data link infrastructure and reduced operator workload.

2. The E–767 AWACS MCU will also add an Electronic Support Measure (ESM) capability using a derivative of the Boeing 737 AEW&C SE–200A System. JASDF will procure a classified emitter database, through a separate FMS case, to support this system. The emitter database is classified up to Secret.

3. The E–767 AWACS MCU will provide IFF Modes 4, 5 and Mode S capabilities with the AN/UPX–40 interrogator or a derivative. The AN/UPX–40 hardware and software will not be classified. Military article KIV–77 encryption device will be used with the AN/UPX–40. The key material will be classified Secret.

4. The E–767 AWACS MCU will improve identification by using a COTS Automatic Identification System (AIS), a VHF transceiver system to automatically track and identify marine vessels. AIS-produced tracks will be associated with the E–767 tracks; not used to update E–767 mission computer produced tracks.

5. The E–767 AWACS MCU will add a COTS Traffic Alert and Collision Avoidance System (TCAS) to the cockpit navigation system. TCAS alerts the pilot to the potential of loss of separation with other aircraft, using air traffic control radar beacon systems and the capabilities of Mode S transponders to coordinate with other TCAS equipped aircraft. In addition, the E–767 AWACS MCU will replace the current military IFF transponder with the AN/APX–119 digital transponder for IFF Modes 4/5/S. The KIV–77 encryption device will be used with the transponder. The key material will be classified Secret.

6. If a technologically advanced adversary were to obtain knowledge of the specific hardware and software elements, the information could be used to develop countermeasures that might reduce weapon system effectiveness or be used in the development of a system with similar or advanced capabilities.

[FR Doc. 2013–24572 Filed 10–21–13; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Office of the Secretary

[Transmittal Nos. 13–51]

36(b)(1) Arms Sales Notification

AGENCY: Defense Security Cooperation Agency, Department of Defense.

ACTION: Notice.

SUMMARY: The Department of Defense is publishing the unclassified text of a section 36(b)(1) arms sales notification. This is published to fulfill the requirements of section 155 of Public Law 104–164 dated July 21, 1996.

FOR FURTHER INFORMATION CONTACT: Ms. B. English, DSCA/DBO/CFM, (703) 601–3740.

The following is a copy of a letter to the Speaker of the House of Representatives, Transmittals 13–51 with attached transmittal, policy justification, and Sensitivity of Technology.

Dated: October 17, 2013.

Aaron Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

BILLING CODE 5001–06–P

DEFENSE SECURITY COOPERATION AGENCY
201 12TH STREET SOUTH, STE 203
ARLINGTON, VA 22202-5408

OCT 8 2013

The Honorable John A. Boehner
Speaker of the House
U.S. House of Representatives
Washington, DC 20515

Dear Mr. Speaker:

Pursuant to the reporting requirements of Section 36(b)(1) of the Arms Export Control Act, as amended, we are forwarding herewith Transmittal No. 13-51, concerning the Department of the Army's proposed Letter(s) of Offer and Acceptance to Singapore for defense articles and services estimated to cost $179 million. After this letter is delivered to your office, we plan to issue a press statement to notify the public of this proposed sale.

Sincerely,

For J.W. Rixey
Vice Admiral, USN
Director

Enclosures:
1. Transmittal
2. Policy Justification
3. Sensitivity of Technology

BILLING CODE 5001–06–C

Transmittal No. 13–51

Notice of Proposed Issuance of Letter of Offer Pursuant to Section 36(b)(1) of the Arms Export Control Act, as amended

(i) *Prospective Purchaser:* Government of Singapore

(ii) *Total Estimated Value:*

Major Defense Equipment ..	$ 99 million
Other	$ 80 million
TOTAL	$ 179 million

(iii) *Description and Quantity or Quantities of Articles or Services under Consideration for Purchase:* 6 AN/TPQ–53 (V) Counterfire Target Acquisition Radar Systems with 120 degree sector scan capability, software support, support equipment, simulator, generators, power units, publications and technical documentation, spare and repair parts, live fire exercise, communication support equipment, tool and test equipment, personnel training and training equipment, U.S. Government and contractor technical and logistic support services, repair and return, Quality Assurance Teams, and other related elements or program and logistics support.

(iv) *Military Department:* Army (VPN)

(v) *Prior Related Cases, if any:* None

(vi) *Sales Commission, Fee, etc., Paid, Offered, or Agreed to be Paid:* None

(vii) *Sensitivity of Technology Contained in the Defense Article or Defense Services Proposed to be Sold:* See Attached Annex.

(viii) *Date Report Delivered to Congress:* 08 Oct 13

* As defined in Section 47(6) of the Arms Export Control Act.

POLICY JUSTIFICATION

Singapore—AN/TPQ–53 Counter fire Acquisition Radar Systems

The Government of Singapore has requested a possible sale of 6 AN/TPQ–53 (V) Counterfire Target Acquisition Radar Systems with 120 degree sector scan capability, software support, support equipment, simulator, generators, power units, publications and technical documentation, spare and repair parts, live fire exercise, communication support equipment, tool and test equipment, personnel training and training equipment, U.S. Government and contractor technical and logistic support services, repair and return, Quality Assurance Teams, and other related elements or program and logistics support. The estimated cost is $179 million.

This proposed sale will contribute to the foreign policy and national security of the United States by increasing the ability of the Republic of Singapore to contribute to regional security. Its contributions to counter-piracy and counterterrorism efforts continue to stabilize a critical chokepoint where much of the world's goods and services transit en route to and from the Asia Pacific region. The proposed sale will improve the security of a strategic partner which has been, and continues to be, an important force for political stability and economic progress in the Asia Pacific region.

The Government of Singapore intends to use these radar systems to modernize its armed forces. The purchase of these target acquisition radars will enhance the Singapore Army's foundational defense capability. The radars will reduce the vulnerability of forces to indirect fire attacks and provide them with the information necessary to respond to such attacks. The proposed sale provides the Government of Singapore with assets vital to protect and deter potential threats. Singapore will have no difficulty absorbing this equipment into its armed forces.

The proposed sale of this equipment and support will not alter the basic military balance in the region.

The principal contractor will be Lockheed Martin Corporation in Syracuse, New York. There are no known offset agreements proposed in connection with the potential sale.

Implementation of this proposed sale will require the U.S. Government and contractor representatives to travel to Singapore for a period of six (6) weeks for equipment deprocessing/fielding, systems checkout and new equipment training.

There will be no adverse impact on U.S. defense readiness as a result of this proposed sale.

Transmittal No. 13–51

Notice of Proposed Issuance of Letter of Offer Pursuant to Section 36(b)(1) of the Arms Export Control Act, as amended

Annex

Item No. vii

(vii) *Sensitivity of Technology:*

1. The AN/TPQ–53(V) Counterfire target acquisition radar is a new generation of counter fire sensor with the flexibility to adapt to targets and changing missions. The solid-state phased array AN/TPQ–53 radar system detects, classifies, tracks and determines the location of enemy indirect fire. This radar system is replacing the aging AN/TPQ–36 and AN/TPQ–37 medium-range radars. The radar is mounted on a 5-ton prime mover and is mobile, maneuverable, fully supportable and easily maintained. The AN/TPQ–53(V) Radar System is Unclassified. There is no sensitive or restricted information contained in the AN/TPQ–53(V) Radar System or software.

2. If a technologically advanced adversary were to obtain knowledge of the specific hardware and software elements, the information could be used to identify ways of countering the detection capabilities of the AN/TPQ–53(V) Radar System or improve the performance of their radar systems. The hardware used in the AN/TPQ–53(V) Radar System is considered mature and available in other industrial nation's comparable performance thresholds.

[FR Doc. 2013–24574 Filed 10–21–13; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Office of the Secretary

[Transmittal Nos. 13–48]

36(b)(1) Arms Sales Notification

AGENCY: Defense Security Cooperation Agency, Department of Defense.

ACTION: Notice.

SUMMARY: The Department of Defense is publishing the unclassified text of a section 36(b)(1) arms sales notification. This is published to fulfill the requirements of section 155 of Public Law 104–164 dated July 21, 1996.

FOR FURTHER INFORMATION CONTACT: Ms. B. English, DSCA/DBO/CFM, (703) 601–3740.

The following is a copy of a letter to the Speaker of the House of Representatives, Transmittals 13–48 with attached transmittal, policy justification, and Sensitivity of Technology.

Dated: October 17, 2013.

Aaron Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

BILLING CODE 5001–06–P

DEFENSE SECURITY COOPERATION AGENCY
201 12TH STREET SOUTH, STE 203
ARLINGTON, VA 22202-5408

The Honorable John A. Boehner
Speaker of the House
U.S. House of Representatives
Washington, DC 20515

OCT 11 2013

Dear Mr. Speaker:

Pursuant to the reporting requirements of Section 36(b)(1) of the Arms Export Control Act, as amended, we are forwarding herewith Transmittal No. 13-48, concerning the Department of the Navy's proposed Letter(s) of Offer and Acceptance to United Arab Emirates for defense articles and services estimated to cost $4.0 billion. After this letter is delivered to your office, we plan to issue a press statement to notify the public of this proposed sale.

Sincerely,

FOR J.W. Rixey
Vice Admiral, USN
Director

Enclosures:
1. Transmittal
2. Policy Justification
3. Sensitivity of Technology
4. Regional Balance (Classified Document Provided Under Separate Cover)

BILLING CODE 5001–06–C

Transmittal No. 13–48

Notice of Proposed Issuance of Letter of Offer Pursuant to Section 36(b)(1) of the Arms Export Control Act

(i) *Prospective Purchaser:* United Arab Emirates

(ii) *Total Estimated Value:*

Major Defense Equipment*	$2.5 billion
Other	$1.5 billion
TOTAL	$4.0 billion

(iii) *Description and Quantity or Quantities of Articles or Services under Consideration for Purchase:* 5000 GBU–39/B Small Diameter Bombs (SDB) with BRU–61 carriage systems, 8 SDB Guided Test Vehicles for aircraft integration, 16 SDB Captive Flight and Load Build trainers, 1200 AGM–154C Joint Stand Off Weapon (JSOW), 10 JSOW CATMs, 300 AGM–84H Standoff Land Attack Missiles-Expanded Response (SLAM–ER), 40 CATM–84H Captive Air Training Missiles, 20 ATM–84H SLAM–ER Telemetry Missiles, 4 Dummy Air Training Missiles, 30 AWW–13 Data Link pods, containers, munitions storage security and training, mission planning, transportation, tools and test equipment, integration support and testing, weapon operational flight program software development, support equipment, spare and repair parts, publications and technical documentation, personnel training and training equipment, U.S. Government and contractor engineering and logistics support services, and other related elements of logistics support.

(iv) *Military Department:* Navy (ABD) Air Force (YAD)

(v) *Prior Related Cases, if any:*

FMS case SAA–$114M–24Aug00

FMS case YAB–$156M–31Aug02
FMS case YAC–$886M–4Mar08

(vi) *Sales Commission, Fee, etc., Paid, Offered, or Agreed to be Paid:* None

(vii) *Sensitivity of Technology Contained in the Defense Article or Defense Services Proposed to be Sold:* See Annex attached

(viii) *Date Report Delivered to Congress:* 11 October 2013

* as defined in Section 47(6) of the Arms Export Control Act.

Policy Justification

United Arab Emirates (UAE)—Various Munitions and Support

The Government of the United Arab Emirates has requested a possible sale of 5000 GBU–39/B Small Diameter Bombs (SDB) with BRU–61 carriage systems, 8 SDB Guided Test Vehicles for aircraft integration, 16 SDB Captive Flight and Load Build trainers, 1200 AGM–154C Joint Stand Off Weapon (JSOW), 10 JSOW CATMs, 300 AGM–84H Standoff Land Attack Missiles-Expanded Response (SLAM–ER), 40 CATM–84H Captive Air Training Missiles, 20 ATM–84H SLAM–ER Telemetry Missiles, 4 Dummy Air Training Missiles, 30 AWW–13 Data Link pods, containers, munitions storage security and training, mission planning, transportation, tools and test equipment, integration support and testing, weapon operational flight program software development, support equipment, spare and repair parts, publications and technical documentation, personnel training and training equipment, U.S. Government and contractor engineering and logistics support services, and other related elements of logistics support. The estimated cost is $4.0 billion.

This proposed sale will contribute to the foreign policy and national security of the United States by helping to improve the security of a friendly country that has been and continues to be an important force for political stability and economic progress in the Middle East. The UAE continues host-nation support of vital U.S. forces stationed at Al Dhafra Air Base and plays a vital role in supporting U.S. regional interests.

The sale of these munitions is in support of the UAE's fleet of F–16s. This proposed sale will improve the UAE's military readiness and capabilities to meet current and future regional threats, reduce the dependence on U.S. forces in the region, and enhance any coalition operations the U.S. may undertake. The UAE will have no difficulty absorbing these munitions into its armed forces.

The proposed sale of these weapon systems will not alter the basic military balance in the region.

The principal contractors will be The Boeing Company in St. Louis, Missouri; Raytheon in Indianapolis, Indiana; and Raytheon in Tucson, Arizona. There are no known offset agreements proposed in connection with this potential sale.

Implementation of this proposed sale may require the assignment of approximately 2–4 U.S. Government or contractor representatives to the UAE. The actual number and duration to support the program will be determined in joint negotiations as the program proceeds through the development, production and equipment installation phases. Additionally, the proposed sale will require multiple trips to UAE during the life of the program for program and technical reviews.

There will be no adverse impact on U.S. defense readiness as a result of this proposed sale.

Transmittal No. 13–48

Notice of Proposed Issuance of Letter of Offer Pursuant to Section 36(b)(1) of the Arms Export Control Act

Annex

Item No. vii

(vii) *Sensitivity of Technology:*

1. The AGM–84H Standoff Land Attack Missile-Expanded Response (SLAM–ER) is a non-nuclear tactical weapon system currently in service in the U.S. Navy and in two other foreign nations. It provides a day, night, and adverse weather, standoff air-to-surface capability. SLAM–ER is a follow on to the SLAM missile that is no longer in production. It is a variant of the Harpoon missile that uses the Maverick Imaging Infrared (IIR) seeker, Global Positioning System—Precise Positioning System (GPS/PPS) for improved navigation, proprietary automatic target acquisition, planar wings, and a new warhead. SLAM–ER is effective against a wide range of land-based targets and has a secondary anti-ship mission capability. The missile is classified Confidential.

2. The SLAM–ER incorporates components, software, and technical design information that are considered sensitive. The following SLAM–ER components being conveyed by the proposed sale that are considered sensitive and are classified Confidential include Imaging Infrared (IIR) seeker, the Global Positioning System/Inertial Navigation System (GPS/INS), Operational Flight Program (OFP) Software, Missile operational characteristics and performance data.

3. The AGM–154 Joint Standoff Weapon (JSOW) is used by Navy, Marine Corps, and Air Force, and allows aircraft to attack well-defended targets in day, night, and adverse weather conditions. AGM–154C carries a BROACH warhead. The BROACH warhead incorporates an advanced multi-stage warhead. JSOW uses the GPS Precise Positioning System (PPS), which provides for a more accurate capability than the commercial version of GPS.

4. The JSOW incorporates components, software, and technical design information that are considered sensitive. The following JSOW–C components being conveyed by the proposed sale that are considered sensitive and are classified Confidential include the GPS/INS, IIR seeker, OFP software and missile operational characteristics and performance data. These elements are essential to the ability of the JSOW–C missile to selectively engage hostile targets under a wide range of operational, tactical, and environmental conditions.

5. The GBU–39/B Small Diameter Bomb (SDB) I weapon is a 250-lb class, all-up round (AUR) that provides greater than 50nm standoff range. SDB I is a day or night, adverse weather, precision engagement capability against pre-planned fixed or stationary soft, non-hardened, and hardened targets. The warhead has a high-strength steel penetration design with a blast or fragmentation capability containing approximately 36 pounds of high explosives. SDB I is a Global Positioning System (GPS) guided weapon aided by Inertial Navigation System (INS).

6. The SDB I include an integrated height of burst (HoB) sensor that provides the weapon with an airburst capability.

7. A key component of the SDB system is the weapon planning module (WPM). The module is hosted on the Joint Mission Planning System (JMPS). The WPM provides unit-level planners and intelligence personnel a means of importing target location data, programming desired fuzing parameters, and computing release and impact conditions (or using defaults) for the employment of each weapon. This weapon planning data is saved to an aircraft data transfer device for download into the aircraft avionics and subsequently passed to the carriage and weapon upon initialization.

8. Logistics components consist of training equipment, technical data, sustainment spares, shipping and storage containers, and a test adapter unit for the Common Munitions BIT and Reprogramming Equipment (CMBRE) or CMBRE Plus. The GBU–39/B (SBD I) hardware and software is Unclassified.

9. The BRU–61/A carriage system consists of a four-place rack with a self-

contained pneumatic charging and accumulator section. Four ejector assemblies hold the individual weapons. Internal avionics and wire harnesses connect the carriage system to the aircraft and to the individual weapons. The carriage avionics assembly provides the interface between the individual stores and the aircraft for targeting, GPS keys, alignment, fuze settings, and weapon release sequence information. A MIL–STD–1760 umbilical using a MIL–STD–1760 Class II primary interface signal set connects the carriage system to the aircraft. Each ejector station has a Joint Miniature Munitions Interface (JMMI) umbilical which provides the electrical and logical interface to the individual weapons.

10. If a technologically advanced adversary were to obtain knowledge of the specific hardware in the proposed sale, the information could be used to develop countermeasures which might reduce weapons system effectiveness or be used in the development of a system with similar or advanced capabilities. In order to mitigate this possibility, the USG, in conjunction with the UAE, has developed a robust protocol of handling and storage procedures that maximizes security of the munitions, minimizes the opportunity for unauthorized disclosure of sensitive information, with the net effect of preserving the capability and effectiveness of the munitions for the USG and our international partners.

[FR Doc. 2013–24622 Filed 10–21–13; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Office of the Secretary

[Transmittal Nos. 13–49]

36(b)(1) Arms Sales Notification

AGENCY: Defense Security Cooperation Agency, Department of Defense.

ACTION: Notice.

SUMMARY: The Department of Defense is publishing the unclassified text of a section 36(b)(1) arms sales notification. This is published to fulfill the requirements of section 155 of Public Law 104–164 dated July 21, 1996.

FOR FURTHER INFORMATION CONTACT: Ms. B. English, DSCA/DBO/CFM, (703) 601–3740.

The following is a copy of a letter to the Speaker of the House of Representatives, Transmittals 13–49 with attached transmittal, policy justification, and Sensitivity of Technology.

Dated: October 17, 2013.

Aaron Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

BILLING CODE 5001–06–P

DEFENSE SECURITY COOPERATION AGENCY
201 12TH STREET SOUTH, STE 203
ARLINGTON, VA 22202-5408

The Honorable John A. Boehner
Speaker of the House
U.S. House of Representatives
Washington, DC 20515

OCT 11 2013

Dear Mr. Speaker:

Pursuant to the reporting requirements of Section 36(b)(1) of the Arms Export Control Act, as amended, we are forwarding herewith Transmittal No. 13-49, concerning the Department of the Air Force's proposed Letter(s) of Offer and Acceptance to Saudi Arabia for defense articles and services estimated to cost $6.8 billion. After this letter is delivered to your office, we plan to issue a press statement to notify the public of this proposed sale.

Sincerely,

FOR J.W. Rixey
Vice Admiral, USN
Director

Enclosures:
1. Transmittal
2. Policy Justification
3. Sensitivity of Technology
4. Regional Balance (Classified Document Provided Under Separate Cover)

Transmittal No. 13–49

Notice of Proposed Issuance of Letter of Offer Pursuant to Section 36(b)(l) of the Arms Export Control Act

(i) *Prospective Purchaser:* Kingdom of Saudi Arabia.

(ii) *Total Estimated Value:*

Major Defense Equipment*	$4.1 billion
Other	$2.7 billion
Total	$6.8 billion

* As defined in Section 47(6) of the Arms Export Control Act.

(iii) *Description and Quantity or Quantities of Articles or Services under Consideration for Purchase:* 650 AGM–84H Standoff Land Attack Missiles—Expanded Response (SLAM–ER), 973 AGM–154C Joint Stand Off Weapon (JSOW), 400 AGM–84L Harpoon Block II missiles, 1000 GBU–39/B Small Diameter Bomb (SDB) with BRU–61 carriage systems, 40 CATM–84H Captive Air Training Missiles (CATM), 20 ATM–84H SLAM–ER Telemetry Missiles, 4 Dummy Air Training Missiles, 60 AWW–13 Data Link pods, 10 JSOW CATMs, 40 Harpoon CATMs, 20 ATM–84L Harpoon Exercise Missiles, 36 SDB Captive Flight and Load Build trainers, containers, mission planning, integration support and testing, munitions storage security and training, weapon operational flight program software development, transportation, tools and test equipment, support equipment, spare and repair parts, publications and technical documentation, personnel training and training equipment, U.S. Government and contractor engineering and logistics support services, and other related elements of logistics support.

(iv) *Military Department:* Air Force (YBD) and Navy (ABS).

(v) *Prior Related Cases, if any:*

FMS case SAI–$8.4B–24Dec11
FMS case SAN–$8.8B–24Dec11
FMS case SAO–$3.8B–24Dec11
FMS case SAP–$8.3B–24Dec11

(vi) *Sales Commission, Fee, etc., Paid, Offered, or Agreed to be Paid:* None.

(vii) *Sensitivity of Technology Contained in the Defense Article or Defense Services Proposed to be Sold:* See Annex attached.

(viii) *Date Report Delivered to Congress:* 11 October 2013.

POLICY JUSTIFICATION

Saudi Arabia—Various Munitions and Support

The Government of Saudi Arabia has requested a possible sale of 650 AGM–84H Standoff Land Attack Missiles—Expanded Response (SLAM–ER), 973 AGM–154C Joint Stand Off Weapons (JSOW), 400 AGM–84L Harpoon Block II missiles, 1000 GBU–39/B Small Diameter Bombs (SDB), 40 CATM–84H Captive Air Training Missiles (CATM), 20 ATM–84H SLAM–ER Telemetry Missiles, 4 Dummy Air Training Missiles, 60 AWW–13 Data Link pods, 10 JSOW CATMs, 40 Harpoon CATMs, 20 ATM–84L Harpoon Exercise Missiles, 36 SDB Captive Flight and Load Build trainers, containers, mission planning, integration support and testing, munitions storage security and training, weapon operational flight program software development, transportation, tools and test equipment, support equipment, spare and repair parts, publications and technical documentation, personnel training and training equipment, U.S. Government and contractor engineering and logistics support services, and other related elements of logistics support. The estimated total cost is $ 6.8 billion.

This proposed sale will contribute to the foreign policy and national security of the United States by helping to improve the security of a friendly country that has been and continues to be an important force for political stability in the Middle East.

This proposed sale will improve Saudi Arabia's capability to meet current and future regional threats. These munitions will strengthen the effectiveness and interoperability of the air force of a potential coalition partner, enhancing the coalition operation. In December 2011, Saudi Arabia signed a letter of offer and acceptance (LOA) to purchase 84 new and 70 refurbished F–15SA multi-role fighter aircraft and associated weapons. The armaments in this request are separate and distinct from those in the F–15SA LOA, but are intended for that platform. Saudi Arabia will have no difficulty absorbing these weapons into its armed forces.

The proposed sale of these weapon systems will not alter the basic military balance in the region.

The principal contractors will be The Boeing Company in St. Louis, Missouri; Raytheon in Indianapolis, Indiana; and Raytheon in Tucson, Arizona. There are no known offset agreements proposed in connection with this potential sale.

Implementation of this sale will require the assignment of approximately 2–4 additional U.S. Government or contractor representatives to Saudi Arabia. The actual number and duration will be determined in joint negotiations as the program proceeds through the development, production, and equipment installation phases.

There will be no adverse impact on U.S. defense readiness as a result of this proposed sale.

Transmittal No. 13–49

Notice of Proposed Issuance of Letter of Offer Pursuant to Section 36(b)(1) of the Arms Export Control Act

Annex—Item No. vii

(vii): Sensitivity of Technology

1. The AGM–84H Standoff Land Attack Missile-Expanded Response (SLAM–ER) is a non-nuclear tactical weapon system currently in service in the U.S. Navy and two other foreign nations. It provides a day, night, and adverse weather, standoff air-to-surface capability. SLAM–ER is a follow on to the SLAM missile that is no longer in production. It is a variant of the Harpoon missile that uses the Maverick Imaging Infrared (IIR) seeker, Global Positioning System-Precise Positioning System (GPS/PPS) for improved navigation, proprietary automatic target acquisition, planar wings, and a new warhead. SLAM–ER is effective against a wide range of land-based targets and has a secondary anti-ship mission capability. The missile is classified as Confidential.

2. The SLAM–ER incorporates components, software, and technical design information that are considered sensitive. The following SLAM–ER components being conveyed by the proposed sale that are considered sensitive and are classified Confidential include-Imaging Infrared (IIR) seeker, the Global Positioning System/Inertial Navigation System (GPS/INS), Operational Flight Program (OFP) Software, Missile operational characteristics and performance data.

3. The AGM–154 JSOW is used by Navy, Marine Corps, and Air Force, and allows aircraft to attack well-defended targets in day, night, and adverse weather conditions. The AGM–154C carries a BROACH warhead. The BROACH warhead incorporates an advanced multi stage warhead. The JSOW uses the GPS Precise Positioning System (PPS), which provides for a more accurate capability than the commercial version of GPS.

4. The JSOW incorporates components, software, and technical design information that are considered sensitive. The following JSOW–C components being conveyed by the proposed sale that are considered sensitive and are classified Confidential include the GPS/INS, IIR seeker, INS OFP software and missile operational characteristics and performance data. These elements are essential to the ability of the JSOW–C missile to selectively engage hostile targets under a wide range of operational, tactical, and environmental conditions.

5. The AGM–84L Harpoon missiles is a non-nuclear tactical weapon system currently in service in the U.S. Navy and in 28 other foreign nations. It provides a day, night, and adverse weather conditions, standoff air-to-surface capability. Harpoon Block II is a follow on to the Harpoon missile that is no longer in production. Harpoon Block II is an effective Anti-Surface Warfare missile. The version being proposed for Saudi Arabia includes Coastal Target Suppression (CTS). The missiles are classified as Confidential.

6. The AGM–84L incorporates components, software, and technical design information that are considered sensitive. The following Harpoon components being conveyed by the proposed sale that are considered sensitive and are classified Confidential include-the Radar seeker, GPS/INS, OFP Software, missile operational characteristics and performance data.

7. The GBU–39/B Small Diameter Bomb (SDB) I weapon is a 250-lb class, all-up round (AUR) that provides greater than 50nm standoff range. SDB I is a day or night, adverse weather, precision engagement capability against pre-planned fixed or stationary soft, non-hardened, and hardened targets. The warhead has a high-strength steel penetration design with a blast or fragmentation capability containing approximately 36 pounds of high explosives. SDB I is a Global Positioning System (GPS) guided weapon aided by Inertial Navigation System (INS).

8. The SDB I includes an integrated height of burst (HoB) sensor that provides the weapon with an airburst capability.

9. A key component of the SDB system is the weapon planning module (WPM). The module is hosted on the Joint Mission Planning System (JMPS). The WPM provides unit-level planners and intelligence personnel a means of importing target location data, programming desired fuzing parameters, and computing release and impact conditions (or using defaults) for the employment of each weapon. This weapon planning data is saved to the aircraft data transfer device (DTD) for download into the aircraft avionics and subsequently passed to the carriage and weapon upon initialization.

10. Logistics components consist of training equipment, technical data, sustainment spares, shipping and storage containers, and a test adapter unit for the Common Munitions BIT and Reprogramming Equipment (CMBRE) or CMBRE Plus. The GBU–39/B SDB I is Unclassified.

11. The BRU–61/A carriage system consists of a four-place rack with a self-contained pneumatic charging and accumulator section. Four ejector assemblies hold the individual weapons. Internal avionics and wire harnesses connect the carriage system to the aircraft and to the individual weapons. The carriage avionics assembly provides the interface between the individual stores and the aircraft for targeting, GPS keys, alignment, fuze settings, and weapon release sequence information. A MIL–STD–1760 umbilical, using a MIL–STD–1760 Class II primary interface signal set connects the carriage system to the aircraft. Each ejector station has a Joint Miniature Munitions Interface (JMMI) umbilical which provides the electrical and logical interface to the individual weapons.

12. If a technologically advanced adversary were to obtain knowledge of the specific hardware in the proposed sale, the information could be used to develop countermeasures which might reduce weapons system effectiveness or be used in the development of a system with similar or advanced capabilities. In order to mitigate this possibility, the USG, in conjunction with Saudi Arabia, has developed a robust protocol of handling and storage procedures that maximizes security of the munitions, minimizes the opportunity for unauthorized disclosure of sensitive information, with the net effect of preserving the capability and effectiveness of the munitions for the USG and our international partners.

[FR Doc. 2013–24623 Filed 10–21–13; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Office of the Secretary

[Transmittal Nos. 13–47]

36(b)(1) Arms Sales Notification

AGENCY: Defense Security Cooperation Agency, Department of Defense.

ACTION: Notice.

SUMMARY: The Department of Defense is publishing the unclassified text of a section 36(b)(1) arms sales notification. This is published to fulfill the requirements of section 155 of Public Law 104–164 dated July 21, 1996.

FOR FURTHER INFORMATION CONTACT: Ms. B. English, DSCA/DBO/CFM, (703) 601–3740.

The following is a copy of a letter to the Speaker of the House of Representatives, Transmittal 13–47 with attached transmittal, policy justification, and Sensitivity of Technology.

Dated: October 17, 2013.

Aaron Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

BILLING CODE 5001–06–P

DEFENSE SECURITY COOPERATION AGENCY
201 12TH STREET SOUTH, STE 203
ARLINGTON, VA 22202-5408

SEP 26 2013

The Honorable John A. Boehner
Speaker of the House
U.S. House of Representatives
Washington, DC 20515

Dear Mr. Speaker:

Pursuant to the reporting requirements of Section 36(b)(1) of the Arms Export Control Act, as amended, we are forwarding herewith Transmittal No. 13-47, concerning the Department of the Navy's proposed Letter(s) of Offer and Acceptance to Belgium for defense articles and services estimated to cost $68 million. After this letter is delivered to your office, we plan to issue a press statement to notify the public of this proposed sale.

Sincerely,

For J. W. Rixey
Vice Admiral, USN
Director

Enclosures:
1. Transmittal
2. Policy Justification
3. Sensitivity of Technology

BILLING CODE 5001–06–C

Transmittal No. 13–47

Notice of Proposed Issuance of Letter of Offer Pursuant to Section 36(b)(1) of the Arms Export Control Act, as amended

(i) *Prospective Purchaser:* Belgium

(ii) *Total Estimated Value:*

Major Defense Equipment * ..	$52 million
Other	$16 million
Total	$68 million

(iii) *Description and Quantity or Quantities of Articles or Services Under Consideration for Purchase:* 40 AIM–9X–2 Sidewinder Block II All-Up-Round Missiles, 36 CATM–9X–2 Captive Air Training Missiles, 2 CATM–9X–2 Block II Missile Guidance Units, and 10 AIM–9X–2 Block II Tactical Guidance Units, 4 Dummy Air Training Missiles, containers, missile support and test equipment, provisioning, spare and repair parts, personnel training and training equipment, publications and technical data, U.S. Government and contractor technical assistance and other related logistics support, and other related elements of logistics and program support.

(iv) *Military Department:* Navy (ACX)

(v) *Prior Related Cases:* None

(vi) *Sales Commission, Fee, etc., Paid, Offered, or Agreed To Be Paid:* None

(vii) *Sensitivity of Technology Contained in the Defense Article or Defense Services Proposed To Be Sold:* See Annex attached.

(viii) *Date Report Delivered to Congress:* 26 September 2013

* as defined in Section 47(6) of the Arms Export Control Act.

Policy Justification

Belgium—AIM–9X–2 SIDEWINDER MISSILES

The Government of Belgium has requested a possible sale of 40 AIM–9X–2 Sidewinder Block II All-Up-Round Missiles, 36 CATM–9X–2 Captive Air Training Missiles, 2 CATM–9X–2 Block II Missile Guidance Units, and 10 AIM–9X–2 Block II Tactical Guidance Units, 4 Dummy Air Training Missiles, containers, missile support and test equipment, provisioning, spare and repair parts, personnel training and training equipment, publications and technical data, U.S. Government and contractor technical assistance and other related logistics support, and other related elements of logistics and program support. The estimated cost is $68 million.

This proposed sale will contribute to the foreign policy and national security of the United States by helping to improve the security of a NATO ally which continues to be an important force for political stability and economic progress in Europe.

The Belgian Air Force (BAF) intends to obtain these AIM–9X missiles as part of an overall military modernization program to better support its own air defense needs and to improve its interoperability with the U.S. and other NATO allies. The BAF will have no difficulty absorbing the AIM–9X missiles into its armed forces.

The proposed sale of this weapon system will not alter the basic military balance in the region.

The principal contractor will be Raytheon Missile Systems Company in Tucson, Arizona. There are no known offset requirements in connection with this potential sale.

Implementation of this proposed sale will require travel of U.S. Government or contractor representatives to Belgium on a temporary basis for program technical support and management oversight.

There will be no adverse impact on U.S. defense readiness as a result of this proposed sale.

Transmittal No. 13–47

Notice of Proposed Issuance of Letter of Offer Pursuant to Section 36(b)(1) Of the Arms Export Control Act

Annex Item No. vii

(vii) *Sensitivity of Technology:*

1. The AIM–9X–2 Block II Sidewinder Missile represents a substantial increase in missile acquisition and kinematics performance over the AIM–9M and replaces the AIM–9X Block I Missile. The missile includes a high off-boresight seeker, enhanced countermeasure rejection capability, low drag/high angle of attack airframe and the ability to integrate the Helmet Mounted Cueing System. The software algorithms are the most sensitive portion of the AIM–9X–2 missile. The software continues to be modified via a pre-planned product improvement (P^3I) program in order to improve its counter-countermeasure capabilities. No software source code or algorithms will be released. The missile is classified as Confidential.

2. The AIM–9X–2 will result in the transfer of sensitive technology and information. The equipment, hardware, and documentation are classified Confidential. The software and operational performance are classified Secret. The seeker/guidance control section and the target detector are Confidential and contain sensitive state-of-the-art technology. Manuals and technical documentation that are necessary or support operational use and organizational management are classified up to Secret. Performance and operating logic of the counter-countermeasures circuits are classified Secret. The hardware, software, and data identified are classified to protect vulnerabilities, design and performance parameters and similar critical information.

3. If a technologically advanced adversary were to obtain knowledge of the specific hardware and software elements, the information could be used to develop countermeasures that might reduce weapon system effectiveness or be used in the development of a system with similar advanced capabilities.

[FR Doc. 2013–24573 Filed 10–21–13; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Office of the Secretary

Board of Regents, Uniformed Services University of the Health Sciences; Notice of Federal Advisory Committee Meeting; Correction

AGENCY: Uniformed Services University of the Health Sciences (USU), DoD.

ACTION: Quarterly meeting notice; correction.

SUMMARY: On Thursday, October 3, 2013 (78 FR 61344), the Department of Defense published in the **Federal Register**, a notice to announce the quarterly meeting of the Board of Regents, Uniformed Services University of the Health Sciences on Wednesday, October 23, 2013, from 8:30 a.m. to 10:30 a.m. (Open Session) and 10:30 a.m. to 11:30 a.m. (Closed Session). Due to the extended government shutdown, the meeting location has been moved. This notice corrects the meeting location.

ADDRESSES: The meeting location has been moved to the Everett Alvarez Jr. Board of Regents Room (D3001), Uniformed Services University of the Health Sciences, 4301 Jones Bridge Road, Bethesda, Maryland 20814.

FOR FURTHER INFORMATION CONTACT: Members of the public wishing to attend the meeting should contact S. Leeann Ori, Designated Federal Officer, 4301 Jones Bridge Road, D3002, Bethesda, Maryland 20814; telephone 301–295–3066; email *sherri.ori@usuhs.edu.*

SUPPLEMENTARY INFORMATION: Pursuant to Federal statute and regulations (5 U.S.C. 552b and 41 CFR 102–3.140 through 102–3.165) and the availability of space, the meeting is open to the public from 8:30 a.m. to 10:30 a.m. Seating is on a first-come basis.

Meeting Announcement: Due to the lapse of appropriations, the Department of Defense had to change the meeting location for Board of Regents Uniformed Services University of the Health Sciences on October 23, 2013. As a result, the Department of Defense was unable to provide appropriate notification as required by 41 CFR 102–3.150(a). Therefore, the Advisory Committee Management Officer for the Department of Defense, pursuant to 41 CFR 102–3.150(b), waives the 15-calendar day notification requirement.

Dated: October 17, 2013.

Aaron Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 2013–24652 Filed 10–21–13; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF EDUCATION

[Docket No.: ED–2013–ICCD–0076]

Agency Information Collection Activities; Submission to the Office of Management and Budget for Review and Approval; Comment Request; Targeted Teacher Shortage Areas Nationwide Listing

AGENCY: Office of Postsecondary Education (OPE), Department of Education (ED).

ACTION: Notice

SUMMARY: In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. chapter 3501 *et seq.*), ED is proposing an extension of an existing information collection of a previously approved information collection.

DATES: Interested persons are invited to submit comments on or before [insert the 30th day after publication of this notice].

ADDRESSES: Comments submitted in response to this notice should be submitted electronically through the Federal eRulemaking Portal at *http://www.regulations.gov* by selecting Docket ID number ED–2013–ICCD–0076 or via postal mail, commercial delivery, or hand delivery. *Please note that comments submitted by fax or email and those submitted after the comment period will not be accepted.* Written requests for information or comments submitted by postal mail or delivery should be addressed to the Acting Director of the Information Collection Clearance Division, U.S. Department of Education, 400 Maryland Avenue SW, LBJ, Room 2E103, Washington, DC 20202–4537.

FOR FURTHER INFORMATION CONTACT: For questions related to collection activities or burden, please call Kate Mullan, 202–401–0563 or electronically mail *ICDocketMgr@ed.gov.* Please do not send comments here.

SUPPLEMENTARY INFORMATION: The Department of Education (ED), in accordance with the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3506(c)(2)(A)), provides the general public and Federal agencies with an opportunity to comment on proposed, revised, and continuing collections of information. This helps the Department assess the impact of its information collection requirements and minimize the public's reporting burden. It also helps the public understand the Department's information collection requirements and provide the requested data in the desired format. ED is soliciting comments on the proposed information collection request (ICR) that is described below. The Department of Education is especially interested in public comment addressing the following issues: (1) Is this collection necessary to the proper functions of the Department; (2) will this information be processed and used in a timely manner; (3) is the estimate of burden accurate; (4) how might the Department enhance the quality, utility, and clarity of the information to be collected; and (5) how might the Department minimize the burden of this collection on the respondents, including through the use of information technology. Please note that written comments received in response to this notice will be considered public records.

Title of Collection: Targeted Teacher Shortage Areas Nationwide Listing.

OMB Control Number: 1840–0595.

Type of Review: Extension without change of an existing collection of information.

Respondents/Affected Public: State, Local, or Tribal Governments.

Total Estimated Number of Annual Responses: 57.

Total Estimated Number of Annual Burden Hours: 4,560.

Abstract: This request is for approval of recordkeeping and reporting requirements that are contained in the Federal Family Education Loan Programs (FFELP) regulations, which address the targeted teacher deferment provision of the Higher Education Act of 1965, as amended. The information collected is necessary for a State to support its annual request for designation of teacher shortage areas within the State. The collection of information from Chief State School Officers to support and document the request for teacher shortage areas within a given State can potentially enable student financial aid recipients to defer, reduce, or discharge loan debts and/or meet other specified obligations.

Kate Mullan,

Acting Director, Information Collection Clearance Division, Privacy, Information and Records Management Services, Office of Management.

[FR Doc. 2013–24594 Filed 10–21–13; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF EDUCATION

Notice of Proposed Collection Requests; Comment Request

AGENCY: Department of Education.

ACTION: Correction Notice.

SUMMARY: On October 3, 2013, the U.S. Department of Education published a 30-day comment period notice in the **Federal Register** (Page 61348, Column 1) seeking public comment for an information collection entitled, ''Foreign Schools Eligibility Criteria Apply to Participate in Title IV HEA Programs.'' The OMB control was incorrect. The correct OMB control number is 1845–0105.

The Acting Director, Information Collection Clearance Division, Privacy, Information and Records Management Services, Office of Management, hereby issues a correction notice as required by the Paperwork Reduction Act of 1995.

Kate Mullan,

Acting Director, Information Collection Clearance Division, Privacy, Information and Records Management Services, Office of Management.

[FR Doc. 2013–24593 Filed 10–21–13; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF EDUCATION

[Docket No.: ED–2013–ICCD–0061]

Agency Information Collection Activities; Submission to the Office of Management and Budget for Review and Approval; Comment Request; 2014–2015 Federal Student Aid Application

AGENCY: Federal Student Aid (FSA), Department of Education (ED).

ACTION: Notice.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. chapter 3501 *et seq.*), ED is proposing a revision of an existing information collection.

DATES: Interested persons are invited to submit comments on or before November 21, 2013.

ADDRESSES: Comments submitted in response to this notice should be submitted electronically through the Federal eRulemaking Portal at *http://www.regulations.gov* by selecting Docket ID number ED–2013–ICCD–0061 or via postal mail, commercial delivery, or hand delivery. Please note that comments submitted by fax or email and those submitted after the comment period will not be accepted. Written requests for information or comments submitted by postal mail or delivery should be addressed to the Acting Director of the Information Collection Clearance Division, U.S. Department of Education, 400 Maryland Avenue SW., LBJ, Room 2E105, Washington, DC 20202–4537.

FOR FURTHER INFORMATION CONTACT: For questions related to collection activities or burden, please call Katrina Ingalls, 703–620–3655 or electronically mail *ICDocketMgr@ed.gov*. Please do not send comments here.

SUPPLEMENTARY INFORMATION: The Department of Education (ED), in accordance with the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3506(c)(2)(A)), provides the general public and Federal agencies with an opportunity to comment on proposed, revised, and continuing collections of information. This helps the Department assess the impact of its information collection requirements and minimize the public's reporting burden. It also helps the public understand the Department's information collection requirements and provide the requested data in the desired format. ED is soliciting comments on the proposed information collection request (ICR) that is described below. The Department of Education is especially interested in public comment addressing the

following issues: (1) Is this collection necessary to the proper functions of the Department; (2) will this information be processed and used in a timely manner; (3) is the estimate of burden accurate; (4) how might the Department enhance the quality, utility, and clarity of the information to be collected; and (5) how might the Department minimize the burden of this collection on the respondents, including through the use of information technology. Please note that written comments received in response to this notice will be considered public records.

Title of Collection: 2014–2015 Federal Student Aid Application.

OMB Control Number: 1845–0001.

Type of Review: Revision of an existing collection of information.

Respondents/Affected Public: Individuals.

Total Estimated Number of Annual Responses: 47,401,966.

Total Estimated Number of Annual Burden Hours: 26,164,366.

Abstract:

Section 483 of the Higher Education Act of 1965, as amended (HEA), mandates that the Secretary of Education ''. . . shall produce, distribute, and process free of charge common financial reporting forms as described in this subsection to be used for application and reapplication to determine the need and eligibility of a student for financial assistance . . .''.

The determination of need and eligibility are for the following Title IV, HEA, federal student financial assistance programs: the Federal Pell Grant Program; the Campus-Based programs (Federal Supplemental Educational Opportunity Grant (FSEOG), Federal Work-Study (FWS), and the Federal Perkins Loan Program); the William D. Ford Federal Direct Loan Program; the Teacher Education Assistance for College and Higher Education (TEACH) Grant; and the Iraq and Afghanistan Service Grant.

Federal Student Aid, an office of the U.S. Department of Education (hereafter ''the Department''), subsequently developed an application process to collect and process the data necessary to determine a student's eligibility to receive Title IV, HEA program assistance. The application process involves an applicant's submission of the Free Application for Federal Student Aid (FAFSA). After submission and processing of the FAFSA, an applicant receives a Student Aid Report (SAR), which is a summary of the processed data they submitted on the FAFSA. The applicant reviews the SAR, and, if necessary, will make corrections or updates to their submitted FAFSA data. Institutions of higher education listed by the applicant on the FAFSA also receive a summary of processed data submitted on the FAFSA which is called the Institutional Student Information Record (ISIR).

The Department seeks OMB approval of all application components as a single ''collection of information''. The aggregate burden will be accounted for under OMB Control Number 1845–0001. The specific application components, descriptions and submission methods for each are listed in the following Table.

Component	Description	Submission method
Initial Submission of FAFSA		
FAFSA on the Web (FOTW)	Online FAFSA that offers applicants a customized experience	Submitted by the applicant via *www.fafsa.gov*.
FOTW—Renewal	Online FAFSA for applicants who have previously completed the FAFSA.	
FOTW—EZ	Online FAFSA for applicants who qualify for the Simplified Needs Test (SNT) or Automatic Zero (Auto Zero) needs analysis formulas.	
FOTW—EZ Renewal	Online FAFSA for applicants who have previously completed the FAFSA and who qualify for the SNT or Auto Zero needs analysis formulas.	
FAFSA on the Phone (FOTP)	The Federal Student Aid Information Center (FSAIC) representatives assist applicants by filing the FAFSA on their behalf through FOTW.	Submitted through *www.fafsa.gov* for applicants who call 1–800–4–FED–AID.
FOTP—EZ	FSAIC representatives assist applicants who qualify for the SNT or Auto Zero needs analysis formulas by filing the FAFSA on their behalf through FOTW.	
FAA Access	Online tool that a financial aid administrator (FAA) utilizes to submit a FAFSA.	Submitted through *www.faaacess.ed.gov* by a FAA on behalf of an applicant.
FAA Access—Renewal	Online tool that a FAA can utilize to submit a Renewal FAFSA.	
FAA Access—EZ	Online tool that a FAA can utilize to submit a FAFSA for applicants who qualify for the SNT or Auto Zero needs analysis formulas.	
FAA Access—EZ Renewal	Online tool that a FAA can utilize to submit a FAFSA for applicants who have previously completed the FAFSA and who qualify for the SNT or Auto Zero needs analysis formulas.	
Electronic Other	This is a submission done by a FAA, on behalf of the applicant, using the Electronic Data Exchange (EDE).	The FAA may be using their mainframe computer or software to facilitate the EDE process.
PDF FAFSA or Paper FAFSA	The paper version of the FAFSA printed by the Department for applicants who are unable to access the Internet or the online PDF FAFSA for applicants who can access the Internet but are unable to complete the form using FOTW.	Mailed by the applicant.
Correcting Submitted FAFSA Information and Reviewing FAFSA Information		
FOTW—Corrections	Any applicant who has a Federal Student Aid PIN (FSA PIN)—regardless of how they originally applied—may make corrections using FOTW Corrections.	Submitted by the applicant via *www.fafsa.gov*.

Component	Description	Submission method
Electronic Other—Corrections	With the applicant's permission, corrections can be made by a FAA using the EDE.	The FAA may be using their mainframe computer or software to facilitate the EDE process.
Paper SAR—This is a SAR and an option for corrections.	The full paper summary that is mailed to paper applicants who did not provide an e-mail address and to applicants whose records were rejected due to critical errors during processing. Applicants can write corrections directly on the paper SAR and mail for processing.	Mailed by the applicant.
FAA Access—Corrections	An institution can use FAA Access to correct the FAFSA	Submitted through *www.faaacess.ed.gov* by a FAA on behalf of an applicant.
Internal Department Corrections	The Department will submit an applicant's record for system-generated corrections.	There is no burden to the applicants under this correction type as these are system-based corrections.
FSAIC Corrections	Any applicant, with their Data Release Number (DRN), can change the postsecondary institutions listed on their FAFSA or change their address by calling FSAIC.	These changes are made directly in the CPS system by a FSAIC representative.
SAR Electronic (eSAR)	The eSAR is an online version of the SAR that is available on FOTW to all applicants with a PIN. Notifications for the eSAR are sent to students who applied electronically or by paper and provided an e-mail address. These notifications are sent by e-mail and include a secure hyperlink that takes the user to the FOTW site.	Cannot be submitted for processing.

This information collection also documents an estimate of the annual public burden as it relates to the application process for federal student aid. The Applicant Burden Model (ABM), measures applicant burden through an assessment of the activities each applicant conducts in conjunction with other applicant characteristics and in terms of burden, the average applicant's experience. Key determinants of the ABM include:

- The total number of applicants that will potentially apply for federal student aid;
- How the applicant chooses to complete and submit the FAFSA (e.g., by paper or electronically via FOTW);
- How the applicant chooses to submit any corrections and/or updates (e.g., the paper SAR or electronically via FOTW Corrections);
- The type of SAR document the applicant receives (eSAR, SAR acknowledgment, or paper SAR);
- The formula applied to determine the applicant's EFC (full need analysis formula, Simplified Needs Test or Automatic Zero); and
- The average amount of time involved in preparing to complete the application.

The ABM is largely driven by the number of potential applicants for the application cycle. The total application projection for 2014–2015 is based upon two factors—estimates of the total enrollment in all degree-granting institutions and the percentage change in FAFSA submissions for the last completed or almost completed application cycle. The ABM is also based on the application options available to students and parents. The Department accounts for each application component based on Web trending tools, survey information, and other Department data sources.

For 2014–2015, the Department is reporting a net burden increase of 204,513 hours attributed to the increase in applicants.

In response to the 60-day comment period, the Department has made some changes to the application explained in the Summary of Enhancements (see *Summary of Enhancements to the 2014–2015 Free Application for Federal Student Aid*). We project that these changes will not substantively impact burden.

Dated: October 17, 2013.

Stephanie Valentine,

Acting Director, Information Collection Clearance Division, Privacy, Information and Records Management Services, Office of Management.

[FR Doc. 2013–24672 Filed 10–21–13; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF EDUCATION

Privacy Act of 1974; System of Records—Office of Hearings and Appeals (OHA) Records System

AGENCY: Office of Hearings & Appeals, Office of Management, Department of Education.

ACTION: Notice of a new system of records.

SUMMARY: In accordance with the Privacy Act of 1974, as amended (Privacy Act), the Department of Education (Department) publishes this notice of a new system of records entitled ''The Office of Hearings & Appeals (OHA) Records System'' (18–05–19).

DATES: Submit your comments on the system of records in this notice on or before November 21, 2013. The Department filed a report describing the new system of records covered by this notice with the Chair of the Senate Committee on Homeland Security and Governmental Affairs, the Chair of the House Committee on Oversight and Government Reform, and the Administrator of the Office of Information and Regulatory Affairs, Office of Management and Budget (OMB) on September 26, 2013. This system of records will become effective at the later date of—(1) the expiration of the 40 day period for OMB review on November 5, 2013, unless OMB waives 10 days of the 40-day review period for compelling reasons shown by the Department, or (2) November 21, 2013, unless the system of records needs to be changed as a result of public comment or OMB review. The Department will publish any changes to the system of records or routine uses that result from public comment or OMB review.

ADDRESSES: Address all comments about this new system of records notice to Frank Furey, Director, Office of Hearings & Appeals, Office of Management, U.S. Department of Education, 400 Maryland Avenue SW., Suite 2100A, Washington, DC 20202–4416. If you prefer to send your comments through the Internet, use the following address: *comments@ed.gov.*

You must include the term ''OHA system of records'' in the subject line of your electronic message.

During and after the comment period, you may inspect all comments about this notice at the U.S. Department of Education in room 2100A, 400 Maryland Avenue SW., Washington, DC, between the hours of 8:00 a.m. and 4:30 p.m., Eastern Time, Monday through Friday of each week except Federal holidays.

Assistance to Individuals With Disabilities in Reviewing the Rulemaking Record

On request we will supply an appropriate accommodation or auxiliary aid to an individual with a disability, such as a reader or print magnifier, who needs assistance to review the comments or other documents in the public rulemaking record for this notice. If you want to schedule an appointment for this type of accommodation or auxiliary aid, please contact the person listed under **FOR FURTHER INFORMATION CONTACT**.

FOR FURTHER INFORMATION CONTACT: Frank Furey, Director, Office of Hearings & Appeals, Office of Management, U.S. Department of Education, 400 Maryland Avenue SW., Suite 2100A, Washington, DC 20202–4416.

If you use a telecommunications device for the deaf (TDD) or text telephone (TTY), you may call the Federal Relay Service (FRS), toll free, at 1–800–877–8339.

SUPPLEMENTARY INFORMATION:

Introduction

The Privacy Act requires the Department to publish in the **Federal Register** this notice of a new system of records maintained by the Department (5 U.S.C. 552a(e)(4) and (11)). The Department's regulations implementing the Privacy Act are contained in the Code of Federal Regulations (CFR) in 34 CFR part 5b.

The Privacy Act applies to any record about an individual that is maintained in a system of records from which individually identifying information is retrieved by a unique identifier associated with each individual, such as a name or Social Security number. The information about each individual is called a ''record,'' and the system, whether manual or computer-based, is called a ''system of records.''

The Privacy Act requires each agency to publish a notice of a system of records in the **Federal Register** and to prepare and send a report to OMB whenever the agency publishes a new system of records or makes a significant change to an established system of records. Each agency is also required to send copies of the report to the Chair of the Senate Committee on Homeland Security and Governmental Affairs and the Chair of the House Committee on Oversight and Government Reform. These reports are included to permit an evaluation of the probable effect of the proposal on the privacy rights of individuals.

''The Office of Hearings & Appeals (OHA) Records System'' reflects how the Office of Hearings and Appeals processes its records, including the development of a case tracking database and the use of electronic filing designed to streamline case management. This system of records also reflects the Office of Hearings and Appeals' jurisdiction over salary offset cases including waiver requests and hearing requests challenging the validity of salary overpayment debts involving current and former Department employees, and administrative wage garnishment cases under the cross servicing program of the Department and the U.S. Department of the Treasury.

This notice describes in detail the system of records, including among other items, its title, location, authority for maintenance of the system, routine uses of records maintained in the system, policies and practices for storing, retrieving, accessing, retaining, and disposing of records in the system (specifically the retention and disposal of system records), safeguards that protect the records in the system, and system manager's title and address.

Accessible Format: Individuals with disabilities can obtain this document in an accessible format (e.g., braille, large print, audiotape, or compact disc) on request to the contact person listed in the preceding paragraph.

Electronic Access to this Document: The official version of this document is the document published in the **Federal Register**. Free Internet access to the official edition of the **Federal Register** and the Code of Federal Regulations is available via the Federal Digital System at: *www.gpo.gov/fdsys.* At this site you can view this document, as well as all other documents of this Department published in the **Federal Register**, in text or Adobe Portable Document Format (PDF). To use PDF you must have Adobe Acrobat Reader, which is available free at the site.

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

Dated: October 17, 2013.

Denise L. Carter,

Principal Deputy Assistant Secretary for Management. Delegated the Authority to Perform the Functions and Duties of the Assistant Secretary for Management.

For the reasons discussed in the preamble, the Principal Deputy Assistant Secretary for Management, U.S. Department of Education publishes a notice of a new system of records to read as follows:

SYSTEM NUMBER: 18–05–19

SYSTEM NAME:

The Office of Hearings & Appeals (OHA) Records System.

SECURITY CLASSIFICATION:

None.

SYSTEM LOCATION:

OHA, Office of Management, U.S. Department of Education, 400 Maryland Avenue SW., Suite 2100A, 490 L'Enfant Plaza, Washington, DC 20202–4616.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

This system of records contains records about current and former Department of Education (Department) employees against whom the Department has a claim for a salary overpayment debt who request a waiver or challenge the validity of a salary overpayment. It also contains records regarding recipients subject to administrative wage garnishments under the cross servicing program of the Department and the U.S. Department of the Treasury (Treasury). Administrative wage garnishment applies to collection of any financial obligation owed to the United States by an individual that arises under a program the Department administers with the exception of debts that arise from an individual's obligation to repay a loan or an overpayment of a grant received under a student financial assistance program authorized under title IV of the Higher Education Act of 1965, as amended.

CATEGORIES OF RECORDS IN THE SYSTEM:

This system of records notice covers salary overpayment case files that contain information that is pertinent to the particular claim (e.g., a request for a waiver of a salary overpayment filed by current or former Department employees or a salary pre-offset hearing request filed by a current or former Department employee), including but not limited to, documents that contain the employee's name, sex, date of birth, home address, telephone number, email address, as well as information that is pertinent to the particular claim being

asserted, including audits of payroll accounts during period(s) of overpayments, earning and leave statements, identity of debtors and information pertaining to how debts arose, and documents relating to financial hardship.

This system of records also covers wage garnishment case files that contain information that is pertinent to the particular claim (e.g., a wage garnishment proceeding) including but not limited to, documents that contain the individual's name, sex, date of birth, home address, telephone number, email address, as well as information that is pertinent to the particular claim being asserted, including documents relating to the existence, amount, or current enforceability of the debt, financial hardship, and payroll documentation.

This system of records does not include records covered by other Departmental or governmental system of records notices, such as the Department's systems of records notices entitled ''Education's Central Automated Processing System (EDCAPS)'' (18–03–02) and the ''Receivables Management System'' (18–03–03) (which the Department soon expects to delete and include as part of the EDCAPS system of records notice).

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

5 U.S.C. 5584; 31 U.S.C. § 3711 et seq.;, 34 CFR part 32; 34 CFR part 34; Federal Claims Collection Standards (FCCS) 31 CFR chapter IX, parts 900–904; and the U.S. Department of Education, Administrative Communications System, Handbook for Processing Salary Overpayments (Handbook ACS–OM–04) (Jan. 19, 2012).

PURPOSE(S):

The information in this system of records is used: To adjudicate requests for waivers of salary overpayments and claims regarding the validity of salary overpayments made to current and former employees and to adjudicate administrative wage garnishments under the cross servicing program of the Department and Treasury. The Department also uses the OHA Records System to provide docket management, including scheduling of hearings, oral arguments, and determining compliance with parties' filing deadlines and to produce docket reports that may be distributed internally in the Department. The authorities identified in this notice require hearing officers to preside over and issue decisions regarding the aforementioned cases.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:

The Department may disclose information contained in a record in this system of records without the consent of the individual if the disclosure is compatible with the purposes for which the record was collected. The Department may make these disclosures on a case-by-case basis or, if the Department has complied with the computer matching requirements of the Computer Matching and Privacy Protection Act of 1988, as amended, under a computer matching agreement.

(1) *Program Purposes.* The Department may disclose records from this system of records to any agency or entity administering the Department's payroll system to inform them of decisions regarding salary overpayment cases.

(2) *Debt Servicing.* The Department may disclose records to Treasury or to the employers of individuals subject to administrative wage garnishments for the purpose of collecting debts owed to the Government by individuals subject to administrative wage garnishments.

(3) *Disclosure for Use by Other Law Enforcement Agencies.* The Department may disclose information to any Federal, State, local, or foreign agency or other public authority responsible for enforcing, investigating, or prosecuting violations of administrative, civil, or criminal law or regulation if that information is relevant to any enforcement, regulatory, investigative, or prosecutorial responsibility within the receiving entity's jurisdiction.

(4) *Enforcement Disclosure.* In the event that information in this system of records indicates, either on its face or in connection with other information, a violation or potential violation of any applicable statute, regulation, or order of a competent authority, the Department may disclose the relevant records to the appropriate agency, whether foreign, Federal, State, Tribal, or local, charged with the responsibility of investigating or prosecuting that violation or charged with enforcing or implementing the statute, executive order, rule, regulation, or order issued pursuant thereto.

(5) *Litigation and Alternative Dispute Resolution (ADR) Disclosures.*

(a) *Introduction.* In the event that one of the parties listed in this paragraph is involved in judicial or administrative litigation or ADR, or has an interest in judicial or administrative litigation or ADR, the Department may disclose certain records to the parties described in paragraphs (b), (c), and (d) of this routine use under the conditions specified in those paragraphs:

(i) The Department of Education, or any component of the Department;

(ii) Any Department employee in his or her official capacity;

(iii) Any Department employee in his or her individual capacity if the Department of Justice (DOJ) has been requested to or has agreed to provide or arrange for representation for the employee;

(iv) Any Department employee in his or her individual capacity where the agency has agreed to represent the employee; or

(v) The United States where the Department determines that the litigation is likely to affect the Department or any of its components.

(b) *Disclosure to the Department of Justice (DOJ).* If the Department determines that disclosure of certain records to the DOJ is relevant and necessary to judicial or administrative litigation or ADR, the Department may disclose those records as a routine use to the DOJ.

(c) *Adjudicative Disclosures.* If the Department determines that it is relevant and necessary to the judicial or administrative litigation or ADR to disclose certain records to an adjudicative body before which the Department is authorized to appear, to an individual, or to an entity designated by the Department or otherwise empowered to resolve or mediate disputes, the Department may disclose those records as a routine use to the adjudicative body, individual, or entity.

(d) *Parties, counsels, representatives and witnesses.* If the Department determines that disclosure of certain records to a party, counsel, representative, or witness is relevant and necessary to the judicial or administrative litigation or ADR, the Department may disclose those records as a routine use to the party, counsel, representative, or witness.

(6) *Employment, Benefit, and Contracting Disclosure.*

(a) *For Decisions by the Department.* The Department may disclose a record to a Federal, State, or local agency maintaining civil, criminal, or other relevant enforcement or other pertinent records, or to another public authority or professional organization, if necessary to obtain information relevant to a Department decision concerning the hiring or retention of an employee or other personnel action, the issuance of a security clearance, the letting of a contract, or the issuance of a license, grant, or other benefit.

(b) *For Decisions by Other Public Agencies and Professional*

Organizations. The Department may disclose a record to a Federal, State, local, or foreign agency or other public authority or professional organization, in connection with the hiring or retention of an employee or other personnel action, the issuance of a security clearance, the reporting of an investigation of an employee, the letting of a contract, or the issuance of a license, grant, or other benefit, to the extent that the record is relevant and necessary to the receiving entity's decision on the matter.

(7) *Employee Grievance, Complaint, or Conduct Disclosure.* The Department may disclose a record in this system of records to another agency of the Federal Government if the record is relevant to one of the following proceedings regarding a current or former employee of the Department: A complaint, a grievance, or a disciplinary or competency determination proceeding. The disclosure may only be made during the course of the proceeding.

(8) *Labor Organization Disclosure.* The Department may disclose records from this system of records to an arbitrator to resolve disputes under a negotiated grievance procedure or to officials of labor organizations recognized under 5 U.S.C. chapter 71 when relevant and necessary to their duties of exclusive representation.

(9) *Freedom of Information Act (FOIA) and Privacy Act Advice Disclosure.* The Department may disclose records to the Department of Justice or the Office of Management and Budget (OMB) if the Department concludes that disclosure is desirable or necessary in determining whether particular records are required to be disclosed under FOIA or the Privacy Act.

(10) *Disclosure to the Department of Justice.* The Department may disclose records to DOJ to the extent necessary for obtaining DOJ advice on any matter relevant to an audit, inspection, or other inquiry related to the programs covered by this system.

(11) *Contract Disclosure.* If the Department contracts with an entity for the purposes of performing any function that requires disclosure of records in this system to employees of the contractor, the Department may disclose the records to those employees. Before entering into such a contract, the Department must require the contractor to maintain Privacy Act safeguards as required under 5 U.S.C. 552a(m) with respect to the records in the system.

(12) *Research Disclosure.* The Department may disclose records to a researcher if an appropriate official of the Department determines that the individual or organization to which the disclosure would be made is qualified to carry out specific research related to functions or purposes of this system of records. The official may disclose records from this system of records to that researcher solely for the purpose of carrying out that research related to the functions or purposes of this system of records. The Department must require the researcher to maintain Privacy Act safeguards as required under 5 U.S.C. 552a(m) with respect to the disclosed records.

(13) *Congressional Member Disclosure.* The Department may disclose records to a member of Congress from the record of an individual in response to an inquiry from the member made at the written request of that individual. The member's right to the information is no greater than the right of the individual who requested it.

(14) *Disclosure to the Office of Management and Budget (OMB) for Credit Reform Act (CRA) Support.* The Department may disclose records to OMB as necessary to fulfill CRA requirements.

(15) *Disclosure in the Course of Responding to Breach of Data.* The Department may disclose records from this system of records to appropriate agencies, entities, and persons when: (a) The Department suspects or has confirmed that the security or confidentiality of information in the OHA Records Systems has been compromised; (b) the Department has determined that as a result of the suspected or confirmed compromise, there is a risk of harm to economic or property interests, identity theft or fraud, or harm to the security or integrity of the OHA Records System or other systems or programs (whether maintained by the Department or another agency or entity) that rely upon the compromised information; and, (c) the disclosure made to such agencies, entities, and persons is reasonably necessary to assist in connection with the Department's efforts to respond to the suspected or confirmed compromise and prevent, minimize, or remedy such harm.

DISCLOSURE TO CONSUMER REPORTING AGENCIES:

Not applicable to this system of records notice.

POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING, AND DISPOSING OF RECORDS IN THE SYSTEM:

STORAGE:

The Department maintains records in paper files in filing cabinets, and electronically on a computerized tracking system.

RETRIEVABILITY:

Records are indexed by docket number and can be retrieved by the name of the non-Government party.

SAFEGUARDS:

Records are maintained electronically and in paper files.

All physical access to the Department's site where these paper and electronic records are maintained is controlled and monitored by security personnel who check each individual entering the building for his or her employee or visitor badge. Paper records are maintained in a secured space in locked cabinets.

In accordance with the Department's Administrative Communications System (ACS) Directive OM: 5–101 entitled ''Contractor Employee Personnel Security Screenings,'' all contract personnel who have facility access and system access are required to undergo a security clearance investigation. Individuals requiring access to Privacy Act data are required to hold, at a minimum, a moderate-risk security clearance level. These individuals are required to undergo periodic screening at five-year intervals.

In addition to holding security clearances, contract and Department personnel are required to complete security awareness training on an annual basis. This training is required to ensure that contract and Department users are trained appropriately in safeguarding Privacy Act data in accordance with OMB Circular No. A–130, Appendix III.

The computer system employed by the Department offers a high degree of resistance to tampering and circumvention. This security system limits data access to Department and contract staff on a need-to-know basis, and controls individual users' ability to access and alter records within the system. All users of this system of records are given a unique user identification.

The OHA electronic records system is a web-based J2EE application that is platform independent which captures all information relating to salary overpayment cases and administrative wage garnishment cases. Authorized log-on codes and passwords prevent unauthorized users from gaining access to data and system resources. All users have unique log-on codes and passwords. The password scheme requires that users must change passwords every 90 days and may not repeat the old password.

Any individual attempting to log on who fails is locked out of the system after three attempts. Access after that time requires intervention by the system manager.

RETENTION AND DISPOSAL:

The records are maintained in accordance with the Department of Education Records Disposition Schedules (ED/RDS) 241 and 243. Under ED/RDS 241, ''Administrative Adjudication Files for the Office of Hearings and Appeals,'' official docket files are cut off annually upon close of a case and transferred to a certified records center or to a certified records storage facility one year after cut off. Files will be destroyed or deleted six years after cutoff.

For attorney working files, these files will be cut off annually upon close of case and destroyed or deleted when no longer needed for administrative or reference purposes.

Duplicate copies maintained for reference purposes and that do not serve as the record copy will be destroyed or deleted when no longer needed for reference.

Under ED/RDS 243, ''Decisions Made by Hearing Officials, Administrative Law Judges, the Secretary of Education and Members of the CRRA,'' copies of the original decision are permanent and removed before official docket file is transferred to a certified records center. Original decisions are held on site and transferred to the National Archives and Records Administration in five-year blocks. Duplicate copies regardless of medium maintained for reference purposes do not serve as the record copy and will be destroyed/deleted when no longer needed for reference.

SYSTEM MANAGER(S) AND ADDRESS:

Director, Office of Hearings & Appeals, Office of Management, U.S. Department of Education, 400 Maryland Avenue SW., Suite 2100A, 490 L'Enfant Plaza, Washington, DC 20202–4616.

NOTIFICATION PROCEDURE:

If you wish to determine whether a record exists regarding you in the system of records, contact the system manager. Your request must meet the requirements of the regulations at 34 CFR 5b.5, including proof of identity.

RECORD ACCESS PROCEDURE:

If you wish to gain access to a record regarding you in the system of records, contact the system manager. Your request must meet the requirements of the regulations at 34 CFR 5b.5, including proof of identity.

CONTESTING RECORD PROCEDURE:

If you wish to contest the content of a record regarding you in the system of records, contact the system manager. Your request must meet the requirements of the regulations at 34 CFR 5b.7.

RECORD SOURCE CATEGORIES:

The information in the OHA Records System comes from a number of sources including: Employees, former employees, and grant recipients. Information may also be supplied by an individual's attorney or representative and by Department officials or other employees.

EXEMPTIONS CLAIMED FOR THE SYSTEM:

None.

[FR Doc. 2013–24688 Filed 10–21–13; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF ENERGY

Agency Information Collection Extension

AGENCY: U.S. Department of Energy.

ACTION: Notice and Request for Comments.

SUMMARY: The Department of Energy (DOE), pursuant to the Paperwork Reduction Act of 1995, intends to extend for three years, an information collection request (ICR) with the Office of Management and Budget (OMB) concerning the *Occupational Radiation Protection Program,* OMB Control Number 1910–5105. The Office of Worker Safety and Health Policy ensures that adequate policies are in place for the protection of workers at DOE sites and operations. The Office of Worker Safety and Health Policy uses the information collected from the contractors to evaluate the adequacy of DOE policies for the protection of workers from exposure to ionizing radiation.

Comments are invited on: (a) Whether the extended collection of information is necessary for the proper performance of the functions of the Agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology.

DATES: Comments regarding this proposed information collection must be received on or before December 23, 2013. If you anticipate difficulty in submitting comments within that period, contact the person listed below as soon as possible.

ADDRESSES: Written comments may be sent to Dr. Judith D. Fouke, Office of Worker Safety and Health Policy (HS–11), U.S. Department of Energy, Office of Health, Safety and Security, 1000 Independence Ave. SW., Washington, DC 20585, telephone (301) 903–5865, by fax at (301) 903–3445, or by email at *judy.foulke@hq.doe.gov.*

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the information collection instrument and instructions should be directed to the person listed above in **ADDRESSES.** Information about the collection instrument may be obtained at *http://www.hss.doe.gov/pra.html.*

SUPPLEMENTARY INFORMATION: This information collection request contains: (1) *OMB No.* 1910–5105; (2) *Information Collection Request Title:* Occupational Radiation Protection Program; (3) *Type of Review:* Renewal; (4) *Purpose:* The recordkeeping and reporting requirements that comprise this information collection will permit DOE and its contractors to provide management control and oversight over health and safety programs concerning worker exposure to ionizing radiation; (5) *Annual Estimated Number of Respondents:* 34; (6) *Annual Estimated Number of Total Responses:* 34; (7) *Annual Estimated Number of Burden Hours:* 41,500; (8) *Annual Estimated Reporting and Recordkeeping Cost Burden:* $4,150,000; Response Obligation: Mandatory.

Statutory Authority: Title 10, Code of Federal Regulations, Part 835, Subpart H.

Issued in Washington, DC, on September 29, 2013.

Stephen A. Kirchhoff,

Director, Office of Resource Management, Office of Health, Safety and Security.

[FR Doc. 2013–24599 Filed 10–21–13; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

DOE/NSF Nuclear Science Advisory Committee

AGENCY: Office of Science, Department of Energy.

ACTION: Notice of Renewal.

SUMMARY: Pursuant to Section 14(a)(2)(A) of the Federal Advisory Committee Act, (Pub. L. 92–463), and in

accordance with Title 41 of the Code of Federal Regulations, Section 102–3.65, and following consultation with the Committee Management Secretariat, General Services Administration, notice is hereby given that the DOE/NSF Nuclear Science Advisory Committee (NSAC) will be renewed for a two-year period.

The Committee will provide advice and recommendations to the Director, Office of Science (DOE), and the Assistant Director, Directorate for Mathematical and Physical Sciences (NSF), on scientific priorities within the field of basic nuclear science research.

Additionally, the renewal of the DOE/NSF Nuclear Science Advisory Committee has been determined to be essential to conduct business of the Department of Energy and the National Science Foundation, and to be in the public interest in connection with the performance of duties imposed upon the Department of Energy and National Science Foundation, by law and agreement. The Committee will continue to operate in accordance with the provisions of the Federal Advisory Committee Act, adhering to the rules and regulations in implementation of that Act.

FOR FURTHER INFORMATION CONTACT: Dr. Timothy Hallman at (301) 903–3613.

Issued in Washington, DC on September 30, 2013.

Carol A. Matthews,

Committee Management Officer.

[FR Doc. 2013–24608 Filed 10–21–13; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. CP14–1–000]

North Baja Pipeline, LLC; Notice of Application

Take notice that on October 3, 2013, North Baja Pipeline, LLC (North Baja), 717 Texas Street, Suite 2400, Houston, Texas 77002–2761, filed an application in Docket No. CP14–1–000 pursuant to section 7(b) of the Natural Gas Act (NGA) and Part 157 of the Commission's regulations, for authorization for a temporary act or operation to reduce the authorized horsepower associated with two 7,200 horsepower compressor units at its Ehrenberg Compressor Station located in Ehrenberg, Arizona. North Baja states that the subject compressor units will be removed and returned to the manufacturer. North Baja proposes that the temporary action last for 36 months. North Baja avers that, during the 36-month period, it will determine if market conditions support replacement of the units or whether it will seek authorization for permanent abandonment of the horsepower related to the two units, all as more fully set forth in the application which is on file with the Commission and open to public inspection. The filing is available for review at the Commission in the Public Reference Room or may be viewed on the Commission's Web site 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, (886) 208–3676 or TYY, (202) 502–8659.

Any questions concerning this application may be directed to Richard Parke, Manager, Certificates, North Baja Pipeline, LLC, 717 Texas Street, Suite 2400, Houston, Texas 77002–2761, by telephone at (832) 320–5516, or by email at *richard_parke@transcanada.com.*

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 an original and seven copies of filings made with the Commission and must mail a copy to the applicant and to every other party in the proceeding. 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.

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 seven copies of the protest or intervention to the Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426. This filing is accessible on-line at *http://www.ferc.gov,* using the ''eLibrary'' link and is available for review in the Commission's Public Reference Room in Washington, DC. There is an ''eSubscription'' link on the Web site that enables subscribers to receive email notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please email *FERCOnlineSupport@ferc.gov,* or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Comment Date: November 5, 2013.

Dated: October 15, 2013.

Kimberly D. Bose,

Secretary.

[FR Doc. 2013–24529 Filed 10–21–13; 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 corporate filings:

Docket Numbers: EC14–4–000.

Applicants: Duke Energy Ohio, Inc., The Dayton Power and Light Company, Duke Energy Ohio, Inc.

Description: Application of Authorization under Section 203 of the FPA by Ohio Power Company, et al.

Filed Date: 10/11/13.

Accession Number: 20131011–5211.

Comments Due: 5 p.m. ET 11/1/13.

Docket Numbers: EC14–5–000.

Applicants: Leidos Renewable Energy, LLC, Plainfield Renewable Energy, LLC.

Description: Application for Authorization under Section 203 of the Federal Power Act for the Disposition of Jurisdictional Facilities, Request for Expedited Consideration and Confidential Treatment of Leidos Renewable Energy, LLC, et. al.

Filed Date: 10/11/13.

Accession Number: 20131011–5218.

Comments Due: 5 p.m. ET 11/1/13.

Docket Numbers: EC14–6–000.
Applicants: Aircraft Services Corporation, East Coast Power Linden Holding, L.L.C., Cogen Technologies Linden Venture, L.P., Highstar Capital GP, IV, L.P.
Description: Joint Application of Aircraft Services Corporation, et al. for approval of transfer of securities and disposition of facilities pursuant to FPA Section 203 and Request for Expedited Action.
Filed Date: 10/11/13.
Accession Number: 20131011–5227.
Comments Due: 5 p.m. ET 11/1/13.

Take notice that the Commission received the following electric rate filings:

Docket Numbers: ER13–238–001.
Applicants: Appalachian Power Company.
Description: Withdraw Mitchell Operating Agreement to be effective 1/1/2014.
Filed Date: 10/15/13.
Accession Number: 20131015–5289.
Comments Due: 5 p.m. ET 11/5/13.

Docket Numbers: ER13–239–001.
Applicants: Kentucky Power Company.
Description: Mitchell Operating Agreement Amendment to be effective 1/1/2014.
Filed Date: 10/15/13.
Accession Number: 20131015–5294.
Comments Due: 5 p.m. ET 11/5/13.

Docket Numbers: ER13–868–003.
Applicants: Midcontinent Independent System Operator, Inc.
Description: 2013–10–11 Module E–2 Compliance to be effective 4/3/2013.
Filed Date: 10/11/13.
Accession Number: 20131011–5118.
Comments Due: 5 p.m. ET 11/1/13.

Docket Numbers: ER13–1718–001.
Applicants: Midcontinent Independent System Operator, Inc.
Description: 2013–10–14 Name Change Compliance Filing to be effective 6/1/2013.
Filed Date: 10/15/13.
Accession Number: 20131015–5029.
Comments Due: 5 p.m. ET 11/5/13.

Docket Numbers: ER13–1896–001.
Applicants: AEP Generation Resources Inc.
Description: Application of AEP Generation Resources Inc. for Market-Based Rate Amendment to be effective 1/1/2014.
Filed Date: 10/15/13.
Accession Number: 20131015–5300.
Comments Due: 5 p.m. ET 11/5/13.

Docket Numbers: ER14–74–000.
Applicants: Midcontinent Independent System Operator, Inc.
Description: 10–11–2013 SA 2545 Ameren-IMEA Waterloo Construction Agr to be effective 9/30/2013.
Filed Date: 10/11/13.
Accession Number: 20131011–5103.
Comments Due: 5 p.m. ET 11/1/13.

Docket Numbers: ER14–75–000.
Applicants: Entergy Arkansas, Inc.
Description: Section 1.01 Amendment to be effective 10/12/2013.
Filed Date: 10/11/13.
Accession Number: 20131011–5160.
Comments Due: 5 p.m. ET 11/1/13.

Docket Numbers: ER14–76–000.
Applicants: Entergy Gulf States Louisiana, L.L.C.
Description: Section 1.01 Amendment to be effective 10/12/2013.
Filed Date: 10/11/13.
Accession Number: 20131011–5165.
Comments Due: 5 p.m. ET 11/1/13.

Docket Numbers: ER14–77–000.
Applicants: Entergy Louisiana, LLC.
Description: Section 1.01 Amendment to be effective 10/12/2013.
Filed Date: 10/11/13.
Accession Number: 20131011–5166.
Comments Due: 5 p.m. ET 11/1/13.

Docket Numbers: ER14–78–000.
Applicants: Entergy Mississippi, Inc.
Description: Section 1.01 Amendment to be effective 10/12/2013.
Filed Date: 10/11/13.
Accession Number: 20131011–5167.
Comments Due: 5 p.m. ET 11/1/13.

Docket Numbers: ER14–79–000.
Applicants: Entergy New Orleans, Inc.
Description: Section 1.01 Amendment to be effective 10/12/2013.
Filed Date: 10/11/13.
Accession Number: 20131011–5168.
Comments Due: 5 p.m. ET 11/1/13.

Docket Numbers: ER14–80–000.
Applicants: Entergy Texas, Inc.
Description: Section 1.01 Amendment to be effective 10/12/2013.
Filed Date: 10/11/13.
Accession Number: 20131011–5169.
Comments Due: 5 p.m. ET 11/1/13.

Docket Numbers: ER14–81–000.
Applicants: Pacific Gas and Electric Company.
Description: Balancing Account Update 2014 (TRBAA, RSBAA, and ECRBAA) to be effective 1/1/2014.
Filed Date: 10/11/13.
Accession Number: 20131011–5205.
Comments Due: 5 p.m. ET 11/1/13.

Docket Numbers: ER14–82–000.
Applicants: Midcontinent Independent System Operator, Inc.
Description: 10–14–13 Module A Reorganization to be effective 10/15/2013.
Filed Date: 10/15/13.
Accession Number: 20131015–5034.
Comments Due: 5 p.m. ET 11/5/13.

Docket Numbers: ER14–83–000.
Applicants: Midcontinent Independent System Operator, Inc.
Description: 10–14–2013 External Resources Filing to be effective 12/13/2013.
Filed Date: 10/15/13.
Accession Number: 20131015–5045.
Comments Due: 5 p.m. ET 11/5/13.

Docket Numbers: ER14–84–000.
Applicants: California Independent System Operator Corporation.
Description: Petition for Distribution of Forfeited Funds Collected from Generator Interconnection Customers of California Independent System Operator Corporation.
Filed Date: 10/15/13.
Accession Number: 20131015–5210.
Comments Due: 5 p.m. ET 11/5/13.

Docket Numbers: ER14–85–000.
Applicants: ISO New England Inc.
Description: ISO New England Inc., Capital Budget Quarterly Filing for 3rd Quarter of 2013.
Filed Date: 10/15/13.
Accession Number: 20131015–5223.
Comments Due: 5 p.m. ET 11/5/13.

Docket Numbers: ER14–86–000.
Applicants: AEP Generation Resources Inc.
Description: Mitchell Operating Agreement Concurrence to be effective 1/1/2014.
Filed Date: 10/15/13.
Accession Number: 20131015–5296.
Comments Due: 5 p.m. ET 11/5/13.

Docket Numbers: ER14–87–000.
Applicants: Appalachian Power Company.
Description: Reactive Supply and Voltage Control from Generation Sources Service Amendment to be effective 1/1/2014.
Filed Date: 10/15/13.
Accession Number: 20131015–5297.
Comments Due: 5 p.m. ET 11/5/13.

Docket Numbers: ER14–88–000.
Applicants: AEP Generation Resources Inc.
Description: Reactive Supply and Voltage Control from Generation Sources Service Amendment to be effective 1/1/2014.
Filed Date: 10/15/13.
Accession Number: 20131015–5298.
Comments Due: 5 p.m. ET 11/5/13.

Docket Numbers: ER14–89–000.
Applicants: Entergy Arkansas, Inc.
Description: Entergy Arkansas, Inc. submits EAI Mo. OATT to be effective 12/19/2013.
Filed Date: 10/15/13.
Accession Number: 20131015–5306.
Comments Due: 5 p.m. ET 11/5/13.

Docket Numbers: ER14–90–000.
Applicants: ISO New England Inc.
Description: ISO New England Inc. submits 2014 Capital and Administrative Budgets to be effective 1/1/2014.

Filed Date: 10/15/13.
Accession Number: 20131015–5310.
Comments Due: 5 p.m. ET 11/5/13.

Docket Numbers: ER14–91–000.
Applicants: ISO New England Inc.
Description: ISO New England Inc. submits Rev. Tariff sheet for Rec. of Costs—2014 Operation of NESCOE to be effective 1/1/2014.
Filed Date: 10/15/13.
Accession Number: 20131015–5311.
Comments Due: 5 p.m. ET 11/5/13.

Docket Numbers: ER14–92–000.
Applicants: Public Service Company of New Mexico.
Description: Public Service Company of New Mexico submits Modification of OATT Sections to be effective 12/14/2013.
Filed Date: 10/15/13.
Accession Number: 20131015–5324.
Comments Due: 5 p.m. ET 11/5/13.

Docket Numbers: ER14–93–000.
Applicants: California Independent System Operator Corporation.
Description: California Independent System Operator Corporation submits 2013–10–15_MSG_Configuration to be effective 12/17/2013.
Filed Date: 10/15/13.
Accession Number: 20131015–5326.
Comments Due: 5 p.m. ET 11/5/13.

Docket Numbers: ER14–94–000.
Applicants: Midcontinent Independent System Operator, Inc., Wolverine Power Supply Cooperative, Inc.
Description: Midcontinent Independent System Operator, Inc. submits 10–15–2013 Consumers-Wolverine Hesperia-Tremaine to be effective 10/16/2013.
Filed Date: 10/15/13.
Accession Number: 20131015–5361.
Comments Due: 5 p.m. ET 11/5/13.

Docket Numbers: ER14–95–000.
Applicants: American Electric Power Service Corporation.
Description: Request of American Electric Power Service Corporation for Waiver of Certain Affiliate Restrictions and Expedited Treatment.
Filed Date: 10/15/13.
Accession Number: 20131015–5369.
Comments Due: 5 p.m. ET 11/5/13.

Take notice that the Commission received the following electric securities filings:

Docket Numbers: ES14–2–000.
Applicants: AEP Generation Resources Inc.
Description: Application Under Section 204 of the Federal Power Act for Authorization to Issue Securities of AEP Generation Resources Inc.
Filed Date: 10/15/13.
Accession Number: 20131015–5295.
Comments Due: 5 p.m. ET 11/5/13.

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: October 15, 2013.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2013–24563 Filed 10–21–13; 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 corporate filings:

Docket Numbers: EC14–3–000.
Applicants: Hardee Power Partners Limited
Description: Application for Authorization under Section 203 of the Federal Power Act and Request for Waivers and Expedited Action of Hardee Power Partners Limited.
Filed Date: 10/11/13
Accession Number: 20131011–5029
Comments Due: 5 p.m. ET 11/1/13

Take notice that the Commission received the following exempt wholesale generator filings:

Docket Numbers: EG14–4–000.
Applicants: PE Hydro Generation, LLC
Description: Self-Certification of EG of PE Hydro Generation, LLC.
Filed Date: 10/10/13
Accession Number: 20131010–5028
Comments Due: 5 p.m. ET 10/31/13

Docket Numbers: EG14–5–000.
Applicants: Seneca Generation, LLC
Description: Self-Certification of EG of Seneca Generation, LLC.
Filed Date: 10/10/13
Accession Number: 20131010–5029
Comments Due: 5 p.m. ET 10/31/13

Docket Numbers: EG14–6–000.
Applicants: Lake Lynn Generation, LLC
Description: Self-Certification of EG of Lake Lynn Generation, LLC.
Filed Date: 10/10/13
Accession Number: 20131010–5030
Comments Due: 5 p.m. ET 10/31/13

Docket Numbers: EG14–7–000.
Applicants: All Dams Generation, LLC
Description: Self-Certification of EG of All Dams Generation, LLC.
Filed Date: 10/10/13
Accession Number: 20131010–5031
Comments Due: 5 p.m. ET 10/31/13

Take notice that the Commission received the following electric rate filings:

Docket Numbers: ER12–2292–004.
Applicants: Southwest Power Pool, Inc.
Description: Compliance Filing and Request for Limited Waiver to be effective 3/19/2013.
Filed Date: 10/10/13
Accession Number: 20131010–5038
Comments Due: 5 p.m. ET 10/31/13

Docket Numbers: ER13–1100–001.
Applicants: Energy Technology Savings LLC
Description: Notice of Non-Material Change in Status of Energy Technology Savings LLC.
Filed Date: 10/10/13
Accession Number: 20131010–5139
Comments Due: 5 p.m. ET 10/31/13

Docket Numbers: ER13–1885–001.
Applicants: Malacha Hydro Limited Partnership
Description: Malacha Hydro Limited Partnership submits 2012 Price Amendment to PPA to be effective 10/10/2013.
Filed Date: 10/11/13
Accession Number: 20131011–5002
Comments Due: 5 p.m. ET 11/1/13

Docket Numbers: ER14–69–000.
Applicants: PJM Interconnection, L.L.C.
Description: PJM Interconnection, L.L.C. submits Revision to OATT Att Q to correct up-to congestion credit exposure calculation to be effective 9/1/2013.
Filed Date: 10/10/13
Accession Number: 20131010–5086
Comments Due: 5 p.m. ET 10/31/13

Docket Numbers: ER14–69–000.
Applicants: PJM Interconnection, L.L.C.
Description: PJM Interconnection, L.L.C. submits Revision to OATT Att Q to correct up-to congestion credit exposure calculation to be effective 9/1/2013.
Filed Date: 10/10/13

Accession Number: 20131010–5086
Comments Due: 5 p.m. ET 10/31/13

Docket Numbers: ER14–70–000.
Applicants: Tampa Electric Company
Description: Tampa Electric Company submits First Revised Rate Schedule No 83 Trilateral Agreement w SEC and HPP to be effective 12/31/9998.
Filed Date: 10/11/13
Accession Number: 20131011–5020
Comments Due: 5 p.m. ET 11/1/13

Docket Numbers: ER14–71–000.
Applicants: Southern California Edison Company
Description: Southern California Edison Company submits Amended Distribution Service Agmt—QF Resources to be effective 12/11/2013.
Filed Date: 10/11/13
Accession Number: 20131011–5022
Comments Due: 5 p.m. ET 11/1/13

Docket Numbers: ER14–73–000.
Applicants: Entergy Services, Inc.
Description: Application Proposing Amendments to the Entergy System Agreement of Entergy Services, Inc.
Filed Date: 10/11/13
Accession Number: 20131011–5092
Comments Due: 5 p.m. ET 11/1/13

Take notice that the Commission received the following electric securities filings:

Docket Numbers: ES14–1–000.
Applicants: Mississippi Power Company
Description: Application of Mississippi Power Company for authorization to issue securities under section 204 of the Federal Power Act and request for exemption from competitive bidding requirements.
Filed Date: 10/10/13
Accession Number: 20131010–5140
Comments Due: 5 p.m. ET 10/31/13

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: October 15, 2013.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2013–24562 Filed 10–21–13; 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: RP14–33–000.
Applicants: Texas Eastern Transmission, LP.
Description: Cleanup of NegRate Agreements—Oct2013 to be effective 11/10/2013.
Filed Date: 10/10/13.
Accession Number: 20131010–5047.
Comments Due: 5 p.m. ET 10/22/13.

Docket Numbers: RP14–34–000.
Applicants: Algonquin Gas Transmission, LLC.
Description: Algonquin Gas Transmission, LLC submits tariff filing per 154.204: KeySpan Nov2013 release to Brooklyn Union to be effective 11/1/2013.
Filed Date: 10/10/13.
Accession Number: 20131010–5123.
Comments Due: 5 p.m. ET 10/22/13.

Docket Numbers: RP14–35–000.
Applicants: Kern River Gas Transmission Company.
Description: Kern River Gas Transmission Company submits tariff filing per 154.204: 2013 Miscellaneous to be effective 11/11/2013.
Filed Date: 10/11/13.
Accession Number: 20131011–5000.
Comments Due: 5 p.m. ET 10/23/13.

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.

Filings in Existing Proceedings

Docket Numbers: RP13–1105–004.
Applicants: Energy West Development, Inc.
Description: Energy West Development, Inc. submits tariff filing per 154.203: Compliance Filing to 153 to be effective 12/1/2012.
Filed Date: 10/10/13.
Accession Number: 20131010–5083.
Comments Due: 5 p.m. ET 10/22/13.

The filings are accessible in the Commission's eLibrary system by clicking on the links or querying the docket number.

eFiling is encouraged. More detailed information relating to filing requirements, interventions, protests, service, and qualifying facilities filings can be found at: *http://www.ferc.gov/docs-filing/efiling/filing-req.pdf.* For other information, call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Dated: October 15, 2013.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2013–24614 Filed 10–21–13; 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: RP14–36–000.
Applicants: Texas Eastern Transmission, LP.
Description: PSEG ERT 11–01–2013 Negotiated Rate (TIME II) to be effective 11/1/2013.
Filed Date: 10/15/13.
Accession Number: 20131015–5216.
Comments Due: 5 p.m. ET 10/28/13.

Docket Numbers: RP14–37–000.
Applicants: Iroquois Gas Transmission System, L.P.
Description: 10/15/13 Negotiated Rates—Barclays (RTS) 7055–33, 34, 36, 37, 39, 40, 41 & 42 to be effective 11/1/2013.
Filed Date: 10/15/13.
Accession Number: 20131015–5237.
Comments Due: 5 p.m. ET 10/28/13.

Docket Numbers: RP14–38–000.
Applicants: Iroquois Gas Transmission System, L.P.
Description: 10/15/13 Negotiated Rates—Cargill Incorporated (RTS) 3085–15 & 16 to be effective 11/1/2013.
Filed Date: 10/15/13.
Accession Number: 20131015–5238.
Comments Due: 5 p.m. ET 10/28/13.

Docket Numbers: RP14–39–000.
Applicants: Iroquois Gas Transmission System, L.P.
Description: 10/15/13 Negotiated Rates—Emera Energy Services, Inc. (RTS) 2715–03 & 04 to be effective 11/1/2013.

Filed Date: 10/15/13.
Accession Number: 20131015–5239.
Comments Due: 5 p.m. ET 10/28/13.

Docket Numbers: RP14–40–000.
Applicants: Iroquois Gas Transmission System, L.P.
Description: 10/15/13 Negotiated Rates—JP Morgan Ventures Energy Corp (RTS)—6025–26 to be effective 11/1/2013.
Filed Date: 10/15/13.
Accession Number: 20131015–5240.
Comments Due: 5 p.m. ET 10/28/13.

Docket Numbers: RP14–41–000.
Applicants: Iroquois Gas Transmission System, L.P.
Description: 10/15/13 Negotiated Rates—JP Morgan Ventures Energy Corp (RTS)—6025–38 to be effective 11/1/2013.
Filed Date: 10/15/13.
Accession Number: 20131015–5277.
Comments Due: 5 p.m. ET 10/28/13.

Docket Numbers: RP14–42–000.
Applicants: Iroquois Gas Transmission System, L.P.
Description: Iroquois Gas Transmission System, L.P. submits tariff filing per 154.204: 10/15/13 Negotiated Rates—Emera Energy Services, Inc. (RTS) 2715–11 & 12 to be effective 11/1/2013.
Filed Date: 10/15/13.
Accession Number: 20131015–5397.
Comments Due: 5 p.m. ET 10/28/13.

Docket Numbers: RP14–43–000.
Applicants: Tennessee Gas Pipeline Company, L.L.C.
Description: Tennessee Gas Pipeline Company, L.L.C. submits tariff filing per 154.204: Rate Schedule PAL Flexibility to be effective 11/15/2013.
Filed Date: 10/15/13.
Accession Number: 20131015–5429.
Comments Due: 5 p.m. ET 10/28/13.

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: October 16, 2013.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2013–24615 Filed 10–21–13; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. OR14–4–000]

Guttman Energy, Inc., PBF Holding Company LLC v. Buckeye Pipe Line Company, L.P., Laurel Pipe Line Company, L.P.; Notice of Complaint

Take notice that on October 15, 2013, Guttman Energy, Inc. and PBF Holding Company LLC (Complainants) submitted for filing with the Federal Energy Regulatory Commission (Commission) a complaint against Buckeye Pipe Line Company L.P. and Laurel Pipe Line Company L.P. (Respondents) challenging the rates charged by the Respondents for pipeline transportation of petroleum products from Chelsea Junction, Pennsylvania, to delivery points in Pennsylvania on the grounds that (1) the Respondents are unlawfully charging interstate tariff rates for intrastate transportation, (2) the pertinent interstate rates are excessive, unjust and unreasonable, (3) the pertinent market-based rates of Buckeye are no longer justified because, as a result of changed circumstances, Buckeye does not, in fact, lack significant market power, and (4) the Respondents' collection of interstate rates which are higher than intrastate rates for the same service is unduly and unreasonably preferential and discriminatory, all in violation of the Interstate Commerce Act.

The Complainants state that copies of the complaint were served on the Respondents.

Any person desiring to intervene or to protest this filing must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211, 385.214). Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a notice of intervention or motion to intervene, as appropriate. The Respondent's answer and all interventions, or protests must be filed on or before the comment date. The Respondent's answer, motions to intervene, and protests must be served on the Complainants.

The Commission encourages electronic submission of 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.

This filing is accessible on-line at *http://www.ferc.gov,* using the ''eLibrary'' link and is available for review in the Commission's Public Reference Room in Washington, DC. There is an ''eSubscription'' link on the Web site that enables subscribers to receive email notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please email *FERCOnlineSupport@ferc.gov,* or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Comment Date: 5:00 p.m. Eastern Time on November 4, 2013.

Dated: October 15, 2013.

Kimberly D. Bose,

Secretary.

[FR Doc. 2013–24527 Filed 10–21–13; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. EL14–4–000]

CalWind Resources, Inc. v. California Independent System Operator Corporation; Notice of Complaint

Take notice that on October 11, 2013, pursuant to section 206 of the Federal Power Act (FPA), 16 U.S.C. 824e and Rule 206 of the Federal Energy Regulatory Commission's (Commission) Rules of Practice and Procedure, 18 CFR 385.206 (2013), CalWind Resources, Inc. (Complainant) filed a formal complaint against California Independent System Operator Corporation (CAISO or Respondent), requesting that the Commission direct CAISO to file an amendment to sections 25.1 and 25.1.2 of its open access transmission tariff or, in the alternative, direct CAISO to follow a tariff interpretation conforming to the Commission's policy, as more fully described in the complaint.

The Complainant certifies that copies of the complaint were served on the contacts for the Respondent as listed on the Commission's list of Corporate Officials.

Any person desiring to intervene or to protest this filing must file in

accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211, 385.214). Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a notice of intervention or motion to intervene, as appropriate. The Respondent's answer and all interventions, or protests must be filed on or before the comment date. The Respondent's answer, motions to intervene, and protests must be served on the Complainants.

The Commission encourages electronic submission of 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.

This filing is accessible on-line at *http://www.ferc.gov,* using the ''eLibrary'' link and is available for review in the Commission's Public Reference Room in Washington, DC. There is an ''eSubscription'' link on the Web site that enables subscribers to receive email notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please email *FERCOnlineSupport@ferc.gov,* or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Comment Date: 5:00 p.m. Eastern Time on October 31, 2013.

Dated: October 15, 2013.

Kimberly D. Bose,

Secretary.

[FR Doc. 2013–24530 Filed 10–21–13; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. ER14–42–000]

RE Rosamond Two LLC; Supplemental Notice That Initial Market-Based Rate Filing Includes Request for Blanket Section 204 Authorization

This is a supplemental notice in the above-referenced proceeding of RE Rosamond Two LLC's application for market-based rate authority, with an accompanying rate tariff, noting that such application includes a request for blanket authorization, under 18 CFR part 34, of future issuances of securities and assumptions of liability.

Any person desiring to intervene or to protest should file with the Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant.

Notice is hereby given that the deadline for filing protests with regard to the applicant's request for blanket authorization, under 18 CFR part 34, of future issuances of securities and assumptions of liability, is November 5, 2013.

The Commission encourages electronic submission of protests and interventions in lieu of paper, using the FERC Online links at *http://www.ferc.gov.* To facilitate electronic service, persons with Internet access who will eFile a document and/or be listed as a contact for an intervenor must create and validate an eRegistration account using the eRegistration link. Select the eFiling link to log on and submit the intervention or protests.

Persons unable to file electronically should submit an original and 5 copies of the intervention or protest to the Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426.

The filings in the above-referenced proceeding are accessible in the Commission's eLibrary system by clicking on the appropriate link in the above list. They are also available for review in the Commission's Public Reference Room in Washington, DC. There is an eSubscription link on the Web site that enables subscribers to receive email notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please email *FERCOnlineSupport@ferc.gov.* or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Dated: October 16, 2013.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2013–24560 Filed 10–21–13; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. ER14–96–000]

Healthy Planet Partners Energy Company, LLC; Supplemental Notice that Initial Market-Based Rate Filing Includes Request for Blanket Section 204 Authorization

This is a supplemental notice in the above-referenced proceeding of Healthy Planet Partners Energy Company, LLC's application for market-based rate authority, with an accompanying rate tariff, noting that such application includes a request for blanket authorization, under 18 CFR part 34, of future issuances of securities and assumptions of liability.

Any person desiring to intervene or to protest should file with the Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant.

Notice is hereby given that the deadline for filing protests with regard to the applicant's request for blanket authorization, under 18 CFR part 34, of future issuances of securities and assumptions of liability, is November 5, 2013.

The Commission encourages electronic submission of protests and interventions in lieu of paper, using the FERC Online links at *http://www.ferc.gov.* To facilitate electronic service, persons with Internet access who will eFile a document and/or be listed as a contact for an intervenor must create and validate an eRegistration account using the eRegistration link. Select the eFiling link to log on and submit the intervention or protests.

Persons unable to file electronically should submit an original and 5 copies of the intervention or protest to the Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426.

The filings in the above-referenced proceeding are accessible in the Commission's eLibrary system by clicking on the appropriate link in the above list. They are also available for review in the Commission's Public Reference Room in Washington, DC. There is an eSubscription link on the Web site that enables subscribers to receive email notification when a document is added to a subscribed

docket(s). For assistance with any FERC Online service, please email *FERCOnlineSupport@ferc.gov.* or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Dated: October 16, 2013.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2013–24561 Filed 10–21–13; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. ER14–41–000]

RE Rosamond One LLC; Supplemental Notice That Initial Market-Based Rate Filing Includes Request for Blanket Section 204 Authorization

This is a supplemental notice in the above-referenced proceeding of RE Rosamond One LLC's application for market-based rate authority, with an accompanying rate tariff, noting that such application includes a request for blanket authorization, under 18 CFR Part 34, of future issuances of securities and assumptions of liability.

Any person desiring to intervene or to protest should file with the Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant.

Notice is hereby given that the deadline for filing protests with regard to the applicant's request for blanket authorization, under 18 CFR part 34, of future issuances of securities and assumptions of liability, is November 5, 2013.

The Commission encourages electronic submission of protests and interventions in lieu of paper, using the FERC Online links at *http://www.ferc.gov.* To facilitate electronic service, persons with Internet access who will eFile a document and/or be listed as a contact for an intervenor must create and validate an eRegistration account using the eRegistration link. Select the eFiling link to log on and submit the intervention or protests.

Persons unable to file electronically should submit an original and 5 copies of the intervention or protest to the Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426.

The filings in the above-referenced proceeding are accessible in the Commission's eLibrary system by clicking on the appropriate link in the above list. They are also available for review in the Commission's Public Reference Room in Washington, DC. There is an eSubscription link on the Web site that enables subscribers to receive email notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please email *FERCOnlineSupport@ferc.gov.* or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Dated: October 16, 2013.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2013–24565 Filed 10–21–13; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. EL14–2–000]

Duke Energy Progress, Inc.; Notice of Initiation of Proceeding and Refund Effective Date

On October 15, 2013, the Commission issued an order that initiated a proceeding in Docket No. EL14–2–000, pursuant to section 206 of the Federal Power Act (FPA), 16 U.S.C. 824e (2006), to determine the justness and reasonableness of the rate decrease proposed by Duke Energy Progress, Inc. *Duke Energy Progress, Inc.,* 145 FERC ¶ 61,037 (2013).

The refund effective date in Docket No. EL14–2–000, established pursuant to section 206(b) of the FPA, will be the date of publication of this notice in the **Federal Register**.

Dated: October 16, 2013.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2013–24564 Filed 10–21–13; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 3730–005]

Salmon Creek Hydroelectric Company, Salmon Creek Hydroelectric Company, LLC; Notice of Transfer of Exemption

1. By letter filed September 23, 2013, Salmon Creek Hydroelectric Company informed the Commission that they have changed its name to Salmon Creek Hydroelectric Company, LLC for the Salmon Creek Hydroelectric Project, FERC No. 3730, originally issued August 10, 1981.[1] The project is located on Salmon and Sardine Creeks in Sierra County, California. The transfer of an exemption does not require Commission approval.

2. Salmon Creek Hydroelectric Company, LLC is now the exemptee of the Salmon Creek Hydroelectric Project, FERC No. 3730. All correspondence should be forwarded to: Mr. Mark Henwood, Salmon Creek Hydroelectric Company, LLC, 7311 Greenhaven Drive, Suite 275, Sacramento, CA 95831.

Dated: October 15, 2013.

Kimberly D. Bose,

Secretary.

[FR Doc. 2013–24528 Filed 10–21–13; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Southwestern Power Administration

Integrated System Power Rates

AGENCY: Southwestern Power Administration, DOE.

ACTION: Notice of Rate Order.

SUMMARY: The U.S. Department of Energy Deputy Secretary has approved and placed into effect on an interim basis Rate Order No. SWPA–66, which increases the power rates for the Integrated System pursuant to the Integrated System Rate Schedules to supersede the existing rate schedules.

DATES: The effective period for the rate schedules specified in Rate Order No. SWPA–66 is October 1, 2013, through September 30, 2017.

FOR FURTHER INFORMATION CONTACT: Mr. James K. McDonald, Vice President for Corporate Operations/Chief Operating Office, Southwestern Power Administration, Department of Energy, Williams Center Tower I, One West Third Street, Tulsa, Oklahoma 74103, (918) 595–6690, *jim.mcdonald@swpa.gov.*

SUPPLEMENTARY INFORMATION: Rate Order No. SWPA–66, which has been approved and placed into effect on an interim basis, increases the power rates for the Integrated System pursuant to the following Integrated System Rate Schedules:

Rate Schedule P–13, Wholesale Rates for Hydro Peaking Power;

[1] 16 FERC ¶ 62,209, Order Granting Exemption from Licensing of a Small Hydroelectric Project of 5 Megawatts or Less and Dismissing Application for Preliminary Permit.

Rate Schedule NFTS–13, Wholesale Rates for Non-Federal Transmission/ Interconnection Facilities Service;

Rate Schedule EE–13, Wholesale Rate for Excess Energy.

The rate schedules supersede the existing rate schedules shown below:

Rate Schedule P–11, Wholesale Rates for Hydro Peaking Power (superseded by P–13);

Rate Schedule NFTS–11, Wholesale Rates for Non-Federal Transmission/ Interconnection Facilities Service (superseded by NFTS–13);

Rate Schedule EE–11, Wholesale Rate for Excess Energy (superseded by EE–13).

Southwestern Power Administration's (Southwestern) Administrator has determined based on the 2013 Integrated System Current Power Repayment Study, that existing rates will not satisfy cost recovery criteria specified in Department of Energy Order No. RA 6120.2 and Section 5 of the Flood Control Act of 1944. The finalized 2013 Integrated System Power Repayment Studies (PRSs) indicate that an increase in annual revenue of $8,706,702, or 4.7 percent, beginning October 1, 2013, will satisfy cost recovery criteria for the Integrated System projects. The proposed Integrated System rate schedules would increase annual revenues from $184,059,100 to $192,765,802 to recover increased investments and replacements in the hydroelectric generating and transmission facilities and increased operations and maintenance costs for both Southwestern and the U.S. Army's Corps of Engineers (Corps). Additionally, the PRS analyzes the Purchased Power Deferral Account which indicated a reduction was needed for the Purchased Power Adder which is used to recover average year purchased energy costs. This proposal also continues the Administrator's Discretionary Purchased Power Adder Adjustment (Adjustment). This Adjustment allows the Administrator to adjust the Purchased Power Adder twice annually, limited to ±$0.0059 per kilowatthour per year as necessary, at his/her discretion, with notification to the Federal Energy Regulatory Commission, to regulate the account at a level that will recover purchased power costs.

The Administrator has followed Title 10, Part 903 Subpart A, of the Code of Federal Regulations, ''Procedures for Public Participation in Power and Transmission Rate Adjustments and Extensions'' in connection with the proposed rate schedule. On July 1, 2013, Southwestern published notice in the **Federal Register** (78 FR 39280) of a 60-day comment period, together with a planned combined Public Information and Comment Forum, to provide an opportunity for customers and other interested members of the public to review and comment on the proposed rate increase for the Integrated System. The forum was not held because Southwestern did not receive any requests to hold such a forum. Written comments were accepted through August 30, 2013. No comments were received.

Information regarding this rate proposal, including studies and other supporting material, is available for public review and comment in the offices of Southwestern Power Administration, Williams Center Tower I, One West Third Street, Tulsa, Oklahoma 74103. Following review of Southwestern's proposal within the Department of Energy, I hereby approve Rate Order No. SWPA–66, which increases the existing Integrated System annual revenue requirement to $192,765,802 per year for the period October 1, 2013 through September 30, 2017. Rate Order No. SWPA–66 will be submitted to FERC for confirmation and approval on a final basis.

The Administrative Procedure Act requires that publication of a substantive rule be made not less than 30 days before its effective date, except, in relevant part, if the agency has good cause to waive the delay requirement (5 U.S.C. 553(d)). Southwestern finds good cause to waive the 30-day delay in effective date, placing the rates in effect on an interim basis starting October 1, 2013, because the current rate is insufficient to recover costs as required by statute; no change to the standard October 1 date of implementation is being made; and no comments were received and no revisions were made to the proposed rates.

Dated: September 30, 2013.

Daniel Poneman,

Deputy Secretary.

UNITED STATES OF AMERICA

DEPARTMENT OF ENERGY

DEPUTY SECRETARY OF ENERGY

In the matter of: Southwestern Power Administration Integrated System Rates

Rate Order No. SWPA–66

Order Confirming, Approving and Placing Increased Power Rate Schedules in Effect on an Interim Basis ( )

Pursuant to Sections 302(a) and 301(b) of the Department of Energy Organization Act, Public Law 95–91, the functions of the Secretary of the Interior and the Federal Power Commission under Section 5 of the Flood Control Act of 1944, 16 U.S.C. 825s, relating to the Southwestern Power Administration (Southwestern) were transferred to and vested in the Secretary of Energy. By Delegation Order Nos. 00–037.00 and 00–001.00E, the Secretary of Energy delegated to the Administrator of Southwestern the authority to develop power and transmission rates, delegated to the Deputy Secretary of the Department of Energy the authority to confirm, approve, and place in effect such rates on an interim basis, and delegated to the Federal Energy Regulatory Commission (FERC) the authority to confirm and approve on a final basis or to disapprove rates developed by the Administrator under the delegation. Pursuant to delegated authority, the Deputy Secretary issued this interim rate order.

BACKGROUND

FERC confirmation and approval of the following Integrated System (System) rate schedules was provided in FERC Docket No. EF12–1–000 issued on March 5, 2012, (138 FERC ¶ 62,199) effective for the period from January 1, 2012, through September 30, 2015:

Rate Schedule P–11, Wholesale Rates for Hydro Peaking Power;

Rate Schedule NFTS–11, Wholesale Rates for Non-Federal Transmission/ Interconnection Facilities Service;

Rate Schedule EE–11, Wholesale Rate for Excess Energy.

Southwestern prepared a 2013 Current Power Repayment Study (PRS) which indicated that the existing rates would not satisfy present financial criteria regarding repayment of investment within a 50-year period due to increased investments, replacements, and operations and maintenance expenses in the U.S. Army Corps of Engineers (Corps) hydroelectric generating facilities and Southwestern's transmission facilities. The Revised PRS indicated the need for a 4.7 percent revenue increase. These preliminary results, which presented the basis for the proposed revenue increase, were provided to the customers for their review prior to the formal process.

The final 2013 Revised PRS indicates that an increase in annual revenues of $8,706,702 (a 4.7 percent increase) is necessary beginning October 1, 2013, to accomplish repayment in the required number of years. Accordingly, Southwestern has prepared proposed rate schedules based on the additional revenue requirement and the 2013 Rate Design Study which allocates the revenue requirement to the various System rate schedules to ensure repayment.

Title 10, Part 903, Subpart A of the Code of Federal Regulations, ''Procedures for Public Participation in Power and Transmission Rate Adjustments and Extensions,'' has been followed in connection with the proposed rate adjustments. Specifically, opportunities for public review and comment on proposed System power rates during a 60-day period were announced by notice published in the **Federal Register**, July 1, 2013, (78 FR 39280). The consultation and comment period was shortened from the 90 days provided for in the regulations by the Administrator, in accordance with Sec. 903.14 of 10 CFR part 903, because Southwestern held a pre-issuance consultation with customers. A Public Information and Comment Forum was proposed to be held on July 11, 2013, in

Tulsa, Oklahoma. Such forum was not held since no one requested that the forum be held. No request for information or copies of the proposed Power Repayment and Rate Design Studies were received from any customers or interested parties during the formal period of public participation. Written comments were due by August 30, 2013.

No comments were received during the public participation process on Southwestern's preliminary results. Following the conclusion of the comment period on August 30, 2013, the 2013 Power Repayment and Rate Design Studies were finalized. The Administrator made the decision to submit the rate proposal for interim approval and implementation.

DISCUSSION

General

The existing rate schedules as developed in the 2011 Integrated System PRS were the basis for the revenue determination in the System Current PRS. The Current PRS indicates that existing rates are insufficient to produce the annual revenues necessary to accomplish repayment of the capital investment as required by Section 5 of the Flood Control Act of 1944 and Department of Energy (DOE) Order No. RA 6120.2.

The Revised PRS indicates it is necessary to increase annual revenues by $8,706,702 or 4.7 percent, which satisfies the cost recovery criteria outlined in DOE Order No. RA 6120.2 and Section 5 of the Flood Control Act of 1944.

In Southwestern's 2013 Rate Design proposal, rates were designed to recover the additional revenue requirements. The monthly demand charge for the sale of Federal hydroelectric power has increased. The base energy and supplemental energy charges also reflect an increase over the current rate. In addition, transmission charges for non-Federal, firm service have increased. Those customers taking transformation service will also see an increase in that rate component. The increases to the transmission charges are due to including projected additions and replacements to Southwestern's aging transmission facilities since the last rate change and a transmission-specific cost related to participation in the Southwest Power Pool Regional Transmission Organization.

Consistent with FERC's Order No. 888, Southwestern will continue charging for the six ancillary services under Rate Schedule P–13 and Rate Schedule NFTS–13, and offering non-Federal transmission service under Rate Schedule NFTS–13. Southwestern's rate design has separated the ancillary services for all transmission service. Two ancillary services, Scheduling, System Control and Dispatch Service together with Reactive and Voltage Support Service, are required for every transmission transaction. These charges are also a part of the capacity rate for Federal power. This is consistent with Southwestern's long-standing practice of charging for the sale and delivery of Federal power in its Federal demand charge. The remaining ancillary services will be made available to any transmission user within Southwestern's balancing area, including Federal power customers. The rate schedules for Peaking Power and Non-Federal Transmission Service reflect these charges. Network transmission service is provided to those who have contracted for the service, but only for non-Federal deliveries. The rate for and application of this service are identified in the Non-Federal Transmission/Interconnection Facilities Service Rate Schedule, NFTS–13.

With respect to the Purchased Power Adder (PPA), Southwestern proposed, as in all previous proposals beginning with the 1983 implementation of the purchased power rate component, that the Adder is set equal to the current average long-term purchased power revenue requirement. As shown in the Rate Design Study, the amount is determined by dividing the estimated total average direct purchased power costs by Southwestern's total annual contractual 1200-hour peaking energy commitments to the customers (exclusive of contract support arrangements). In Southwestern's rate proposal, the resulting Adder decreases from the current $0.0062 per kWh of peaking energy to $0.0059 per kWh of peaking energy. The total revenue created through application of this Adder should enable Southwestern to cover its average annual purchased power costs.

COMMENTS AND RESPONSES

Southwestern received no comments or questions during the public participation period.

AVAILABILITY OF INFORMATION

Information regarding this rate proposal, including studies, comments and other supporting material, is available for public review and comment in the offices of Southwestern Power Administration, One West Third Street, Tulsa, OK 74103.

ADMINISTRATION'S CERTIFICATION

The July 2013 Revised PRS indicates that the increased power rates will repay all costs of the Integrated System including amortization of the power investment consistent with the provisions of Department of Energy Order No. RA 6120.2. In accordance with Delegation Order No. 00–037.00 (December 6, 2001) and Section 5 of the Flood Control Act of 1944, the Administrator has determined that the proposed System rates are consistent with applicable law and the lowest possible rates consistent with sound business principles.

ENVIRONMENT

The environmental impact of the proposed System rates was evaluated in consideration of DOE's guidelines for implementing the procedural provisions of the National Environmental Policy Act and was determined to fall within the class of actions that are categorically excluded (10 CFR 1021) from the requirements of preparing either an Environmental Impact Statement or an Environmental Assessment.

ORDER

In view of the foregoing and pursuant to the authority delegated to me by the Secretary of Energy, I hereby confirm, approve and place in effect on an interim basis, effective October 1, 2013, the following Southwestern Integrated System Rate Schedules which shall remain in effect on an interim basis through September 30, 2017, or until the FERC confirms and approves the rates on a final basis.

Dated: September 30, 2013.

Daniel Poneman,

Deputy Secretary.

United States Department of Energy

Southwestern Power Administration

Rate Schedule P–13 [1]

Wholesale Rates for Hydro Peaking Power

Effective:

During the period October 1, 2013, through September 30, 2017, in accordance with interim approval from Rate Order No. SWPA–66 issued by the Deputy Secretary of Energy on *September 30, 2013* and pursuant to final approval by the Federal Energy Regulatory Commission.

Available:

In the marketing area of Southwestern Power Administration (Southwestern), described generally as the States of Arkansas, Kansas, Louisiana, Missouri, Oklahoma, and Texas.

Applicable:

To wholesale Customers which have contractual rights from Southwestern to purchase Hydro Peaking Power and associated energy (Peaking Energy and Supplemental Peaking Energy).

Character and Conditions of Service:

Three-phase, alternating current, delivered at approximately 60 Hertz, at the nominal voltage(s), at the point(s) of delivery, and in such quantities as are specified by contract.

1. Definitions of Terms

1.1. Ancillary Services

The services necessary to support the transmission of capacity and energy from resources to loads while maintaining reliable operation of the System of Southwestern in accordance with good utility practice, which include the following:

1.1.1. Scheduling, System Control, and Dispatch Service is provided by Southwestern as Balancing Authority Area operator and is in regard to interchange and load-match scheduling and related system control and dispatch functions.

1.1.2. Reactive Supply and Voltage Control from Generation Sources Service is provided at transmission facilities in the System of Southwestern to produce or absorb reactive power and to maintain transmission voltages within specific limits.

1.1.3. Regulation and Frequency Response Service is the continuous balancing of generation and interchange resources accomplished by raising or lowering the output of on-line generation as necessary to follow the moment-by-moment changes in load and to maintain frequency within a Balancing Authority Area.

1.1.4. Spinning Operating Reserve Service maintains generating units on-line, but loaded at less than maximum output, which may be used to service load immediately

[1] Supersedes Rate Schedule P–11.

when disturbance conditions are experienced due to a sudden loss of generation or load.

1.1.5. Supplemental Operating Reserve Service provides an additional amount of operating reserve sufficient to reduce Area Control Error to zero within 10 minutes following loss of generating capacity which would result from the most severe single contingency.

1.1.6. Energy Imbalance Service corrects for differences over a period of time between schedules and actual hourly deliveries of energy to a load. Energy delivered or received within the authorized bandwidth for this service is accounted for as an inadvertent flow and is returned to the providing party by the receiving party in accordance with standard utility practice or a contractual arrangement between the parties.

1.2. Customer

The entity which is utilizing and/or purchasing Federal Power and Federal Energy and services from Southwestern pursuant to this Rate Schedule.

1.3. Demand Period

The period of time used to determine maximum integrated rates of delivery for the purpose of power accounting which is the 60-minute period that begins with the change of hour.

1.4. Federal Power and Energy

The power and energy provided from the System of Southwestern.

1.5. Hydro Peaking Power

The Federal Power that Southwestern sells and makes available to the Customers through their respective Power Sales Contracts in accordance with this Rate Schedule.

1.6. Peaking Billing Demand

The quantity equal to the Peaking Contract Demand for any month unless otherwise provided by the Customer's Power Sales Contract.

1.7. Peaking Contract Demand

The maximum rate in kilowatts at which Southwestern is obligated to deliver Federal Energy associated with Hydro Peaking Power as set forth in the Customer's Power Sales Contract.

1.8. Peaking Energy

The Federal Energy associated with Hydro Peaking Power that Southwestern sells and makes available to the Customer in accordance with the terms and conditions of the Customer's Power Sales Contract.

1.9. Power Sales Contract

The Customer's contract with Southwestern for the sale of Federal Power and Federal Energy.

1.10. Supplemental Peaking Energy

The Federal Energy associated with Hydro Peaking Power that Southwestern sells and makes available to the Customer if determined by Southwestern to be available and that is in addition to the quantity of Peaking Energy purchased by the Customer in accordance with the terms and conditions of the Customer's Power Sales Contract.

1.11. System of Southwestern

The transmission and related facilities owned by Southwestern, and/or the generation, transmission, and related facilities owned by others, the capacity of which, by contract, is available to and utilized by Southwestern to satisfy its contractual obligations to the Customer.

1.12. Uncontrollable Force

Any force which is not within the control of the party affected, including, but not limited to failure of water supply, failure of facilities, flood, earthquake, storm, lightning, fire, epidemic, riot, civil disturbance, labor disturbance, sabotage, war, act of war, terrorist acts or restraint by court of general jurisdiction, which by exercise of due diligence and foresight such party could not reasonably have been expected to avoid.

2. Wholesale Rates, Terms, and Conditions for Hydro Peaking Power, Peaking Energy, Supplemental Peaking Energy, and Associated Services

Unless otherwise specified, this Section 2 is applicable to all sales under the Customer's Power Sales Contract.

2.1. Hydro Peaking Power Rates, Terms, and Conditions

2.1.1. Monthly Capacity Charge for Hydro Peaking Power

$4.50 per kilowatt of Peaking Billing Demand.

2.1.2. Services Associated With Capacity Charge for Hydro Peaking Power

The capacity charge for Hydro Peaking Power includes such transmission services as are necessary to integrate Southwestern's resources in order to reliably deliver Hydro Peaking Power and associated energy to the Customer. This capacity charge also includes two Ancillary Services charges: Scheduling, System Control, and Dispatch Service; and Reactive Supply and Voltage Control from Generation Sources Service.

2.1.3. Secondary Transmission Service Under Capacity Associated With Hydro Peaking Power

Customers may utilize the transmission capacity associated with Peaking Contract Demand for the transmission of non-Federal energy, on a non-firm, as-available basis, at no additional charge for such transmission service or associated Ancillary Services, under the following terms and conditions:

2.1.3.1. The sum of the capacity, for any hour, which is used for Peaking Energy, Supplemental Peaking Energy, and Secondary Transmission Service, may not exceed the Peaking Contract Demand;

2.1.3.2. The non-Federal energy transmitted under such secondary service is delivered to the Customer's point of delivery for Hydro Peaking Power;

2.1.3.3. The Customer commits to provide Real Power Losses associated with such deliveries of non-Federal energy; and

2.1.3.4. Sufficient transfer capability exists between the point of receipt into the System of Southwestern of such non-Federal energy and the Customer's point of delivery for Hydro Peaking Power for the time period that such secondary transmission service is requested.

2.1.4. Adjustment for Reduction in Service

If, during any month, the Peaking Contract Demand associated with a Power Sales Contract in which Southwestern has the obligation to provide 1,200 kilowatthours of Peaking Energy per kilowatt of Peaking Contract Demand is reduced by Southwestern for a period or periods of not less than two consecutive hours by reason of an outage caused by either an Uncontrollable Force or by the installation, maintenance, replacement or malfunction of generation, transmission and/or related facilities on the System of Southwestern, or insufficient pool levels, the Customer's capacity charges for such month will be reduced for each such reduction in service by an amount computed under the formula:

$R = (C \times K \times H) \div S$

with the factors defined as follows:

R = The dollar amount of reduction in the monthly total capacity charges for a particular reduction of not less than two consecutive hours during any month, except that the total amount of any such reduction shall not exceed the product of the Customer's capacity charges associated with Hydro Peaking Power times the Peaking Billing Demand.

C = The Customer's capacity charges associated with Hydro Peaking Power for the Peaking Billing Demand for such month.

K = The reduction in kilowatts in Peaking Billing Demand for a particular event.

H = The number of hours duration of such particular reduction.

S = The number of hours that Peaking Energy is scheduled during such month, but not less than 60 hours times the Peaking Contract Demand.

Such reduction in charges shall fulfill Southwestern's obligation to deliver Hydro Peaking Power and Peaking Energy.

2.2. Peaking Energy and Supplemental Peaking Energy Rates, Terms, and Conditions

2.2.1. Peaking Energy Charge

$0.0094 per kilowatthour of Peaking Energy delivered plus the Purchased Power Adder as defined in Section 2.2.3 of this Rate Schedule.

2.2.2. Supplemental Energy Charge

$0.0094 per kilowatthour of Supplemental Peaking Energy delivered.

2.2.3. Purchased Power Adder

A purchased power adder of $0.0059 per kilowatthour of Peaking Energy delivered, as adjusted by the Administrator, Southwestern, in accordance with the procedure within this Rate Schedule.

2.2.3.1. Applicability of Purchased Power Adder

The Purchased Power Adder shall apply to sales of Peaking Energy. The Purchased Power Adder shall not apply to sales of Supplemental Peaking Energy or sales to any Customer which, by contract, has assumed the obligation to supply energy to fulfill the minimum of 1,200 kilowatthours of Peaking

Energy per kilowatt of Peaking Contract Demand during a contract year (hereinafter ''Contract Support Arrangements'').

2.2.3.2. Procedure for Determining Net Purchased Power Adder Adjustment

Not more than twice annually, the Purchased Power Adder of $0.0059 (5.9 mills) per kilowatthour of Peaking Energy, as noted in this Rate Schedule, may be adjusted by the Administrator, Southwestern, by an amount up to a total of ±$0.0059 (5.9 mills) per kilowatthour per year, as calculated by the following formula:

ADJ = (PURCH − EST + DIF) ÷ SALES

with the factors defined as follows:

ADJ = The dollar per kilowatthour amount of the total adjustment, plus or minus, to be applied to the net Purchased Power Adder, rounded to the nearest $0.0001 per kilowatthour, provided that the total ADJ to be applied in any year shall not vary from the then-effective ADJ by more than $0.0059 per kilowatthour;

PURCH = The actual total dollar cost of Southwestern's System Direct Purchases as accounted for in the financial records of the Southwestern Federal Power System for the period;

EST = The estimated total dollar cost ($13,273,800 per year) of Southwestern's System Direct Purchases used as the basis for the Purchased Power Adder of $0.0059 per kilowatthour of Peaking Energy;

DIF = The accumulated remainder of the difference in the actual and estimated total dollar cost of Southwestern's System Direct Purchases since the effective date of the currently approved Purchased Power Adder set forth in this Rate Schedule, which remainder is not projected for recovery through the ADJ in any previous periods;

SALES = The annual Total Peaking Energy sales projected to be delivered (2,241,300,000 KWh per year) from the System of Southwestern, which total was used as the basis for the $0.0059 per kilowatthour Purchased Power Adder.

2.3. Transformation Service Rates, Terms, and Conditions

2.3.1. Monthly Capacity Charge for Transformation Service

$0.46 per kilowatt will be assessed for capacity used to deliver energy at any point of delivery at which Southwestern provides transformation service for deliveries at voltages of 69 kilovolts or less from higher voltage facilities.

2.3.2. Applicability of Capacity Charge for Transformation Service

Unless otherwise specified by contract, for any particular month, a charge for transformation service will be assessed on the greater of (1) that month's highest metered demand, or (2) the highest metered demand recorded during the previous 11 months, at any point of delivery. For the purpose of this Rate Schedule, the highest metered demand will be based on all deliveries, of both Federal and non-Federal energy, from the System of Southwestern, at such point during such month.

2.4. Ancillary Services Rates, Terms, and Conditions

2.4.1. Capacity Charges for Ancillary Services

2.4.1.1. Regulation and Frequency Response Service

Monthly rate of $0.07 per kilowatt of Peaking Billing Demand plus the Regulation Purchased Adder as defined in Section 2.4.5 of this Rate Schedule.

2.4.1.2. Spinning Operating Reserve Service

Monthly rate of $0.0146 per kilowatt of Peaking Billing Demand.

Daily rate of $0.00066 per kilowatt for non-Federal generation inside Southwestern's Balancing Authority Area.

2.4.1.3. Supplemental Operating Reserve Service

Monthly rate of $0.0146 per kilowatt of Peaking Billing Demand.

Daily rate of $0.00066 per kilowatt for non-Federal generation inside Southwestern's Balancing Authority Area.

2.4.1.4. Energy Imbalance Service

$0.0 per kilowatt for all reservation periods.

2.4.2. Availability of Ancillary Services

Regulation and Frequency Response Service and Energy Imbalance Service are available only for deliveries of power and energy to load within Southwestern's Balancing Authority Area. Spinning Operating Reserve Service and Supplemental Operating Reserve Service are available only for deliveries of non-Federal power and energy generated by resources located within Southwestern's Balancing Authority Area and for deliveries of all Hydro Peaking Power and associated energy from and within Southwestern's Balancing Authority Area. Where available, such Ancillary Services must be taken from Southwestern; unless, arrangements are made in accordance with Section 2.4.4 of this Rate Schedule.

2.4.3. Applicability of Charges for Ancillary Services

For any month, the charges for Ancillary Services for deliveries of Hydro Peaking Power shall be based on the Peaking Billing Demand.

The daily charge for Spinning Operating Reserve Service and Supplemental Operating Reserve Service for non-Federal generation inside Southwestern's Balancing Authority Area shall be applied to the greater of Southwestern's previous day's estimate of the peak, or the actual peak, in kilowatts, of the internal non-Federal generation.

2.4.4. Provision of Ancillary Services by Others

Customers for which Ancillary Services are made available as specified above, must inform Southwestern by written notice of the Ancillary Services which they do *not* intend to take and purchase from Southwestern, and of their election to provide all or part of such Ancillary Services from their own resources or from a third party.

Subject to Southwestern's approval of the ability of such resources or third parties to meet Southwestern's technical and operational requirements for provision of such Ancillary Services, the Customer may change the Ancillary Services which it takes from Southwestern and/or from other sources at the beginning of any month upon the greater of 60 days notice or upon completion of any necessary equipment modifications necessary to accommodate such change; *Provided,* That, if the Customer chooses not to take Regulation and Frequency Response Service, which includes the associated Regulation Purchased Adder, the Customer must pursue these services from a different host Balancing Authority; thereby moving all metered loads and resources from Southwestern's Balancing Authority Area to the Balancing Authority Area of the new host Balancing Authority. Until such time as that meter reconfiguration is accomplished, the Customer will be charged for the Regulation and Frequency Response Service and applicable Adder then in effect. The Customer must notify Southwestern by July 1 of this choice, to be effective the subsequent calendar year.

2.4.5. Regulation Purchased Adder

Southwestern has determined the amount of energy used from storage to provide Regulation and Frequency Response Service in order to meet Southwestern's Balancing Authority Area requirements. The replacement value of such energy used shall be recovered through the Regulation Purchased Adder. The Regulation Purchased Adder during the time period of January 1 through December 31 of the current calendar year is based on the average annual use of energy from storage [1] for Regulation and Frequency Response Service and Southwestern's estimated purchased power price for the corresponding year from the most currently approved Power Repayment Studies.

The Regulation Purchased Adder will be phased in over a period of four (4) years as follows:

Year	Regulation purchased adder for the incremental replacement value of energy used from storage
2014	¼ of the average annual use of energy from storage × 2014 Purchased Power price.
2015	½ of the average annual use of energy from storage × 2015 Purchased Power price.
2016	¾ of the average annual use of energy from storage × 2016 Purchased Power price.
2017 and thereafter	The total average annual use of energy from storage × the applicable Purchased Power price.

2.4.5.1. Applicability of Regulation Purchased Adder

The replacement value of the estimated annual use of energy from storage for Regulation and Frequency Response Service shall be recovered by Customers located within Southwestern's Balancing Authority

[1] The average annual use of energy from storage for Regulation and Frequency Response Service is based on Southwestern studies.

Area on a non-coincident peak ratio share basis, divided into twelve equal monthly payments, in accordance with the formula in Section 2.4.5.2.

If the Regulation Purchased Adder is determined and applied under Southwestern's Rate Schedule NFTS–11, then it shall not be applied here.

2.4.5.2. Procedure for Determining Regulation Purchased Adder

Unless otherwise specified by contract, the Regulation Purchased Adder for an individual Customer shall be based on the following formula rate, calculated to include the replacement value of the estimated annual use of energy from storage by Southwestern for Regulation and Frequency Response Service.

RPA = The Regulation Purchased Adder for an individual Customer per month, which is as follows:

$$[(L_{Customer} \div L_{Total}) \times RP_{Total}] \div 12$$

with the factors defined as follows:

$L_{Customer}$ = The sum in MW of the following three factors:

(1) The Customer's highest metered load plus generation used to serve the Customer's load that is accounted for through a reduction in the Customer's metered load (referred to as 'generation behind the meter') during the previous calendar year, and

(2) The Customer's highest rate of Scheduled Exports [2] during the previous calendar year, and

(3) The Customer's highest rate of Scheduled Imports [2] during the previous calendar year.

L_{Total} = The sum of all $L_{Customer}$ factors for all Customers that were inside Southwestern's Balancing Authority Area at the beginning of the previous calendar year in MW.

RP_{Total} = The ''net'' cost in dollars and cents based on Southwestern's estimated purchased power price for the corresponding year from the most currently approved Power Repayment Studies multiplied by the average annual use of energy from storage, as provided for in the table in Section 2.4.5, to support Southwestern's ability to regulate within its Balancing Authority Area. The ''net'' cost in dollars and cents shall be adjusted by subtracting the product of the quantity of such average annual use of energy from storage in MWh and Southwestern's highest rate in dollars per MWh for Supplemental Peaking Energy during the previous calendar year.

For Customers that have aggregated their load, resources, and scheduling into a single node by contract within Southwestern's Balancing Authority Area, the individual Customer's respective Regulation Purchased Adder shall be that Customer's ratio share of the Regulation Purchased Adder established for the node. Such ratio share shall be determined for the Customer on a non-coincident basis and shall be calculated for the Customer from their highest metered load plus generation behind the meter.

2.4.6. Energy Imbalance Service Limitations

Energy Imbalance Service primarily applies to deliveries of power and energy which are required to satisfy a Customer's load. As Hydro Peaking Power and associated energy are limited by contract, the Energy Imbalance Service bandwidth specified for Non-Federal Transmission Service does not apply to deliveries of Hydro Peaking Power, and therefore Energy Imbalance Service is not charged on such deliveries. Customers who consume a capacity of Hydro Peaking Power greater than their Peaking Contract Demand may be subject to a Capacity Overrun Penalty.

3. Hydro Peaking Power Penalties, Terms, and Conditions

3.1. Capacity Overrun Penalty

3.1.1. Penalty Charge for Capacity Overrun

For each hour during which Hydro Peaking Power was provided at a rate greater than that to which the Customer is entitled, the Customer will be charged a Capacity Overrun Penalty at the following rates:

Months associated with charge	Rate per kilowatt
March, April, May, October, November, December	$0.15
January, February, June, July, August, September	0.30

3.1.2. Applicability of Capacity Overrun Penalty

Customers which have loads within Southwestern's Balancing Authority Area are obligated by contract to provide resources, over and above the Hydro Peaking Power and associated energy purchased from Southwestern, sufficient to meet their loads. A Capacity Overrun Penalty shall be applied only when the formulas provided in Customers' respective Power Sales Contracts indicate an overrun on Hydro Peaking Power, *and* investigation determines that all resources, both firm and non-firm, which were available at the time of the apparent overrun were insufficient to meet the Customer's load.

3.2. Energy Overrun Penalty

3.2.1. Penalty Charge for Energy Overrun

$0.1034 per kilowatthour for each kilowatthour of overrun.

3.2.2. Applicability of Energy Overrun Penalty

By contract, the Customer is subject to limitations on the maximum amounts of Peaking Energy which may be scheduled under the Customer's Power Sales Contract. When the Customer schedules an amount in excess of such maximum amounts, such Customer is subject to the Energy Overrun Penalty.

3.3. Power Factor Penalty

3.3.1. Requirements Related to Power Factor

Any Customer served from facilities owned by or available by contract to Southwestern will be required to maintain a power factor of not less than 95 percent and will be subject to the following provisions.

3.3.2. Determination of Power Factor

The power factor will be determined for all Demand Periods and shall be calculated under the formula:

$$PF = (kWh) \div \sqrt{(kWh^2 + rkVAh^2)}$$

with the factors defined as follows:

PF = The power factor for any Demand Period of the month.

kWh = The total quantity of energy which is delivered during such Demand Period to the point of delivery or interconnection in accordance with Section 3.3.4.

rkVAh = The total quantity of reactive kilovolt-ampere-hours (kVARs) delivered during such Demand Period to the point of delivery or interconnection in accordance with Section 3.3.4.

3.3.3. Penalty Charge for Power Factor

The Customer shall be assessed a penalty for all Demand Periods of a month where the power factor is less than 95 percent lagging. For any Demand Period during a particular month such penalty shall be in accordance with the following formula:

$$C = D \times (0.95 - LPF) \times \$0.10$$

with the factors defined as follows:

C = The charge in dollars to be assessed for any particular Demand Period of such month that the determination of power factor ''PF'' is calculated to be less than 95 percent lagging.

D = The Customer's demand in kilowatts at the point of delivery for such Demand Period in which a low power factor was calculated.

LPF = The lagging power factor, if any, determined by the formula ''PF'' for such Demand Period.

If C is negative, then C = zero (0).

3.3.4. Applicability of Power Factor Penalty

The Power Factor Penalty is applicable to radial interconnections with the System of Southwestern. The total Power Factor Penalty for any month shall be the sum of all charges ''C'' for all Demand Periods of such month. No penalty is assessed for leading power factor. Southwestern, in its sole judgment and at its sole option, may determine whether power factor calculations should be applied to (i) a single physical point of delivery, (ii) a combination of physical points of delivery where a Customer has a single, electrically integrated load, (iii) or interconnections. The general criteria for such decision shall be that, given the configuration of the Customer's and Southwestern's systems, Southwestern will determine, in its sole judgment and at its sole option, whether the power factor calculation more accurately assesses the detrimental impact on Southwestern's system when the above formula is calculated for a single physical point of delivery, a combination of physical points of delivery, or for an

[2] Scheduled Exports and Scheduled Imports are transactions, such as sales and purchases respectively, which are in addition to a Customer's metered load that contribute to Southwestern's Balancing Authority Area need for regulation.

interconnection as specified by an Interconnection Agreement.

Southwestern, at its sole option, may reduce or waive Power Factor Penalties when, in Southwestern's sole judgment, low power factor conditions were not detrimental to the System of Southwestern due to particular loading and voltage conditions at the time the power factor dropped below 95 percent lagging.

4. Hydro Peaking Power Miscellaneous Rates, Terms, and Conditions

4.1. Real Power Losses

Customers are required to self-provide all Real Power Losses for non-Federal energy transmitted by Southwestern on behalf of such Customers under the provisions detailed below.

Real Power Losses are computed as four (4) percent of the total amount of non-Federal energy transmitted by Southwestern. The Customer's monthly Real Power Losses are computed each month on a megawatthour basis as follows:

$ML = 0.04 \times NFE$

with the factors defined as follows:

ML = The total monthly loss energy, rounded to the nearest megawatthour, to be scheduled by a Customer for receipt by Southwestern for Real Power Losses associated with non-Federal energy transmitted on behalf of such Customer; and

NFE = The amount of non-Federal energy that was transmitted by Southwestern on behalf of a Customer during a particular month.

The Customer must schedule or cause to be scheduled to Southwestern, Real Power Losses for which it is responsible subject to the following conditions:

4.1.1. The Customer shall schedule and deliver Real Power Losses back to Southwestern during the second month after they were incurred by Southwestern in the transmission of the Customer's non-Federal power and energy over the System of Southwestern unless such Customer has accounted for Real Power Losses as part of a metering arrangement with Southwestern.

4.1.2. On or before the twentieth day of each month, Southwestern shall determine the amount of non-Federal loss energy it provided on behalf of the Customer during the previous month and provide a written schedule to the Customer setting forth hour-by-hour the quantities of non-Federal energy to be delivered to Southwestern as losses during the next month.

4.1.3. Real Power Losses not delivered to Southwestern by the Customer, according to the schedule provided, during the month in which such losses are due shall be billed by Southwestern to the Customer to adjust the end-of-month loss energy balance to zero (0) megawatthours and the Customer shall be obliged to purchase such energy at the following rates:

Months associated with charge	Rate per kilowatthour
March, April, May, October, November, December	$0.15
January, February, June, July, August, September	0.30

4.1.4. Real Power Losses delivered to Southwestern by the Customer in excess of the losses due during the month shall be purchased by Southwestern from the Customer at a rate per megawatthour equal to Southwestern's rate per megawatthour for Supplemental Peaking Energy, as set forth in Southwestern's then-effective Rate Schedule for Hydro Peaking Power to adjust such hourly end-of-month loss energy balance to zero (0) megawatthours.

United States Department of Energy

Southwestern Power Administration

Rate Schedule NFTS–13 [1]

Wholesale Rates for Non-Federal Transmission/Interconnection Facilities Service

Effective: During the period October 1, 2013, through September 30, 2017, in accordance with interim approval from Rate Order No. SWPA–66 issued by the Deputy Secretary of Energy on *September 30, 2013* and pursuant to final approval by the Federal Energy Regulatory Commission.

Available: In the region of the System of Southwestern.

Applicable: To Customers which have executed Service Agreements with Southwestern for the transmission of non-Federal power and energy over the System of Southwestern or for its use for interconnections. Southwestern will provide services over those portions of the System of Southwestern in which the Administrator, Southwestern, in his or her sole judgment, has determined that uncommitted transmission and transformation capacities in the System of Southwestern are and will be available in excess of the capacities required to market Federal power and energy pursuant to Section 5 of the Flood Control Act of 1944 (58 Stat. 887,890; 16 U.S.C. 825s).

Character and Conditions of Service: Three-phase, alternating current, delivered at approximately 60 Hertz, at the nominal voltage(s), at the point(s) specified by Service Agreement or Transmission Service Transaction.

1. Definitions of Terms

1.1. Ancillary Services

The services necessary to support the transmission of capacity and energy from resources to loads while maintaining reliable operation of the System of Southwestern in accordance with good utility practice, which include the following:

1.1.1. Scheduling, System Control, and Dispatch Service is provided by Southwestern as Balancing Authority Area operator and is in regard to interchange and load-match scheduling and related system control and dispatch functions.

1.1.2. Reactive Supply and Voltage Control from Generation Sources Service is provided at transmission facilities in the System of Southwestern to produce or absorb reactive power and to maintain transmission voltages within specific limits.

1.1.3. Regulation and Frequency Response Service is the continuous balancing of generation and interchange resources accomplished by raising or lowering the output of on-line generation as necessary to follow the moment-by-moment changes in load and to maintain frequency within a Balancing Authority Area.

1.1.4. Spinning Operating Reserve Service maintains generating units on-line, but loaded at less than maximum output, which may be used to service load immediately when disturbance conditions are experienced due to a sudden loss of generation or load.

1.1.5. Supplemental Operating Reserve Service provides an additional amount of operating reserve sufficient to reduce Area Control Error to zero within 10 minutes following loss of generating capacity which would result from the most severe single contingency.

1.1.6. Energy Imbalance Service corrects for differences over a period of time between schedules and actual hourly deliveries of energy to a load. Energy delivered or received within the authorized bandwidth for this service is accounted for as an inadvertent flow and is returned to the providing party by the receiving party in accordance with standard utility practice or a contractual arrangement between the parties.

1.2. Customer

The entity which is utilizing and/or purchasing services from Southwestern pursuant to this Rate Schedule.

1.3. Demand Period

The period of time used to determine maximum integrated rates of delivery for the purpose of power accounting which is the 60-minute period that begins with the change of hour.

1.4. Firm Point-to-Point Transmission Service

Transmission service reserved on a firm basis between specific points of receipt and delivery pursuant to either a Firm Transmission Service Agreement or to a Transmission Service Transaction.

1.5. Interconnection Facilities Service

A service that provides for the use of the System of Southwestern to deliver energy and/or provide system support at an interconnection.

1.6. Network Integration Transmission Service

Transmission service provided under Part III of Southwestern's Open Access Transmission Service Tariff which provides the Customer with firm transmission service for the delivery of capacity and energy from the Customer's resources to the Customer's load.

1.7. Non-Firm Point-to-Point Transmission Service

Transmission service reserved on a non-firm basis between specific points of receipt and delivery pursuant to a Transmission Service Transaction.

[1] Supersedes Rate Schedule NFTS–11.

1.8. Point of Delivery

Either a single physical point to which electric power and energy are delivered from the System of Southwestern, or a specified set of delivery points which together form a single, electrically integrated load.

1.9. Secondary Transmission Service

Service that is associated with Firm Point-to-Point Transmission Service and Network Integration Transmission Service. For Firm Point-to-Point Transmission Service, it consists of transmission service provided on an as-available, non-firm basis, scheduled within the limits of a particular capacity reservation for transmission service, and scheduled from points of receipt, or to points of delivery, other than those designated in a Long-Term Firm Transmission Service Agreement or a Transmission Service Transaction for Firm Point-to-Point Transmission Service. For Network Integration Transmission Service, Secondary Transmission Service consists of transmission service provided on an as-available, non-firm basis, from resources other than the network resources designated in a Network Transmission Service Agreement, to meet the Customer's network load. The charges for Secondary Transmission Service, other than Ancillary Services, are included in the applicable capacity charges for Firm Point-to-Point Transmission Service and Network Integration Transmission Service.

1.10. Service Agreement

A contract executed between a Customer and Southwestern for the transmission of non-Federal power and energy over the System of Southwestern or for interconnections which include the following:

1.10.1. Firm Transmission Service Agreement provides for reserved transmission capacity on a firm basis, for a particular point-to-point delivery path.

1.10.2. Interconnection Agreement provides for the use of the System of Southwestern and recognizes the exchange of mutual benefits for such use or provides for application of a charge for Interconnection Facilities Service.

1.10.3. Network Transmission Service Agreement provides for the Customer to request firm transmission service for the delivery of capacity and energy from the Customer's network resources to the Customer's network load, for a period of one year or more.

1.10.4. Non-Firm Transmission Service Agreement provides for the Customer to request transmission service on a non-firm basis.

1.11. Service Request

The request made under a Transmission Service Agreement through the Southwest Power Pool, Inc. (hereinafter ''SPP'') Open Access Same-Time Information System (hereinafter ''OASIS'') for reservation of transmission capacity over a particular point-to-point delivery path for a particular period. The Customer must submit hourly schedules for actual service in addition to the Service Request.

1.12. System of Southwestern

The transmission and related facilities owned by Southwestern, and/or the generation, transmission, and related facilities owned by others, the capacity of which, by contract, is available to and utilized by Southwestern to satisfy its contractual obligations to the Customer.

1.13. Transmission Service Transaction

A Service Request that has been approved by SPP.

1.14. Uncontrollable Force

Any force which is not within the control of the party affected, including, but not limited to failure of water supply, failure of facilities, flood, earthquake, storm, lightning, fire, epidemic, riot, civil disturbance, labor disturbance, sabotage, war, act of war, terrorist acts or restraint by court of general jurisdiction, which by exercise of due diligence and foresight such party could not reasonably have been expected to avoid.

2. Wholesale Rates, Terms, and Conditions for Firm Point-to-Point Transmission Service, Non-Firm Point-to-Point Transmission Service, Network Integration Transmission Service, and Interconnection Facilities Service

2.1. Firm Point-to-Point Transmission Service Rates, Terms, and Conditions

2.1.1. Monthly Capacity Charge for Firm Point-to-Point Transmission Service

$1.48 per kilowatt of transmission capacity reserved in increments of one month of service or invoiced in accordance with a longer term agreement.

2.1.2. Weekly Capacity Charge for Firm Point-to-Point Transmission Service

$0.370 per kilowatt of transmission capacity reserved in increments of one week of service.

2.1.3. Daily Capacity Charge for Firm Point-to-Point Transmission Service

$0.0673 per kilowatt of transmission capacity reserved in increments of one day of service.

2.1.4. Services Associated With Capacity Charge for Firm Point-to-Point Transmission Service

The capacity charge for Firm Point-to-Point Transmission Service includes Secondary Transmission Service, but does not include charges for Ancillary Services associated with actual schedules.

2.1.5. Applicability of Capacity Charge for Firm Point-to-Point Transmission Service

Capacity charges for Firm Point-to-Point Transmission Service are applied to quantities reserved by contract under a Firm Transmission Service Agreement or in accordance with a Transmission Service Transaction.

A Customer, unless otherwise specified by contract, will be assessed capacity charges on the greatest of (1) the highest metered demand at any particular Point of Delivery during a particular month, rounded up to the nearest whole megawatt, or (2) the highest metered demand recorded at such Point of Delivery during any of the previous 11 months, rounded up to the nearest whole megawatt, or (3) the capacity reserved by contract; which amount shall be considered such Customer's reserved capacity. Secondary Transmission Service for such Customer shall be limited during any month to the most recent metered demand on which that Customer is billed or to the capacity reserved by contract, whichever is greater.

2.2. Non-Firm Point-to-Point Transmission Service Rates, Terms, and Conditions

2.2.1. Monthly Capacity Charge for Non-Firm Point-to-Point Transmission Service

80 percent of the monthly capacity charge for Firm Point-to-Point Transmission Service reserved in increments of one month.

2.2.2. Weekly Capacity Charge for Non-Firm Point-to-Point Transmission Service

80 percent of the monthly capacity charge divided by 4 for Firm Point-to-Point Transmission Service reserved in increments of one week.

2.2.3. Daily Capacity Charge for Non-Firm Point-to-Point Transmission Service

80 percent of the monthly capacity charge divided by 22 for Firm Point-to-Point Transmission Service reserved in increments of one day.

2.2.4. Hourly Capacity Charge for Non-Firm Point-to-Point Transmission Service

80 percent of the monthly capacity charge divided by 352 for Firm Point-to-Point Transmission Service reserved in increments of one hour.

2.2.5. Applicability of Charges for Non-Firm Point-to-Point Transmission Service

Capacity charges for Non-Firm Point-to-Point Transmission Service are applied to quantities reserved under a Transmission Service Transaction, and do not include charges for Ancillary Services.

2.3. Network Integration Transmission Service Rates, Terms, and Conditions

2.3.1. Annual Revenue Requirement for Network Integration Transmission Service

$15,533,800.

2.3.2. Monthly Revenue Requirement for Network Integration Transmission Service

$1,294,483.

2.3.3. Net Capacity Available for Network Integration Transmission Service

872,000 kilowatts.

2.3.4. Monthly Capacity Charge for Network Integration Transmission Service

$1.48 per kilowatt of Network Load (charge derived from $1,294,483 ÷ 872,000 kilowatts).

2.3.5. Applicability of Charges for Network Integration Transmission Service

Network Integration Transmission Service is available only for deliveries of non-Federal power and energy, and is applied to the Customer utilizing such service exclusive of any deliveries of Federal power and energy. The capacity on which charges for any particular Customer utilizing this service is determined on the greatest of (1) the highest metered demand at any particular point of

delivery during a particular month, rounded up to the nearest whole megawatt, or (2) the highest metered demand recorded at such point of delivery during any of the previous 11 months, rounded up to the nearest whole megawatt.

For a Customer taking Network Integration Transmission Service who is also taking delivery of Federal Power and Energy, the highest metered demand shall be determined by subtracting the energy scheduled for delivery of Federal Power and Energy for any hour from the metered demand for such hour.

Secondary transmission Service for a Customer shall be limited during any month to the most recent highest metered demand on which such Customer is billed. Charges for Ancillary Services shall also be assessed.

2.4. Interconnection Facilities Service Rates, Terms, and Conditions

2.4.1. Monthly Capacity Charge for Interconnection Facilities Service

$1.48 per kilowatt.

2.4.2. Applicability of Capacity Charge for Interconnection Facilities Service

Any Customer that requests an interconnection from Southwestern which, in Southwestern's sole judgment and at its sole option, does not provide commensurate benefits or compensation to Southwestern for the use of its facilities shall be assessed a capacity charge for Interconnection Facilities Service. For any month, charges for Interconnection Facilities Service shall be assessed on the greater of (1) that month's actual highest metered demand, or (2) the highest metered demand recorded during the previous eleven months, as metered at the interconnection. The use of Interconnection Facilities Service will be subject to power factor provisions as specified in this Rate Schedule. The interconnection customer shall also schedule and deliver Real Power Losses pursuant to the provisions of this Rate Schedule based on metered flow through the interconnection where Interconnection Facilities Services is assessed.

2.5. Transformation Service Rates, Terms, and Conditions

2.5.1. Monthly Capacity Charge for Transformation Service

$0.46 per kilowatt will be assessed for capacity used to deliver energy at any point of delivery at which Southwestern provides transformation service for deliveries at voltages of 69 kilovolts or less from higher voltage facilities.

2.5.2. Applicability of Capacity Charge for Transformation Service

Unless otherwise specified by contract, for any particular month, a charge for transformation service will be assessed on the greater of (1) that month's highest metered demand, or (2) the highest metered demand recorded during the previous 11 months, at any point of delivery. For the purpose of this Rate Schedule, the highest metered demand will be based on all deliveries, of both Federal and non-Federal energy, from the System of Southwestern, at such point during such month.

2.6. Ancillary Services Rates, Terms, and Conditions

2.6.1. Capacity Charges for Ancillary Services

2.6.1.1. Scheduling, System Control, and Dispatch Service

Monthly rate of $0.09 per kilowatt of transmission capacity reserved in increments of one month of service or invoiced in accordance with a Long-Term Firm Transmission Service Agreement or Network Transmission Service Agreement.

Weekly rate of $0.023 per kilowatt of transmission capacity reserved in increments of one week of service.

Daily rate of $0.0041 per kilowatt of transmission capacity reserved in increments of one day of service.

Hourly rate of $0.00026 per kilowatt of transmission energy delivered as non-firm transmission service.

2.6.1.2. Reactive Supply and Voltage Control From Generation Sources Service

Monthly rate of $0.04 per kilowatt of transmission capacity reserved in increments of one month of service or invoiced in accordance with a Long-Term Firm Transmission Service Agreement or Network Transmission Service Agreement.

Weekly rate of $0.010 per kilowatt of transmission capacity reserved in increments of one week of service.

Daily rate of $0.0018 per kilowatt of transmission capacity reserved in increments of one day of service.

Hourly rate of $0.00011 per kilowatt of transmission energy delivered as non-firm transmission service.

2.6.1.3. Regulation and Frequency Response Service

Monthly rate of $0.07 per kilowatt of transmission capacity reserved in increments of one month of service or invoiced in accordance with a Long-Term Firm Transmission Service Agreement or Network Transmission Service Agreement plus the Regulation Purchased Adder as defined in Section 2.6.5 of this Rate Schedule.

Weekly rate of $0.018 per kilowatt of transmission capacity reserved in increments of one week of service plus the Regulation Purchased Adder as defined in Section 2.6.5 of this Rate Schedule.

Daily rate of $0.0032 per kilowatt of transmission capacity reserved in increments of one day of service plus the Regulation Purchased Adder as defined in Section 2.6.5 of this Rate Schedule.

Hourly rate of $0.00020 per kilowatt of transmission energy delivered as non-firm transmission service plus the Regulation Purchased Adder as defined in Section 2.6.5 of this Rate Schedule.

2.6.1.4. Spinning Operating Reserve Service

Monthly rate of $0.0146 per kilowatt of transmission capacity reserved in increments of one month of service or invoiced in accordance with a Long-Term Firm Transmission Service Agreement or Network Transmission Service Agreement.

Weekly rate of $0.00365 per kilowatt of transmission capacity reserved in increments of one week of service.

Daily rate of $0.00066 per kilowatt of transmission capacity reserved in increments of one day of service.

Hourly rate of $0.00004 per kilowatt of transmission energy delivered as non-firm transmission service.

2.6.1.5. Supplemental Operating Reserve Service

Monthly rate of $0.0146 per kilowatt of transmission capacity reserved in increments of one month of service or invoiced in accordance with a Long-Term Firm Transmission Service Agreement or Network Transmission Service Agreement.

Weekly rate of $0.00365 per kilowatt of transmission capacity reserved in increments of one week of service.

Daily rate of $0.00066 per kilowatt of transmission capacity reserved in increments of one day of service.

Hourly rate of $0.00004 per kilowatt of transmission energy delivered as non-firm transmission service.

2.6.1.6. Energy Imbalance Service

$0.0 per kilowatt for all reservation periods.

2.6.2. Availability of Ancillary Services

Scheduling, System Control, and Dispatch Service and Reactive Supply and Voltage Control from Generation Sources Service are available for all transmission services in and from the System of Southwestern and shall be provided by Southwestern. Regulation and Frequency Response Service and Energy Imbalance Service are available only for deliveries of power and energy to load within Southwestern's Balancing Authority Area, and shall be provided by Southwestern, unless, subject to Southwestern's approval, they are provided by others. Spinning Operating Reserve Service and Supplemental Operating Reserve Service are available only for deliveries of power and energy generated by resources located within Southwestern's Balancing Authority Area and shall be provided by Southwestern, unless, subject to Southwestern's approval, they are provided by others.

2.6.3. Applicability of Charges for Ancillary Services

Charges for all Ancillary Services are applied to the transmission capacity reserved or network transmission service taken by the Customer in accordance with the rates listed above when such services are provided by Southwestern.

The charges for Ancillary Services are considered to include Ancillary Services for any Secondary Transmission Service, except in cases where Ancillary Services identified in Sections 2.6.1.3 through 2.6.1.6 of this Rate Schedule are applicable to a Transmission Service Transaction of Secondary Transmission Service, but are not applicable to the transmission capacity reserved under which Secondary Transmission Service is provided. When charges for Ancillary Services are applicable to Secondary Transmission Service, the charge for the Ancillary Service shall be the hourly rate applied to all energy transmitted utilizing the Secondary Transmission Service.

2.6.4. Provision of Ancillary Services by Others

Customers for which Ancillary Services identified in Sections 2.6.1.3 through 2.6.1.6 of this Rate Schedule are made available as specified above must inform Southwestern by written notice of the Ancillary Services which they do *not* intend to take and purchase from Southwestern, and of their election to provide all or part of such Ancillary Services from their own resources or from a third party. Such notice requirements also apply to requests for Southwestern to provide Ancillary Services when such services are available as specified above.

Subject to Southwestern's approval of the ability of such resources or third parties to meet Southwestern's technical and operational requirements for provision of such Ancillary Services, the Customer may change the Ancillary Services which it takes from Southwestern and/or from other sources at the beginning of any month upon the greater of 60 days written notice or upon the completion of any necessary equipment modifications necessary to accommodate such change; *Provided,* That, if the Customer chooses not to take Regulation and Frequency Response Service, which includes the associated Regulation Purchased Adder, the Customer must pursue these services from a different host Balancing Authority; thereby moving all metered loads and resources from Southwestern's Balancing Authority Area to the Balancing Authority Area of the new host Balancing Authority. Until such time as that meter reconfiguration is accomplished, the Customer will be charged for the Regulation and Frequency Response Service and applicable Adder then in effect. The Customer must notify Southwestern by July 1 of this choice, to be effective the subsequent calendar.

2.6.5. Regulation Purchased Adder

Southwestern has determined the amount of energy used from storage to provide Regulation and Frequency Response Service in order to meet Southwestern's Balancing Authority Area requirements. The replacement value of such energy used shall be recovered through the Regulation Purchased Adder. The Regulation Purchased Adder during the time period of January 1 through December 31 of the current calendar year is based on the average annual use of energy from storage [1] for Regulation and Frequency Response Service and Southwestern's estimated purchased power price for the corresponding year from the most currently approved Power Repayment Studies.

The Regulation Purchased Adder will be phased in over a period of four (4) years as follows:

Year	Regulation purchased adder for the incremental replacement value of energy used from storage
2014	¼ of the average annual use of energy from storage × 2014 Purchased Power price.
2015	½ of the average annual use of energy from storage × 2015 Purchased Power price.
2016	¾ of the average annual use of energy from storage × 2016 Purchased Power price.
2017 and thereafter	The total average annual use of energy from storage × the applicable Purchased Power price.

2.6.5.1. Applicability of Regulation Purchased Adder

The replacement value of the estimated annual use of energy from storage for Regulation and Frequency Response Service shall be recovered by Customers located within Southwestern's Balancing Authority Area on a non-coincident peak ratio share basis, divided into twelve equal monthly payments, in accordance with the formula in Section 2.4.5.2.

If the Regulation Purchased Adder is determined and applied under Southwestern's Rate Schedule NFTS–11, then it shall not be applied here.

2.6.5.2. Procedure for Determining Regulation Purchased Adder

Unless otherwise specified by contract, the Regulation Purchased Adder for an individual Customer shall be based on the following formula rate, calculated to include the replacement value of the estimated annual use of energy from storage by Southwestern for Regulation and Frequency Response Service.

RPA = The Regulation Purchased Adder for an individual Customer per month, which is as follows:

$$[(L_{Customer} \div L_{Total}) \times RP_{Total}] \div 12$$

with the factors defined as follows:

$L_{Customer}$ = The sum in MW of the following three factors:

(1) The Customer's highest metered load plus generation used to serve the Customer's load that is accounted for through a reduction in the Customer's metered load (referred to as 'generation behind the meter') during the previous calendar year, and

(2) The Customer's highest rate of Scheduled Exports[2] during the previous calendar year, and

(3) The Customer's highest rate of Scheduled Imports[2] during the previous calendar year.

L_{Total} = The sum of all $L_{Customer}$ factors for all Customers that were inside Southwestern's Balancing Authority Area at the beginning of the previous calendar year in MW.

RP_{Total} = The ''net'' cost in dollars and cents based on Southwestern's estimated purchased power price for the corresponding year from the most currently approved Power Repayment Studies multiplied by the average annual use of energy from storage, as provided for in the table in Section 2.4.5, to support Southwestern's ability to regulate within its Balancing Authority Area. The ''net'' cost in dollars and cents shall be adjusted by subtracting the product of the quantity of such average annual use of energy from storage in MWh and Southwestern's highest rate in dollars per MWh for Supplemental Peaking Energy during the previous calendar year.

For Customers that have aggregated their load, resources, and scheduling into a single node by contract within Southwestern's Balancing Authority Area, the individual Customer's respective Regulation Purchased Adder shall be that Customer's ratio share of the Regulation Purchased Adder established for the node. Such ratio share shall be determined for the Customer on a non-coincident basis and shall be calculated for the Customer from their highest metered load plus generation behind the meter.

2.6.6. Energy Imbalance Service Limitations

Energy Imbalance Service primarily applies to deliveries of power and energy which are required to satisfy a Customer's load. As Hydro Peaking Power and associated energy are limited by contract, the Energy Imbalance Service bandwidth specified for Non-Federal Transmission Service does not apply to deliveries of Hydro Peaking Power, and therefore Energy Imbalance Service is not charged on such deliveries. Customers who consume a capacity of Hydro Peaking Power greater than their Peaking Contract Demand may be subject to a Capacity Overrun Penalty.

Energy delivered or received within the authorized bandwidth for this service is accounted for as an inadvertent flow and will be netted against flows in the future. The inadvertent flow in any given hour will only be offset with the flows in the corresponding hour of a day in the same category. Unless otherwise specified by contract, the two categories of days are weekdays and weekend days/North American Electric Reliability Corporation holidays, and this process will result in a separate inadvertent accumulation for each hour of the two categories of days. The hourly accumulations in the current month will be added to the hourly inadvertent balances from the previous month, resulting in a month-end balance for each hour.

The Customer is required to adjust the scheduling of resources in such a way as to reduce the accumulation towards zero. It is recognized that the inadvertent hourly flows

[1] The average annual use of energy from storage for Regulation and Frequency Response Service is based on Southwestern studies.

[2] Scheduled Exports and Scheduled Imports are transactions, such as sales and purchases respectively, which are in addition to a Customer's metered load that contribute to Southwestern's Balancing Authority Area need for regulation.

can be both negative and positive, and that offsetting flows should deter a significant accumulation of inadvertent. Unless otherwise specified by contract, in the event any hourly month-end balance exceeds 12 MWhs, the excess will be subject to Section 3.1 or Section 3.2 of this Rate Schedule, depending on the direction of the accumulation.

3. Non-Federal Transmission/ Interconnection Facilities Service Penalties, Terms, and Conditions

3.1. Capacity Overrun Penalty

3.1.1. Penalty Charge for Capacity Overrun

For each hour during which energy flows outside the authorized bandwidth, the Customer will be obliged to purchase such energy at the following rates:

Months associated with charge	Rate per kilowatt
March, April, May, October, November, December	$0.15
January, February, June, July, August, September	0.30

3.1.2. Applicability of Capacity Overrun Penalty

Customers who receive deliveries within Southwestern's Balancing Authority Area are obligated to provide resources sufficient to meet their loads. Such obligation is not related to the amount of transmission capacity that such Customers may-have reserved for transmission service to a particular load. In the event that a Customer underschedules its resources to serve its load, resulting in a difference between resources and actual metered load (adjusted for transformer losses as applicable) outside the authorized bandwidth for Energy Imbalance Service for any hour, then such Customer is subject to the Capacity Overrun Penalty.

3.2. Unauthorized Use of Energy Imbalance Service by Overscheduling of Resources

In the event that a Customer schedules greater resources than are needed to serve its load, such that energy flows at rates beyond the authorized bandwidth for the use of Energy Imbalance Service, Southwestern retains such energy at no cost to Southwestern and with no obligation to return such energy.

3.3. Power Factor Penalty

3.3.1. Requirements Related to Power Factor

Any Customer served from facilities owned by or available by contract to Southwestern will be required to maintain a power factor of not less than 95 percent and will be subject to the following provisions.

3.3.2. Determination of Power Factor

The power factor will be determined for all Demand Periods and shall be calculated under the formula:

$$PF = (kWh) \div \sqrt{(kWh^2 + rkVAh^2)}$$

with the factors defined as follows:

PF = The power factor for any Demand Period of the month.

kWh = The total quantity of energy which is delivered during such Demand Period to the point of delivery or interconnection in accordance with Section 3.3.4.

rkVAh = The total quantity of reactive kilovolt-ampere-hours (kVARs) delivered during such Demand Period to the point of delivery or interconnection in accordance with Section 3.3.4.

3.3.3. Penalty Charge for Power Factor

The Customer shall be assessed a penalty for all Demand Periods of a month where the power factor is less than 95 percent lagging. For any Demand Period during a particular month such penalty shall be in accordance with the following formula:

$$C = D \times (0.95 - LPF) \times \$0.10$$

with the factors defined as follows:

C = The charge in dollars to be assessed for any particular Demand Period of such month that the determination of power factor ''PF'' is calculated to be less than 95 percent lagging.

D = The Customer's demand in kilowatts at the point of delivery for such Demand Period in which a low power factor was calculated.

LPF = The lagging power factor, if any, determined by the formula ''PF'' for such Demand Period.

If C is negative, then C = zero (0).

3.3.4. Applicability of Power Factor Penalty

The Power Factor Penalty is applicable to radial interconnections with the System of Southwestern. The total Power Factor Penalty for any month shall be the sum of all charges ''C'' for all Demand Periods of such month. No penalty is assessed for leading power factor. Southwestern, in its sole judgment and at its sole option, may determine whether power factor calculations should be applied to (i) a single physical point of delivery, (ii) a combination of physical points of delivery where a Customer has a single, electrically integrated load, (iii) or interconnections. The general criteria for such decision shall be that, given the configuration of the Customer's and Southwestern's systems, Southwestern will determine, in its sole judgment and at its sole option, whether the power factor calculation more accurately assesses the detrimental impact on Southwestern's system when the above formula is calculated for a single physical point of delivery, a combination of physical points of delivery, or for an interconnection as specified by an Interconnection Agreement.

Southwestern, at its sole option, may reduce or waive Power Factor Penalties when, in Southwestern's sole judgment, low power factor conditions were not detrimental to the System of Southwestern due to particular loading and voltage conditions at the time the power factor dropped below 95 percent lagging.

4. Non-Federal Transmission/ Interconnection Facilities Service Miscellaneous Rates, Terms, and Conditions

4.1. Real Power Losses

Customers are required to self-provide all Real Power Losses for non-Federal energy transmitted by Southwestern on behalf of such Customers under the provisions detailed below.

Real Power Losses are computed as four (4) percent of the total amount of non-Federal energy transmitted by Southwestern. The Customer's monthly Real Power Losses are computed each month on a megawatthour basis as follows:

$$ML = 0.04 \times NFE$$

with the factors defined as follows:

ML = The total monthly loss energy, rounded to the nearest megawatthour, to be scheduled by a Customer for receipt by Southwestern for Real Power Losses associated with non-Federal energy transmitted on behalf of such Customer; and

NFE = The amount of non-Federal energy that was transmitted by Southwestern on behalf of a Customer during a particular month.

The Customer must schedule or cause to be scheduled to Southwestern, Real Power Losses for which it is responsible subject to the following conditions:

4.1.1. The Customer shall schedule and deliver Real Power Losses back to Southwestern during the second month after they were incurred by Southwestern in the transmission of the Customer's non-Federal power and energy over the System of Southwestern unless such Customer has accounted for Real Power Losses as part of a metering arrangement with Southwestern.

4.1.2. On or before the twentieth day of each month, Southwestern shall determine the amount of non-Federal loss energy it provided on behalf of the Customer during the previous month and provide a written schedule to the Customer setting forth hour-by-hour the quantities of non-Federal energy to be delivered to Southwestern as losses during the next month.

4.1.3. Real Power Losses not delivered to Southwestern by the Customer, according to the schedule provided, during the month in which such losses are due shall be billed by Southwestern to the Customer to adjust the end-of-month loss energy balance to zero (0) megawatthours and the Customer shall be obliged to purchase such energy at the following rates:

Months associated with charge	Rate per kilowatthour
March, April, May, October, November, December	$0.15
January, February, June, July, August, September	0.30

4.1.4. Real Power Losses delivered to Southwestern by the Customer in excess of the losses due during the month shall be purchased by Southwestern from the Customer at a rate per megawatthour equal to Southwestern's rate per megawatthour for Supplemental Peaking Energy, as set forth in Southwestern's then-effective Rate Schedule for Hydro Peaking Power to adjust such hourly end-of-month loss energy balance to zero (0) megawatthours.

UNITED STATES DEPARTMENT OF ENERGY

SOUTHWESTERN POWER ADMINISTRATION

RATE SCHEDULE EE–13 [1]

WHOLESALE RATES FOR EXCESS ENERGY

Effective: During the period October 1, 2013, through September 30, 2017, in accordance with interim approval from Rate Order No. SWPA–66 issued by the Deputy Secretary of Energy on *September 30, 2013* and pursuant to final approval by the Federal Energy Regulatory Commission.

Available: In the marketing area of Southwestern Power Administration (Southwestern), described generally as the States of Arkansas, Kansas, Louisiana, Missouri, Oklahoma, and Texas.

Applicable: To electric utilities which, by contract, may purchase Excess Energy from Southwestern.

Character and Conditions of Service: Three-phase, alternating current, delivered at approximately 60 Hertz, at the nominal voltage(s) and at the point(s) of delivery specified by contract.

1. Wholesale Rates, Terms, and Conditions for Excess Energy

Excess Energy will be furnished at such times and in such amounts as Southwestern determines to be available.

1.1. Transmission and Related Ancillary Services

Transmission service for the delivery of Excess Energy shall be the sole responsibility of such customer purchasing Excess Energy.

1.2. Excess Energy Charge

$0.0094 per kilowatthour of Excess Energy delivered.

[FR Doc. 2013–24606 Filed 10–21–13; 8:45 am]

BILLING CODE 6450–01–P

[1] Supersedes Rate Schedule EE–11.

DEPARTMENT OF ENERGY

Southwestern Power Administration

Sam Rayburn Dam Rate

AGENCY: Southwestern Power Administration, DOE.

ACTION: Notice of Rate Order.

SUMMARY: The U.S. Department of Energy Deputy Secretary has approved and placed into effect on an interim basis Rate Order No. SWPA–67, which increases the power rate for the Sam Rayburn Dam (Rayburn) project pursuant to the Rayburn rate schedule (SRD–13) to supersede the existing rate schedule.

DATES: The effective period for the rate schedule specified in Rate Order No. SWPA–67 is October 1, 2013, through September 30, 2017.

FOR FURTHER INFORMATION CONTACT: Mr. James K. McDonald, Vice President for Corporate Operations/Chief Operating Officer, Southwestern Power Administration, U.S. Department of Energy, One West Third Street, Tulsa, Oklahoma 74103, (918) 595–6690 (office), (918) 595–6656 (fax), *jim.mcdonald@swpa.gov.*

SUPPLEMENTARY INFORMATION: Rate Order No. SWPA–67, which has been approved and placed into effect on an interim basis, increases the power rate for the Rayburn project pursuant to the following rate schedule:

Rate Schedule SRD–13, Wholesale Rates for Hydro Power and Energy Sold to Sam Rayburn Dam Electric Cooperative, Inc. (Contract No. DE–PM75–92SW00215)

The rate schedule supersedes the existing rate schedule shown below:

Rate Schedule SRD–08, Wholesale Rates for Hydro Power and Energy Sold to Sam Rayburn Dam Electric Cooperative, Inc. (Contract No. DE–PM75–92SW00215) (superseded by SRD–13)

Southwestern Power Administration's (Southwestern) Administrator has determined, based on the 2013 Rayburn Current Power Repayment Study, that existing rates will not satisfy cost recovery criteria specified in Department of Energy Order No. RA 6120.2 and Section 5 of the Flood Control Act of 1944. The finalized 2013 Rayburn Revised Power Repayment Studies (PRSs) indicate that an increase in annual revenue of $280,248, or 7.1 percent, beginning October 1, 2013, will satisfy cost recovery criteria for the Rayburn project. The proposed Rayburn rate schedule would increase annual revenues from $3,949,872 to $4,230,120, to recover increased U.S. Army Corps of Engineers' (Corps) investments and replacements in the hydroelectric generating facility and increased operations and maintenance costs.

The Administrator has followed Title 10, part 903 subpart A, of the Code of Federal Regulations, ''Procedures for Public Participation in Power and Transmission Rate Adjustments and Extensions'' in connection with the proposed rate schedule. On August 6, 2013, Southwestern published notice in the **Federal Register**, (78 FR 47695), of the proposed rate increase for the Rayburn project. Southwestern provided a 30-day comment period as an opportunity for customers and other interested members of the public to review and comment on the proposed rate increase. Southwestern did not hold the combined Public Information and Comment Forum (Forum) because Southwestern did not receive any requests to hold the Forum. One comment was received from Gillis, Borchardt and Barthel, LLP, on behalf of the Sam Rayburn Dam Electric Cooperative, Inc., which stated no objection to the proposed rate adjustment.

Information regarding this rate proposal, including studies and other supporting material, is available for public review and comment in the offices of Southwestern Power Administration, Williams Center Tower I, One West Third Street, Tulsa, Oklahoma 74103. Following review of Southwestern's proposal within the Department of Energy, I hereby approve Rate Order No. SWPA–67 which increases the existing Sam Rayburn Dam rate to $4,230,120 per year for the period October 1, 2013 through September 30, 2017. Rate Order No. SWPA–67 will be submitted to FERC for confirmation and approval on a final basis.

The Administrative Procedure Act requires that publication of a substantive rule be made not less than 30 days before its effective date, except, in relevant part, if the agency has good cause to waive the delay requirement (5 U.S.C. 553(d)). Southwestern finds good cause to waive the 30-day delay in effective date, placing the rates in effect on an interim basis starting October 1, 2013, because the current rate is insufficient to recover costs as required by statute; no change to the standard October 1 date of implementation is being made; and no comments were received and no revisions were made to the proposed rates.

Dated: September 30, 2013.

Daniel Poneman,

Deputy Secretary.

UNITED STATES OF AMERICA

DEPARTMENT OF ENERGY

DEPUTY SECRETARY OF ENERGY

In the matter of: Southwestern Power Administration Sam Rayburn Dam Project Rate Rate Order No. SWPA–67

ORDER CONFIRMING, APPROVING AND PLACING INCREASED POWER RATE SCHEDULE IN EFFECT ON AN INTERIM BASIS

Pursuant to Sections 302(a) and 301(b) of the Department of Energy Organization Act, Public Law 95–91, the functions of the Secretary of the Interior and the Federal Power Commission under Section 5 of the Flood Control Act of 1944, 16 U.S.C. 825s, relating to the Southwestern Power Administration (Southwestern) were transferred to and vested in the Secretary of Energy. By Delegation Order No. 00–037.00, the Secretary of Energy delegated to the Administrator of Southwestern the authority to develop power and transmission rates, delegated to the Deputy Secretary of the

Department of Energy the authority to confirm, approve, and place in effect such rates on an interim basis, and delegated to the Federal Energy Regulatory Commission (FERC) the authority to confirm and approve on a final basis or to disapprove rates developed by the Administrator under the delegation. Pursuant to delegated authority, the Deputy Secretary issued this interim rate order.

BACKGROUND

The Sam Rayburn Dam (Rayburn) is located on the Angelina River in the State of Texas in the Neches River Basin. Since the beginning of its operation in 1965, it has been marketed as an isolated project, under contract with Sam Rayburn Dam Electric Cooperative, Inc. (SRDEC) (Contract No. DE–PM75–92SW00215).

FERC confirmation and approval of the current Rayburn rate schedule was provided in FERC Docket No. EF09–4021–000 issued on March 30, 2009, (126 FERC ¶ 62224) effective for the period January 1, 2009, through September 30, 2012. The rate was extended by the Deputy Secretary of Energy for the period October 1, 2012 through September 30, 2013 (77 FR 67813, November 14, 2012), and FERC was notified of the extension (Docket No. EF13–2–000).

DISCUSSION

Southwestern prepared a 2013 Current Power Repayment Study (PRS) which indicated that the existing rate would not satisfy present financial criteria regarding repayment of investment within a 50-year period due to increased U.S. Army Corps of Engineers (Corps) investments, replacements and operations and maintenance expenses in the hydroelectric generating facilities. The Revised PRS indicated the need for a 7.1 percent revenue increase. These preliminary results, which presented the basis for the proposed revenue increase, were provided to the customers for their review prior to the formal process.

The final 2013 Revised PRS indicates that an increase in annual revenues of $280,248 (7.1 percent) is necessary beginning October 1, 2013, to accomplish repayment in the required number of years. Accordingly, Southwestern has prepared a proposed rate schedule based on the additional revenue requirement to ensure repayment.

Southwestern conducted the rate adjustment proceeding in accordance with Title 10, part 903, subpart A of the Code of Federal Regulations, ''Procedures for Public Participation in Power and Transmission Rate Adjustments and Extensions.'' More specifically, opportunities for public review and comment during a 30-day period on the proposed Rayburn power rate were announced by a **Federal Register** notice published on August 6, 2013 (78 FR 47695). The combined Public Information and Comment Forum tentatively scheduled for August 27, 2013, in Tulsa, Oklahoma was not held because Southwestern did not receive any requests to hold such a forum. Southwestern provided the **Federal Register** notice, together with any requested supporting data, to the customer and interested parties for review and comment during the public comment period.

Southwestern will continue to perform its Power Repayment Studies annually, and if the 2014 results should indicate the need for additional revenues, another rate filing will be conducted and updated revenue requirements implemented for FY 2014 and thereafter.

Following the conclusion of the comment period on September 5, 2013, Southwestern finalized the PRS and rate schedule for the proposed annual rate of $4,230,120 which is the lowest possible rate needed to satisfy repayment criteria. This rate represents an annual increase of 7.1 percent. The Administrator made the decision to submit the rate proposal for interim approval and implementation.

COMMENTS AND RESPONSES

Southwestern received one comment during the public comment period. That comment expressed no objection to the final proposed rate on behalf of the Sam Rayburn Dam Electric Cooperative, Inc.

AVAILABILITY OF INFORMATION

Information regarding this rate increase, including studies, comments and other supporting material, is available for public review and comment in the offices of Southwestern Power Administration, One West Third Street, Tulsa, OK 74103.

ADMINISTRATION'S CERTIFICATION

The 2013 Rayburn Revised PRS indicates that the increased power rate of $4,230,120 will repay all costs of the project including amortization of the power investment consistent with the provisions of Department of Energy Order No. RA 6120.2. In accordance with Delegation Order No. 00–037.00 (December 6, 2001), and Section 5 of the Flood Control Act of 1944, the Administrator has determined that the proposed Rayburn rate is consistent with applicable law and the lowest possible rate consistent with sound business principles.

ENVIRONMENT

The environmental impact of the rate increase proposal was evaluated in consideration of DOE's guidelines for implementing the procedural provisions of the National Environmental Policy Act and was determined to fall within the class of actions that are categorically excluded from the requirements of preparing either an Environmental Impact Statement or an Environmental Assessment.

ORDER

In view of the foregoing and pursuant to the authority delegated to me by the Secretary of Energy, I hereby confirm, approve and place in effect on an interim basis, effective October 1, 2013, through September 30, 2017, the annual Sam Rayburn Dam rate of $4,230,120 for the sale of power and energy from the Sam Rayburn Dam project to the Sam Rayburn Dam Electric Cooperative Inc., under Contract No. DE–PM75–92SW00215. This rate shall remain in effect on an interim basis through September 30, 2017, or until the FERC confirms and approves the rate on a final basis, or until it is superseded by a subsequent rate.

Dated: September 30, 2013

Daniel Poneman
Deputy Secretary

UNITED STATES DEPARTMENT OF ENERGY

SOUTHWESTERN POWER ADMINISTRATION

RATE SCHEDULE SRD–13 [1] WHOLESALE RATES FOR HYDRO POWER AND ENERGY SOLD TO SAM RAYBURN DAM ELECTRIC COOPERATIVE, INC. (CONTRACT NO. DE–PM75–92SW00215)

Effective:

During the period October 1, 2013, through September 30, 2017, in accordance with interim approval from Rate Order No. SWPA–67 issued by the Deputy Secretary of Energy on *September 30, 2013* and pursuant to final approval by the Federal Energy Regulatory Commission.

Applicable:

To the power and energy purchased by Sam Rayburn Dam Electric Cooperative, Inc., (SRDEC) from the Southwestern Power Administration (Southwestern) under the terms and conditions of the Power Sales Contract dated October 7, 1992, for the sale of all Hydro Power and Energy generated at the Sam Rayburn Dam.

Character and Conditions of Service:

Three-phase, alternating current, delivered at approximately 60 Hertz, at the nominal voltage, at the point of delivery, and in such quantities as are specified by contract.

1. Wholesale Rates, Terms, and Conditions for Hydro Power and Energy

1.1. These rates shall be applicable regardless of the quantity of Hydro Power and Energy available or delivered to SRDEC; *provided, however,* that if an Uncontrollable Force prevents utilization of both of the project's power generating units for an entire billing period, and if during such billing period water releases were being made which otherwise would have been used to generate Hydro Power and Energy, then Southwestern shall, upon request by SRDEC, suspend billing for subsequent billing periods, until such time as at least one of the project's generating units is again available.

1.2. The term ''Uncontrollable Force,'' as used herein, shall mean any force which is not within the control of the party affected, including, but not limited to, failure of water supply, failure of facilities, flood, earthquake, storm, lightning, fire, epidemic, riot, civil disturbance, labor disturbance, sabotage, war, acts of war, terrorist acts, or restraint by court of general jurisdiction, which by exercise of due diligence and foresight such party could not reasonably have been expected to avoid.

1.3. Hydro Power Rates, Terms, and Conditions

1.3.1. Monthly Charge for the Period of October 1, 2013 through September 30, 2017

$352,510 per month ($4,230,120 per year) for Sam Rayburn Dam Hydro Power and

[1] Supersedes Rate Schedule SRD–08

Energy purchased by SRDEC from October 1, 2013, through September 30, 2017.

[FR Doc. 2013–24601 Filed 10–21–13; 8:45 am]

BILLING CODE 6450–01–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OW–2005–0023; FRL—9901–73–OW]

Proposed Information Collection Request; Comment Request; Clean Water Act Section 404 State-Assumed Programs (Renewal)

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: The Environmental Protection Agency is planning to submit an information collection request (ICR), ''Clean Water Act Section 404 State-Assumed Programs'' (EPA ICR No. 0220.12, OMB Control No. 2040–0168) to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*). Before doing so, EPA is soliciting public comments on specific aspects of the proposed information collection as described below. This is a proposed extension of the ICR, which is currently approved through January 31, 2014. An Agency may not conduct or sponsor and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number.

DATES: Comments must be submitted on or before December 23, 2013.

ADDRESSES: Submit your comments, referencing Docket ID No. EPA–HQ–OW–2005–0023, online using *www.regulations.gov* (our preferred method), by email to *ow-docket@epa.gov*, or by mail to: EPA Docket Center, Environmental Protection Agency, Mail Code 28221T, 1200 Pennsylvania Ave. NW., Washington, DC 20460.

EPA's policy is that all comments received will be included in the public docket without change including any personal information provided, unless the comment includes profanity, threats, information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute.

FOR FURTHER INFORMATION CONTACT: Kathy Hurld, Office of Wetlands, Oceans, and Watersheds, Wetlands Division (4502T), Environmental Protection Agency, 1200 Pennsylvania Ave. NW., Washington, DC 20460; telephone: 202–566–1348; fax number: 202–566–1349; email address: *hurld.kathy@epa.gov*.

SUPPLEMENTARY INFORMATION:

Supporting documents which explain in detail the information that the EPA will be collecting are available in the public docket for this ICR. The docket can be viewed online at *www.regulations.gov* or in person at the EPA Docket Center, WJC West, Room 3334, 1301 Constitution Ave. NW., Washington, DC. The telephone number for the Docket Center is 202–566–1744. For additional information about EPA's public docket, visit *http://www.epa.gov/dockets*.

Pursuant to section 3506(c)(2)(A) of the PRA, EPA is soliciting comments and information to enable it to: (i) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the Agency, including whether the information will have practical utility; (ii) evaluate the accuracy of the Agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (iii) enhance the quality, utility, and clarity of the information to be collected; and (iv) 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. EPA will consider the comments received and amend the ICR as appropriate. The final ICR package will then be submitted to OMB for review and approval. At that time, EPA will issue another **Federal Register** notice to announce the submission of the ICR to OMB and the opportunity to submit additional comments to OMB.

Abstract: Section 404(g) of the Clean Water Act authorizes States [and Tribes] to assume the section 404 permit program for discharges of dredged or fill material into certain Waters of the U.S. This ICR covers the collection of information EPA needs to perform its program approval and oversight responsibilities and the State/Tribe needs to implement its program.

Request to assume CWA section 404 permit program. States/Tribes must demonstrate that they meet the statutory and regulatory requirements (40 CFR 233) for an approvable program. Specified information and documents must be submitted by the State/Tribe to EPA to request assumption and must be sufficient to enable EPA to undertake a thorough analysis of the State/Tribal program. Once the required information and documents are submitted and EPA has a complete assumption request package, the statutory time clock for EPA's decision to either approve or disapprove the State/Tribe's assumption request starts. The information contained in the assumption request submission is provided to the other involved Federal agencies (Corps of Engineers, US Fish and Wildlife Service, and National Marine Fisheries Service) and to the general public for review and comment.

States/Tribes with assumed programs must be able to issue permits that assure compliance with all applicable statutory and regulatory requirements, including the 404(b)(1) Guidelines. Sufficient information must be provided in the application so that States/Tribes, and Federal agencies reviewing the permit, are able to evaluate, avoid, minimize and compensate for any anticipated impacts resulting from the proposed project. EPA's assumption regulations establish required and recommended elements that should be included in the State/Tribe's permit application, so that sufficient information is available to make a thorough analysis of anticipated impacts. (40 CFR 233.30). These minimum information requirements generally reflect the information that must be submitted when applying for a section 404 permit from the Corps of Engineers. (CWA section 404(h); CWA section 404(j); 40 CFR 230.10, 233.20, 233.21, 233.34, and 233.50; 33 CFR 325).

EPA has an oversight role for assumed 404 permitting programs to ensure that State/Tribal programs are in compliance with applicable requirements and that State/Tribal permit decisions adequately consider, avoid, minimize and compensate for anticipated impacts. States/Tribes must evaluate their programs annually and submit the results in a report to EPA. EPA's assumption regulations establish minimum requirements for the annual report (40 CFR 233.52).

The information included in the State/Tribe's assumption request and the information included in a permit application is made available for public review and comment. The information included in the annual report to EPA is made available to the public. EPA does not make any assurances of confidentiality for this information.

Form numbers: None.

Respondents/affected entities: Entities potentially affected by this action are those States/Tribes requesting assumption of the Clean Water Act section 404 permit program; States/

Tribes with approved assumed programs; and permit applicants in States/Tribes with assumed programs.

Respondent's obligation to respond: Required to obtain or retain a benefit (40 CFR 233)

Estimated number of respondents: 2 States/Tribes to request program assumption; 20,000 permit applicants; and 4 States/Tribes which have assumed the program.

Frequency of response: States/Tribes will respond one time to request assumption and once the program is approved they will respond annually for the annual permit and annual report; permit applicants will respond one time when requesting a permit.

Total estimated burden: The public reporting and recordkeeping burden for this collection of information is estimated to be 101,360 hours per year. Burden is defined at 5 CFR 1320.3(b).

Total estimated cost: Costs to states for assumed Section 404 permit programs will vary widely by state and permit, however there are $0 capital or operation & maintenance costs.

Changes in Estimates: There is no change in hours in the total estimated respondent burden compared with the ICR currently approved by OMB.

Dated: September 27, 2013.

Benita Best-Wong,

Acting Director, Office of Wetlands, Oceans, and Watersheds.

[FR Doc. 2013–24693 Filed 10–21–13; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OECA–2013–0318; FRL–9901–50–OEI]

Information Collection Request Submitted to OMB for Review and Approval; Comment Request; NSPS for Magnetic Tape Coating Facilities (Renewal)

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: The Environmental Protection Agency has submitted an information collection request (ICR), ''NSPS for Magnetic Tape Coating Facilities (40 CFR part 60, subpart SSS) (Renewal)'' (EPA ICR No. 1135.11, OMB Control No. 2060–0171), to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act (44 U.S.C. 3501 *et seq*). This is a proposed extension of the ICR, which is currently approved through November 30, 2013. Public comments were previously requested via the **Federal Register** (78 *FR* 33409) on June 4, 2013, during a 60-day comment period. This notice allows for an additional 30 days for public comments. A fuller description of the ICR is given below, including its estimated burden and cost to the public. An Agency may not conduct or sponsor and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number.

DATES: Additional comments may be submitted on or before November 21, 2013.

ADDRESSES: Submit your comments, referencing Docket ID Number EPA–HQ–OECA–2013–0318, to: (1) EPA online using *www.regulations.gov* (our preferred method), by email to *docket.oeca@epa.gov,* or by mail to: EPA Docket Center, Environmental Protection Agency, Mail Code 28221T, 1200 Pennsylvania Ave. NW., Washington, DC 20460; and (2) OMB via email to *oira_submission@omb.eop.gov*. Address comments to OMB Desk Officer for EPA.

EPA's policy is that all comments received will be included in the public docket without change including any personal information provided, unless the comment includes profanity, threats, information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute.

FOR FURTHER INFORMATION CONTACT: Learia Williams, Monitoring, Assistance, and Media Programs Division, Office of Compliance, Mail Code 2227A, Environmental Protection Agency, 1200 Pennsylvania Ave. NW., Washington, DC 20460; telephone number: (202) 564–4113; fax number: (202) 564–0050; email address: *williams.learia@epa.gov*.

SUPPLEMENTARY INFORMATION: Supporting documents which explain in detail the information that the EPA will be collecting are available in the public docket for this ICR. The docket can be viewed online at *www.regulations.gov* or in person at the EPA Docket Center, WJC West, Room 3334, 1301 Constitution Ave. NW., Washington, DC. The telephone number for the Docket Center is 202–566–1744. For additional information about EPA's public docket, visit: *http://www.epa.gov/dockets.*

Abstract: The NSPS for the Magnetic Tape Coating Facilities (40 CFR part 60, subpart SSS) were: Proposed on January 22, 1986; promulgated on October 3, 1988; and last amended on February 12, 1999. The affected entities are subject to the General Provisions of the NSPS at 40 CFR part 60, subpart A and any changes, or additions to the Provisions specified at 40 CFR part 60, subpart SSS. Owners or operators of the affected facilities must make an initial notification, performance tests, periodic reports, and maintain records of the occurrence and duration of any startup, shutdown, or malfunction in the operation of an affected facility, or any period during which the monitoring system is inoperative. Reports are required semiannually at a minimum.

Form Numbers: None.

Respondents/affected entities: Magnetic tape coating facilities.

Respondent's obligation to respond: Mandatory (40 CFR part 60, subpart SSS).

Estimated number of respondents: 6 (total).

Frequency of response: Initially, occasionally, quarterly, and semiannually.

Total estimated burden: 2,017 hours (per year). ''Burden'' is defined at 5 CFR 1320.3(b).

Total estimated cost: $283,727 (per year), includes $86,400 annualized capital or operation & maintenance costs.

Changes in the estimates: There is no change in labor hours in this ICR compared to the previous ICR. This is due to two considerations: (1) The regulations have not changed over the past three years and are not anticipated to change over the next three years; and (2) the growth rate for the industry is very low, negative or non-existent, so there is no significant change in the overall burden. However, there is an adjustment increase in both the respondent and Agency burden costs due to an increase in labor rates.

Richard T. Westlund,

Acting Director, Collection Strategies Division.

[FR Doc. 2013–24575 Filed 10–21–13; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[FRL–9901–70-Region 4; CERCLA–04–2013–3765]

Vantran Electric Corporation Site, Louisville, Jefferson County, GA; Notice of Settlement

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of Settlement.

SUMMARY: Under 122(h) of the Comprehensive Environmental

Response, Compensation and Liability Act (CERCLA), the United States Environmental Protection Agency has entered into a settlement with the Vantran Electric Corporation addressing past costs concerning the Vantran Electric Corporation Site located in Louisville, Jefferson County, Georgia. The settlement addresses costs from a fund-lead Removal Action taken by EPA at the Site.

DATES: The Agency will consider public comments on the settlement until November 21, 2013. The Agency will consider all comments received and may modify or withdraw its consent to the settlement if comments received disclose facts or considerations which indicate that the settlement is inappropriate, improper, or inadequate.

ADDRESSES: Copies of the settlement are available from the Agency by contacting Ms. Paula V. Painter, Environmental Protection Specialist using the contact information provided in this notice. Comments may also be submitted by referencing the Site's name through one of the following methods:

- *Internet: www.epa.gov/region4/superfund/programs/enforcement/enforcement.html.*
- *U.S. Mail:* U.S. Environmental Protection Agency, Superfund Division, Attn: Paula V. Painter, 61 Forsyth Street SW., Atlanta, Georgia 30303.
- *Email: Painter.Paula@epa.gov.*

FOR FURTHER INFORMATION CONTACT: Paula V. Painter at 404/562–8887

Dated: September 12, 2013.

Anita L. Davis,

Chief, Superfund Enforcement & Information Management Branch, Superfund Division.

[FR Doc. 2013–24691 Filed 10–21–13; 8:45 am]

BILLING CODE 6560–50–P

FEDERAL DEPOSIT INSURANCE CORPORATION

Agency Information Collection Activities: Revision of a Currently-Approved Collection; Comment Request

AGENCY: Federal Deposit Insurance Corporation (FDIC).

ACTION: Notice and request for comment.

SUMMARY: In accordance with requirements of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 et seq.), the FDIC may not conduct or sponsor, and the respondent is not required to respond to, an information collection unless it displays a currently valid Office of Management and Budget (OMB) control number. As part of its continuing effort to reduce paperwork and respondent burden, the FDIC invites the general public and other Federal agencies to take this opportunity to comment on revision of an existing information collection, as required by the Paperwork Reduction Act of 1995 (44 U.S.C. chapter 35). The FDIC is seeking public comment on proposed revisions to its ''Forms Related to Processing Deposit Insurance Claims'' information collection (OMB No. 3064–0143). At the end of the comment period, any comments and recommendations received will be analyzed to determine the extent to which the FDIC should modify the proposed revisions prior to submission to OMB for review and approval.

DATES: Comments must be submitted on or before December 23, 2013.

ADDRESSES: Interested parties are invited to submit written comments. All comments should refer to the name of the collection. Comments may be submitted by any of the following methods:

- *http://www.FDIC.gov/regulations/laws/federal/propose.html.*
- *Email: comments@fdic.gov.*
- *Mail:* Gary Kuiper (202.898.3877), Counsel, Federal Deposit Insurance Corporation, 550 17th Street NW., NYA–5046, Washington, DC 20429.
- *Hand Delivery:* Comments may be hand-delivered to the guard station at the rear of the 550 17th Street Building (located on F Street), on business days between 7:00 a.m. and 5:00 p.m.

A copy of the comments may also be submitted to the FDIC Desk Officer, Office of Information and Regulatory Affairs, Office of Management and Budget, New Executive Office Building, Room 10235, Washington, DC 20503.

FOR FURTHER INFORMATION CONTACT: For further information about the revisions discussed in this notice, please contact Gary Kuiper, by telephone at 202.898.3877 or by mail at the address identified above. In addition, a link to copies of the revised and new forms is available directly beneath this notice on the FDIC's *Web site (http://www.fdic.gov/regulations/laws/federal/notices.html).*

SUPPLEMENTARY INFORMATION: The FDIC is proposing to revise three of the forms in the collection: Declaration for Combined Contribution Plan (7200/10), Declaration for Defined Benefit Plan (7200/12), and Declaration for Health and Welfare Plan (7200/14); make minor clarifying changes to 10 of the forms in the collection: Declaration for Government Deposit (7200/04), Declaration for Revocable Living Trust (7200/05), Declaration of Independent Activity (7200/06), Declaration of Independent Activity for Unincorporated Association (7200/07), Declaration of Joint Ownership Deposit (7200/08), Declaration of Testamentary Deposit (7200/09), Declaration of IRA Keogh Deposit (7200/11), Declaration of Custodian Deposit (7200/13), Declaration for Plan and Trust (7200/15), and Declaration for Irrevocable Trust (7200/18); and add two new forms to the collection: Claimant Verification Form (7200/24) and Depositor Interview Form (7200/26).

Title: Forms Related to Processing of Deposit Insurance Claims.

Forms Currently in Use:

Declaration for Public Unit Deposit, Form 7200/04

Declaration for Trust, Form 7200/05

Declaration of Independent Activity, Form 7200/06

Declaration of Independent Activity for Unincorporated Association, Form 7200/07

Declaration for Joint Ownership Deposit, Form 7200/08

Declaration for Testamentary Deposit (Multiple Grantors), Form 7200/09

Declaration for Defined Contribution Plan, Form 7200/10

Declaration for IRA/KEOGH Deposit, Form 7200/11

Declaration for Defined Benefit Plan, Form 7200/12

Declaration of Custodian Deposit, Form 7200/13

Declaration for Health and Welfare Plan, Form 7200/14

Declaration for Plan and Trust, Form 7200/15

Declaration for Irrevocable Trust, Form 7200/18.

ESTIMATED NUMBER OF RESPONDENTS AND BURDEN HOURS

FDIC document	Hours per response	Number of respondents	Burden hours
Declaration for Public Unit Deposit, Form 7200/04	0.50	500	250
Declaration for Trust, Form 7200/05	0.50	900	450
Declaration of Independent Activity, Form 7200/06	0.50	25	12.5

ESTIMATED NUMBER OF RESPONDENTS AND BURDEN HOURS—Continued

FDIC document	Hours per response	Number of respondents	Burden hours
Declaration of Independent Activity for Unincorporated Association, Form 7200/07	0.50	25	12.5
Declaration for Joint Ownership Deposit, Form 7200/08	0.50	25	12.5
Declaration for Testamentary Deposit, Form 7200/09	0.50	1,500	750
Declaration for Defined Contribution Plan, Form 7200/10	1.0	50	50
Declaration for IRA/KEOGH Deposit, Form 7200/11	0.50	50	25
Declaration for Defined Benefit Plan, Form 7200/12	1.0	200	200
Declaration of Custodian Deposit, Form 7200/13	0.50	50	25
Declaration for Health and Welfare Plan, Form 7200/14	1.0	200	200
Declaration for Plan and Trust, Form 7200/15	0.50	1,300	650
Declaration for Irrevocable Trust, Form 7200/18	0.50	200	100
Subtotal		5,095	2,875
Additional Burden for Deposit Brokers Only		211	137
New Forms To Be Added:			
Claimant Verification Form, Form 7200/24	0.50	700	350
Depositor Interview Form, Form 7200/26	0.50	75	37.5
Subtotal		1,100	570
Total		6,406	3,582

General Description of Collection: The collection involves forms used by the FDIC to obtain information from individual depositors and deposit brokers necessary to supplement the records of failed depository institutions to make determinations regarding deposit insurance coverage for depositors of failed institutions. The information provided allows the FDIC to identify the actual owners of an account and each owner's interest in the account.

Current Action: The FDIC is proposing modifications, which may be considered substantive and material, to the following forms: 7200/10, Declaration for Combined Contribution Plan; 7200/12, Declaration for Defined Benefit Plan; and 7200/14, Declaration for Health and Welfare Plan. The content of the forms was revised to reflect current deposit insurance rules and regulations; to focus on the collection of information required for an insurance determination; and to incorporate applicable Code of Federal Regulations (both FDIC and non-FDIC) citations. The FDIC also proposes modifications, which may be considered non-substantive and nonmaterial, to the following forms: 7200/04, Declaration for Government Deposit; 7200/05, Declaration for Revocable Living Trust; 7200/06, Declaration of Independent Activity; 7200/07, Declaration of Independent Activity for Unincorporated Association; 7200/08, Declaration of Joint Ownership Deposit; 7200/09, Declaration of Testamentary Deposit; 7200/11, Declaration of IRA Keogh Deposit; 7200/13, Declaration of Custodian Deposit; 7200/15, Declaration for Plan and Trust; and 7200/18, Declaration for Irrevocable Trust. Finally, the FDIC proposes to add two new forms: 7200/24, Claimant Verification Form, 7200/24, and Depositor Interview Form, 7200/06. The purpose of the new forms is to facilitate collection of specific information that the FDIC will need in calculating insurance coverage after a bank failure.

Request for Comment

Comments are invited on: (a) Whether these collections of information are necessary for the proper performance of the FDIC's functions, including whether the information has practical utility; (b) the accuracy of the estimate of the burden of the information collection, including the validity of the methodology and assumptions used; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the information collection on respondents, including through the use of automated collection techniques or other forms of information technology. All comments will become a matter of public record.

Dated at Washington, DC, this 17th day of October 2013.

Federal Deposit Insurance Corporation.

Robert E. Feldman,

Executive Secretary.

[FR Doc. 2013–24603 Filed 10–21–13; 8:45 am]

BILLING CODE 6714–01–P

FEDERAL DEPOSIT INSURANCE CORPORATION

Agency Information Collection Activities; Proposed Collection Renewal; Comment Request Re: Guidance on Sound Incentive Compensation Practices

AGENCY: Federal Deposit Insurance Corporation (FDIC).

ACTION: Notice and request for comment.

SUMMARY: In accordance with the requirements of the Paperwork Reduction Act (PRA) of 1995 (44 U.S.C. chapter 35), the FDIC may not conduct or sponsor, and the respondent is not required to respond to, an information collection unless it displays a currently valid Office of Management and Budget (OMB) control number. The FDIC hereby gives notice that it is seeking comment on renewal of its information collection, entitled *Guidance on Sound Incentive Compensation Practices* (OMB No. 3064–0175). At the end of the comment period, any comments and recommendations received will be analyzed to determine the extent to which the collections should be modified prior to submission to OMB for review and approval.

DATES: Comments must be submitted on or before December 23, 2013.

ADDRESSES: Interested parties are invited to submit written comments to the FDIC by any of the following methods:

- *http://www.FDIC.gov/regulations/laws/federal/notices.html.*

• *Email: comments@fdic.gov* Include the name of the collection in the subject line of the message.

• *Mail:* Leneta G. Gregorie (202–898–3719), Counsel, Room NYA–5050, Federal Deposit Insurance Corporation, 550 17th Street NW., Washington, DC 20429.

• *Hand Delivery:* Comments may be hand-delivered to the guard station at the rear of the 17th Street Building (located on F Street), on business days between 7:00 a.m. and 5:00 p.m.

All comments should refer to the relevant OMB control number. A copy of the comments may also be submitted to the OMB desk officer for the FDIC: Office of Information and Regulatory Affairs, Office of Management and Budget, New Executive Office Building, Washington, DC 20503.

FOR FURTHER INFORMATION CONTACT: Leneta Gregorie, at the FDIC address above.

SUPPLEMENTARY INFORMATION: Proposal to renew the following currently approved collections of information:

Title: Guidance on Sound Incentive Compensation Practices.

OMB Number: 3064–0175.

Frequency of Response: Implementation—once; maintenance—annual.

Affected Public: Insured state nonmember banks.

Estimated Number of Respondents: 4890 (20 large banks, 4870 small banks).

Estimated Time per Response: Implementation—80 hours, small banks and; 480 hours, large banks; maintenance—40 hours, all banks.

Total Annual Burden: 594,800 hours (one-time implementation—399,200 hours; ongoing maintenance—195,600).

General Description of Collection: The Guidance on Sound Incentive Compensation Practices helps ensure that incentive compensation policies at insured state non-member banks do not encourage excessive risk-taking and are consistent with the safety and soundness of the organization. Under the Guidance, banks are required to: (i) Have policies and procedures that identify and describe the role(s) of the personnel and units authorized to be involved in incentive compensation arrangements, identify the source of significant risk-related inputs, establish appropriate controls governing these inputs to help ensure their integrity, and identify the individual(s) and unit(s) whose approval is necessary for the establishment or modification of incentive compensation arrangements; (ii) create and maintain sufficient documentation to permit an audit of the organization's processes for incentive compensation arrangements; (iii) have any material exceptions or adjustments to the incentive compensation arrangements established for senior executives approved and documented by its board of directors; and (iv) have its board of directors receive and review, on an annual or more frequent basis operation of the organization's incentive compensation system in providing risk-taking incentives that are consistent with the organization's safety and soundness.

Request for Comment

Comments are invited on: (a) Whether the collection of information is necessary for the proper performance of the FDIC's functions, including whether the information has practical utility; (b) the accuracy of the estimates of the burden of the information collection, including the validity of the methodology and assumptions used; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the information collection on respondents, including through the use of automated collection techniques or other forms of information technology. All comments will become a matter of public record.

Dated at Washington, DC, this 10th day of October 2013.

Federal Deposit Insurance Corporation.

Robert E. Feldman,

Executive Secretary.

[FR Doc. 2013–24533 Filed 10–21–13; 8:45 am]

BILLING CODE P

FEDERAL DEPOSIT INSURANCE CORPORATION

Designated Reserve Ratio for 2014

AGENCY: Federal Deposit Insurance Corporation (FDIC).

ACTION: Notice of Designated Reserve Ratio for 2014.

Pursuant to the Federal Deposit Insurance Act, the Board of Directors of the Federal Deposit Insurance Corporation designates that the Designated Reserve Ratio (DRR) for the Deposit Insurance Fund shall remain at 2 percent for 2014.[1] The Board is publishing this notice as required by section 7(b)(3)(A)(i) of the Federal Deposit Insurance Act (12 U.S.C. 1817(b)(3)(A)(i)).

FOR FURTHER INFORMATION CONTACT: Munsell St. Clair, Chief, Banking and Regulatory Policy Section, Division of Insurance and Research, (202) 898–8967; or, Christopher Bellotto, Counsel, Legal Division, (202) 898–3801.

Dated at Washington, DC, this 8th day of October 2013.

By order of the Board of Directors.

Robert E. Feldman,

Executive Secretary.

[FR Doc. 2013–24531 Filed 10–21–13; 8:45 am]

BILLING CODE 6714–01–P

[1] Section 327.4(g) of the FDIC's regulations sets forth the DRR. There is no need to amend this provision, because the DRR for 2014 is the same as the current DRR.

FEDERAL RESERVE SYSTEM

Change in Bank Control Notices; Formations of, Acquisitions by, and Mergers of Bank Holding Companies; Correction

This notice corrects a notice (FR Doc. 2013–24477) published on page 62333 of the issue for Thursday, October 17, 2013.

Under the Federal Reserve Bank of Minneapolis heading, the entry for Karen Neidhardt, Tampa, Florida, is revised to read as follows:

A Federal Reserve Bank of Minneapolis (Jacqueline G. King, Community Affairs Officer) 90 Hennepin Avenue, Minneapolis, Minnesota 55480–0291:

1. *Karen Neidhardt,* Tampa, Florida, individually and as trustee, to retain voting shares and thereby control Jorgenson Holding Company, Inc., and thereby indirectly retain voting shares and control State Bank and Trust of Kenmare, both in Kenmare, North Dakota, and The Citizens State Bank at Mohall, Mohall, North Dakota.

In addition, Ann Lenore Musser Irrevocable Trust, Kenmare, North Dakota, Karen Neidhardt and Jane Neidhardt Farris, co-trustees, and Jane Ellen Neidhardt Irrevocable Trust, all of Kenmare, North Dakota, Karen Neidhardt and Ann N. Musser, co-trustees, to retain voting shares of Jorgenson Holding Company and thereby join the Jorgenson family group.

Comments on this application must be received by October 31. 2013.

Board of Governors of the Federal Reserve System, October 17, 2013.

Margaret McCloskey Shanks,

Deputy Secretary of the Board.

[FR Doc. 2013–24619 Filed 10–21–13; 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 November 15, 2013.

A. Federal Reserve Bank of San Francisco (Gerald C. Tsai, Director, Applications and Enforcement) 101 Market Street, San Francisco, California 94105–1579:

1. *TFB Bancorp, Inc.,* Yuma, Arizona; to become a bank holding company by acquiring 100 percent of the voting shares of The Foothills Bank, Yuma, Arizona.

Board of Governors of the Federal Reserve System, October 17, 2013.

Margaret McCloskey Shanks,

Deputy Secretary of the Board.

[FR Doc. 2013–24617 Filed 10–21–13; 8:45 am]

BILLING CODE 6210–01–P

FEDERAL RESERVE SYSTEM

Formations of, Acquisitions by, and Mergers of Savings and Loan Holding Companies

The companies listed in this notice have applied to the Board for approval, pursuant to the Home Owners' Loan Act (12 U.S.C. 1461 *et seq.*) (HOLA), Regulation LL (12 CFR part 238), and Regulation MM (12 CFR part 239), and all other applicable statutes and regulations to become a savings and loan holding company and/or to acquire the assets or the ownership of, control of, or the power to vote shares of a savings association and nonbanking companies owned by the savings and loan 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 application also will 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 HOLA (12 U.S.C. 1467a(e)). 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 10(c)(4)(B) of the HOLA (12 U.S.C. 1467a(c)(4)(B)). 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 November 15, 2013.

A. Federal Reserve Bank of Dallas (E. Ann Worthy, Vice President) 2200 North Pearl Street, Dallas, Texas 75201–2272:

1. *Grant Scott as Trustee of the Voting Trust Agreement dated as of December 6, 2012,* Raleigh, North Carolina; to become a savings and loan holding company through controlling NexBank Capital, Inc., and thereby indirectly acquiring voting shares of NexBank, State Savings Bank, both in Dallas, Texas.

Board of Governors of the Federal Reserve System, October 17, 2013.

Margaret McCloskey Shanks,

Deputy Secretary of the Board.

[FR Doc. 2013–24618 Filed 10–21–13; 8:45 am]

BILLING CODE 6210–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Meeting of the National Biodefense Science Board

AGENCY: Office of the Secretary, Department of Health and Human Services.

ACTION: Notice.

SUMMARY: As stipulated by the Federal Advisory Committee Act, the U.S. Department of Health and Human Services (HHS) is hereby giving notice that the National Biodefense Science Board (NBSB) will be holding a public meeting via teleconference. The meeting is open to the public.

DATES: The NBSB will hold a public meeting on October 31, 2013, tentatively, from 3:00 p.m. to 4:00 p.m. ET. The agenda is subject to change as priorities dictate.

ADDRESSES: Individuals who wish to participate should send an email to *NBSB@HHS.GOV* with ''NBSB Registration'' in the subject line. The meeting will occur by teleconference. To attend via teleconference and for further instructions, please visit the NBSB Web site at *WWW.PHE.GOV/NBSB.*

FOR FURTHER INFORMATION CONTACT: The National Biodefense Science Board mailbox: *NBSB@HHS.GOV.*

SUPPLEMENTARY INFORMATION: Pursuant to section 319M of the Public Health Service Act (*42 U.S.C. 247d–7f*) and section 222 of the Public Health Service Act (*42 U.S.C. 217a*), the Department of Health and Human Services established the National Biodefense Science Board. The NBSB shall provide expert advice and guidance to the Secretary on scientific, technical, and other matters of special interest to HHS regarding current and future chemical, biological, nuclear, and radiological agents, whether naturally occurring, accidental, or deliberate. The NBSB may also provide advice and guidance to the Secretary and/or the Assistant Secretary for Preparedness and Response (ASPR) on other matters related to public health emergency preparedness and response.

Background: This public meeting via teleconference will be dedicated to the NBSB's deliberation and vote on the findings from the NBSB's Situational Awareness Working Group, and the NBSB's National Health Security Working Group. Subsequent agenda topics will be added as priorities dictate. Any additional agenda topics will be available on the NBSB's October 31, 2013, meeting Web page, available at *WWW.PHE.GOV/NBSB.*

Availability of Materials: The meeting agenda and materials will be posted prior to the meeting on the October meeting Web page at *WWW.PHE.GOV/NBSB.*

Procedures for Providing Public Input: Members of the public are invited to attend by teleconference via a toll-free call-in phone number which is available on the NBSB Web site at *WWW.PHE.GOV/NBSB.* All members of the public are encouraged to provide written comment to the NBSB. All written comments must be received prior to October 31, 2013, and should be sent by email to *NBSB@HHS.GOV* with ''NBSB Public Comment'' as the subject

line. Public comments received by close of business one week prior to each teleconference will be distributed to the NBSB in advance.

Dated: September 30, 2013.

Nicole Lurie,

Assistant Secretary for Preparedness and Response.

[FR Doc. 2013–24620 Filed 10–21–13; 8:45 am]

BILLING CODE 4150–28–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

Subcommittee on Procedures Review, Advisory Board on Radiation and Worker Health (ABRWH), National Institute for Occupational Safety and Health (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 subcommittee:

Time and Date: 11:00 a.m.–5:00 p.m. Eastern Time, November 7, 2013.

Place: Audio Conference Call via FTS Conferencing. The USA toll-free, dial-in number is 1 (866) 659–0537 and the pass code is 9933701.

Status: Open to the public, but without a public comment period. The instructions for the submission of written comments are provided in the section entitled ''MATTERS TO BE DISCUSSED.'' To access by conference call dial the following information 1 (866) 659–0537, Participant Pass Code 9933701.

Background: The ABRWH was established under the Energy Employees Occupational Illness Compensation Program Act of 2000 to advise the President on a variety of policy and technical functions required to implement and effectively manage the compensation program. Key functions of the ABRWH include providing advice on the development of probability of causation guidelines that have been promulgated by the Department of Health and Human Services (HHS) as a final rule; advice on methods of dose reconstruction which have also been promulgated by HHS as a final rule; advice on the scientific validity and quality of dose estimation and reconstruction efforts being performed for purposes of the compensation program; and advice on petitions to add classes of workers to the Special Exposure Cohort (SEC).

In December 2000, the President delegated responsibility for funding, staffing, and operating the ABRWH to HHS, which subsequently delegated this authority to CDC. NIOSH implements this responsibility for CDC. The charter was issued on August 3, 2001, renewed at appropriate intervals, and will expire on August 3, 2015.

Purpose: The ABRWH is charged with (a) providing advice to the Secretary, HHS, on the development of guidelines under Executive Order 13179; (b) providing advice to the Secretary, HHS, on the scientific validity and quality of dose reconstruction efforts performed for this program; and (c) upon request by the Secretary, HHS, advising the Secretary on whether there is a class of employees at any Department of Energy facility who were exposed to radiation but for whom it is not feasible to estimate their radiation dose, and on whether there is a reasonable likelihood that such radiation doses may have endangered the health of members of this class. The Subcommittee on Procedures Review was established to aid the ABRWH in carrying out its duty to advise the Secretary, HHS, on dose reconstructions. The Subcommittee on Procedures Review is responsible for overseeing, tracking, and participating in the reviews of all procedures used in the dose reconstruction process by the NIOSH Division of Compensation Analysis and Support (DCAS) and its dose reconstruction contractor (Oak Ridge Associated Universities—ORAU).

Matters To Be Discussed: The agenda for the Subcommittee meeting includes discussion of the following ORAU and DCAS procedures: ORAU Team Technical Information Bulletin (OTIB) 054 (''Fission and Activation Product Assignment for Internal Dose-Related Gross Beta and Gross Gamma Analyses''), Program Evaluation Report (PER) 011 (''K–25 TBD and TIB Revisions''), PER 014 (''Construction Trades Workers''), PER 020 (''Blockson TBD Revision''), PER 25 (''Huntington Pilot Plant TBD Revision''), PER 030 (''Savannah River Site TBD Revisions''), PER 031 (''Y–12 TBD Revisions''), PER 033 (''Reduction Pilot Plant TBD Revision''), PER 038 (''Hooker Electrochemical TBD Revisions''); Update on Review of ORAU Team Report 0053 (''Stratified Co-Worker Sets); estimating radiation doses associated with localized skin exposures to uranium at Atomic Weapons Employer facilities; International Commission on Radiological Protection Publication 116 (''Conversion Coefficients for Radiological Protection Quantities for External Radiation Exposures''); and a continuation of the comment-resolution process for other dose reconstruction procedures under review by the Subcommittee.

The agenda is subject to change as priorities dictate.

This meeting is open to the public, but without a public comment period. In the event an individual wishes to provide comments, written comments may be submitted. Any written comments received will be provided at the meeting and should be submitted to the contact person below in advance of the meeting.

Contact Person for More Information: Theodore Katz, Designated Federal Official, NIOSH, CDC, 1600 Clifton Road, Mailstop E–20, Atlanta GA 30333, Telephone (513) 533–6800, Toll Free 1 (800) CDC–INFO, Email *dcas@cdc.gov.*

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.

[FR Doc. 2013–24339 Filed 10–21–13; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

Advisory Committee to the Director (ACD), Centers for Disease Control and Prevention—Health Disparities Subcommittee (HDS)

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 of the aforementioned subcommittee:

Time and Date: 9:00 a.m.–3:15 p.m. EDT, October 28, 2013.

Place: CDC, Building 21, Room 1204A, 1600 Clifton Road NE., Atlanta, Georgia 30333.

Status: Open to the public, limited only by the space available. The meeting room accommodates approximately 20 people. The public is welcome to participate during the public comment, which is tentatively scheduled from 3:00 to 3:10 p.m. This meeting is also available by teleconference. Please dial (877) 496–4855 and enter code 4363556.

Purpose: The Subcommittee will provide advice to the CDC Director through the ACD on strategic and other health disparities and health equity issues and provide guidance on opportunities for CDC.

Matters To Be Discussed: The Health Disparities Subcommittee members will discuss some of the current health equity activities at CDC, as well as discuss health equity recommendations to the CDC ACD.

The agenda is subject to change as priorities dictate.

Web links: Connection-1: *http://wm.onlinevideoservice.com/CDC1.*

Mac/Flash Connection-3: *http://www.onlinevideoservice.com/clients/CDC/?mount=CDC3.*

Closed Caption is only available on the Windows Media link Connection-1. Viewer's report is given the next day. Number for Technical Support: (404) 639–3737.

Contact Person for More Information: Leandris Liburd, Ph.D., M.P.H., M.A., Designated Federal Officer, Health Disparities Subcommittee, Advisory Committee to the Director, CDC, 1600 Clifton Road NE., M/S K–77, Atlanta, Georgia 30333 Telephone (770) 488–8200, Email: *LEL1@cdc.gov.*

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. 2013–24338 Filed 10–21–13; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

Healthcare Infection Control Practices Advisory Committee (HICPAC)

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) announce the following meeting for the aforementioned committee:

Times and Dates: 9:00 a.m.–5:00 p.m., November 6, 2013; 9:00 a.m.–12:00 p.m., November 7, 2013.

Place: Centers for Disease Control and Prevention, Global Communications Center, Building 19, Auditorium B3, 1600 Clifton Road NE., Atlanta, Georgia 30333.

Status: Open to the public, limited only by the space available. Please register for the meeting at *www.cdc.gov/hicpac.*

Purpose: The Committee is charged with providing advice and guidance to the Director, Division of Healthcare Quality Promotion, the Director, National Center for Emerging and Zoonotic Infectious Diseases (NCEZID), the Director, CDC, the Secretary, Health and Human Services regarding (1) the practice of healthcare infection prevention and control; (2) strategies for surveillance, prevention, and control of infections, antimicrobial resistance, and related events in settings where healthcare is provided; and (3) periodic updating of CDC guidelines and other policy statements regarding prevention of healthcare-associated infections and healthcare-related conditions.

Matters To Be Discussed: The agenda will include updates on CDC and Division of Healthcare Quality Promotion's (DHQP's) activities for prevention and surveillance of healthcare associated infections (HAI) and antimicrobial resistance, and developing a process to define core infection prevention and control methods. Also to be discussed is the development of guidance for CDC guideline recommendations that are categorized as ''unresolved''.

Agenda items are subject to change as priorities dictate.

Contact Person for More Information: Erin Stone, M.S., HICPAC, Division of Healthcare Quality Promotion, NCEZID, CDC, l600 Clifton Road NE., Mailstop A–07, Atlanta, Georgia 30333. Telephone (404) 639–4045. Email: *hicpac@cdc.gov.*

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.

[FR Doc. 2013–24341 Filed 10–21–13; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

Disease, Disability, and Injury Prevention and Control Special Emphasis Panel (SEP): Initial Review

The meeting announced below concerns Cooperative Agreement on Occupational Health with the World Health Organization (WHO): Implementing World Health Assembly Resolution 60.26 Global Plan of Action for Workers Health 2008–2017; RFA OH14–002.

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 aforementioned meeting:

Time and Date: 1:00 p.m.–4:00 p.m., December 10, 2013 (Closed).

Place: Teleconference.

Status: The meeting will be closed to the public in accordance with provisions set forth in Section 552b(c)(4) and (6), Title 5 U.S.C., and the Determination of the Director, Management Analysis and Services Office, CDC, pursuant to Public Law 92–463.

Matters To Be Discussed: The meeting will include the initial review, discussion, and evaluation of applications received in response to Cooperative Agreement on Occupational Health with the World Health Organization (WHO): Implementing World Health Assembly Resolution 60.26 Global Plan of Action for Workers Health 2008–2017; RFA OH14–002.

Contact Person for More Information: Nina Turner, Ph.D., Scientific Review Officer, CDC, National Institute for Occupational Safety and Health, 1095 Willowdale Road, Morgantown, West Virginia 26506, Telephone: (304) 285–5976.

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.

[FR Doc. 2013–24340 Filed 10–21–13; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Medicare & Medicaid Services

[Document Identifiers: CMS–10486]

Agency Information Collection Activities: Submission for OMB Review; Comment Request

ACTION: Notice.

SUMMARY: The Centers for Medicare & Medicaid Services (CMS) is announcing an opportunity for the public to comment on CMS' intention to collect information from the public. Under the Paperwork Reduction Act of 1995 (PRA), federal agencies are required to publish notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension or reinstatement of an existing collection of information, and to allow a second opportunity for public comment on the notice. Interested persons are invited to send comments regarding the burden estimate or any other aspect of this collection of information, including 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 on the collection(s) of information must be received by the OMB desk officer by *November 21, 2013.*

ADDRESSES: When commenting on the proposed information collections, please reference the document identifier or OMB control number. To be assured consideration, comments and recommendations must be received by the OMB desk officer via one of the following transmissions: OMB, Office of Information and Regulatory Affairs, Attention: CMS Desk Officer, Fax Number: (202) 395–6974 or Email: *OIRA_submission@omb.eop.gov.*

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: Under the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3501–3520), federal Agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. The term ''collection of information'' is defined in 44 U.S.C. 3502(3) and 5 CFR 1320.3(c) and includes agency requests or requirements that members of the public submit reports, keep records, or provide information to a third party. Section 3506(c)(2)(A) of the PRA (44 U.S.C. 3506(c)(2)(A)) requires federal agencies to publish a 30-day notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension or reinstatement of an existing collection of information, before submitting the collection to OMB for approval. To comply with this requirement, CMS is publishing this notice that summarizes the following proposed collection(s) of information for public comment:

1. *Type of Information Collection Request:* New collection; *Title of Information Collection:* Health Care Sharing Ministries Information Collection; *Use:* In order to facilitate the provision of an exemption for membership in a health care sharing ministry to the members of such ministry, we specify in Sec. 155.615(c)(2) that an organization that believes that it meets the statutory standards to be considered a health care sharing ministry will submit certain information to HHS. We are aware of four organizations that have made public statements regarding their status as a health care sharing ministry, and so have estimated burden for four entities. The burden associated with this process includes the time for the organization to collect and input the necessary information, maintain a copy for recordkeeping by clerical staff, for a manager and legal counsel to review it and for a senior executive to review and sign it. The information would be submitted to CMS electronically at minimal cost. *Form Number:* CMS–10486 (OCN: 0938–NEW); *Frequency:* Once, Yearly; *Affected Public:* Private sector—Not-for-profit institutions; *Number of Respondents:* 4; *Total Annual Responses:* 4; *Total Annual Hours:* 4.25. (For policy questions regarding this collection contact Zach Baron at 301–492–4478.)

Dated: September 30, 2013.

Martique Jones,

Deputy Director, Regulations Development Group, Office of Strategic Operations and Regulatory Affairs.

[FR Doc. 2013–24320 Filed 10–21–13; 8:45 am]

BILLING CODE 4120–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Administration for Children and Families

Proposed Information Collection Activity; Comment Request

Title: Personal Responsibility Education Program (PREP) Multi-Component Evaluation—Data Collection Related to the Design and Implementation Study.

OMB No.: 0970–0398.

Description: The Office of Data Analysis, Research, and Evaluation (HHS/ACF/ACYF/ODARE) in the Administration for Children, Youth and Families (ACYF) and the Office of Planning, Research, and Evaluation (HHS/ACF/OPRE) in the Administration for Children and Families (ACF) propose a data collection activity as part of the Personal Responsibility Education Program (PREP) Multi-Component Evaluation.

The goals of the PREP Multi-Component Evaluation are to document how PREP programs are designed and implemented in the field, collect performance measure data for PREP programs, and assess the effectiveness of selected PREP-funded programs.

The PREP Multi-Component Evaluation contains three components: The ''Design and Implementation Study,'' the ''Performance Analysis Study,'' and the ''Impact and In-Depth Implementation Study.'' Previously approved data collection efforts for each of the three components can be found on *reginfo.gov.* This notice is specific to data collection activities for the implementation portion of the Design and Implementation Study.

The goals of this portion of the study are to document how States and sub-awardees actually implemented their PREP programs, given their program designs. In order to meet this goal, both State PREP Administrators and a selection of sub-awardee program providers, across the nation, will be interviewed. The interviews will be used to understand important aspects of implementation, such as training, technical assistance and program fidelity monitoring.

Respondents: State PREP Administrators; Program Providers

Instrument	Total number of respondents	Annual number of respondents	Number of responses per respondent	Average burden hours per response	Estimated annual burden hours
Design and Implementation Study: Implementation Survey					
State PREP Administrator survey	45	15	1	1	15
Program Provider (Sub-awardee) survey	50	17	1	1	17
Total					32

In compliance with the requirements of Section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995, the Administration for Children and Families is soliciting public comment on the specific aspects of the information collection described above. Copies of the proposed collection of information can be obtained and comments may be forwarded by writing to the Administration for Children and Families, Office of Planning, Research and Evaluation, 370 L'Enfant Promenade SW., Washington, DC 20447, Attn: OPRE Reports Clearance Officer. Email address: *OPREinfocollection@acf.hhs.gov.* All requests should be

identified by the title of the information collection.

The Department specifically requests comments on (a) whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the proposed collection of information; (c) the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology. Consideration will be given to comments and suggestions submitted within 60 days of this publication.

Robert Sargis,

Reports Clearance Officer, Administration for Children and Families.

[FR Doc. 2013–24578 Filed 10–21–13; 8:45 am]

BILLING CODE 4184–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Administration for Children and Families

Agency Recordkeeping/Reporting Requirements Under Emergency Review by the Office of Management and Budget (OMB)

Title: Low Income Home Energy Assistance Program (LIHEAP) Grantee Needs Assessment.

OMB No.: New Collection.

Description: This information collection is a direct response to recommendations for strengthening LIHEAP program integrity made by the Government Accountability Office in 2010 and the LIHEAP Program Integrity Work Group. The purpose of this data collection is to gauge the capacity of LIHEAP grantees to perform two critical tasks:

1. To implement third-party verification of household data obtained during the LIHEAP intake process, in order to strengthen program integrity by reducing the risk of making LIHEAP benefit payments to ineligible households or in the wrong amount. These risks arise in large part when there are errors or fraud in the reporting of household members' identity and income during the LIHEAP intake process.

2. To collect and report new performance measures that ACF is proposing to require of all State LIHEAP grantees by Fiscal Year 2015.

This needs assessment represents a maturity model—a process for determining the existing capabilities of grantees. Through a web-based tool, respondents will be asked to indicate the level of maturity, or sophistication, of their program across multiple areas of evaluation. The data collected will be analyzed to identify strengths and weaknesses among grantees and determine opportunities for improvement. This needs assessment is designed to identify and organize the systems, processes and activities that are critical to each grantee's LIHEAP program.

The needs assessment is broken up into multiple sections. Each section is focused on a different part of the overall program, and as such may be best answered by an individual with expertise in that specific area of the program. Burden estimates shown below represent the total time to complete all sections by all relevant parties.

The data that will be obtained through this needs assessment is a one-time collection to inform ACF in its operational decision-making over how to distribute training and technical assistance, and other capacity building resources to its directly-funded LIHEAP grantees. The data will be for internal use by ACF and its contractors for this internal purpose only. Currently, there is very limited data available on a national scale to provide program administrators and stakeholders information on the impact of LIHEAP services and the effectiveness of how the program is administered. The data that will be collected through this needs assessment will inform ACF as to how to help LIHEAP grantees improve the timeliness and accuracy of their data collection and reporting which will in turn provide better feedback to ACF and national stakeholders about the program's performance.

Respondents: The respondents to this one-time needs assessment will be all 51 State LIHEAP grantees, including the District of Columbia, and the Commonwealth of Puerto Rico.

Instrument	Number of respondents	Number of responses per respondent	Average burden hours per response	Total burden hours
Grantee Needs Assessment	52	1	1 hr. 40 min.	86 hours 40 minutes.

Estimated Total Annual Burden Hours: 86 hours 40 minutes.

Additional Information: ACF is requesting that OMB grant a 180 day approval for this information collection under procedures for emergency processing by October 28, 2013. A copy of this information collection, with applicable supporting documentation, may be obtained by calling the Administration for Children and Families, Reports Clearance Officer, Robert Sargis at (202) 690–7275.

Comments and questions about the information collection described above should be directed to the Office of Information and Regulatory Affairs, Attn: OMB Desk Officer for ACF, Office of Management and Budget, Paperwork Reduction Project, 725 17th Street NW., Washington, DC 20503; FAX: (202) 395–7285; email: *oira_submission@omb.eop.gov.*

Robert Sargis,

Reports Clearance Officer.

[FR Doc. 2013–24579 Filed 10–21–13; 8:45 am]

BILLING CODE 4184–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute on Minority Health and Health Disparities; 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 contract proposals and the discussions could disclose

confidential trade secrets or commercial property such as patentable materials, and personal information concerning individuals associated with the contract proposals, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute on Minority Health and Health Disparities Special Emphasis Panel; NIMHD Technologies for Improving Minority Health and Eliminating Health Disparities (R41/R42).

Date: November 8, 2013.

Time: 8:00 a.m. to 5:00 p.m.

Agenda: To review and evaluate contract proposals.

Place: National Institute on Minority Health and Health Disparities, 6707 Democracy Blvd., Suite 800, Bethesda, MD 20892.

Contact Person: Hui Chen, M.D., Scientific Review Officer, National Institute on Minority Health and Health Disparities, 6707 Democracy Blvd., Suite 800, Bethesda, MD 20892, (301) 594–7784, *chenhui@mail.nih.gov.*

Name of Committee: National Institute on Minority Health and Health Disparities Special Emphasis Panel; NIMHD Conference Grant Review (R13).

Date: November 22, 2013.

Time: 8:00 a.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institute on Minority Health and Health Disparities, 6707 Democracy Blvd., Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Hui Chen, M.D., Scientific Review Officer, National Institute on Minority Health and Health Disparities, 6707 Democracy Blvd., Suite 800, Bethesda, MD 20892, (301) 594–7784, *chenhui@mail.nih.gov.*

Dated: September 30, 2013.

David Clary,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2013–24293 Filed 10–21–13; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Eye Institute; 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 Eye Institute Special Emphasis Panel; NEI Clinical and Cooperative Agreement Grant Applications.

Date: November 6, 2013.

Time: 8:00 a.m. to 4:00 p.m.

Agenda: To review and evaluate grant applications.

Place: Hilton Garden Inn, 7301 Waverly Street, Bethesda, MD 20814.

Contact Person: Brian Hoshaw, Ph.D., Scientific Review Officer, National Eye Institute, National Institutes of Health, Division of Extramural Research, 5635 Fishers Lane, Suite 1300, Rockville, MD 20892, 301–451–2020, *hoshawb@mail.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.867, Vision Research, National Institutes of Health, HHS)

Dated: September 30, 2013.

Melanie Gray,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2013–24292 Filed 10–21–13; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Diabetes and Digestive and Kidney Diseases; Notice of Closed 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: National Institute of Diabetes and Digestive and Kidney Diseases Special Emphasis Panel; Diabetic Nephropathy Ancillary Studies.

Date: December 6, 2013.

Time: 2:00 p.m. to 3:30 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Two Democracy Plaza, 6707 Democracy Boulevard, Bethesda, MD 20892, (Telephone Conference Call).

Contact Person: Michele L. Barnard, Ph.D., Scientific Review Officer, Review Branch, DEA, NIDDK, National Institutes of Health, Room 753, 6707 Democracy Boulevard, Bethesda, MD 20892–2542, (301) 594–8898, *barnardm@extra.niddk.nih.gov.*

Name of Committee: National Institute of Diabetes and Digestive and Kidney Diseases Special Emphasis Panel; T2 Diabetes Ancillary Study.

Date: December 16, 2013.

Time: 2:00 p.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Two Democracy Plaza, 6707 Democracy Boulevard, Bethesda, MD 20892, (Telephone Conference Call).

Contact Person: Robert Wellner, Ph.D., Scientific Review Officer, Review Branch, DEA, NIDDK, National Institutes of Health, Room 706, 6707 Democracy Boulevard, Bethesda, MD 20892–5452, 301–594–4721, *rw175w@nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.847, Diabetes, Endocrinology and Metabolic Research; 93.848, Digestive Diseases and Nutrition Research; 93.849, Kidney Diseases, Urology and Hematology Research, National Institutes of Health, HHS)

Dated: September 30, 2013.

David Clary,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2013–24294 Filed 10–21–13; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute on Aging; Notice of Closed 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: National Institute on Aging Special Emphasis Panel; Comparing Genomes of Aged.

Date: October 28, 2013.

Time: 12:00 p.m. to 4:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institute on Aging, Gateway Building, Suite 2C212, 7201

Wisconsin Avenue, Bethesda, MD 20892, (Telephone Conference Call).

Contact Person: Bita Nakhai, Ph.D., Scientific Review Branch, National Institute on Aging, Gateway Bldg., 2c212, 7201 Wisconsin Avenue, Bethesda, MD 20814, 301–402–7701, *nakhaib@nia.nih.gov.*

Name of Committee: National Institute on Aging Special Emphasis Panel; Alzheimer's Disease Research Centers.

Date: October 30–31, 2013.

Time: 8:00 a.m. to 4:00 p.m.

Agenda: To review and evaluate grant applications.

Place: The Bolger Center, 9600 Newbridge Drive, Potomac, MD 20854.

Contact Person: William Cruce, Ph.D., Scientific Review Officer, National Institute on Aging, Scientific Review Branch, Gateway Building 2c212, 7201 Wisconsin Ave., Bethesda, MD 20814, 301–402–7704, *crucew@nia.nih.gov.*

Name of Committee: National Institute on Aging Special Emphasis Panel; Long Life Family Studies.

Date: November 13, 2013.

Time: 12:00 p.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institute on Aging, Gateway Building, Suite 2C212, 7201 Wisconsin Avenue, Bethesda, MD 20892, (Telephone Conference Call).

Contact Person: Alicja L. Markowska, Ph.D., DSC, Scientific Review Branch, National Institute on Aging, 7201 Wisconsin Avenue, Suite 2c212, Bethesda, MD 20892, 301–496–9666, *markowsa@nia.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.866, Aging Research, National Institutes of Health, HHS)

Dated: September 30, 2013.

Melanie J. Gray,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2013–24290 Filed 10–21–13; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Eye Institute; 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 Eye Institute Special Emphasis Panel; NEI Bioinformatics, Genetics and Genetic Epidemiology Grant Applications.

Date: November 4, 2013.

Time: 8:30 a.m. to 2:00 p.m.

Agenda: To review and evaluate grant applications.

Place: Hilton Washington/Rockville, 1750 Rockville Pike, Rockville, MD 20852.

Contact Person: Anne E. Schaffner, Ph.D., Chief, Scientific Review Branch, Division of Extramural Research, National Eye Institute, 5635 Fishers Lane, Suite 1300, MSC 9300, Bethesda, MD 20892–9300, (301) 451–2020, *aes@nei.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.867, Vision Research, National Institutes of Health, HHS)

Dated: September 30, 2013.

Melanie Gray,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2013–24291 Filed 10–21–13; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Office of the Director, National Institutes of Health; 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: Office of Research Infrastructure Programs Special Emphasis Panel; Texas Biomed P51 SEP.

Date: November 7, 2013.

Time: 8:00 a.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: Hilton Washington/Rockville, 1750 Rockville Pike, Rockville, MD 20852, (Virtual Meeting).

Contact Person: Sheri A. Hild, Ph.D., Scientific Review Officer, Office of Grants Management and Scientific Review, National Center for Advancing Translational Sciences (NCATS), National Institutes of Health, 6701 Democracy Blvd., Democracy 1, Room 1082, Bethesda, MD 20892–4874, 301–435–0811, *hildsa@mail.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.14, Intramural Research Training Award; 93.22, Clinical Research Loan Repayment Program for Individuals from Disadvantaged Backgrounds; 93.232, Loan Repayment Program for Research Generally; 93.39, Academic Research Enhancement Award; 93.936, NIH Acquired Immunodeficiency Syndrome Research Loan Repayment Program; 93.187, Undergraduate Scholarship Program for Individuals from Disadvantaged Backgrounds, National Institutes of Health, HHS)

Dated: September 30, 2013.

David Clary,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2013–24288 Filed 10–21–13; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Allergy and Infectious Diseases; Notice of Closed 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: National Institute of Allergy and Infectious Diseases Special Emphasis Panel; Drug Target Development and Validation for Antimicrobial Resistant Pathogens (R21/R33).

Date: October 31–November 1, 2013.

Time: 8:00 a.m. to 5:30 p.m.

Agenda: To review and evaluate grant applications.

Place: Sheraton Silver Spring Hotel, 8777 Georgia Avenue, Silver Spring, MD 20910.

Contact Person: Susana Mendez, Ph.D., DVM, Scientific Review Officer, Scientific Review Program, DEA/NIAID/NIH/DHHS, 6700B Rockledge Drive, MSC–7616, Bethesda, MD 20892–7616, 301–496–2550, *mendezs@niaid.nih.gov.*

Name of Committee: National Institute of Allergy and Infectious Diseases Special Emphasis Panel; Drug Target Development and Validation for Antimicrobial Resistant Pathogens (R21/R33).

Date: November 4–5, 2013.

Time: 8:00 a.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: Sheraton Silver Spring Hotel, 8777 Georgia Avenue, Silver Spring, MD 20910.

Contact Person: Susana Mendez, Ph.D., DVM, Scientific Review Officer, Scientific Review Program, DEA/NIAID/NIH/DHHS, 6700B Rockledge Drive, MSC–7616, Bethesda, MD 20892–7616, 301–496–2550, *mendezs@niaid.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.855, Allergy, Immunology, and Transplantation Research; 93.856, Microbiology and Infectious Diseases Research, National Institutes of Health, HHS)

Dated: September 30, 2013.

David Clary,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2013–24296 Filed 10–21–13; 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; Small Business Grant Applications: Immunology.

Date: October 31–November 1, 2013.

Time: 8:00 a.m. to 1:00 p.m.

Agenda: To review and evaluate grant applications.

Place: One Washington Circle Hotel, One Washington Circle, Washington, DC 20037.

Contact Person: Stephen M. Nigida, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4212, MSC 7812, Bethesda, MD 20892, 301–435–1222, *nigidas@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel; Small Business: Biological Chemistry, Biophysics and Drug Discovery.

Date: November 1, 2013.

Time: 8:30 a.m. to 6:00 p.m.

Agenda: To review and evaluate grant applications.

Place: The Westin St. Francis, 335 Powell Street, San Francisco, CA 94102.

Contact Person: Vonda K Smith, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 6188, MSC 7892, Bethesda, MD 20892, 301–435–1789, *smithvo@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel; PAR–10–260: Global Infectious Disease Research Training Program.

Date: November 1, 2013.

Time: 10:00 a.m. to 4:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892.

Contact Person: Kenneth M Izumi, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge, Room 3204, MSC 7808, Bethesda, MD 20892, 301–496–6980, *izumikm@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel; PAR11–304: Development of Appropriate Pediatric Formulations.

Date: November 1, 2013.

Time: 2:00 p.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: Embassy Suites Chevy Chase Pavilion, 4300 Military Road NW., Washington, DC 20015.

Contact Person: Yuan Luo, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5207, MSC 7846, Bethesda, MD 20892, 301–915–6303, *luoy2@mail.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.306, Comparative Medicine; 93.333, Clinical Research, 93.306, 93.333, 93.337, 93.393–93.396, 93.837–93.844, 93.846–93.878, 93.892, 93.893, National Institutes of Health, HHS)

Dated: September 30, 2013.

Melanie J. Gray,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2013–24298 Filed 10–21–13; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Substance Abuse and Mental Health Services Administration

Fiscal Year (FY) 2013 Funding Opportunity

AGENCY: Substance Abuse and Mental Health Services Administration, HHS.

ACTION: Notice of intent to award a Single Source Grant to Link2Health Solutions, Inc.

SUMMARY: This notice is to inform the public that the Substance Abuse and Mental Health Services Administration (SAMHSA) intends to award approximately $2,100,000 (total costs) for the HHS Programs for Disaster Relief Appropriations Act—Non Construction—SAMHSA Disaster Distress Helpline (DDH—Hurricane Sandy) for up to two years to Link2Health Solutions, Inc., the current grantee for the National Suicide Prevention Lifeline. This is not a formal request for applications. Assistance will be provided only to Link2Health Solutions, Inc. based on the receipt of a satisfactory application that is approved by an objective review group.

Funding Opportunity Title: SM–13–011.

Catalogue of Federal Domestic Assistance (CFDA) No.: 93.095.

Authority: The Disaster Relief Appropriations Act of 2013 (Pub. L. 113–2).

Justification: Only an application from Link2Health Solutions will be considered for funding under this announcement. Two-year funding has become available to implement a Disaster Distress Helpline to respond to urgent and emerging behavioral health needs for states directly affected by Hurricane Sandy. It is considered most cost-effective and efficient to award these funds to the existing grantee for the National Suicide Prevention Lifeline and to build on the existing capacity and infrastructure within its network of crisis centers.

Link2Health Solutions is in the unique position to carry out the activities of this grant announcement because it is the current recipient of SAMHSA's cooperative agreement to manage the National Suicide Prevention Lifeline. As such, Link2Health Solutions has been maintaining the network communications system and has an existing relationship with the networked crisis centers.

The purpose of this funding is for the implementation of the Disaster Distress Helpline—Hurricane Sandy, which provides access to trained crisis support professionals, 24 hours a day, 7 days a week (24/7), in response to urgent and emerging behavioral health needs for the areas in Connecticut, Delaware, Maryland, Massachusetts, New Hampshire, New Jersey, New York, Ohio, Pennsylvania, Rhode Island, Virginia, West Virginia, and the District of Columbia, that were directly affected by Hurricane Sandy. The DDH—Hurricane Sandy will utilize one contracted crisis center, from the Suicide Prevention Lifeline network, in the impacted region. Additionally, one back-up center will be funded to support the DDH—Hurricane Sandy.

Contact: Cathy Friedman, Substance Abuse and Mental Health Services

Administration, 1 Choke Cherry Road, Room 8–1097, Rockville, MD 20857; telephone: (240) 276–2316; Email: *Cathy.Friedman@samhsa.hhs.gov*.

Cathy J. Friedman,

Public Health Analyst, SAMHSA.

[FR Doc. 2013–24611 Filed 10–21–13; 8:45 am]

BILLING CODE 4162–20–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Docket ID FEMA–2013–0018; OMB No. 1660–0061]

Agency Information Collection Activities: Submission for OMB Review; Comment Request; Federal Assistance to Individuals and Households Program (IHP)

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice.

SUMMARY: The Federal Emergency Management Agency (FEMA) is submitting a request for review and approval of a collection of information under the emergency processing procedures in Office of Management and Budget (OMB) regulation 5 CFR 1320.13. FEMA is requesting that this information collection be approved by November 12, 2013. The approval will authorize FEMA to use the collection through May 12, 2014. FEMA plans to follow this emergency request with a request for a 3-year renewal approval. The request will be processed under OMB's normal clearance procedures in accordance with the provisions of OMB regulation 5 CFR 1320.10. To help us with the timely processing of the emergency and normal clearance submissions to OMB, FEMA invites the general public to comment on the proposed collection of information.

DATES: Comments must be submitted to OMB on or before November 12, 2013. You may submit comments to FEMA on or before November 12, 2013.

ADDRESSES: Submit written comments on the proposed information collection to the Office of Information and Regulatory Affairs, Office of Management and Budget. Comments should be addressed to the Desk Officer for the Department of Homeland Security, Federal Emergency Management Agency (Proposed change to existing collection, FEMA Form 010–0–11), *oira.submission@omb.eop.gov* or faxed to (202) 395–5806. Comments may also be submitted to the following:

(1) *Online.* Submit comments at *www.regulations.gov* under Docket ID FEMA–2013–0018. Follow the instructions for submitting comments.

(2) *Mail.* Submit written comments to Regulatory Affairs Division, Office of Chief Counsel, DHS/FEMA, 500 C Street SW., Room 840, Washington, DC 20472–3100.

(3) *Facsimile.* Submit comments to (703) 483–2999.

All submissions received must include the agency name and Docket ID. Regardless of the method used for submitting comments or material, all submissions will be posted, without change, to the Federal eRulemaking Portal at *http://www.regulations.gov,* and will include any personal information you provide. Therefore, submitting this information makes it public. You may wish to read the Privacy Act notice that is available via the link in the footer of *www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the information collection should be made to Director, Records Management Division, Office of the Chief Administrative Officer, Mission Support Bureau, Federal Emergency Management Agency, 1800 South Bell Street, Arlington, VA 20598–3005, facsimile number (202) 646–3347, or at email address *FEMA-Information-Collections@dhs.gov.*

SUPPLEMENTARY INFORMATION: The Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. 5121–5207 (the Act) is the legal basis for FEMA to provide disaster related assistance and services to individuals who apply for disaster assistance benefits in the event of a federally declared disaster. The Individuals and Households Program (IHP) (the Act at 5174, Federal Assistance to Individuals and Households) provides financial assistance to eligible individuals and households who, as a direct result of a major disaster or emergency have necessary expenses and serious needs. The ''Other Needs Assistance'' (ONA) provision of IHP provides disaster assistance to address needs other than housing, such as personal property, transportation, etc.

The delivery of the ONA provision of IHP is contingent upon the State/Tribe choosing an administrator for the assistance. States/Tribes satisfy the selection of an administrator of ONA by completing the Administrative Option Agreement (FEMA Form 010–0–11), which establishes a plan for the delivery of ONA. This agreement establishes a partnership with FEMA and inscribes the plan for the delivery of disaster assistance. The agreement is used to identify the State/Tribe's proposed level of support and participation during disaster recovery. In response to Super Storm Sandy (October 2012), Congress added ''child care'' expenses as a category of ONA through the Sandy Recovery Improvement Act of 2013 (SRIA), Public Law 113–2. Section 1108 of the SRIA amends section 408(e)(1) of the Stafford Act (42 U.S.C. 5174(e)(1)), giving FEMA the specific authority to pay for ''child care'' expenses as disaster assistance under ONA.

In light of this legislation, FEMA needs to change FEMA Form 010–0–11 so that States/Tribes who want to administer ONA can choose ''child care'' expenses as one of the categories. Without having this option on the form, FEMA cannot meet statutory requirement to consult with the Governor of a State (or Tribal Executive) with respect to providing IHP ONA.

Collection of Information

Title: Federal Assistance to Individuals and Households Program, (IHP).

Type of Information Collection: Revision of a currently approved collection.

OMB Number: 1660–0061.

FEMA Form: FEMA Form 010–0–11, Administrative Option Agreement for the Other Needs provision of Individuals and Households Program, (IHP).

Abstract: FEMA seeks to add a line item for to provide a maximum dollar amount for Child Care assistance as part of ONA.

Affected Public: State, Local or Tribal Government.

Number of Respondents: 56.

Estimated Time per Respondent: 1.08 (65 minutes).

Estimated Total Annual Burden Hours: 60.5.

Estimated Cost: $2,236.08.

Frequency of Response: Once.

Comments

Written comments are solicited to (a) evaluate whether the proposed data collection is necessary for the proper performance of the agency, including whether the information shall have practical utility; (b) evaluate the accuracy of the agency's estimate of the burden of the proposed information collection, including the validity of the methodology and assumptions used; (c) enhance the quality, utility, and clarity of the information to be collected; and (d) minimize the burden of the collection of information on those who are to respond, including through the

use of appropriate automated, electronic, mechanical, or other technology, e.g., permitting electronic submission of responses. Submit comments to OMB within November 12, 2013. To ensure that FEMA is fully aware of any comments or concerns that you share with OMB, please provide FEMA with a copy of your comments. Submit comments to the FEMA address listed in the **FOR FURTHER INFORMATION CONTACT** caption.

Dated: September 30, 2013.

Charlene D. Myrthil,

Director, Records Management Division, Mission Support Bureau, Federal Emergency Management Agency, Department of Homeland Security.

[FR Doc. 2013–24329 Filed 10–21–13; 8:45 am]

BILLING CODE 9111–23–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Docket ID FEMA–2013–0043; OMB No. 1660–0002]

Agency Information Collection Activities: Submission for OMB Review; Comment Request; Disaster Assistance Registration

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice.

SUMMARY: The Federal Emergency Management Agency (FEMA) is submitting a request for review and approval of a collection of information under the emergency processing procedures in Office of Management and Budget (OMB) regulation 5 CFR 1320.13. FEMA is requesting that this information collection be approved by November 12, 2013. The approval will authorize FEMA to use the collection through May 12, 2014. FEMA plans to follow this emergency request with a request for a 3-year renewal approval. The request will be processed under OMB's normal clearance procedures in accordance with the provisions of OMB regulation 5 CFR 1320.10. To help us with the timely processing of the emergency and normal clearance submissions to OMB, FEMA invites the general public to comment on the proposed collection of information.

DATES: Comments must be submitted to OMB on or before November 12, 2013. You may submit comments to FEMA on or before November 12, 2013.

ADDRESSES: Submit written comments on the proposed information collection to the Office of Information and Regulatory Affairs, Office of Management and Budget. Comments should be addressed to the Desk Officer for the Department of Homeland Security, Federal Emergency Management Agency (Proposed change to existing collection, FEMA FORMS 009–0–1, 009–0–2, 009–0–1Int, 009–0–2Int, 009–0–1S, 009–0–2S, 009–0–1T, and eligibility/verification correspondence). *oira.submission@omb.eop.gov* or faxed to (202) 395–5806. Comments may also be submitted to the following:

(1) *Online.* Submit comments at *www.regulations.gov* under Docket ID FEMA–2013–0043. Follow the instructions for submitting comments.

(2) *Mail.* Submit written comments to Regulatory Affairs Division, Office of Chief Counsel, DHS/FEMA, 500 C Street SW., Room 840, Washington, DC 20472–3100.

(3) *Facsimile.* Submit comments to (703) 483–2999.

All submissions received must include the agency name and Docket ID. Regardless of the method used for submitting comments or material, all submissions will be posted, without change, to the Federal eRulemaking Portal at *http://www.regulations.gov,* and will include any personal information you provide. Therefore, submitting this information makes it public. You may wish to read the Privacy Act notice that is available via the link in the footer of *www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the information collection should be made to Director, Records Management Division, Office of the Chief Administrative Officer, Mission Support Bureau, Federal Emergency Management Agency, 1800 South Bell Street, Arlington, VA 20598–3005, facsimile number (202) 646–3347, or at email address *FEMA-Information-Collections@dhs.gov.*

SUPPLEMENTARY INFORMATION: The Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. 5121–5207 (the Act) is the legal basis for FEMA to provide disaster related assistance and services to individuals who apply for disaster assistance benefits in the event of a federally declared disaster. The Individuals and Households Program (IHP) (the Act at 5174, Federal Assistance to Individuals and Households) provides financial assistance to eligible individuals and households who, as a direct result of a major disaster or emergency have necessary expenses and serious needs. Individuals and households that apply for this assistance must provide information detailing their losses and needs. In response to Super Storm Sandy (October 2012), Congress added ''child care'' expenses as a category of IHP assistance through the Sandy Recovery Improvement Act of 2013 (SRIA), Public Law 113–2. Section 1108 of the SRIA amends section 408(e)(1) of the Stafford Act (42 U.S.C. 5174(e)(1)), giving FEMA the specific authority to pay for ''child care'' expenses as disaster assistance under the Other Needs Assistance (ONA) provision of IHP in addition to funeral, medical and dental expenses.

FEMA's current registration application and script for IHP disaster assistance does not ask questions regarding a survivor/registrant's need for assistance with ''child care'' expenses. Thus, FEMA needs to change its application to include a question about whether the survivor/registrant needs financial assistance for child care expenses as a result of a disaster. FEMA also needs to collect necessary paperwork from the survivor/registrant to determine eligibility and verify the expenses associated with child care through correspondence with the survivor/registrant.

Collection of Information

Title: Disaster Assistance Registration.

Type of Information Collection: Revision of a currently approved collection.

OMB Number: 1660–0002.

FEMA Forms: FEMA Form 009–0–1T (English) Tele-Registration, Disaster Assistance Registration; FEMA Form 009–0–1Int (English) Internet, Disaster Assistance Registration; FEMA Form 009–0–2Int (Spanish) Internet, Registro Para Asistencia De Desastre; FEMA Form 009–0–1 (English) Paper Application/Disaster Assistance Registration; FEMA Form 009–0–2 (Spanish), Solicitud en Papel/Registro Para Asistencia De Desastre; FEMA Form 009–0–1S (English) Smartphone, Disaster Assistance Registration; FEMA Form 009–0–2S (Spanish) Smartphone, Registro Para Asistencia De Desastre; and eligibility/verification correspondence.

Abstract: FEMA seeks to add a question to the registration process asking about any assistance to cover child care expenses and cover eligibility/verification correspondence.

Affected Public: Individuals or households.

Number of Responses: 3,264,753.

Estimated Time per Respondent: .19 hours.

Estimated Total Annual Burden Hours: 626,604.5.

Estimated Cost: $19,211,690.27.

Frequency of Response: Once.

Comments

Written comments are solicited to (a) evaluate whether the proposed data collection is necessary for the proper performance of the agency, including whether the information shall have practical utility; (b) evaluate the accuracy of the agency's estimate of the burden of the proposed information collection, including the validity of the methodology and assumptions used; (c) enhance the quality, utility, and clarity of the information to be collected; and (d) minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technology, e.g., permitting electronic submission of responses. Submit comments to OMB within November 12, 2013. To ensure that FEMA is fully aware of any comments or concerns that you share with OMB, please provide FEMA with a copy of your comments. Submit comments to the FEMA address listed in the **FOR FURTHER INFORMATION CONTACT** caption.

Dated: September 30, 2013.

Charlene D. Myrthil,

Director, Records Management Division, Mission Support Bureau, Federal Emergency Management Agency, Department of Homeland Security.

[FR Doc. 2013–24328 Filed 10–21–13; 8:45 am]

BILLING CODE 9111–23–P

DEPARTMENT OF HOMELAND SECURITY

U.S. Citizenship and Immigration Services

[OMB Control Number 1615–0043]

Agency Information Collection Activities: Application for Temporary Protected Status, Form I–821; Revision of a Currently Approved Collection

ACTION: 30-day notice.

SUMMARY: The Department of Homeland Security (DHS), U.S. Citizenship and Immigration Services (USCIS) will be submitting the following information collection request to the Office of Management and Budget (OMB) for review and clearance in accordance with the Paperwork Reduction Act of 1995. The notice allowing for a 60-day public comment period for this information collection was previously published in the **Federal Register** on July 8, 2013, at 78 FR 40758. USCIS did not receive any public comments in connection with the 60-day notice.

DATES: The purpose of this notice is to allow an additional 30 days for public comments. Comments are encouraged and will be accepted until November 21, 2013. This process is conducted in accordance with 5 CFR 1320.10.

ADDRESSES: Written comments and/or suggestions regarding the item(s) contained in this notice, especially regarding the estimated public burden and associated response time, must be directed to the OMB USCIS Desk Officer via email at *oira_submission@omb.eop.gov.* The comments submitted to the OMB USCIS Desk Officer may also be submitted to DHS, USCIS via the Federal eRulemaking Portal Web site at *http://www.regulations.gov* under e-Docket ID number USCIS–2007–0013 or via email at *uscisfrcomment@uscis.dhs.gov.* All submissions received must include the agency name and the OMB Control Number 1615–0043.

Regardless of the method used for submitting comments or material, all submissions will be posted, without change, to the Federal eRulemaking Portal at *http://www.regulations.gov*, and will include any personal information you provide. Therefore, submitting this information makes it public. You may wish to consider limiting the amount of personal information that you provide in any voluntary submission you make to DHS. For additional information please read the Privacy Act notice that is available via the link in the footer of *http://www.regulations.gov.*

Note: The address listed in this notice should only be used to submit comments concerning this information collection. Please do not submit requests for individual case status inquiries to this address. If you are seeking information about the status of your individual case, please check ''My Case Status'' online at: *https://egov.uscis.gov/cris/Dashboard.do*, or call the USCIS National Customer Service Center at 1–800–375–5283.

Written comments and suggestions from the public and affected agencies should address one or more of the following four points:

(1) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(2) Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

(3) Enhance the quality, utility, and clarity of the information to be collected; and

(4) Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

Overview of this Information Collection:

(1) *Type of Information Collection Request:* Revision of a Currently Approved Collection.

(2) *Title of the Form/Collection:* Application for Temporary Protected Status.

(3) *Agency form number, if any, and the applicable component of the DHS sponsoring the collection:* Form I–821; USCIS.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract: Primary:* Individuals or households. Form I–821 is necessary for USCIS to gather the information necessary to adjudicate TPS applications and determine if an applicant is eligible for TPS.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* 91,882 respondents responding via the paper-based Form I–821 at an estimated 1 hour and 55 minutes (1.92 hours) per response. 81,481 respondents responding via the USCIS Electronic Immigration System (USCIS ELIS) at an estimated 1 hour and 45 minutes (1.75 hours) per response. 173,363 respondents for biometrics processing at an estimated 1 hour and 10 minutes (1.17 hours) per response.

(6) *An estimate of the total public burden (in hours) associated with the collection:* 521,840 total annual burden hours.

If you need a copy of the information collection instrument with supplementary documents, or need additional information, please visit *http://www.regulations.gov.* We may also be contacted at: USCIS, Office of Policy and Strategy, Regulatory Coordination Division, 20 Massachusetts Avenue NW., Washington, DC 20529–2140; Telephone 202–272–8377.

Dated: October 17, 2013.

Laura Dawkins,

Chief, Regulatory Coordination Division, Office of Policy and Strategy, U.S. Citizenship and Immigration Services, Department of Homeland Security.

[FR Doc. 2013–24708 Filed 10–21–13; 8:45 am]

BILLING CODE 9111–97–P

DEPARTMENT OF HOMELAND SECURITY

U.S. Citizenship and Immigration Services

[OMB Control Number 1615–0018]

Agency Information Collection Activities: Application for Permission to Reapply for Admission into the United States after Deportation or Removal, Form I–212; Extension, Without Change, of a Currently Approved Collection.

ACTION: 60-Day Notice.

SUMMARY: The Department of Homeland Security (DHS), U.S. Citizenship and Immigration Services (USCIS) invites the general public and other Federal agencies to comment upon this proposed revision of a currently approved collection of information. In accordance with the Paperwork Reduction Act (PRA) of 1995, the information collection notice is published in the **Federal Register** to obtain comments regarding the nature of the information collection, the categories of respondents, the estimated burden (i.e. the time, effort, and resources used by the respondents to respond), the estimated cost to the respondent, and the actual information collection instruments.

DATES: Comments are encouraged and will be accepted for 60 days until December 23, 2013.

ADDRESSES: All submissions received must include the OMB Control Number 1615–0018 in the subject box, the agency name and Docket ID USCIS-2008–0068. To avoid duplicate submissions, please use only one of the following methods to submit comments:

(1) *Online.* Submit comments via the Federal eRulemaking Portal Web site at *www.regulations.gov* under e-Docket ID number USCIS–2008–0068;

(2) *Email.* Submit comments to *USCISFRComment@uscis.dhs.gov;*

(3) *Mail.* Submit written comments to DHS, USCIS, Office of Policy and Strategy, Chief, Regulatory Coordination Division, 20 Massachusetts Avenue NW., Washington, DC 20529–2140.

SUPPLEMENTARY INFORMATION:

Comments

Regardless of the method used for submitting comments or material, all submissions will be posted, without change, to the Federal eRulemaking Portal at *http://www.regulations.gov,* and will include any personal information you provide. Therefore, submitting this information makes it public. You may wish to consider limiting the amount of personal information that you provide in any voluntary submission you make to DHS. DHS may withhold information provided in comments from public viewing that it determines may impact the privacy of an individual or is offensive. For additional information, please read the Privacy Act notice that is available via the link in the footer of *http://www.regulations.gov.*

Note: The address listed in this notice should only be used to submit comments concerning this information collection. Please do not submit requests for individual case status inquiries to this address. If you are seeking information about the status of your individual case, please check ''My Case Status'' online at: *https://egov.uscis.gov/cris/Dashboard.do,* or call the USCIS National Customer Service Center at 1–800–375–5283.

Written comments and suggestions from the public and affected agencies should address one or more of the following four points:

(1) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(2) Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

(3) Enhance the quality, utility, and clarity of the information to be collected; and

(4) Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

Overview of this Information Collection

(1) *Type of Information Collection:* Extension, Without Change, of a Currently Approved Collection.

(2) *Title of the Form/Collection:* Application for Permission To Reapply for Admission Into the United States After Deportation or Removal.

(3) *Agency form number, if any, and the applicable component of the DHS sponsoring the collection:* I–212; USCIS.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract: Primary:* Individuals or households. The information provided on Form I–212 is used by USCIS to adjudicate applications filed by aliens requesting consent to reapply for admission to the United States after deportation, removal or departure, as provided under section 212 of the Immigration and Nationality Act.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* 5,160 responses at 2 hours per response.

(6) *An estimate of the total public burden (in hours) associated with the collection:* 10,320 annual burden hours.

If you need a copy of the information collection instrument with instructions, or additional information, please visit the Federal eRulemaking Portal site at: *http://www.regulations.gov.* We may also be contacted at: USCIS, Office of Policy and Strategy, Regulatory Coordination Division, 20 Massachusetts Avenue NW., Washington, DC 20529–2140, Telephone number 202–272–8377.

Dated: October 17, 2013.

Laura Dawkins,

Chief, Regulatory Coordination Division, Office of Policy and Strategy, U.S. Citizenship and Immigration Services, Department of Homeland Security.

[FR Doc. 2013–24745 Filed 10–21–13; 8:45 am]

BILLING CODE 9111– 97–P

DEPARTMENT OF HOMELAND SECURITY

U.S. Customs and Border Protection

Accreditation and Approval of Camin Cargo Control, Inc., as a Commercial Gauger and Laboratory

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

ACTION: Notice of accreditation and approval of Camin Cargo Control, Inc., as a commercial gauger and laboratory.

SUMMARY: Notice is hereby given, pursuant to CBP regulations, that Camin Cargo Control, Inc., has been approved to gauge and accredited to test petroleum and petroleum products, organic chemicals and vegetable oils for customs purposes for the next three years as of February 21, 2013.

DATES: *Effective Dates:* The accreditation and approval of Camin Cargo Control, Inc., as commercial gauger and laboratory became effective on February 21, 2013. The next triennial inspection date will be scheduled for February 2016.

FOR FURTHER INFORMATION CONTACT: Approved Gauger and Accredited Laboratories Manager, Laboratories and Scientific Services, U.S. Customs and Border Protection, 1300 Pennsylvania

Avenue NW., Suite 1500N, Washington, DC 20229, tel. 202–344–1060.

SUPPLEMENTARY INFORMATION: Notice is hereby given pursuant to 19 CFR 151.12 and 19 CFR 151.13, that Camin Cargo Control, Inc., 31 Fulton Street—Unit A, New Haven, CT 06513, has been approved to gauge and accredited to test petroleum and petroleum products, organic chemicals and vegetable oils for customs purposes, in accordance with the provisions of 19 CFR 151.12 and 19 CFR 151.13. Anyone wishing to employ this entity to conduct laboratory analyses and gauger services should request and receive written assurances from the entity that it is accredited or approved by the U.S. Customs and Border Protection to conduct the specific test or gauger service requested. Alternatively, inquiries regarding the specific test or gauger service this entity is accredited or approved to perform may be directed to the U.S. Customs and Border Protection by calling (202) 344–1060. The inquiry may also be sent to *cbp.labhq@dhs.gov.* Please reference the Web site listed below for a complete listing of CBP approved gaugers and accredited laboratories. *http://cbp.gov/linkhandler/cgov/trade/basic_trade/labs_scientific_svcs/commercial_gaugers/gaulist.ctt/gaulist.pdf.*

Dated: September 30, 2013.

Ira S. Reese,

Executive Director, Laboratories and Scientific Services.

[FR Doc. 2013–24324 Filed 10–21–13; 8:45 am]

BILLING CODE 9111–14–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

[FWS–R6–ES–2013–N226; FF06E23000–145–FXES11110600000]

Endangered and Threatened Wildlife and Plants; Permits; Low-Effect Habitat Conservation Plan for the Utah Prairie Dog in Garfield County, Utah

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of availability; request for comments.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service), received a permit application from the Garfield County Commission and are announcing the availability of a Draft Low-effect Habitat Conservation Plan (HCP) for the Utah prairie dog in Garfield County, Utah, for review and comment by the public and Federal, Tribal, State, and local governments. We request comment on the draft low-effect HCP.

DATES: Written comments must be submitted by November 21, 2013.

ADDRESSES: Send written comments by U.S. mail to Laura Romin, Deputy Field Supervisor, Utah Ecological Services Field Office, U.S. Fish and Wildlife Service, 2369 W. Orton Circle, Suite 50, West Valley City, UT 84119, or via email to *utahfieldoffice_esa@fws.gov.* You also may send comments by facsimile to 801–975–3331. The draft low-effect HCP is available on our Mountain-Prairie Region Ecological Services Web site at *http://www.fws.gov/utahfieldoffice/LatestNews.html.* You also may review a copy of this document during regular business hours at the Utah Ecological Services Field Office (see address above). If you do not have access to the Web site or cannot visit our office, you may request copies by telephone at 801–975–3330 ext. 142 or by letter to the Utah Field Office.

FOR FURTHER INFORMATION CONTACT: Laura Romin, 801–975–3330, ext. 142; *laura_romin@fws.gov.*

SUPPLEMENTARY INFORMATION: We announce availability for review and comment of the Draft Low-effect Habitat Conservation Plan for the Utah prairie dog in Garfield County, Utah. The Garfield County Commission has prepared a draft low-effect habitat conservation plan (HCP) for the translocation of Utah prairie dogs away from human developed areas or where construction is occurring in and adjacent to Panguitch, Utah, and that may result in incidental take of the federally threatened Utah prairie dog. The intent of this low-effect HCP is to serve as an interim mechanism to authorize incidental take in the short term while a more comprehensive long-term or range-wide habitat conservation plan is prepared for the species. We request public comment on the draft low-effect HCP.

Section 9 of the Endangered Species Act (ESA) (16 U.S.C. 1538) and its implementing regulations prohibit take of species listed as endangered or threatened. The definition of take under the ESA includes to ''harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect listed species or to attempt to engage in such conduct'' (16 U.S.C. 1532(19)). Section 10 of the ESA (16 U.S.C. 1539) establishes a program whereby persons seeking to pursue activities that are otherwise legal, but could result in take of federally protected species, may receive an incidental take permit (ITP). Applicants for ITPs must submit a HCP that meets the section 10 permit issuance criteria. ''Low-effect'' incidental take permits are those permits that, despite their authorization of some small level of incidental take, individually and cumulatively have a minor or negligible effect on the species covered in the HCP.

Background

The USFWS and Iron County began work on a Rangewide HCP (to include Iron, Garfield, and Wayne Counties) in 2006; however, efforts to complete the Rangewide HCP have stalled, due largely to concerns regarding funding mechanisms. Garfield County has committed to proceed with completing a new long-term Garfield County HCP. However, it is likely that completion of a new HCP will require 2–3 years. Therefore, this low-effect HCP will provide a bridge, authorizing incidental take of the Utah prairie dog until a new long-term HCP can be completed.

As a bridge to cover additional take anticipated before a range-wide or long-term plan can be completed, Garfield County has submitted a draft low-effect HCP that would authorize the take of no more than 220 acres (89 hectares) of occupied Utah prairie dog habitat over a maximum 3-year period. Incidental take could occur as a result of (1) translocations of prairie dogs away from the town of Panguitch, Utah, to Federal or other protected lands in Garfield County or (2) ongoing and future residential and commercial development in occupied Utah prairie dog habitat in Panguitch, Utah. Minimization and mitigation measures will include the translocations of Utah prairie dogs to Federal or other protected habitat in Garfield County or the payment of a mitigation fee to a conservation fund for Utah prairie dogs. Under this low-effect HCP, developers would apply to the County for their individual take permits or letters of authorization.

Our Preliminary Determination

We have made a preliminary determination that the HCP qualifies as a ''low-effect'' habitat conservation plan as defined by our Habitat Conservation Planning Handbook (November 1996).

We base our determination on the following information:

(1) The size and scope of the incidental take of Utah prairie dogs is relatively small, and limited to maximum of 220 ac (89 ha) of Utah prairie dog occupied habitats over three years;

(2) The total amount of take amounts to only 1.4 percent of the total mapped

Utah prairie dog habitat in the Paunsaugunt Recovery Unit; and

(3) Most of the take is limited to already developed areas or those areas projected for development in the near future. These areas do not serve to support current or future metapopulations and objectives for recovery of the species in the wild.

Overall we conclude that implementation of the plan would result in overall minor or negligible effects on the Utah prairie dog and its habitats. We may revise this preliminary determination based on public comments submitted in response to this notice.

Public Availability of Comments

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: September 30, 2013.

Larry Crist,

Field Supervisor, Utah Ecological Services Field Office.

[FR Doc. 2013–24602 Filed 10–21–13; 8:45 am]

BILLING CODE 4310–55–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

[FWS–HQ–IA–2013–N230; FXIA16710900000P5–123–FF09A30000]

Endangered Species; Receipt of Applications for Permit

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of receipt of applications for permit.

SUMMARY: We, the U.S. Fish and Wildlife Service, invite the public to comment on the following applications to conduct certain activities with endangered species. With some exceptions, the Endangered Species Act (ESA) prohibits activities with listed species unless Federal authorization is acquired that allows such activities.

DATES: We must receive comments or requests for documents on or before November 21, 2013.

ADDRESSES: Brenda Tapia, Division of Management Authority, U.S. Fish and Wildlife Service, 4401 North Fairfax Drive, Room 212, Arlington, VA 22203; fax (703) 358–2280; or email *DMAFR@fws.gov.*

FOR FURTHER INFORMATION CONTACT: Brenda Tapia, (703) 358–2104 (telephone); (703) 358–2280 (fax); *DMAFR@fws.gov* (email).

SUPPLEMENTARY INFORMATION:

I. Public Comment Procedures

A. How do I request copies of applications or comment on submitted applications?

Send your request for copies of applications or comments and materials concerning any of the applications to the contact listed under **ADDRESSES**. Please include the **Federal Register** notice publication date, the PRT-number, and the name of the applicant in your request or submission. We will not consider requests or comments sent to an email or address not listed under **ADDRESSES.** If you provide an email address in your request for copies of applications, we will attempt to respond to your request electronically.

Please make your requests or comments as specific as possible. Please confine your comments to issues for which we seek comments in this notice, and explain the basis for your comments. Include sufficient information with your comments to allow us to authenticate any scientific or commercial data you include.

The comments and recommendations that will be most useful and likely to influence agency decisions are: (1) Those supported by quantitative information or studies; and (2) Those that include citations to, and analyses of, the applicable laws and regulations. We will not consider or include in our administrative record comments we receive after the close of the comment period (see **DATES**) or comments delivered to an address other than those listed above (see **ADDRESSES**).

B. May I review comments submitted by others?

Comments, including names and street addresses of respondents, will be available for public review at the street address listed under **ADDRESSES**. The public may review documents and other information applicants have sent in support of the application unless our allowing viewing would violate the Privacy Act or Freedom of Information Act. 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.

II. Background

To help us carry out our conservation responsibilities for affected species, and in consideration of section 10(a)(1)(A) of the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 *et seq.*), along with Executive Order 13576, ''Delivering an Efficient, Effective, and Accountable Government,'' and the President's Memorandum for the Heads of Executive Departments and Agencies of January 21, 2009—Transparency and Open Government (74 FR 4685; January 26, 2009), which call on all Federal agencies to promote openness and transparency in Government by disclosing information to the public, we invite public comment on these permit applications before final action is taken.

III. Permit Applications

A. Endangered Species

Multiple Applicants

The following applicants each request a permit to import the sport-hunted trophy of one male bontebok (*Damaliscus pygargus pygargus*) culled from a captive herd maintained under the management program of the Republic of South Africa, for the purpose of enhancement of the survival of the species.

Applicant: Lynn Bourdon, Houston, TX; PRT–16832B

Applicant: Johnathan Johnson, Brandon, MS; PRT–16849B

Applicant: Daniel Saab Salem, Miami, FL; PRT–16912B

Applicant: Robert Perrenot, Dallas, TX; PRT–16830B

Applicant: Michael Stec, Rapid City, SD; PRT–16871B

Applicant: John Basto, Richmond VA; PRT–12866B

Applicant: Hal Johnson, Richmond VA; PRT–15464B

Brenda Tapia,

Program Analyst/Data Administrator, Branch of Permits, Division of Management Authority.

[FR Doc. 2013–24540 Filed 10–21–13; 8:45 am]

BILLING CODE 4310–55–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

[FWS–R4–R–2013–N161; FXRS12650400000S3–123–FF04R02000]

Cat Island National Wildlife Refuge; West Feliciana Parish, Louisiana

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of intent; Comprehensive Conservation Plan and Environmental Assessment request for comments.

SUMMARY: We, the Fish and Wildlife Service (Service), intend to prepare a comprehensive conservation plan (CCP) and associated National Environmental Policy Act (NEPA) documents for Cat Island National Wildlife Refuge (NWR). We provide this notice in compliance with our CCP policy to advise other Federal and State agencies, Native-American Tribes, and the public of our intentions, and to obtain suggestions and information on the scope of issues to consider in the planning process.

DATES: To ensure consideration, we must receive your written comments by November 21, 2013.

ADDRESSES: You may send comments, questions, and requests for information to: Robert Strader, Project Leader, USFWS, Lower Mississippi River Refuge Complex, P.O. Box 217, Sibley, MS, 39165.

FOR FURTHER INFORMATION CONTACT: Michelle Paduani, Project Planner, 662–323–5548, *michelle_paduani@fws.gov* or Robert Strader, Project Leader, 601–442–6696, *bob_strader@fws.gov.*

SUPPLEMENTARY INFORMATION:

Introduction

With this notice, we initiate our process for developing a CCP for Cat Island NWR, West Feliciana Parish, Louisiana. This notice complies with our CCP policy to: (1) Advise other Federal and State agencies, Native-American tribes, and the public of our intention to conduct detailed planning on this refuge; and (2) obtain suggestions and information on the scope of issues to consider in the environmental document and during development of the CCP.

Background

The CCP Process

The National Wildlife Refuge System Administration Act of 1966 (16 U.S.C. 668dd-668ee) (Administration Act), as amended by the National Wildlife Refuge System Improvement Act of 1997, requires us to develop a CCP for each national wildlife refuge. The purpose for developing a CCP is to provide refuge managers with a 15-year plan for achieving refuge purposes and contributing toward the mission of the National Wildlife Refuge System, consistent with sound principles of fish and wildlife management, conservation, legal mandates, and our policies. In addition to outlining broad management direction on conserving wildlife and their habitats, CCPs identify wildlife-dependent recreational opportunities available to the public, including opportunities for hunting, fishing, wildlife observation, wildlife photography, and environmental education and interpretation. We will review and update the CCP at least every 15 years in accordance with the Administration Act.

Each unit of the National Wildlife Refuge System was established for specific purposes. We use these purposes as the foundation for developing and prioritizing the management goals and objectives for each refuge within the National Wildlife Refuge System mission, and to determine how the public can use each refuge. The planning process is a way for us and the public to evaluate management goals and objectives for the best possible conservation approach to this important wildlife habitat, while providing for wildlife-dependent recreation opportunities that are compatible with the refuge's establishing purposes and the mission of the National Wildlife Refuge System.

Our CCP process provides participation opportunities for Tribal, State, and local governments; agencies; organizations; and the public. We encourage input in the form of issues, concerns, ideas, and suggestions for the future management of Cat Island NWR.

We will conduct the environmental review of this project in accordance with the requirements of the National Environmental Policy Act of 1969, as amended (NEPA) (42 U.S.C. 4321 et seq.); NEPA regulations (40 CFR parts 1500–1508); other appropriate Federal laws and regulations; and our policies and procedures for compliance with those laws and regulations.

The Cat Island National Wildlife Refuge was established and shall be managed—(1) to conserve, restore, and manage habitats as necessary to contribute to the migratory bird population goals and habitat objective as established through the Lower Mississippi Valley Joint Venture; (2) to conserve, restore, and manage the significant aquatic resource values associated with the area's forested wetlands and to achieve the habitat objectives of the ''Mississippi River Aquatic Resources Management Plan''; (3) to conserve, enhance, and restore the historic native bottomland community characteristics of the lower Mississippi alluvial valley and its associated fish, wildlife, and plant species; (4) to conserve, enhance, and restore habitat to maintain and assist in the recovery of endangered, and threatened plants and animals; and (5) to encourage the use of volunteers and facilitate partnerships among the United States Fish and Wildlife Service, local communities, conservation organizations, and other non-Federal entities to promote public awareness of the resources of the Refuge and the National Wildlife Refuge System and public participation in the conservation of those resources. 114 STAT. 1418. dated Oct. 27, 2000

Public Availability and Comments

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.

Authority

This notice is published under the authority of the National Wildlife Refuge System Improvement Act of 1997 (16 U.S.C. 668dd et seq.).

Dated: September 5, 2013.

Cynthia K. Dohner,

Regional Director.

[FR Doc. 2013–24590 Filed 10–21–13; 8:45 am]

BILLING CODE 4310–55–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

[FWS–HQ–IA–2013–N231; FXIA16710900000P5–123–FF09A30000]

Endangered Species; Marine Mammals; Issuance of Permits

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of issuance of permits.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service), have issued the following permits to conduct certain activities with endangered species, marine mammals, or both. We issue these permits under the Endangered Species Act (ESA) and Marine Mammal Protection Act (MMPA).

ADDRESSES: Brenda Tapia, Division of Management Authority, U.S. Fish and Wildlife Service, 4401 North Fairfax Drive, Room 212, Arlington, VA 22203; fax (703) 358–2280; or email *DMAFR@fws.gov.*

FOR FURTHER INFORMATION CONTACT: Brenda Tapia, (703) 358–2104 (telephone); (703) 358–2280 (fax); *DMAFR@fws.gov* (email).

SUPPLEMENTARY INFORMATION: On the dates below, as authorized by the provisions of the ESA (16 U.S.C. 1531 *et seq.*), as amended, and/or the MMPA, as amended (16 U.S.C. 1361 *et seq.*), we issued requested permits subject to certain conditions set forth therein. For each permit for an endangered species, we found that (1) The application was filed in good faith, (2) The granted permit would not operate to the disadvantage of the endangered species, and (3) The granted permit would be consistent with the purposes and policy set forth in section 2 of the ESA.

Permit No.	Applicant	Receipt of application **Federal Register** notice	Permit issuance date
Endangered Species			
10814B	Larry Bell	78 FR 45954; July 30, 2013	September 12, 2013.
13216B	Anthony Gaglio	78 FR 50083; August 16, 2013	September 25, 2013.
13270B	Shane Erving	78 FR 50083; August 16, 2013	September 25, 2013.
Marine Mammals			
056326	Dr. Graham Worthy, University of Central Florida	78 FR 30325; May 22, 2013	September 30, 2013.
067925	U.S. Geological Survey, Alaska Science Center	78 FR 37562; June 21, 2013	September 20, 2013.
837923	Gordon Bauer, New College of Florida	78 FR 37563; June 21, 2013	September 30, 2013.
19806A	Thomas Postel	78 FR 40762; July 8, 2013	September 27, 2013.
672624	U.S. Geological Survey, Biological Resources Division, Santa Cruz Field Station.	78 FR 44961; July 25, 2013	September 13, 2013.
05202B	Renegade Pictures	78 FR 48711; August 9, 2013	September 11, 2013.

Availability of Documents

Documents and other information submitted with these applications are available for review, subject to the requirements of the Privacy Act and Freedom of Information Act, by any party who submits a written request for a copy of such documents to: Division of Management Authority, U.S. Fish and Wildlife Service, 4401 North Fairfax Drive, Room 212, Arlington, VA 22203; fax (703) 358–2280.

Brenda Tapia,

Program Analyst/Data Administrator, Branch of Permits, Division of Management Authority.

[FR Doc. 2013–24541 Filed 10–21–13; 8:45 am]

BILLING CODE 4310–55–P

DEPARTMENT OF THE INTERIOR

Bureau of Indian Affairs

[DR.5B711.IA000813]

Indian Gaming

AGENCY: Bureau of Indian Affairs, Interior.

ACTION: Notice of Tribal-State Class III Gaming Compact taking effect.

SUMMARY: This notice publishes the Class III Gaming Compact between the North Fork Rancheria of Mono Indians and the State of California taking effect.

DATES: *Effective Date:* October 22, 2013.

FOR FURTHER INFORMATION CONTACT: Paula L. Hart, Director, Office of Indian Gaming, Office of the Deputy Assistant Secretary—Policy and Economic Development, Washington, DC 20240, (202) 219–4066.

SUPPLEMENTARY INFORMATION: Under section 11 of the Indian Gaming Regulatory Act (IGRA), Public Law 100–497, 25 U.S.C. 2701 *et seq.,* the Secretary of the Interior shall publish in the **Federal Register** notice of approved Tribal-State compacts for the purpose of engaging in Class III gaming activities on Indian lands. The Compact between the State of California and the North Fork Rancheria of Mono Indians allows for one gaming facility and authorizes the Tribe to operate up to 2,000 gaming devices, any banking or percentage card games, and any devices or games authorized under State law to the State lottery. The Compact, also authorizes limited annual payments to the State for statewide exclusivity. Finally, the term of the compact is until December 31, 2033. The Secretary took no action on the Compact within 45 days of its submission by the Tribe and the State. Therefore, the compact is considered to have been approved, but only to the extent that the Compact is consistent with IGRA. *See* 25 U.S.C. 2710(d)(8)(C).

Dated: September 30, 2013.

Kevin K. Washburn,

Assistant Secretary—Indian Affairs.

[FR Doc. 2013–24350 Filed 10–21–13; 8:45 am]

BILLING CODE 4310–4N–P

DEPARTMENT OF THE INTERIOR

Bureau of Indian Affairs

[DR.5B711.IA000813]

Indian Gaming

AGENCY: Bureau of Indian Affairs, Interior.

ACTION: Notice of Approved Tribal-State Class III Gaming Compact.

SUMMARY: This notice publishes the approval of an amendment to the Class III Tribal-State Gaming Compact (Amendment), between the Tunica-Biloxi Tribe of Louisiana (Tribe) and the State of Louisiana (State).

DATES: *Effective Date:* October 22, 2013.

FOR FURTHER INFORMATION CONTACT: Paula L. Hart, Director, Office of Indian Gaming, Office of the Deputy Assistant Secretary—Policy and Economic Development, Washington, DC 20240, (202) 219–4066.

SUPPLEMENTARY INFORMATION: Under section 11 of the Indian Gaming Regulatory Act of 1988 (IGRA) Public Law 100–497, 25 U.S.C. 2701 *et seq.,* the Secretary of the Interior shall publish in the **Federal Register** notice of approved Tribal-State compacts for the purpose of engaging in Class III gaming activities on Indian lands. On August 19, 2013 the Tribe and the State submitted an amendment for review and approval. The Amendment between the State and the Tribe facilitates refinancing of the Tribe's existing gaming-related debt. A presumption of suitability is granted for a Qualified Institutional Buyer as

defined by Rule 144A of the Securities Act of 1933. Pursuant to 25 CFR 293.4, all compacts and amendments are subject to review and approval by the Secretary. Pursuant to 25 CFR 293.15, an approved compact or amendment takes effect on the date that notice of its approval is published in the **Federal Register**.

Dated: September 30, 2013.

Kevin K. Washburn,

Assistant Secretary—Indian Affairs.

[FR Doc. 2013–24348 Filed 10–21–13; 8:45 am]

BILLING CODE 4310–4N–P

DEPARTMENT OF THE INTERIOR

Bureau of Indian Affairs

[DR.5B711.IA000813]

Indian Gaming

AGENCY: Bureau of Indian Affairs, Interior.

ACTION: Notice of extension of Tribal-State Class III Gaming Compact.

SUMMARY: This publishes notice of the extension of the Class III gaming compact between the Rosebud Sioux Tribe and the State of South Dakota.

DATES: *Effective Date:* October 22, 2013.

FOR FURTHER INFORMATION CONTACT: Paula L. Hart, Director, Office of Indian Gaming, Office of the Deputy Assistant Secretary—Policy and Economic Development, Washington, DC 20240, (202) 219–4066.

SUPPLEMENTARY INFORMATION: Pursuant to 25 CFR 293.5, an extension to an existing tribal-state Class III gaming compact does not require approval by the Secretary if the extension does not include any amendment to the terms of the compact. The Rosebud Sioux Tribe and the State of South Dakota have reached an agreement to extend the expiration of their existing Tribal-State Class III gaming compact to February 15, 2014. This publishes notice of the new expiration date of the compact.

Dated: September 30, 2013.

Kevin K. Washburn,

Assistant Secretary—Indian Affairs.

[FR Doc. 2013–24349 Filed 10–21–13; 8:45 am]

BILLING CODE 4310–4N–P

DEPARTMENT OF THE INTERIOR

Bureau of Indian Affairs

[124A2100RM. AADD003200. A087C222. 999900. AR. DED. 97C22214. 001]

Request for Nominees to Serve on the Bureau of Indian Education Advisory Board for Exceptional Children

AGENCY: Bureau of Indian Affairs, Interior.

ACTION: Notice.

SUMMARY: The Bureau of Indian Education (BIE) is seeking nominations for individuals to be considered as a member of the Advisory Board for Exceptional Children (Advisory Board). There are six positions available. BIE will consider nominations received in response to this request for nominations, as well nominations received from as other sources.

DATES: Nomination applications must be received on or before November 15, 2013.

ADDRESSES: Submit nomination applications to Sue Bement, Designated Federal Officer, Bureau of Indian Education, 1011 Indian School Road NW., Suite 332, Albuquerque, New Mexico 87104–1088, telephone (505) 563–5274 or fax (505) 563–5281.

FOR FURTHER INFORMATION CONTACT: Sue Bement, Designated Federal Officer, at the above-listed address and telephone number.

SUPPLEMENTARY INFORMATION: The Advisory Board was established in accordance with the Federal Advisory Committee Act, 5 U.S.C. App 2. The following provides information about the Committee, the membership and the nomination process.

1. Objective and Duties

(a) Members of the Advisory Board will provide guidance, advice, and recommendations with respect to special education and related services for children with disabilities in Bureau-funded schools in accordance with the requirements of the Individuals with Disabilities Education Act of 2004 (IDEA).

(b) The Advisory Board will:

(1) Provide advice and recommendations for the coordination of services within BIE and with other local, State, and Federal agencies;

(2) Provide advice and recommendations on a broad range of policy issues dealing with provision of educational services to American Indian children with disabilities;

(3) Serve as an advocate for American Indian students with special education needs by providing advice and recommendations regarding best practices, effective program coordination strategies, and recommendations for improved educational programming;

(4) Provide advice and recommendations for preparation of information required to be submitted to the Secretary of Education under 20 U.S.C. 1411(h)(2);

(5) Provide advice and recommend policies concerning effective inter- and intra-agency collaboration, including modifications to regulations, and elimination of barriers to inter- and intra-agency programs and activities; and

(6) Report and direct all correspondence to the Assistant Secretary-Indian Affairs through the Director, BIE with a courtesy copy to the Designated Federal Officer (DFO).

2. Membership

(a) Pursuant to 20 U.S.C. 1411(h)(6), the Advisory Board will be composed of up to 15 individuals involved in or concerned with the education and provision of services to Indian infants, toddlers, children, and youth with disabilities. The Advisory Board composition will reflect a broad range of viewpoints and will include at least one member representing each of the following interests: Indians with disabilities; teachers of children with disabilities; Indian parents or guardians of children with disabilities; service providers; state education officials; local education officials; state interagency coordinating councils (for states having Indian reservations); tribal representatives or tribal organization representatives; and other members representing the various divisions and entities of BIE.

(b) The Assistant Secretary—Indian Affairs may provide the Secretary of the Interior recommendations for the chairperson; however, the chairperson and other Advisory Board members will be appointed by the Secretary. Advisory Board members shall serve staggered terms of two years or three years from the date of their appointment.

3. Miscellaneous

(a) Members of the Advisory Board will not receive compensation, but may be reimbursed for travel, including subsistence, and other necessary expenses incurred in the performance of their duties in the same manner as persons employed intermittently in government service under 5 U.S.C. 5703.

(b) A member may not participate in matters that will directly affect, or

appear to affect, the financial interests of the member or the member's spouse or minor children, unless authorized by the appropriate ethics official. Compensation from employment does not constitute a financial interest of the member so long as the matter before the committee will not have a special or distinct effect on the member or the member's employer, other than as part of a class. The provisions of this paragraph do not affect any other statutory or regulatory ethical obligations to which a member may be subject.

(c) The Advisory Board meets at least twice a year, budget permitting, but additional meetings may be held as deemed necessary by the Assistant Secretary—Indian Affairs or DFO.

(d) All Advisory Board meetings are open to the public in accordance with the Federal Advisory Committee Act.

4. Nomination Information

(a) Nominations are requested from individuals, organizations, and federally recognized tribes, as well as from State directors of Special Education (within the 23 States in which Bureau-funded schools are located) concerned with the education of Indian children with disabilities as described above.

(b) Nominees should have expertise in and knowledge of the issues and needs of American Indian children with disabilities. Such knowledge and expertise are needed to provide advice and recommendations to BIE regarding the needs of American Indian children with disabilities.

(c) A summary of the candidate's qualifications (résumé or curriculum vitae) must be provided. Nominees must have the ability to attend Advisory Board meetings, carry out Advisory Board assignments, participate in conference calls, and work in groups.

Basis for Nominations

If you wish to nominate someone for appointment to the Advisory Board, please do not make the nomination until the person has agreed to have his or her name submitted to BIE for this purpose.

Nomination Application

(Please fill out this form completely and include a copy of the nominee's résumé or curriculum vitae.)

Information Collection

This collection of information is authorized by OMB Control Number 1076–0179, ''Solicitation of Nominations for the Advisory Board for Exceptional Children.''

BILLING CODE 4310–6W–P

OMB Control Number: 1076-0179
Expiration: 09/30/2014

BUREAU OF INDIAN EDUCATION

ADVISORY BOARD FOR EXCEPTIONAL EDUCATION

MEMBERSHIP NOMINATION FORM

Nomination Information

A. Nominations are requested from individuals, organizations, and federally recognized tribes, as well as from State Directors of Special Education (within the 23 states in which Bureau-funded schools are located) concerned with the education of Indian children with disabilities.

B. Nominees should have expertise and knowledge of the issues and needs of American Indian children with disabilities. Such knowledge and expertise are needed to provide advice and recommendations to BIE regarding the needs of American Indian children with disabilities.

C. A summary of the candidate's qualifications (resume or curriculum vitae) must be included with the nomination application. Nominees must have the ability to: (1) attend in Advisory Committee meetings, (2) carry out committee assignments, (3) participate in teleconference calls and work in groups.

D. The Department of Interior is committed to equal opportunity in the workplace and seeks diverse Committee membership; however, the Department is bound by the Indian Preference Act of 1990 (Title 25, U.S.C. Section 472).

Objective and Duties

A. The Board provides guidance, advice, and recommendations with respect to special education and related services for children with disabilities in BIE-funded schools in accordance with the requirements of the Individuals with Disabilities Education Act of 2004.

B. The Board provides advice and recommendations for the coordination of services within the BIE and with other local, State and Federal agencies.

C. The Board provides advice and recommendations on a broad range of policy issues dealing with provision of educational services to American Indian children with disabilities.

D. The Board serves as an advocate for American Indian students with special education needs by providing advice and recommendations regarding best practices, effective program coordination strategies, and recommendations for improved educational programming.

OMB Control Number: 1076-0179
Expiration: 09/30/2014

E. The Board provides advice and recommendations for preparation of information required to be submitted to the Secretary of Education.

F. The Board provides advice and recommends policies concerning effective inter- and intra-agency collaboration, including modifications to regulations, and elimination of barriers to inter- and intra - agency programs and activities.

G. The Board reports and directs all correspondence to the Assistant Secretary – Indian Affairs through the Director of the Bureau of Indian Education with a courtesy copy to the Designated Federal Official (DFO).

Membership

A. The Board shall be composed of 15 members. The Assistant Secretary – Indian Affairs may recommend a Chairperson to the Secretary of the Interior; however, all board members will be appointed by the Secretary of the Interior as required. Board members shall serve a staggered term of two years or three years from the date of their appointment. The Secretary may remove members from the Board at any time at his/her discretion.

B. As required by the Individuals with Disabilities Education Act of 2004, the Board will be composed of individuals involved in or concerned with the education and provision of services to Indian children with disabilities. The Board composition will reflect a broad range of viewpoints and will include at least one member representing each of the following interests: Indian persons with disabilities, teachers of children with disabilities, Indian parents or guardians of children with disabilities, service providers, State education officials, local education officials, State interagency coordinating councils (for states having Indian reservations), tribal representatives or tribal organization representatives, and BIE employees concerned with the education of children with disabilities.

C. Members of the Board will not receive compensation, but will be reimbursed for travel, subsistence and other necessary expenses incurred in performance of their duties consistent with the provisions of section 5703, title 5, of the United States Code.

D. A member may not participate in matters that will directly affect, or appear to affect, the financial interests of the member or the member's spouse or minor children, unless authorized by the DFO. Compensation from employment does not constitute a financial interest of the member so long as the matter before the committee will not have a special or distinct effect on the member or the member's employer, other than as part of a class. The provisions of this paragraph do not affect any other statutory or regulatory ethical obligations to which a member may be subject.

E. The Board meets at least twice a year, budget permitting, but additional meetings may be held as deemed necessary by the Assistant Secretary or DFO.

OMB Control Number: 1076-0179
Expiration: 09/30/2014

COMMITTEE MEMBERSHIP NOMINATION FORM

Note: *Please fill out from completely. Additional pages may be added for further explanation of any item. Reference the corresponding item number for which the additional explanation is made.*

1. Full Name:			
2. Mailing Address:	3. City:	4. State:	5. Zip Code:
6. Primary Contact Phone Number: ( )	7. Secondary Contact Phone Number: ( )		
8. Place of Employment			
9. Work Address:	10. City:	11. State:	12. Zip Code:
13. Employment Title:			
14. Work Telefax Number: ( )	15. E-mail address:		

Note to Review Committee: *Prior to submitting this nomination application, the above-named individual must be contacted regarding appointment to the Advisory Board. Do not make nomination until this person has been contacted and agreed to have his/her name submitted to the Bureau of Indian Education.*

16. If appointed this person will represent one of the following categories (check all applicable):

_____ Indian persons with disabilities

_____ Teachers of children with disabilities

_____ Indian parents or guardians of children with disabilities

_____ Service providers

_____ State Education Officials

_____ Local Education Officials

_____ State Interagency Coordinating Councils (for states having Indian reservations)

_____ tribal representatives or tribal organization representatives

_____ Bureau employees concerned with the education of children with disabilities

OMB Control Number: 1076-0179
Expiration: 09/30/2014

17. What role would you recommend this nominee serve?

_____ Advisory Board Chairperson

_____ Advisory Board Member

18. Nominee's experience with BIA funded schools: (check all applicable)

_____ BIE Day School

_____ BIE Boarding School

____ Off-Reservation Boarding School

_____ Tribal Contract School

_____ Tribal Grant School

_____ Cooperative School

19. List nominee's experiences related to the education of Indian infants, toddler, children and youth with disabilities, in the past 10 years. Include dates of experience or employment, position titles, location of employment or organization, and a brief description of duties. (Attach additional pages if necessary.)

20. Provide a list of current memberships or current affiliations with professional education organizations, particularly special education organizations. Identify organization offices held if applicable. (Attach additional pages if necessary.)

21. Identify special interests, activities, and awards (professional, educational and community) related to the education of disabled Indian children (infants, toddlers, children and youth). (Attach additional pages if necessary.)

OMB Control Number: 1076-0179
Expiration: 09/30/2014

22. **Nominee recommended by:**

Name of Indian tribe, organization, individual (include position title) making nomination:		
Address of Indian tribe, organization, or individual making nomination:		
City:	State:	Zip Code:
Signature of Authorizing Official:		
Date of Signature:	Phone (Area code + Number):	Telefax (Area code + Number):

DEADLINE: Submit nomination application on or before November 15, 2013.

ADDRESS: Please submit nomination applications to Sue Bement, DFO, Education Specialist, Bureau of Indian Education, 1011 Indian School Road NW, Suite 332, Albuquerque, New Mexico 87104-1088.

FOR FURTHER INFORMATION: Contact Sue Bement, DFO, Education Specialist, Albuquerque Service Center, Division of Performance and Accountability, at the above listed address or call (505) 563-5274 or send an email to sue.bement@bie.edu.

PAPERWORK REDUCTION ACT STATMENT: This information is being collected to select individuals to serve on a Federal advisory committee, the Advisory Board for Exceptional Children. Response to this request is required to obtain a benefit. You are not required to respond to this collection of information unless it displays a currently valid OMB control number. This information will be used to determine the eligibility and the ranking of the nominee. Public reporting burden for this form is estimated to average 1 hour per response, including the time for reviewing instructions, gathering and maintaining data, and completing and reviewing the form. Direct comments regarding the burden estimate or any other aspect of this form to the Information Collection Clearance Officer – Indian Affairs, 1849 C Street, NW, MS-4141, Washington, DC 20240.

Dated: September 25, 2013.

Kevin K. Washburn,

Assistant Secretary—Indian Affairs.

[FR Doc. 2013–24726 Filed 10–21–13; 8:45 am]

BILLING CODE 4310–6W–C

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[AA–6648–A, AA–6648–C, AA–6648–O; LLAK944000–L14100000–HY0000–P]

Alaska Native Claims Selection

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of Decision Approving Lands for Conveyance.

SUMMARY: As required by 43 CFR 2650.7(d), notice is hereby given that an appealable decision will be issued by the Bureau of Land Management (BLM) to Aleknagik Natives Limited. The decision approves the surface estate in the lands described below for conveyance pursuant to the Alaska Native Claims Settlement Act (43 U.S.C. 1601, *et seq.*). The subsurface estate in these lands will be conveyed to Bristol Bay Native Corporation when the

surface estate is conveyed to Aleknagik Natives Limited. The lands are in the vicinity of Aleknagik, Alaska, and are located in:

Lots 13 and 14, U.S. Survey No. 4927, Alaska.
Containing 7.43 acres.
Lots 1 and 2, U.S. Survey No. 12403, Alaska.
Containing 4.96 acres.

Seward Meridian, Alaska

T. 8 S., R. 53 W.,
Sec. 36.
Containing 640 acres.
T. 10 S., R. 55 W.,
Tract 37;
Sec. 31.
Containing approximately 88 acres.
T. 10 S., R. 57 W.,
Secs. 2, 11, and 12.
Containing approximately 150 acres.
Aggregating approximately 890 acres.

Notice of the decision will also be published once a week for four consecutive weeks in the *Bristol Bay Times*

DATES: Any party claiming a property interest in the lands affected by the decision may appeal the decision in accordance with the requirements of 43 CFR part 4 within the following time limits:

1. Unknown parties, parties unable to be located after reasonable efforts have been expended to locate, parties who fail or refuse to sign their return receipt, and parties who receive a copy of the decision by regular mail which is not certified, return receipt requested, shall have until November 21, 2013 to file an appeal.

2. Parties receiving service of the decision by certified mail shall have 30 days from the date of receipt to file an appeal.

Parties who do not file an appeal in accordance with the requirements of 43 CFR part 4 shall be deemed to have waived their rights. Notices of appeal transmitted by electronic means, such as facsimile or email, will not be accepted as timely filed.

ADDRESSES: A copy of the decision may be obtained from: Bureau of Land Management, Alaska State Office, 222 West Seventh Avenue, #13, Anchorage, AK 99513–7504.

FOR FURTHER INFORMATION CONTACT: The BLM by phone at 907–271–5960 or by email at *blm_ak_akso_public_room@blm.gov.* 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 BLM during normal business hours. In addition, the FIRS is available 24 hours a day, 7 days a week, to leave a message or question with the BLM. The BLM will reply during normal business hours.

Jason Robinson,
Land Law Examiner, Division of Lands and Cadastral.

[FR Doc. 2013–24596 Filed 10–21–13; 8:45 am]

BILLING CODE 4310–JA–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[LLCOS05000 L10100000.PH0000]

Notice of Public Meeting, Southwest Colorado Resource Advisory Council

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of public meeting.

SUMMARY: In accordance with the Federal Land Policy and Management Act and the Federal Advisory Committee Act of 1972 (FACA), the U.S. Department of the Interior, Bureau of Land Management (BLM) Southwest Colorado Resource Advisory Council (RAC) is scheduled to meet as indicated below.

DATES: The Southwest Colorado RAC meeting will be held on November 15, 2013, in Dolores, Colorado.

ADDRESSES: The Southwest Colorado RAC meeting will be held November 15, 2013, at the Dolores Public Lands Center, 29211 Highway 184, Dolores, CO 81323. The meeting will begin at 9 a.m. and adjourn at approximately 4 p.m. A public comment period regarding matters on the agenda will be held at 11:30 a.m.

FOR FURTHER INFORMATION CONTACT: Lori Armstrong, BLM Southwest District Manager, 970–240–5300; or Shannon Borders, Public Affairs Specialist, 970–240–5300; 2505 S. Townsend Ave., Montrose, CO 81401. 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 during normal business hours. The FIRS is available 24 hours a day, seven 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 Southwest Colorado RAC advises the Secretary of the Interior, through the BLM, on a variety of public land issues in Colorado. Topics of discussion for all Southwest Colorado RAC meetings may include field manager and working group reports, recreation, fire management, land use planning, invasive species management, energy and minerals management, travel management, wilderness, land exchange proposals, cultural resource management and other issues as appropriate.

These meetings are open to the public. The public may present written comments to the RACs. Each formal RAC meeting will also have time, as identified above, allocated for hearing public comments. Depending on the number of persons wishing to comment and time available, the time for individual oral comments may be limited.

Dated: September 24, 2013.

Helen M. Hankins,
BLM Colorado State Director.

[FR Doc. 2013–23960 Filed 10–21–13; 8:45 am]

BILLING CODE 4310–JB–P

DEPARTMENT OF THE INTERIOR

National Park Service

[NPS–WASO–BSD–13910; PX.XBSAD0096.00.1]

Proposed Information Collection; The Interagency Access Pass and Senior Pass Application Processes

AGENCY: National Park Service, Interior.

ACTION: Notice; request for comments.

SUMMARY: We (National Park Service) will ask the Office of Management and Budget (OMB) to approve the information collection (IC) described below. As required by the Paperwork Reduction Act of 1995 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. This IC is scheduled to expire on February 28, 2014. 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.

DATES: To ensure that we are able to consider your comments on this IC, we must receive them by December 23, 2013.

ADDRESSES: Send your comments on the IC 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 ''1024–0252'' in the subject line of your comments.

FOR FURTHER INFORMATION CONTACT: To request additional information about this IC, contact Brandon Flint by email

at *brandon_flint@nps.gov,* or at 202–513–7096 (telephone).

SUPPLEMENTARY INFORMATION:

I. Abstract. The America the Beautiful—National Parks and Federal Recreation Lands Pass Program covers recreation opportunities on public lands managed by four Department of the Interior agencies—the National Park Service, U.S. Fish and Wildlife Service, Bureau of Land Management, and the Bureau of Reclamation—and by the Department of Agriculture's U.S. Forest Service. The passes provide U.S. citizens and visitors an affordable and convenient way to access Federal recreation lands. Up to 100 percent of the pass program's proceeds are used to improve and enhance visitor recreation services. Two of the available passes—Interagency Access Pass and Interagency Senior Pass—require documentation and are the bases for this information collection.

The Interagency Access Pass is a free, lifetime pass issued to citizens or persons who are domiciled in the United States, regardless of age, and who have a medical determination and documentation of permanent disability. You can obtain an Access Pass in person, with proper documentation, from a participating Federal recreation site or office. Access Passes may also be obtained via mail order. Mail-order applicants for the Access Pass must submit a completed application, proof of residency, and documentation of permanent disability, and pay the document processing fee of $10 to obtain a pass through the mail.

If a person arrives at a recreation site and claims eligibility for the Interagency Access Pass, but cannot produce any documentation, that person must read, sign, and date a Statement of Disability Form in the presence of the agency officer issuing the Interagency Access Pass. If the applicant cannot read and/or sign the form, someone else may read, date, and sign the statement on his/her behalf in the applicant's presence and in the presence of the agency officer issuing the Interagency Access Pass.

The Interagency Senior Pass is a lifetime pass issued to U.S. citizens or permanent residents who are 62 years or older. There is a $10 fee for the Senior Pass. You can buy a Senior Pass in person from a participating Federal recreation site or office or by mail order. There is an additional document processing fee of $10 to obtain a Senior Pass through the mail. Mail-order applicants must submit a completed application and proof of residency and age, and pay $20 for the pass fee and processing fee.

Agency Web sites provide information on the passes and acceptable documentation. All documentation submitted in person or through the mail is returned to the applicant.

II. Data

OMB Control Number: 1024–0252.

Title: The Interagency Access Pass and Senior Pass Application Processes.

Service Form Number(s): None.

Type of Request: Extension of a currently approved collection.

Description of Respondents: Individuals.

Respondent's Obligation: Required to obtain or retain a benefit.

Frequency of Collection: On occasion.

Activity	Number of respondents	Number of annual responses	Completion time per response	Total annual burden hours
Interagency Access Pass (in person)	69,730	69,730	5 minutes	5,811
Interagency Access Pass (by mail)	3,670	3,670	10 minutes	612
Interagency Senior Pass (by mail)	27,500	27,500	10 minutes	4,583
Totals	100,900	100,900		11,006

Estimated Annual Nonhour Cost Burden: $331,649 ($311,700 for processing fees, and $19,949 for copying and postage costs).

III. Comments

We 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. 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: September 27, 2013.

Madonna L. Baucum,

Information Collection Clearance Officer, National Park Service.

[FR Doc. 2013–24591 Filed 10–21–13; 8:45 am]

BILLING CODE 4310–EH–P

DEPARTMENT OF THE INTERIOR

National Park Service

[NPS–WASO–BSAD–CONC–13365; PPWOBSADC0, PPMVSCS1Y.Y00000]

Proposed Information Collection; National Park Service Leasing Program

AGENCY: National Park Service, Interior.

ACTION: Notice; request for comments.

SUMMARY: We (National Park Service) will ask the Office of Management and Budget (OMB) to approve the information collection (IC) described below. As required by the Paperwork Reduction Act of 1995 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. This IC is scheduled to expire on February 28, 2014. 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.

DATES: To ensure that we are able to consider your comments on this IC, we must receive them by December 23, 2013.

ADDRESSES: Send your comments on the IC 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 ''1024–0233'' in the subject line of your comments.

FOR FURTHER INFORMATION CONTACT: To request additional information about this IC, contact Ben Erichsen at (202) 513–7156 (telephone) or at *Ben_Erichsen@nps.gov* (email).

SUPPLEMENTARY INFORMATION:

I. *Abstract.* The National Park Service leasing program allows the public to lease property located within the boundaries of the park system, under the authority of the Director of the National Park Service. A lease may not authorize an activity that could be authorized by a concessions contract or commercial use authorization. All leases must provide for the payment of fair market value rent. The Director may retain rental payments for park infrastructure needs and, in some cases, to provide administrative support of the leasing program.

Our authority to collect information for the leasing program is derived from section 802 of the National Parks Omnibus Management Act of 1998 (P.L. 105–391), the National Historic Preservation Act (P.L. 89–665), and Title 36, Code of Federal Regulations, section 18 (36 CFR 18). For competitive leasing opportunities, the regulations require the submission of proposals or bids by parties interested in applying for a lease. The regulations also require that the Director approve lease amendments, construction or demolition of structures, and encumbrances on leasehold interests.

We collect Information from anyone who wishes to submit a bid or proposal to lease a property. The Director may issue a request for bids if the amount of rent is the only criterion for award of a lease. The Director issues a request for proposals when the award of a lease is based on selection criteria other than the rental rate. A request for proposals may be preceded by a request for qualifications to select a ''short list'' of potential offerors that meet minimum management, financial, and other qualifications necessary for submission of a proposal.

The Director may enter into negotiations for a lease with nonprofit organizations and units of government without soliciting proposals or bids. In those cases, the Director collects information from the other party regarding the planned use of the premises, potential modifications to the premises, and other information as necessary to support a decision on whether or not to enter into a lease.

We also collect Information from existing leaseholders who seek to:

- Sublet a leased property or assign the lease to a new lessee.
- Construct or demolish portions of a leased property.
- Amend a lease to change the type of activities permitted under the lease.
- Encumber (mortgage) the leased premises.

We use the information to evaluate offers, proposed subleases or assignments, proposed construction or demolition, the merits of proposed lease amendments, and proposed encumbrances. The completion times for each information collection requirement vary substantially depending on the complexity of the leasing opportunity.

II. Data

OMB Control Number: 1024–0233.

Title: National Park Service Leasing Program, 36 CFR 18.

Service Form Number(s): None.

Type of Request: Revision of a currently approved collection.

Description of Respondents: Individuals and businesses.

Respondent's Obligation: Required to obtain or retain a benefit.

Frequency of Collection: On occasion.

Activity	Number of respondents	Number of annual responses	Completion time per response	Total annual burden hours
Proposals, Bids, Qualifications				
Complex	10	10	40	400
Simple	10	10	8	80
Requests to Sublet/Assign Lease				
Complex	1	1	40	40
Simple	4	4	8	32
Construction/Demolition Requests				
Complex	2	2	32	64
Simple	1	1	12	12
Amendments	2	2	4	8
Encumbrance Requests				
Complex	2	2	40	80
Simple	2	2	8	16
Totals	34	34	.....	732

Estimated Annual Nonhour Cost Burden: None.

III. Comments

We 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. 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: September 30, 2013.

Madonna L. Baucum,

Information Collection Clearance Officer, National Park Service.

[FR Doc. 2013–24589 Filed 10–21–13; 8:45 am]

BILLING CODE 4310–EH–P

DEPARTMENT OF THE INTERIOR

Bureau of Ocean Energy Management

[MMAA 104000]

Outer Continental Shelf (OCS), Gulf of Mexico (GOM), Oil and Gas Lease Sales Eastern Planning Area (EPA) Lease Sales 225 and 226

AGENCY: Bureau of Ocean Energy Management (BOEM), Interior.

ACTION: Notice of Availability (NOA) of a Final Environmental Impact Statement (EIS).

SUMMARY: Consistent with the regulations implementing the National Environmental Policy Act, as amended (42 U.S.C. 4321 *et seq.*) (NEPA), BOEM has prepared a Final EIS on oil and gas lease sales tentatively scheduled to be held in 2014 and 2016 in the EPA offshore the states of Louisiana, Mississippi, Alabama, and Florida. Under the Outer Continental Shelf Oil & Gas Leasing Program: 2012–2017 (Five-Year Program), two lease sales are scheduled for the EPA. The proposed EPA lease sales are Lease Sales 225 and 226.

SUPPLEMENTARY INFORMATION: This Final EIS provides information on the baseline conditions and potential environmental effects of oil and natural gas leasing, exploration, development, and production in the EPA. The Final EIS incorporates by reference the analysis presented in the *Gulf of Mexico OCS Oil and Gas Lease Sales: 2012–2017; Western Planning Area Lease Sales 229, 233, 238, 246, and 248; Central Planning Area Lease Sales 227, 231, 235, 241, and 247, Final Environmental Impact Statement* (2012–2017 WPA/CPA Multisale EIS; OCS EIS/EA BOEM 2012–019) and *Gulf of Mexico OCS Oil and Gas Lease Sales: 2013–2014; Western Planning Area Lease Sale 233; Central Planning Area Lease Sale 231, Final Supplemental Environmental Impact Statement* (WPA 233/CPA 231 Supplemental EIS; OCS EIS/EA BOEM 2013–0118). The Final EIS also tiers from the *Outer Continental Shelf Oil and Gas Leasing Program: 2012–2017 Final Programmatic Environmental Impact Statement* (OCS EIS/EA BOEM 2012–030). Subject matter experts surveyed scientific journals and available scientific data, gathered information, and interviewed personnel from academic institutions and Federal, State, and local government agencies. BOEM has examined the potential impacts of routine activities, potential accidental events, and the incremental contribution of a proposed lease sale to the cumulative impacts on environmental and socioeconomic resources. BOEM conducted an extensive search for new information in consideration of the *Deepwater Horizon* explosion, oil spill, and response. BOEM has also examined the potential impacts of a low-probability catastrophic event. The oil and gas resource estimates and scenario information for this Final EIS are presented as a range that would encompass the resources and activities estimated for an EPA proposed lease sale.

Final EIS Availability: BOEM has printed and will be distributing a limited number of paper copies. In keeping with the Department of the Interior's mission of the protection of natural resources and to limit costs while ensuring availability of the document to the public, BOEM will primarily distribute digital copies of this Final EIS on compact discs. However, if you require a paper copy, BOEM will provide one upon request if copies are still available.

1. You may obtain a copy of the Final EIS from the Bureau of Ocean Energy Management, Gulf of Mexico OCS Region, Public Information Office (GM 335A), 1201 Elmwood Park Boulevard, Room 250, New Orleans, Louisiana 70123–2394 (1–800–200–GULF).

2. You may download or view the Final EIS on BOEM's Internet Web site at *http://www.boem.gov/Environmental-Stewardship/Environmental-Assessment/NEPA/nepaprocess.aspx.*

Several libraries along the Gulf Coast have been sent copies of the Final EIS. To find out which libraries have copies of the Final EIS for review, you may contact BOEM's Public Information Office or visit BOEM's Internet Web site at *http://www.boem.gov/Environmental-Stewardship/Environmental-Assessment/NEPA/nepaprocess.aspx.*

FOR FURTHER INFORMATION CONTACT: For more information on the Final EIS, you may contact Mr. Gary D. Goeke, Chief, Environmental Assessment Section, Office of Environment (GM 623E), Bureau of Ocean Energy Management, Gulf of Mexico OCS Region, 1201 Elmwood Park Boulevard, New Orleans, Louisiana 70123–2394 or by email at *boemegomeis@BOEM.gov.* You may also contact Mr. Goeke by telephone at (504) 736–3233.

Authority: This NOA is published pursuant to the regulations (40 CFR 1503) implementing the provisions of NEPA, as amended (42 U.S.C. 4321 *et seq.* [1988]).

Dated: September 19, 2013.

Tommy P. Beaudreau,

Director, Bureau of Ocean Energy Management.

[FR Doc. 2013–24690 Filed 10–21–13; 8:45 am]

BILLING CODE 4310–MR–P

INTERNATIONAL TRADE COMMISSION

[Investigation Nos. 701–TA–506–508 and 731–TA–1238–1243 (Preliminary)]

Non-Oriented Electrical Steel From China, Germany, Japan, Korea, Sweden, and Taiwan Institution of Antidumping and Countervailing Duty Investigations and Scheduling of Preliminary Phase Investigations

AGENCY: United States International Trade Commission.

ACTION: Notice.

SUMMARY: The Commission hereby gives notice of the institution of investigations and commencement of preliminary phase antidumping and countervailing duty investigations Nos. 701–TA–506–508 and 731–TA–1238–1243 (Preliminary) under sections 703(a) and 733(a) of the Tariff Act of 1930 (19 U.S.C. 1671b(a) and 1673b(a)) (the Act) to determine whether there is a reasonable indication that an industry in the United States is materially injured or threatened with material injury, or the establishment of an industry in the United States is materially retarded, by reason of imports from China, Germany, Japan, Korea, Sweden, and Taiwan of non-oriented electrical steel that are alleged to be sold in the United States at less than fair value and alleged to be subsidized by the Governments of China, Korea, and Taiwan. The products subject to the petitions are classifiable in subheadings 7225.19.00 and 7226.19.10, and 7226.19.90 of the Harmonized Tariff Schedule of the United States (HTS). Certain products

subject to these petitions may also be imported under statistical reporting numbers 7225.50.8085, 7225.99.0090, 7226.92.5000, 7226.92.7050, 7226.92.8050, and 7226.99.0180. Unless the Department of Commerce extends the time for initiation pursuant to sections 702(c)(1)(B) or 732(c)(1)(B) of the Act (19 U.S.C. 1671a(c)(1)(B) or 1673a(c)(1)(B)) or investigative deadlines are tolled by government closure, the Commission must reach a preliminary determination in antidumping and countervailing duty investigations in 45 days, or in this case by November 14, 2013. The Commission's views are due at Commerce within five business days thereafter, or by November 21, 2013.

For further information concerning the conduct of these investigations and rules of general application, consult the Commission's Rules of Practice and Procedure, part 201, subparts A through E (19 CFR part 201), and part 207, subparts A and B (19 CFR part 207).

DATES: *Effective* September 30, 2013.

FOR FURTHER INFORMATION CONTACT: Edward Petronzio (202–205–3176), Office of Investigations, U.S. International Trade Commission, 500 E Street SW., Washington, DC 20436. Hearing-impaired persons can obtain information on this matter by contacting the Commission's TDD terminal on 202–205–1810. Persons with mobility impairments who will need special assistance in gaining access to the Commission should contact the Office of the Secretary at 202–205–2000. General information concerning the Commission may also be obtained by accessing its Internet server (*http://www.usitc.gov*).

The public record for these investigations may be viewed on the Commission's electronic docket (EDIS) at *http://edis.usitc.gov.*

SUPPLEMENTARY INFORMATION:

Background. These investigations are being instituted in response to a petition filed on September 30, 2013, by AK Steel Corporation, West Chester, Ohio.

Participation in the investigations and public service list. Persons (other than petitioners) wishing to participate in the investigations as parties must file an entry of appearance with the Secretary to the Commission, as provided in sections 201.11 and 207.10 of the Commission's rules, not later than seven days after publication of this notice in the **Federal Register**. Industrial users and (if the merchandise under investigation is sold at the retail level) representative consumer organizations have the right to appear as parties in Commission antidumping and countervailing duty investigations. The Secretary will prepare a public service list containing the names and addresses of all persons, or their representatives, who are parties to these investigations upon the expiration of the period for filing entries of appearance.

Limited disclosure of business proprietary information (BPI) under an administrative protective order (APO) and BPI service list. Pursuant to section 207.7(a) of the Commission's rules, the Secretary will make BPI gathered in these investigations available to authorized applicants representing interested parties (as defined in 19 U.S.C. 1677(9)) who are parties to the investigations under the APO issued in the investigations, provided that the application is made not later than seven days after the publication of this notice in the **Federal Register**. A separate service list will be maintained by the Secretary for those parties authorized to receive BPI under the APO.

Conference. The Commission's Director of Investigations has scheduled a conference in connection with these investigations for 9:30 a.m. on October 21, 2013, at the U.S. International Trade Commission Building, 500 E Street SW., Washington, DC. Requests to appear at the conference should be filed with *William.Bishop@usitc.gov* and *Sharon.Bellamy@usitc.gov* (do not file on EDIS) on or before October 17, 2013. Parties in support of the imposition of countervailing and antidumping duties in these investigations and parties in opposition to the imposition of such duties will each be collectively allocated one hour within which to make an oral presentation at the conference. A nonparty who has testimony that may aid the Commission's deliberations may request permission to present a short statement at the conference.

Written submissions. As provided in sections 201.8 and 207.15 of the Commission's rules, any person may submit to the Commission on or before October 24, 2013, a written brief containing information and arguments pertinent to the subject matter of the investigations. Parties may file written testimony in connection with their presentation at the conference no later than three days before the conference. If briefs or written testimony contain BPI, they must conform with the requirements of sections 201.6, 207.3, and 207.7 of the Commission's rules. Please be aware that the Commission's rules with respect to electronic filing have been amended. The amendments took effect on November 7, 2011. See 76 FR 61937 (Oct. 6, 2011) and the newly revised Commission's Handbook on E-Filing, available on the Commission's Web site at *http://edis.usitc.gov.*

In accordance with sections 201.16(c) and 207.3 of the rules, each document filed by a party to the investigations must be served on all other parties to the investigations (as identified by either the public or BPI service list), and a certificate of service must be timely filed. The Secretary will not accept a document for filing without a certificate of service.

Authority: These investigations are being conducted under authority of title VII of the Tariff Act of 1930; this notice is published pursuant to section 207.12 of the Commission's rules.

Issued: September 30, 2013.

By order of the Commission.

Lisa R. Barton,

Acting Secretary to the Commission.

[FR Doc. 2013–24337 Filed 10–21–13; 8:45 am]

BILLING CODE 7020–02–P

DEPARTMENT OF JUSTICE

Notice of Lodging of Consent Decree Pursuant to the Clean Air Act

On September 30, 2013, the Department of Justice lodged a proposed Consent Decree (''Decree'') in the United States District Court for the District of South Carolina, Florence Division in the lawsuit entitled *United States of America* v. *ConAgra Foods, Inc., and ConAgra Grocery Products, LLC,* Civil Action No. 2:13-cv-02756.

This Decree represents a settlement of claims against the Defendants ConAgra Foods, Inc., and ConAgra Grocery Products, LLC (''Defendants'' or ''ConAgra'') for violations of the Clean Water Act, 33 U.S.C. 1321, and Spill Prevention, Control and Countermeasure (''SPCC'') and Facility Response Plan (''FRP'') regulations found at 40 CFR part 112. The Decree requires that the Defendants pay a civil penalty of $475,000. The Decree further requires that ConAgra implement a formal tank integrity testing program in accordance with the American Petroleum Institute's (''API'') formal standard 653. ConAgra will be required to submit a report annually to EPA summarizing the status of the tank testing and identifying which tanks were inspected during the previous calendar year and which will be inspected in the current year. The Decree provides for stipulated penalties in the event the Defendants fail to comply with the Decree's requirements.

The publication of this notice opens a period for public comment on the Consent Decree. Comments should be

addressed to the Assistant Attorney General, Environment and Natural Resources Division, and should refer to *United States* v. *ConAgra Foods, Inc., and ConAgra Grocery Products, LLC,* Civil Action No. 2:13-cv-02756, D. J. Ref. No. 90–5–1–1–10403. All comments must be submitted no later than thirty (30) days after the publication date of this notice. Comments may be submitted either by email or by mail:

To submit comments:	Send them to:
By e-mail	*pubcomment-ees.enrd@usdoj.gov.*
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Henry S. Friedman,

Assistant Section Chief, Environmental Enforcement Section, Environment and Natural Resources Division.

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DEPARTMENT OF JUSTICE

Drug Enforcement Administration

Ronald F. Lambert, D.D.S.; Decision and Order

On November 17, 2011, the Deputy Assistant Administrator issued an Order to Show Cause to Ronald Lambert, D.D.S. (hereinafter, Respondent), of Longmont, Colorado. The Show Cause Order proposed the denial of Respondent's application for a DEA Certificate of Registration as a practitioner, on the ground that Respondent's ''registration would be inconsistent with the public interest.'' Show Cause Order at 1 (citing 21 U.S.C. 823(f)).

The Show Cause Order alleged that on January 1, 2011, Respondent had applied for a practitioner's registration with authority to dispense controlled substances in schedules III through V. *Id.* The Order alleged that during an interview by DEA investigators, Respondent admitted to having possessed and used methamphetamine, a schedule II controlled substance, ''on numerous occasions,'' in violation of federal and state law. *Id.* (citing 21 U.S.C. 844(a); Colo. Rev. Stat. § 18–18–404(1)(a)). The Order also alleged that, during the interview, Respondent also admitted to working with an outlaw motorcycle gang to improve their process of manufacturing methamphetamine. *Id.* at 1–2 (citations omitted).

Next, the Show Cause Order alleged that on June 10, 2003, Respondent's dental license was suspended by the Colorado State Board of Dental Examiners (hereinafter, the Board), and that on November 5, 2003, the Board revoked his license. *Id.* Finally, the Order alleged that on March 13, 2008, Respondent entered into a Stipulation and Final Agency Order with the Board, in which he admitted that he had a history of abusing substances including alcohol, marijuana, methamphetamine, and cocaine, as well as a criminal history that includes a conviction for burglary and a conviction for manufacturing and possession of a controlled substance. *Id.* The Order then alleged that the Board had placed Respondent on probation for a period of five years and had prohibited him from having controlled substances in his dental practice. *Id.*

On November 22, 2011, the Show Cause Order, which also notified Respondent of his right to request a hearing on the allegations, or to submit a written statement of position in lieu of a hearing, the procedure for electing either option, and the consequence for failing to elect either option, was served on Respondent by certified mail addressed to him at his proposed registered location. *Id.* (citing 21 CFR 1301.43 (a)–(e), *id.* § 1316.47). Thereafter, on December 15, 2011, Respondent's counsel filed a letter waiving his right to a hearing, but submitting a statement of position as to why his application should not be denied. GX 2.

On August 8, 2012, the Government submitted a Request for Final Agency Action, along with the Investigative Record it had compiled. Having considered the entire record, including Respondent's statement of position, I conclude that the evidence submitted by the Government makes out a *prima facie* case for denial of Respondent's application. However, the Government concedes that Respondent has accepted responsibility for his misconduct and that he has demonstrated his sobriety for an extensive period. While the Government argues that notwithstanding these concessions, Respondent's application should be denied for various reasons, I conclude that the Government's arguments are not persuasive and will therefore grant Respondent's application and order that he be issued a restricted registration. I make the following factual findings.

Findings of Fact

Respondent is a dentist licensed by Colorado State Board of Dental Examiners. GX 10. While on November 5, 2003, the Board revoked Respondent's dental license based on his having engaged in substance abuse and criminal activity, on March 13, 2008, the Board approved a Stipulation and Final Agency Order, pursuant to which it reinstated Respondent's dental license while placing him on probation for five years. *Id.* Respondent's state license was last renewed on March 1, 2012 and does not expire until February 28, 2014. GX 3.

In the Stipulation and Final Agency Order, Respondent admitted that he ''has a history of substance abuse with alcohol, marijuana, methamphetamine and cocaine.'' GX 10, at 1. He also admitted to having a felony conviction for manufacture and possession of a schedule II controlled substance on November 11, 2003.[1] *Id.*

[1] Respondent also admitted to a felony conviction for first degree burglary in 1983.

Respondent previously held a DEA practitioner's registration, which expired on March 31, 2004. GX 12. On January 11, 2011, Respondent applied for a new registration, seeking authority to dispense controlled substances in schedules III through V. GX 4. On his application, Respondent disclosed that on April 22, 2003, he pled guilty to manufacturing a controlled substance and that he was sentenced to two years in jail and four years of supervised probation, which he had successfully completed. *Id.* He also disclosed that on November 15, 2002, his dental license had been revoked due ''to undefended allegations of substance abuse.'' *Id.* Respondent further explained that ''after successful rehabilitation from drug addiction and proving this to the Board's satisfaction with documented clean time, I was granted a new license to practice dentistry in March 2008.'' [2] *Id.*

On June 29, 2011, two DEA Diversion Investigators interviewed Respondent.[3] GX 13. During the course of the interview, Respondent admitted that in the 1970s he had regularly used marijuana; that in April 1983, he had participated, while intoxicated, in a burglary during which his partner had murdered the victim of the burglary; and that in April 2003, police, who had been requested by his ex-wife to perform a welfare check on him at his residence, found methamphetamine. *Id.* at 1–2. Further, Respondent engaged in a struggle with the police. *Id.* at 2.

Thereafter, Respondent was taken to a local hospital for a 72-hour mental health hold. GX 8, at 2. Upon his arrival, ''Respondent was cursing, screaming and refus[ed] all treatment.'' *Id.* After he ''bit a security guard,'' he was ''placed in restraints.'' *Id.* Respondent admitted that he had used a half-gram of methamphetamine on the day of this incident, and a urine drug screen was positive for meth. *Id.* at 2–3. The same day, Respondent was transferred to another hospital where he was evaluated; the evaluation determined that he met the criteria for a diagnosis of methamphetamine abuse and depressive disorder. *Id.* at 3.

The following day, Respondent admitted to methamphetamine use; he also admitted to daily use of marijuana in the preceding six months. *Id.* Respondent stated that he started using methamphetamine ''because of a depressed mood.'' *Id.* However, he denied needing treatment for substance abuse. *Id.*

Upon being discharged from the hospital, family members took Respondent to the Talbot Recovery Center in Atlanta to undergo residential treatment. GX 7, at 6; GX 13, at 2. However, five days after entering treatment, Talbot discharged him alleging that he had brought a vial of methamphetamine with him. GX 13, at 2. Upon his return to Colorado, Respondent learned that he had criminal charges pending against him based on the April 21, 2003 incident. *Id.*

Respondent admitted to DEA Investigators that on returning to Colorado, he purchased methamphetamine from street dealers. *Id.* He also admitted to being friends with two individuals who were associated with the President of the local chapter of the Bandidos, a designated outlaw motorcycle gang. *Id.* at 3. According to the affidavit, Respondent admitted that he helped the Bandidos manufacture methamphetamine. *Id.*

As a condition of his bond, Respondent was required to undergo urine drug screening. *Id.* Respondent tested positive for methamphetamine on various occasions and was charged with seventeen counts of violating the bond conditions. *Id.*

On November 11, 2003, Respondent met with several members of the Bandidos at a home in Denver. *Id.* The gang members had unsuccessfully attempted to manufacture a batch of methamphetamine. *Id.* Respondent took the batch and placed it in his car, with the aim of reversing the chemistry of the batch and making it into methamphetamine. *Id.*

Respondent drove to an address in Arvada, Colorado, where someone reported to the police that he/she had observed him cursing, screaming at two girls who were walking in a nearby park, and slamming the trunk of his car. GX 5, at 1. Two police officers were dispatched to the scene; upon their arrival they observed Respondent standing near the trunk of his car, which was open. *Id.* The officers also saw two battery chargers lying in the street next to car. *Id.*

When the officers asked Respondent what he was doing, he was uncooperative and would not answer their questions. *Id.* Respondent became agitated, could not provide his vehicle's registration and would not tell the officers his name. *Id.* When asked if he had any identification, Respondent said no. *Id.*

The officers observed a bulge in Respondent's left front pants pocket and that Respondent's left hand was in the pocket. *Id.* When one of the officers asked Respondent to remove his hand from his pocket, he refused. *Id.* The officer then forcibly removed Respondent's hand, and subdued him. *Id.* While conducting a pat-down search, the officers found a small zip-lock bag containing a white powder which they suspected to be a controlled substance; Respondent then complained that the officers had planted drugs on him. *Id.*

Thereafter, the officers determined that Respondent was the owner of the car and conducted an inventory search, during which they found a variety items used to manufacture methamphetamine. *Id.* at 2. Specifically, the officers found a box holding 50 books of red-phosphorous matches; a small bottle of iodine tincture; a package of pseudoephedrine; a one liter bottle containing a two-layer liquid, the top layer of which tested positive for amphetamine; and a book of handwritten recipes for manufacturing narcotics. *Id.* In addition, the officers field tested the substance they had previously found on Respondent and determined that it was methamphetamine. *Id.*

Respondent was then charged with manufacturing methamphetamine, possession of a schedule II controlled substance, and disorderly conduct. GX 13, at 3–4. Respondent was offered a plea bargain, pursuant to which he pled guilty to the manufacturing charge; the other charges, including those which were brought after the April 2003 incident, were dismissed. *Id.* at 4. On March 22, 2004, Respondent pled guilty to the charge and was sentenced to two years in prison and four years of probation; Respondent was imprisoned for fifteen months. GX 6, at 8.

In February 2006, Respondent returned to the Talbot Recovery Center, and in May 2006, he successfully completed the Center's in-patient treatment program. *Id.;* GX 10, at 1. Moreover, as the Board found in the Stipulation and Final Agency Order, at least through the date of the 2008 order, Respondent ''ha[d] been actively involved in the Peer Assistance Service Program, 12 step work, the ARC relapse prevention class and regular toxicity screens.'' GX 10, at 1–2. The Board also noted that ''Respondent had over four years of documented sobriety.'' *Id.* at 2.

Pursuant to the Board's Order, Respondent was placed on probation for five years. The terms of his probation included, *inter alia,* that he: (1) Enter a new Dentist Rehabilitation Contract (DRC); (2) maintain full compliance

[2] While the dates Respondent provided on the application for the Board actions were not the actual dates of the various actions, these errors are not material misstatements as they have no capacity to influence the decision in this matter.

[3] It is noted that this affidavit was not executed until more than a year after the interview. GX 13, at 1 & 4.

with his treatment program and any other conditions of the DRC; (3) provide random urine screens and that if he failed to appear, such failure would be deemed a positive test and a violation of his probation; (4) notify the Dentist Peer Assistance Program of any drug (and its dosage) prescribed to him; and (5) totally abstain from using ''any habit-forming drugs, controlled substances, or prescription substances other than those prescribed for him by a licensed treating physician or dentist,'' and that he take such drugs ''only within the scope of treatment'' and only ''as prescribed.'' *Id.* at 3–4. Finally, ''Respondent agree[d] to have no controlled substances in his dental practice throughout his period of probation.'' *Id.* at 4.

In his statement of position, Respondent states that he ''has been very honest with the DEA and the [State Board] by admitting his past struggles with substance abuse as well as his past felony convictions, one of which was related to the manufacture and possession of a Schedule II controlled substance.'' GX 2, at 2. However, Respondent denies that he ''work[ed] directly with the Banditos to illegally manufacture methamphetamine,'' stating that ''[h]e helped a person illegally manufacture methamphetamine, and . . . later learned that this man was associated with the Banditos.'' *Id.*

Respondent acknowledges that he ''has a history of substance abuse as well as a Major Depressive Disorder,'' but states that he ''has sought, and continues to seek, treatment for this disease.'' *Id.* He further notes that he completed the recovery program at Talbot; that he currently participates in the Peer Assistance Program in Colorado, the 12-step program, and in a relapse prevention class; and that he provides regular urine drug screens. *Id.* In addition, Respondent advises that ''[h]e is under the care of a psychiatrist, and [that] his major depression is currently stable.'' *Id.* Moreover, ''he has been sober since February 11, 2004.'' *Id.* Respondent states that he ''has fully complied with the terms of'' the Board's 2008 Order. *Id.*

Finally, Respondent states that he ''is not trying to ignore his past nor make excuses for his conduct.'' *Id.* Indeed, he admits that he ''has made mistakes in the past'' and that ''he has suffered the criminal consequences for these transgressions.'' *Id.* at 3. However, Respondent argues that he has ''embraced his recovery and sobriety'' and ''has made significant changes in his life and is not a threat to public safety.'' *Id.* Respondent thus contends that ''the issuance of a . . . registration would not be inconsistent with the public interest,'' and recognizes that the issuance of a ''registration would likely be subject to the terms of a'' memorandum of understanding.

Discussion

Section 303(f) of the Controlled Substances Act (CSA) provides that an application for a practitioner's registration may be denied upon a determination ''that the issuance of such registration would be inconsistent with the public interest.'' 21 U.S.C. 823(f). In making the public interest determination in the case of a practitioner, Congress directed that the following factors be considered:

(1) The recommendation of the appropriate State licensing board or professional disciplinary authority.

(2) The applicant's experience in dispensing . . . controlled substances.

(3) The applicant's conviction record under Federal or State laws relating to the manufacture, distribution, or dispensing of controlled substances.

(4) Compliance with applicable State, Federal, or local laws relating to controlled substances.

(5) Such other conduct which may threaten the public health and safety. *Id.*

''[T]hese factors are considered in the disjunctive.'' *Robert A. Leslie,* 68 FR 15227, 15230 (2003). I may rely on any one or a combination of factors and may give each factor the weight I deem appropriate in determining whether . . . to deny an application. *Id.* Moreover, I am ''not required to make findings as to all of the factors.'' *Hoxie* v. *DEA,* 419 F.3d 477, 482 (6th Cir. 2005) (citing *Morall* v. *DEA,* 412 F.3d 165, 173–74 (D.C. Cir. 2005)).

The Government has the burden of proving, by a preponderance of the evidence, that the requirements for denial of an application pursuant to 21 U.S.C. 823(f) are met. 21 CFR 1301.44(d). However, ''once the [G]overnment establishes a prima facie case showing a practitioner has committed acts which render his registration inconsistent with the public interest, the burden shifts to the practitioner to show why [granting his application for] registration would be consistent with the public interest. '' *MacKay,* 664 F.3d at 817 (citing *Medicine Shoppe-Jonesborough,* 73 FR 364, 387 (2008) (citing cases)).

Having considered all of the factors, I conclude that the Government's evidence with respect to factors three, four, and five establishes its *prima facie* burden of showing that issuance of registration to Respondent would be inconsistent with the public interest.[4] However, as explained below, in its Request for Final Agency Action, the Government essentially concedes that Respondent has rebutted its *prima facie* case. Having considered the Government's various arguments as to why Respondent's application should nonetheless be denied, I conclude that his application should be granted.

Factors Three, Four and Five—Respondent's Record of Convictions for Offenses Related to the Manufacture or Distribution of Controlled Substances, His Compliance with Applicable Laws Related to Controlled Substances, and Such Other Conduct Which May Threaten Public Health and Safety

It is undisputed that in March 2004, Respondent pled guilty to, and was convicted of, the state law offense of manufacturing methamphetamine, a schedule II controlled substance. GX 6, at 3 (citing Colo. Rev. Stat. § 18–18–405(1)(a)(2)(a)(I)(A)). Respondent's conviction of this offense, which arose out of the November 2003 incident, supports an adverse finding under factor three, and by itself, satisfies the Government's *prima facie* burden of demonstrating that Respondent's registration would be inconsistent with the public interest.[5] *See* 21 U.S.C. 823(f).

Buttressing the Government's case is the undisputed evidence that Respondent possessed and abused controlled substances including methamphetamine, cocaine and marijuana. For example, the evidence

[4] With respect to factor one—the recommendation of the state licensing board—it should be noted that the Board has not made a recommendation in this matter. Moreover, while Respondent now apparently has authority under Colorado law to engage in some controlled substance activities (such as prescribing), and thus meets a prerequisite for obtaining a new practitioner's registration, *see* 21 U.S.C. 802(21) and 823(f), the Agency has long held that possession of state authority is not dispositive of the public interest inquiry. *George Mathew,* 75 FR 66138, 66145 (2010), *pet. for rev. denied, Mathew* v. *DEA,* No. 10–73480, slip op. at 5 (9th Cir., Mar. 16, 2012); *see also Patrick W. Stodola,* 74 FR 20727, 20730 n.16 (2009); *Robert A. Leslie,* 68 FR 15227,15230 (2003). As the Agency has long held, ''[T]he Controlled Substances Act requires that the Administrator . . . make an independent determination [from that made by state officials] as to whether the granting of controlled substance privileges would be in the public interest.'' *Mortimer Levin,* 57 FR 8680, 8681 (1992). Thus, this factor neither weighs in favor of granting, or denying, his application. *Paul Weir Battershell,* 76 FR 44359, 44366 (2009) (citing *Edmund Chein,* 74 FR 6580, 6590 (2007), *pet. for rev. denied, Chein* v. *DEA,* 533 F.3d 828 (D.C. Cir. 2008)).

It is further noted that there is no evidence regarding factor two, Respondent's experience in dispensing controlled substances.

[5] While Respondent was not charged under federal law, his conviction for the state law offense supports a finding under factor four that he violated federal law as well. *See* 21 U.S.C. 841(a)(1).

shows that, at the time of the April 2003 incident which led to his arrest and hospitalization, Respondent possessed and used a half-gram of methamphetamine; indeed, Respondent admitted to using methamphetamine and tested positive for the drug. He also admitted to purchasing methamphetamine after being discharged by Talbot and, while on bond, tested positive on multiple occasions for methamphetamine. Thus, Respondent clearly violated federal law. 21 U.S.C. 844(a).

Moreover, during the April 2003 hospitalization, Respondent admitted that he had used marijuana on a daily basis for the past six months. And finally, in the 2008 Board Order, he admitted to abusing cocaine. Thus, Respondent clearly possessed controlled substances in violation of federal law; his failure to comply with federal laws related to controlled substances likewise supports an adverse finding under factor four.

So too, DEA has long held that a practitioner's self-abuse of controlled substances constitutes ''[s]uch other conduct which may threaten the public health and safety.'' *See Tony T. Bui,* 75 FR 49979, 49989 (2010); *id.* at 49988 (quoting *David E. Trawick,* 53 FR 5326, 5327 (1988) (factor five ''encompasses 'wrongful acts relating to controlled substances committed by a registrant outside of his professional practice but which relate to controlled substances'')). Moreover, by itself, a practitioner's self-abuse of a controlled substance provides an adequate ground to deny an application even where there is no evidence that the registrant abused his prescription-writing authority, *Trawick,* 53 FR at 5326, or committed acts involving unlawful distribution to others. *See Bui,* 75 FR at 49989 (citing *Kenneth Wayne Green, Jr.,* 59 FR 51453 (1994); *Allan L. Gant,* 59 FR 10826 (1994); *William H. Carranza,* 51 FR 2771 (1986)). Thus, this factor also supports the Government's contention that Respondent's registration would be inconsistent with the public interest and supports denial of his application.[6] 21 U.S.C. 823(f).

Sanction

This Agency has repeatedly held that a proceeding under section 303 '' 'is a remedial measure, based upon the public interest and the necessity to protect the public from those individuals who have misused controlled substances or their DEA Certificate of Registration, and who have not presented sufficient mitigating evidence to assure the Administrator that they can be entrusted with the responsibility carried by such a registration.' '' *Samuel S. Jackson,* 72 FR 23848, 23853 (2007) (quoting *Leo R. Miller,* 53 FR 21931, 21932 (1988)). Therefore, where, as here, ''the Government has proved that a registrant has committed acts inconsistent with the public interest, a registrant must ' ''present sufficient mitigating evidence to assure the Administrator that [he] can be entrusted with the responsibility carried by such a registration.'' ' '' *Medicine Shoppe-Jonesborough,* 73 FR 364, 387 (2008) (quoting *Jackson,* 72 FR at 23853 (2007) (quoting *Leo R. Miller,* 53 FR 21931, 21932 (1988))), *aff'd, Medicine Shoppe-Jonesborough* v. *DEA,* 300 F. App'x 409 (6th Cir. 2008). ''Moreover, because 'past performance is the best predictor of future performance,' *ALRA Labs, Inc.* v. *DEA,* 54 F.3d 450, 452 (7th Cir. 1995), [DEA] has repeatedly held that where a registrant has committed acts inconsistent with the public interest, the registrant must accept responsibility for [his] actions and demonstrate that [he] will not engage in future misconduct.'' *Medicine Shoppe,* 73 FR at 387; *accord Jackson,* 72 FR at 23853; *John H. Kennedy,* 71 FR 35705, 35709 (2006); *Prince George Daniels,* 60 FR 62884, 62887 (1995). *See also Hoxie* v. *DEA,* 419 F.3d at 483 (''admitting fault'' is ''properly consider[ed]'' by DEA to be an ''important factor[]'' in the public interest determination).

With respect to the first prerequisite for rebutting the Government's *prima facie* case, the Government itself acknowledges that Respondent ''has accepted responsibility for his actions and other than clarifying his involvement with the Bandidos, he has not attempted to minimize or justify his conduct.'' Req. for Final Agency Action, at 16–17. And with respect to the second prerequisite, the Government concedes that ''[s]ince reinstatement of his dental license, it is of some significance that Respondent's professional practice has continued without blemish and that he has avoided illicit drugs for what appears to be eight years.'' *Id.* at 16.

Notwithstanding its concessions that Respondent has provided sufficient evidence as to both prongs necessary to rebut the Government's *prima facie* case, the Government argues that he cannot be entrusted with a registration. *Id.* at 17. First, it argues that Respondent's misconduct goes beyond simple possession and abuse, and that he ''willingly participated in the production of methamphetamine for illegitimate purposes'' and did so ''for an outlaw motorcycle gang.'' *Id.* at 13. Noting the circumstances of his November 2003 arrest, the Government contends that ''Respondent sought to 'reverse' the chemistry of the failed batch and turn it into methamphetamine'' and ''[h]ad it been sold or distributed, the [drug] would have had an enormous potential for injury to [the] community.'' *Id.* Second, the Government argues that Respondent has a ''long-standing history'' of substance abuse, which could have placed his patients at risk, and that even if his ''addiction did not adversely affect his dental practice, it would come to mean that Respondent was able to hide his addiction for all those years.'' *Id.* at 14–16. The Government thus argues that ''[w]hile his recovery is commendable and indicates potential for future registration, Respondent's historically reckless abandonment of his responsibility as a registrant and 'willingness to risk serious criminal and professional sanctions do not augur well' [sic] as consistent with the public interest.'' *Id.* at 17 (quoting *Imran I. Chaudry,* 69 FR 62081, 62084 (2004)). Accordingly, the Government seeks the denial of Respondent's application. *Id.* (citing *Mark Binette,* 64 FR 42977, 42980 (1999)).

It cannot be disputed that Respondent committed serious misconduct in possessing and abusing various controlled substances; his participation in the manufacturing of methamphetamine is especially egregious. Yet the record demonstrates that he was addicted to methamphetamine and started using methamphetamine because of his depression. Nor can it be disputed that at the time he committed the offense of manufacturing methamphetamine, he was in the throes of his addiction.

In *Chaudry,* I rejected an ALJ's recommendation that I grant a restricted registration to a physician who had purchased, abused and distributed methamphetamine. 69 FR at 62084. Therein, I specifically explained that Dr. Chaudry's ''illicit purchase and use of methamphetamine [were] particularly serious acts of misconduct.'' *Id.* Yet I further observed that the evidence showed that the ''[r]espondent was not chemically dependent,'' and explained that this suggested ''that it was neither addiction nor dependency that motivated his 'street' purchases of methamphetamine,'' but rather, the physician's ''unhindered judgment to illegally obtain and use'' the drug. *Id.*

[6] I place no weight, however, on the evidence regarding Respondent's thirty-year old conviction, both because the Government did not establish the conviction's nexus to Respondent's activities as a practitioner, and because the event is too remote in time.

By contrast, the evidence here shows that Respondent was addicted to methamphetamine throughout the period in which he committed the various acts of misconduct involving that drug, a substance which this Agency has recognized is a highly addictive controlled substance.[7] *See Sunny Wholesale, Inc.,* 73 FR 57655, 57657 (2008). While this does not excuse Respondent's criminal acts, here, in contrast to the case of Dr. Chaudry, who did not testify at his hearing and thus ''left the record silent as to possible remorse,'' 69 FR at 62083, the Government concedes that Respondent ''has accepted responsibility for his actions.'' Req. for Final Agency Action, at 16.

As for the Government's contention that Respondent has a long-standing history of substance abuse, which could have placed his patients at risk, the argument is refuted by its acknowledgment that Respondent ''has avoided illicit drugs for what appears to be eight years'' and that his ''professional practice has continued without blemish.'' *Id.* Indeed, the evidence establishes that, at the time of this review, Respondent had nearly completed the five year probation imposed by the State Board without incident and had been sober for nearly nine years. The Government's contention that this merely ''indicates potential for future registration,'' *id.* at 17, begs the question of how many years of sobriety must Respondent demonstrate to be granted a registration. And as for the suggestion that even if Respondent did not harm any of his patients, his application should nonetheless be denied because of his putative ability to hide his addiction from others, it is significant that the State subjected him to random urine drug screening for a period of five years and there is no evidence that Respondent yielded a positive test result or that it is possible to beat such a test.[8]

Accordingly, I will grant Respondent's application for a new registration. However, Respondent's registration shall be subject to the following conditions:

1. Respondent shall only be authorized to prescribe controlled substances in schedules III through V and may not administer or dispense directly any controlled substances to his patients. Respondent may not store any controlled substance at his registered location except for a controlled substance which has been prescribed to him by another practitioner, who is authorized to prescribe controlled substances, for the purpose of treating a legitimate medical condition. Respondent shall not accept any samples of controlled substances from any representative of a manufacturer, distributor or pharmacy.

2. Respondent shall maintain a log of all controlled substance prescriptions he issues, which shall list in chronological order, the date of the prescription, the patient name, the drug name and strength, dosage, and quantity. Respondent shall submit a copy of the log to the nearest DEA Field Office no later than ten (10) days following the last day of each quarter (March 31, June 30, September 30, and December 31).

3. Respondent shall consent to unannounced inspections of his registered location and agrees to waive his right to require that DEA personnel obtain an Administrative Inspection Warrant prior to conducting any inspection.

4. In the event Respondent's probation is continued by the State Board past its ending date, Respondent shall notify the DEA Field Office within five days of the Board's order and provide a copy of the order to the DEA Field Office.

Order

Pursuant to the authority vested in me by 21 U.S.C. 823(f) and 28 CFR 0.100(b), I order that the application of Ronald F. Lambert, D.D.S., for a DEA Certificate of Registration as a practitioner, be, and it hereby is, granted subject to the conditions set forth above. This Order is effective immediately.

Dated: September 23, 2013.

Michele M. Leonhart,

Administrator.

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[7] While the Government argues that Respondent ''actively endeavored to improve the Bandidos' process to manufacture methamphetamine,'' Req. for Final Agency Action at 13, it does not appear to take issue with Respondent's assertion that he did not learn until after the fact that the person he helped to manufacture methamphetamine was a member of the gang. GX 2, at 2; Req. for Final Agency Action, at 17.

[8] The Government also asserts that ''[w]hile the Administrator has granted applications to recovering addicts, such self-abuse often arose pursuant to'' being prescribed controlled substances to treat a legitimate medical condition. Req. for Final Agency Action, at 16. While this may be, the Agency has never held that the only category of practitioners, who are entitled to regain their registrations, are those whose substance abuse problem arose out of being prescribed controlled substances for the treatment of a legitimate medical condition.

Indeed, in *Binette,* which the Government cites in supports of its contention that Respondent's application should be denied, *see id.* at 17, the Agency granted a restricted registration to a physician who had both used methamphetamine and had engaged in the unlawful distribution of the drug. *See Binette,* 64 FR at 42978–79. Like the Respondent here, Dr. Binette expressed remorse for his actions and demonstrated a substantial period of rehabilitation and sobriety. *See id.* at 42980. Significantly, Respondent has been sober for nearly twice as long as Dr. Binette was at the time that the Agency granted his application. *See id.* at 42979, 42981.

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

[Docket No. 11–22]

Kenneth Harold Bull, M.D.; Decision and Order

On December 14, 2010, the Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration, issued an Order to Show Cause to Kenneth Harold Bull, M.D. (Respondent), of Albuquerque, New Mexico. ALJ Ex. 1. The Show Cause Order proposed the revocation of Respondent's DEA Certificate of Registration, which authorizes him to dispense controlled substances in schedules II through V as a practitioner, on the ground that because of actions taken by the New Mexico Medical Board, Respondent was without authority to handle controlled substances in New Mexico, the State in which he holds his DEA registration. *Id.; see also* 21 U.S.C. 824(a)(3).

Respondent timely requested a hearing. ALJ Ex. 2. The matter was placed on the docket of the DEA Office of Administrative Law Judges (ALJ) and assigned to ALJ Wing, who, on January 19, 2011, issued an Order for Prehearing Statements. ALJ Ex. 3. The next day, the Government moved to stay the proceeding and for summary disposition; its motion was based on the New Mexico Medical Board's (hereinafter, Board) issuance, on October 1, 2010, of an order which summarily suspended Respondent's state medical license ''[u]ntil further [o]rder of the Board.'' ALJ Ex. 4 (Appendix A).

On January 25, 2011, Respondent opposed the motion, arguing that the Board's hearing was scheduled for February 11, 2011 and that the Government ''will not be prejudiced by this short delay.'' ALJ Ex. 5. On February 9, 2011, the ALJ issued his ruling on the motion, ''conclud[ing] that further delay in ruling on the Government's motion for summary disposition is not warranted.'' ALJ Ex. 6, at 4. Because Respondent did not dispute that he ''is presently without state authority to handle controlled substances,'' the ALJ granted the Government's motion and recommended that his registration be revoked. *Id.* at 4–5. On March 18, 2011,

the ALJ forwarded the record to this Office for Final Agency Action. ALJ Ex. 7.

On May 9, 2011, the State Board issued an order, which authorizes Respondent to ''continue to practice medicine in psychiatry,'' but prohibits him ''from treating patients with chronic pain.'' ALJ Ex. 8 (Appendix A, at 13). The State order also prohibits him from ''prescrib[ing] narcotics, including but not limited to, all opioid analgesics, including buprenorphine and all synthetic opioid analgesics.'' *Id.*

Because the sole basis for the issuance of a final order was no longer in existence, on May 26, 2011, the Government filed with my Office an unopposed motion to remand. ALJ Ex. 8, at 2, 4. Therein, the Government stated that it ''intends to seek to amend the current Order to Show Cause and will seek the revocation of the Respondent's DEA Certificate of Registration on the basis that the Respondent's registration is inconsistent with the public interest.'' *Id.* at 2. The Government also stated that it ''will allege that the DEA investigation revealed that the Respondent would ask his patients to return their unused drugs, which included controlled substances, and that the Respondent would re-distribute these drugs to other patients as samples.'' *Id.* at 2–3. The Government also stated that ''Respondent told the DEA that he did not maintain a log of the returned drugs, . . . that he had no record-keeping for this illegal activity, that he did not keep any drug inventories, and that he did not keep a dispensing record of the re-dispensed drugs given to his other patients.'' *Id.* at 3. On June 28, 2011, I issued an order granting the Government's motion. ALJ Ex. 9.

Thereafter, additional prehearing procedures were conducted during which both parties submitted prehearing statements; the Government also submitted a supplemental prehearing statement. The Government did not, however, file an amended show cause order.

In its Prehearing Statement, the Government stated the issues as: (1) ''[w]hether the DEA should revoke the registration of [Respondent], pursuant to 21 U.S.C. 824(a)(4) and 823(f), and deny any pending applications for renewal or modification of such registration, pursuant to 21 U.S.C. 823(f),'' and (2) ''[w]hether the DEA should revoke the registration of the Respondent pursuant to 21 U.S.C. 824(a)(3) and deny any pending applications for renewal or modification of the registration, pursuant to 21 U.S.C. 823(f), based on the Respondent's restricted/limited state authority to practice medicine or handle controlled substances in the State of New Mexico, the state in which the Respondent is registered with the DEA.'' ALJ Ex. 11, at 2.

In its Prehearing Statement, the Government further discussed the proposed testimony of two witnesses, an Agency Investigator (hereinafter, DI) and Respondent. *Id.* at 3. With respect to the DI, the Government stated that she would ''testify that the DEA investigation revealed that the Respondent would ask his patients to return their unused drugs, which included controlled substances, and that the Respondent would re-distribute these drugs to his other patients as samples.'' *Id.* at 3–4. The Government also stated that the DI would testify that ''Respondent told the DEA that he did not maintain a log of the returned drugs, that he did not pay his patients for the returned drugs, that he had no record-keeping for this illegal activity, that he did not keep any drug inventories, and that he did not keep a dispensing record of the re-dispensed drugs that he gave to his other patients.'' *Id.* at 4. Moreover, the Government stated that the DI would testify that Respondent ''told the DEA that he received samples from pharmaceutical companies[,] which included controlled substances[,] but that he did not keep invoices of the controlled substance samples that he received.'' *Id.* at 4–5.

With respect to the second issue, the Government stated that the DI would testify that the State Board ''issued a Decision and Order dated May 9, 2011 which reinstated the Respondent's license to practice medicine and state authority to handle controlled substances for an indefinite term of probation which includes terms, conditions, and restrictions imposed by the Board.'' *Id.* at 6. The Government also stated that the DI would testify that on August 15, 2011, the Board issued an Amended Decision and Order, which stated that Respondent ''may not prescribe narcotics, including but not limited to, all opioid analgesics, including buprenorphine and all synthetic opioid analgesics, as defined by the [New Mexico] Controlled Substances Act.'' *Id.* The Government then contended that ''Respondent currently has limited/restricted state authority to handle controlled substances in the State of New Mexico, the state in which the Respondent is registered with the DEA'' and that his ''registration is not a restricted registration and includes the authority to handle all controlled substances in Schedules II through V which is different from and inconsistent with the Respondent's limited/restricted state authority to handle controlled substances.'' *Id.*[1]

As for Respondent's proposed testimony, the Government stated that Respondent would testify ''he is currently on an indefinite term of probation with the Board which included terms, conditions, and restrictions,'' and ''that he is not authorized by the State of New Mexico to handle all controlled substances in Schedules II through V.'' *Id.* at 9. The Government also stated that Respondent would ''testify that he asked his patients to return their unused drugs which included controlled substances and that he would re-distribute these drugs to his other patients as samples.'' *Id.* Finally, the Government stated that Respondent would ''testify that he did not maintain any log for the returned drugs, that he did not pay the patients for the returned drugs, that he had no record-keeping for this illegal activity, that he did not keep any drug inventories, and that he did not keep a dispensing record of the re-dispensed drugs given to his other patients.'' *Id.*

In its Supplemental Prehearing Statement, the Government provided notice that it also intended to elicit testimony from a former State Drug Inspector (hereinafter, SDI) for the New Mexico State Board of Pharmacy. ALJ Ex. 14, at 3. The Government stated that the SDI would testify regarding a complaint the Pharmacy Board received alleging that Respondent would take ''returned medications from patients and re-dispens[e] these same medications to different patients,'' and that on November 16, 2009, he accompanied DEA DIs on an inspection of Respondent's office. *Id.* The Government also stated that the SDI would ''testify that [Respondent] told him that he received returned medications from patients and re-dispensed these medications to different patients, that he kept no records of these transactions, and that he denied using any of the controlled substances himself.'' *Id.* In addition, the Government stated that Respondent ''admitted that he kept medication samples in his medical office which he dispensed to his patients and that he dispensed samples of Lyrica, Lunesta, and Ambien without the annual inventory required by state law and without a biennial inventory required by federal law and that [Respondent] admitted that he did not know that

[1] The Government also stated that the DI would testify as to the inventory of various controlled substances which were found at Respondent's office during a November 16, 2009 inspection. ALJ Ex. 11, at 6–8.

these medication samples were controlled substances.'' *Id.*

Finally, in its Supplemental Prehearing Statement, the Government noted that the DI would testify that during the November 16, 2009 inspection, nine empty prescription vials were seized. *Id.* at 4. The Government further stated that the DI would testify ''that the seized controlled substances were not only prescribed by [Respondent] but were prescribed by several . . . physicians.'' *Id.*

On November 15, 2011, the ALJ conducted a hearing in Tucson, Arizona, at which both parties elicited testimony and submitted documentary evidence. ALJ Recommended Decision (hereinafter R.D.), at 5. Thereafter, both parties filed briefs containing their proposed factual findings, legal conclusions and argument. *Id.*

On January 6, 2012, the ALJ issued his R.D. *Id.* at 1. Therein, the ALJ made findings with respect to each of the five public interest factors. *See* 21 U.S.C. 823(f). With respect to factor one—the recommendation of the state licensing board—the ALJ noted that the State Board had placed Respondent on probation based on ''findings pertaining to both Respondent's prescribing practices, as well as his record-keeping practices.'' R.D. at 16. While noting that ''Respondent is not entirely precluded from prescribing controlled substances in New Mexico,'' the ALJ reasoned that ''the detailed findings and opinions contained within the Medical Board's order are consistent with the evidence of record, and weigh in favor of a finding that Respondent's continued registration would be inconsistent with the public interest.'' *Id.* at 17. (citation omitted).

With respect to factors two and four—Respondent's experience in dispensing controlled substances and compliance with applicable laws related to controlled substances—the ALJ first addressed the Government's argument that Respondent ''improperly act[ed] as a pharmacist without a DEA registration . . . by retrieving controlled substances from patients and re-distributing them to other patients.'' *Id.* at 18. The ALJ rejected the Government's contention, finding that while ''Respondent admitted that he retrieved controlled substances that had already been dispensed to patients, the Government failed to prove by a preponderance of the evidence that Respondent re-distributed those controlled substances to other patients.'' *Id.* at 19.

Next, the ALJ addressed whether Respondent violated federal and state record-keeping requirements. *Id.* at 19–22. The ALJ specifically found ''that Respondent did not maintain a log of the controlled substances that he retrieved from patients,'' that he did not ''maintain any records pertaining to the controlled substance samples that he received from the pharmaceutical companies,'' and ''failed to keep any drug inventories or dispensing records for the controlled substances that he had on hand or that he dispensed to patients.'' *Id.* at 21. The ALJ also found Respondent's testimony that he documented his dispensing of medication in the patient charts to not be credible, noting the DI's testimony that he ''never provided the patient charts,'' that he ''claimed to maintain these records in the patient charts [only] after she informed him that he was in violation of . . . federal regulations,'' and that Respondent ''testified that he was unaware of his obligations to maintain records under state and federal law.'' *Id.* Finally, the ALJ found that Respondent did not maintain any records of either his receipt or dispensing of Suboxone and Subutex, and again noted that Respondent provided incredible testimony that he documented the dispensings in the patient charts and ''would have shown the . . . charts to the DIs or [SDI] if they had asked to see'' them. *Id.* at 22. The ALJ thus found that Respondent's ''lack of knowledge of his obligations under the law weighs in favor of a finding that [his] continued registration is contrary to the public interest.'' *Id.*

Finally, the ALJ discussed whether Respondent's prescribing practices violated the CSA's requirement that a prescription be ''issued for a legitimate medical purpose by an individual practitioner acting in the usual course of his professional practice.'' *Id.* at 22 (quoting 21 CFR 1306.04(a)). The ALJ noted the State Board's findings, that with respect to five patients, Respondent had committed '' 'unprofessional or dishonorable conduct' '' by engaging in '' 'injudicious prescribing, administering or dispensing of a drug or medicine.' '' *Id.* at 23 (quoting N.M. Stat. Ann. §§ 61–6–15(A) and 61–6–15(D)(26)). Faulting Respondent for his ''failure to address the specific findings pertaining to his prescribing practices of the five patients,'' and notwithstanding that this was ''not a central issue of the Government's case,'' the ALJ found ''that the Government has demonstrated that Respondent has issued prescriptions outside of the usual course of professional practice in violation of federal and state law.'' *Id.* at 24. The ALJ thus concluded that factors two and four ''weigh heavily in favor of a finding that Respondent's continued registration would be inconsistent with the public interest.'' *Id.*

Finally, with respect to factor five—such other conduct which may threaten public health and safety—the ALJ found that ''Respondent's acceptance of responsibility was somewhat mixed, but when considering the record as a whole, [he] has failed to demonstrate that he has accepted responsibility for [his] past misconduct and that he will not engage in future misconduct.'' *Id.* at 25. The ALJ acknowledged that Respondent admitted both that ''he failed to maintain adequate records as required by state and federal regulations'' and ''that he retrieved medications from patients and sometimes re-dispensed the non-controlled medications to other patients.'' *Id.* However, the ALJ also noted Respondent's testimony (which he found incredible) that Respondent had ''always indicated'' in his charts the medications he had given his patients, his testimony that he did not log samples of several controlled substances that he received from pharmaceutical company representatives because the representatives never told him that the drugs were controlled substances, as well as his testimony that ''he does not agree with the Medical Board's findings pertaining to his prescribing practices.'' *Id.* at 25–26.

The ALJ ultimately concluded that the Government had made out a *prima facie* case for revoking Respondent's registration under factors one, two, four, and five, and that Respondent had failed to rebut the Government's case because he failed ''to accept responsibility for his misconduct and demonstrate that he will not engage in future misconduct.'' *Id.* at 26–27. The ALJ thus recommended that Respondent's registration be revoked and that any pending application be denied. *Id.* at 27.

Respondent filed exceptions to the ALJ's R.D. Thereafter, the record was forwarded to this Office for Final Agency Action.

Having considered the record in its entirety, I adopt the ALJ's finding that Respondent violated federal law by failing to keep proper records of the controlled substances he received, as well as his finding that the Government failed to prove that he redistributed the controlled substances he received from his patients. However, I reject the ALJ's findings that Respondent violated the CSA's prescription requirement (21 CFR 1306.04(a)) with respect to the five patients listed in the State Board's order because the Government never provided notice that it intended to raise the issue of whether the Board's findings also establish a violation of federal law.

Because the issue was never properly raised, the ALJ committed further error by requiring Respondent to acknowledge wrongdoing with respect to his prescribing to these patients. With respect to the misconduct which was fairly at issue, I find that Respondent has accepted responsibility. However, I also find his misconduct to be sufficiently egregious to warrant a period of outright suspension. In addition, based on the restrictions imposed by the State Board on his controlled substance prescribing authority, I conclude that federal law requires that his DEA registration be similarly restricted. I make the following findings of fact.

Findings of Fact

Respondent is a psychiatrist licensed by the New Mexico Board; as of the date of the hearing, he has practiced medicine for thirty-seven years, during which he has been the chief of psychiatry or medical director of psychiatric services at nearly every hospital in the Albuquerque area. Tr. 129–30. In addition, he has received a fellowship from the American Psychiatric Association and served as President of the New Mexico Psychiatric Association. *Id.* at 130. Respondent testified—without refutation—that he has ''a reputation for treating particularly difficult or complex psychiatric conditions.'' *Id.* at 131.

On August 9, 2010, the Board issued Respondent a Notice of Contemplated Action against his medical license, and on October 1, 2010, the Board filed an Amended Notice of Contemplated Action and also issued a Summary Suspension Order, which suspended his medical license pending a hearing which was held on some date not clear on the record.

On May 9, 2011, the Board issued its Decision and Order. GX 5, at 1. Therein, the Board found that Respondent committed ''unprofessional or dishonorable conduct'' by engaging in ''injudicious prescribing, administering, or dispensing of a drug or medicine'' with respect to five patients. *Id.* at 13 (citing N.M. Stat. § 61–6–15(D)(26)). In addition, the Board found that Respondent had failed to maintain accurate, complete, and legible medical records. *Id.* (citing N.M. Stat. § 61–6–15(D)(33)). Based on these findings, the Board placed Respondent on probation. *Id.*

Respondent is also the holder of a DEA Certificate of Registration, which authorizes him to dispense controlled substances in schedules II through V, including narcotic controlled substances, as a practitioner. GX 1. In addition, Respondent is authorized to treat up to 100 patients for opiate addiction with Suboxone and Subutex under the Drug Addiction Treatment Act of 2000, Public Law 106–310, title XXXV, 114 Stat. 122 (codified at 21 U.S.C. 823(g)(2)). *See id.* While Respondent's registration was due to expire on July 31, 2010, on June 4, 2010, he filed a renewal application. *Id.* at 2. Because Respondent filed a timely renewal application, his registration remains in effect pending the issuance of this Decision and Order. *See* 5 U.S.C. 557; 21 CFR 1301.36(i).

The DEA Investigation

On August 10, 2009, the New Mexico Board of Pharmacy received information from Presbyterian Health Plan Quality Management, a health insurer, that a consumer had alleged that Respondent ''was accepting medications from patients that had already been dispensed to them'' and that he was asking ''patients to return medications to him so that he could . . . re-dispense them.'' Tr. 26–27. The matter was assigned to one of the Board's SDIs, who contacted the local DEA Office and asked if the DIs wanted to accompany him on a visit to Respondent's office. *Id.* at 29. The DIs agreed, and on November 16, 2009, the SDI, accompanied by several DIs, went to Respondent's office. *Id.* at 30.

Upon their arrival, Respondent agreed to meet with the Investigators, and the SDI informed him of the reason for the visit and presented him with a Notice of Inspection and a Consent to Audit, which Respondent signed. *Id.* at 31, 65. According to the Investigators, Respondent was cooperative during the visit. *Id.* at 31; *see also id.* at 66 (testimony of DI). Respondent admitted that he took back medications from patients and stated that he did so ''to prevent patients from accumulating medications to prevent any possible self-destructive behavior and for compassionate purposes because some of the[ ] medications are very expensive.'' *Id.* at 32–33; *see also id.* at 67. Respondent, however, denied that he was personally taking or diverting any of the controlled substances. *Id.* at 45–46. He also denied that he re-dispensed any of the controlled substances he had obtained, and the SDI testified that he had no evidence to the contrary. *Id.* at 46.

In response to Respondent's explanation of his conduct, the DI explained that ''once a prescription is filled for an end-user it's outside of the cycle of distribution and [that he could not] obtain that from a patient.'' *Id.* at 67. The DI further told Respondent that this was a ''violation of'' federal regulations and that if his concern was that his patients could not have large quantities of controlled substances because they would engage in ''self-destructive behavior,'' he could either ''procure controlled substances himself and then dispense smaller quantities . . . that he wanted a patient to have,'' or ''he could write more frequent prescriptions for those patients.'' *Id.* at 68. Respondent replied that ''he did not like either of those options and . . . that he believed'' that writing multiple prescriptions ''would be an insurance nightmare'' for his patients. *Id.* at 69.

The Investigators then asked to see where Respondent kept the medications. *Id.* at 33–35. Respondent took them to ''a little side room'' which had shelves; on the shelves were boxes containing prescription vials that were labeled with the names of the pharmacy, patient, and drug, as well as dosing instructions. *Id.* at 33–35. According to the SDI, Respondent's name was on more than half of the vials, however, he did not determine the respective number of the vials which Respondent and other physicians had prescribed. *Id.* at 35. Moreover, the SDI did not recall finding any controlled substances in this room. *Id.* at 34. However, the DI testified that the room contained controlled substance samples, *id.* at 76; the samples were for drugs such as Ambien, Lunesta, and Lyrica. *Id.* at 36.

The Investigators were also taken to a different room which was like an office. *Id.* at 36, 77. According to the SDI, the drug samples were kept in this room and ''were in a cabinet that . . . had the ability to be locked,'' but the SDI did not ''recall it being locked when [the Investigators] were there.'' *Id.* at 36–37; *but see id.* at 76 (testimony of DI that the samples were located in the other room). However, according to the DI, the cabinet was closed and Respondent used a key to open it. *Id.* at 77. The cabinet contained both controlled and non-controlled drugs. *Id.* at 78; *see also id.* at 37. According to the DI, the room had shelving on which both controlled and non-controlled substances were stored. *Id.* at 78. The Investigators also found nine empty prescription vials on the shelves, *id.* at 79; three of the vials contained labels which indicated that they had once contained either Lorazepam or Flurazepam, both of which are schedule IV depressants. *Id.* at 87. The labels on two of the vials indicated that the drugs had not been prescribed by Respondent. *Id.* at 88. However, the DI did not ask Respondent if the vials had contained controlled substances when he obtained them from his patients and admitted that she did

not know whether the vials contained any controlled substances when he took possession of them. *Id.* at 113–14.

The Investigators then interviewed Respondent. *Id.* at 38. The SDI asked him if he kept receipt records for the drugs he received from his patients; Respondent ''said he did not.'' *Id.; see also id.* at 80 (testimony of DI that when she asked Respondent for a log of the returned drugs, he did not have one). The SDI then asked Respondent if he kept receipt records for the drug samples; Respondent ''said he did not keep receipt records or a log.'' *Id.* at 38; *see also id.* at 77 (testimony of DI). Moreover, Respondent did not keep ''any dispensing records for the re-dispensed drugs . . . and did not produce any [patient] charts that showed that he dispensed these.'' *Id.* at 38–39. Nor did Respondent offer to show the Investigators any patient charts which contained dispensing information. *Id.* at 39. However, on cross-examination, the SDI did not recall if he had asked Respondent to provide the patient charts. *Id.* at 47. Also, Respondent did not have a controlled substance inventory. *Id.* at 40. Finally, while Respondent was providing maintenance and/or detoxification treatment to patients, he did not maintain a log of the Suboxone/Subutex that he dispensed to his patients, and with the exception of a shipment of Suboxone that arrived during the inspection, he did not have invoices for the Suboxone/Subutex which he received.[2] *Id.* at 70–71, 81; *see also* GX 8.

According to the SDI, during the interview, Respondent stated that he was ''unaware'' that Ambien, Lunesta, and Lyrica ''were controlled substances.'' Tr. 40. However, according to the DI, she only spoke to Respondent about the Lyrica samples, telling him that it was a schedule V controlled substance, which he was unaware of. *Id.* at 80. He also said that he was unaware that he was required to keep records of the drugs he received and dispensed. *Id.* at 49. Respondent then promised to keep the required records going forward. *Id.* at 49–50; *but see id.* at 121 (testimony of DI that Respondent did not say that he would comply with the regulations going forward).[3] Moreover, Respondent told the Investigators that ''he did not redistribute controlled substances.'' *Id.* at 80.

During cross-examination, the DI acknowledged that she had not interviewed any of Respondent's patients. *Id.* at 102–03. She also acknowledged that she did not ask to see any of Respondent's patient charts. *Id.* at 103. However, the DI testified that Respondent had initially stated that he did not maintain any documentation of his dispensing of controlled substances and did not state that he documented the dispensings in the patient records until after being told that he was required to document his dispensings. *Id.* at 104.

At the conclusion of the visit, the SDI seized all of the non-controlled drugs that had been returned by Respondent's patients, as well as the non-controlled drug samples that were past their expiration date; the DEA Investigators seized all of the controlled substances except for the drug samples. *Id.* at 40–41; 82–84; 86–87. The controlled substances seized included schedule II drugs such as Fentanyl (5 patches), Adderall XR (38 capsules), amphetamine (25 tablets), d-amphetamine 5mg (28 tablets), methadone 10mg (79 tablets), methylin 5mg (30 tablets), oxycodone 5mg (26 tablets), oxycodone/apap 5/325mg (20 tablets), oxycodone 30mg (34 tablets), oxycodone er 40mg (26 tablets), OxyContin 80mg (60 tablets), and oxycodone oral suspension 20mg/20ml (3 bottles). GX 16, at 1–2. The drugs also included the schedule III drugs hydrocodone/apap 10/500mg (16 tablets) and Suboxone (267 tablets); the schedule IV drugs zolpidem (27 tablets), Provigil (modafinil) (4 tablets), and nine different benzodiazepines totaling more than 500 tablets; and finally the schedule V drugs diphenoxylate hcl/atropine sulfate (290 tablets) and Lyrica (119 capsules). Moreover, at least seven of the vials contained controlled substances which were prescribed by other physicians. *See* GX 10 at 13–14 (pt. SL, prescriber Dr. KS, drug oxazepam); *id.* at 19–22 (pt. DC, prescriber Dr. JL, two prescriptions for liquid oxycodone); *id.* at 23–24 (pt. SA, prescriber Dr. AW, drug methylphenidate hcl); *id.* at 55–56 (pt. DC, prescriber Dr. JL, drug methadone hcl); *id.* at 57–58 (pt. GN, prescriber Dr. ZH, drug oxycodone); *id.* at 87–88 (pt. KC, prescriber Dr. CS, drug triazolam).

Respondent's Evidence

Respondent testified on his own behalf. Respondent acknowledged that he accepted medications from his patients, stating he did so because it helped him ''feel more secure about treating patients that were potentially dangerous to themselves.'' Tr. 141. He also denied ''ask[ing] patients to bring in their medications . . . so that [he] could redistribute those drugs to other patients.'' *Id.*

Regarding the manner in which the drugs were stored, Respondent denied that any controlled substances were stored in the cardboard boxes. Tr. 142–43. Respondent stated that he kept the controlled substances that his patients returned to him because he ''felt bad about putting them down the toilet'' and that he kept them ''in a locked cabinet,'' *id.* at 143, which is consistent with the testimony of the SDI. He also maintained that he ''never'' re-distributed controlled substances to patients[4] and denied using any of the controlled substances that were given to him by his patients. *Id.; see also id.* at 149, 152. And on cross-examination, he further denied that he was acting as a pharmacy. *Id.* at 187.

Respondent admitted that he ''did not keep'' a log of the return medications and claimed that he ''did not'' know that he was required to do so under state or federal law. *Id.* at 145. He further testified he was no longer accepting either controlled or non-controlled drugs from his patients and that he had stopped doing so after the DEA visit. *Id.* at 146. He also testified that he keeps a log of any samples he receives from drug companies. *Id.*

Respondent testified, however, that he ''always indicated'' in the patient charts the medications and amounts that he had given his patients. *Id.* Moreover, Respondent testified that neither the SDI nor the DI had asked to see any patient charts and neither had ever subpoenaed any of the charts. *Id.* at 147. He stated that if they had asked to review the patient charts, he would have allowed them to do so. *Id.* He further maintained that he documented his dispensing of Suboxone in the patient charts and that he would have shown these charts to the SDI and DI if they had asked to see them. *Id.* at 148–49.

[2] While this line of questioning was directed at ''what type of records are required to be kept for someone who prescribes, administers or dispenses [Suboxone or Subutex] for maintenance or detoxification'' purposes, and the DI initially answered that Respondent was required to keep dispensing records, she also testified that Respondent ''stated he did not keep the invoices of the procurement.'' Tr. 70.

[3] Following the Medical Board's suspension of Respondent's medical license, the DI returned to Respondent's office in an unsuccessful attempt to obtain the surrender of his DEA registration. Tr. 89. She did not, however, inspect any of his records to determine whether he was in compliance with state and federal record keeping requirements. *Id.*

[4] Respondent admitted that ''on very rare occasions,'' he re-dispensed non-controlled drugs to patients who were ''clearly indigent'' and ''needed the medication, either because they were in a crisis mode or because they would go through withdrawal symptoms.'' Tr. 144. He further denied receiving any payment from the patients to whom he provided these drugs. *Id.* at 145.

Regarding whether he knew that various drugs samples were controlled substances, Respondent testified that none of the drug company representatives ''ever stated that these are controlled substances and that logs have to be kept.'' *Id.* at 154. He further testified that representatives for Ambien had ''indoctrinated'' doctors that the drug was ''preferable . . . to the benzodiazepine sedatives . . . and it was a lower risk kind of medication'' and ''non-addictive.'' *Id.* Respondent thus ''just assumed that they were not . . . controlled substances.'' *Id.* However, Respondent testified that he ''[v]ery definitely'' now knows that the drugs are controlled substances. *Id.* Moreover, on cross-examination, Respondent testified that ''[t]here was never any mention made by either the drug reps or the drug companies that I was supposed to be doing some logging of these medications.'' *Id.* at 182. While maintaining that it was part of the drug companies' and their representatives' responsibility to educate him that the drugs were controlled substances, Respondent then explained that ''I'm not saying that I'm not—shouldn't take some responsibility for it, because of course, I do take responsibility for it.'' *Id.*

Respondent also testified that in response to the State Medical Board's order, he has ''endeavored to do a better job'' of charting. *Id.* at 155–56. Moreover, Respondent stated that he ''believe[s] that he has been in compliance with state and federal regulations since the November 2009 inspection and will continue to comply in the future. *Id.* at 158. He also stated that he is remorseful for his previous lack of compliance. *Id.* at 159. However, he maintained that notwithstanding his thirty-seven years of medical practice, he was unaware that the New Mexico Controlled Substances Act imposed mandatory recordkeeping requirements for controlled substances.[5] *Id.* at 169.

On cross-examination, the Government asked Respondent why the Medical Board had suspended his license. *Id.* at 161. According to Respondent, two complaints had been filed against him, one by the wife of a patient who was ''going through some conflict with her husband'' and complained about his ''treatment of her husband''; the other complaint was filed by a mother and daughter who he had expelled from his practice. *Id.* Respondent then stated that during the course of the investigation, two of his patients overdosed and thus ''the Board understandably was worried and summarily suspended [his] license.'' *Id.* at 161–62.

Regarding the two patients who overdosed, Respondent testified that one of the patients had allegedly attempted suicide, but later recounted his statement. *Id.* at 162. Moreover, Respondent asserted that toxicology testing was not performed on the patient. *Id.* at 190. As for the second patient who overdosed, Respondent testified that he believed that the patient ''was depressed about a breakup with a girlfriend and . . . deliberately took an overdose.'' *Id.* at 162. However, according to Respondent, the medications found in the patient's body were ''mostly from another physician that he was also getting medications from,'' and that this doctor had ''lost his license because of medication issues.'' *Id.* Respondent maintained that this patient did not tell him that he was seeing another physician. *Id.* at 190. Moreover, Respondent testified that he ''take[s] [it] seriously when a patient is dishonest'' regarding his use of medications. *Id.* at 191.

The Government also questioned Respondent as to whether the Medical Board's suspension was based in part on his failure to ''conform to record keeping that the Board mandated[.]'' *Id.* at 165. Respondent replied that ''[t]he Board does not mandate specific medical record keeping to my knowledge, per se. There was a question as to whether . . . it was easy to interpret my records or not.'' *Id.* The Government then asked Respondent whether his records were ''legible and easy to interpret[.]'' *Id.* Respondent acknowledged that ''[t]here was some difficulty with the size of the records'' because they ''had been reduced by the Xeroxing method and my writing is small'' and he used ''a lot of arrows, ups and downs kind of notations, to indicate changes in medications.'' *Id.* at 165–66. Respondent then admitted that ''at some level it was difficult for an individual not familiar with my records to interpret them.'' *Id.* at 166. However, he further testified that he had changed his documentation of patients' histories to make it ''a little bit more understandable'' and ''more of a form rather than just written notes,'' and that he had also expanded the level of detail in the patients' progress notes. *Id.* at 192. He also stated that he was ''trying'' to improve his handwriting. *Id.* at 193.

Finally, the Government asked Respondent if the Medical Board's prohibition on his being allowed to practice pain management was based on his ''over prescribing [of] pain medication.'' *Id.* at 166. Respondent answered that while ''that was their interpretation . . . I'm not sure that I agree with that.'' *Id.* However, Respondent then explained that he is ''fully obliged to abide by their decisions and their recommendations.'' *Id.* Moreover, Respondent testified that he was no longer dispensing Suboxone and Subutex. *Id.* at 189.

Discussion

Section 304(a) of the Controlled Substances Act (CSA) provides that a registration to ''dispense a controlled substance . . . may be suspended or revoked by the Attorney General upon a finding that the registrant . . . *has committed such acts* as would render his registration under section 823 of this title inconsistent with the public interest as determined under such section.'' 21 U.S.C. 824(a)(4) (emphasis added). With respect to a practitioner, the Act requires the consideration of the following factors in making the public interest determination:

(1) The recommendation of the appropriate State licensing board or professional disciplinary authority.

(2) The applicant's experience in dispensing . . . controlled substances.

(3) The applicant's conviction record under Federal or State laws relating to the manufacture, distribution, or dispensing of controlled substances.

(4) Compliance with applicable State, Federal, or local laws relating to controlled substances.

(5) Such other conduct which may threaten the public health and safety.

Id. § 823(f).

''These factors are . . . considered in the disjunctive.'' *Robert A. Leslie, M.D.,* 68 FR 15227, 15230 (2003). It is well settled that I ''may rely on any one or

[5] On cross-examination, the Government asked Respondent ''what record keeping requirements'' for controlled substances he was ''now familiar with?'' Tr. 179. Respondent answered that he did not know what the Government was asking and that ''[t]hat's a pretty broad question.'' *Id.* at 180. The Government then asked: ''What records are you keeping for controlled substances at this time?'' *Id.* Respondent replied: ''Are you asking in terms of things that are coming from my office or are you talking about in terms of prescriptions that patients go to fill? What are you—I'm not certain what you're asking?'' *Id.* The Government responded: ''Well, you're the doctor. You would know what you would be prescribing and dispensing so you would know what records need to be kept. I can't answer your question.'' *Id.* Respondent replied: ''Well, I'm not certain if you're talking about medication that I dispense, or medications that I prescribe. Which are you asking?'' *Id.* The Government then stated: ''Records for anything to do with controlled substances that you dispense or prescribe.'' *Id.* Respondent answered: ''Well, the initial documentation is in the patient's chart and to my knowledge that's all that's required. For medications that I would dispense that I had, i.e., samples of Ambien or Lunesta, Lyrica, whatever, that I have a log of, in terms of the medications that have been received and then as they're dispensed.'' *Id.* at 180–81.

a combination of factors[,] and may give each factor the weight [I] deem[] appropriate in determining whether a registration should be revoked. *Id.; see also MacKay* v. *DEA,* 664 F.3d 808, 816 (10th Cir. 2011); *Volkman* v. *DEA,* 567 F.3d 215, 222 (6th Cir. 2009); *Hoxie* v. *DEA,* 419 F.3d 477, 482 (6th Cir. 2005). Moreover, while I am required to consider each of the factors, I ''need not make explicit findings as to each one.'' *MacKay,* 664 F.3d at 816 (quoting *Volkman,* 567 F.3d at 222 (quoting *Hoxie,* 419 F.3d at 482)).[6]

The Government has the burden of proving, by a preponderance of the evidence, that the requirements for revocation or suspension pursuant to 21 U.S.C. 824(a) are met. 21 CFR 1301.44(e). However, ''once the [G]overnment establishes a prima facie case showing a practitioner has committed acts which render his registration inconsistent with the public interest, the burden shifts to the practitioner to show why his continued registration would be consistent with the public interest.'' *MacKay,* 664 F.3d at 817 (citing *Medicine Shoppe-Jonesborough,* 73 FR 364, 387 (2008) (citing cases)).

Factor One—The Recommendation of the State Licensing Board

The evidence shows that the New Mexico Medical Board has not made a recommendation in this matter. However, because the Controlled Substances Act makes the possession of authority under state law to dispense controlled substances a requirement for both obtaining and maintaining a practitioner's registration, *see* 21 U.S.C. 802(21) & 823(f), DEA has interpreted factor one more broadly and thus considers disciplinary actions taken by a state board as relevant in the public interest determination when they result in a loss of state authority, or are based on findings establishing that a registrant diverted controlled substances (whether acting intentionally, recklessly or merely negligently), failed to maintain effective controls against diversion, or otherwise failed to comply with laws and/or regulations related to controlled substances.

Here, the evidence shows that on October 1, 2010, the New Mexico Board of Medicine summarily suspended Respondent's state medical license. GX 4. The evidence also shows that on May 9, 2011, the Board, following a hearing, found that Respondent committed ''unprofessional or dishonorable conduct'' in that he engaged in the ''injudicious prescribing of drugs'' and ''fail[ed] to maintain timely, accurate, legible and complete medical records.'' GX 5, at 13.

Notwithstanding these findings, the Board re-instated Respondent's medical license to allow him to practice psychiatry. *Id.* However, the Board prohibited him from practicing pain management and from prescribing ''narcotics, including but not limited to, all opioid analgesics, including buprenorphine and all synthetic opioid analgesics.'' *Id.*

Under the CSA, a practitioner's registration grants authority to dispense a controlled substance, which by definition ''means to deliver a controlled substance to an ultimate user . . . by, or *pursuant to the lawful order of, a practitioner.*'' 21 U.S.C. 802(10) (emphasis added). Likewise, the CSA defines the ''[t]he term 'practitioner' [to] mean[] a physician . . . licensed, registered, or otherwise permitted, by . . . the jurisdiction in which he practices . . . to distribute, dispense, [or] administer . . . a controlled substance in the course of professional practice.'' *Id.* § 802(21). Finally, as stated above, under the CSA, a practitioner's possession of federal authority to dispense controlled substances is premised on his possession of authority under state law to do so. *See also id.* § 823(f) (''The Attorney General shall register practitioners . . . if the applicant is authorized to dispense . . . controlled substances under the laws of the State in which he practices.''). Thus, to the extent a practitioner is not authorized under state law to dispense certain categories or schedules of controlled substances, he can no longer lawfully dispense them under federal law. Accordingly, where a state board takes such action, at a minimum, a practitioner's CSA registration must be limited to authorize the dispensing of only those controlled substances, which he can lawfully dispense under state law.

Factors Two and Four—Respondent's Experience In Dispensing Controlled Substances and Compliance With Applicable Laws Related to Controlled Substances

With respect to these factors, the ALJ rejected, as unsupported by substantial evidence, the Government's contentions that: (1) Respondent acted as a pharmacy without being registered to do so; and (2) he re-dispensed the controlled substances he obtained from his patients. ALJ at 18–19. The ALJ found, however, that Respondent violated various federal and state controlled substance recordkeeping requirements by failing to: (1) Take inventories of the drugs he had on hand and keep a record of such, (2) maintain records of the drugs he received, and (3) document his dispensings of controlled substances. *Id.* at 19–22. Moreover, based on the Medical Board's Decision and Order, which found that Respondent had engaged in ''injudicious prescribing . . . of a drug,'' *id.* at 23, the ALJ further found ''that the Government has demonstrated that Respondent has issued prescriptions outside of the usual course of professional practice in violation of federal and state law.'' *Id.* at 24. I adopt the ALJ's conclusion that the Government has not proved that Respondent either acted as an unregistered pharmacy or re-dispensed controlled substances, as well as his conclusion that he violated various recordkeeping requirements. However, I reject his conclusion that Respondent violated federal law by issuing prescriptions outside of the usual course of professional practice.

The Allegations of Acting as an Unregistered Pharmacy and Re-Dispensing Controlled Substances

As noted above, in its Prehearing Statement, the Government alleged that Respondent ''ask[ed] his patients to return their unused drugs, which included controlled substances, and that Respondent would re-distribute these drugs to his other patients as samples.'' ALJ Ex. 11, at 3. Yet the SDI, who was a witness for the Government, testified that while Respondent acknowledged that he took back both controlled and non-controlled drugs from his patients, he denied that he ever re-dispensed any controlled substances to his patients. Tr. 46, 80. Respondent likewise denied having ever re-dispensed controlled substances to his patients. *Id.* at 143. Moreover, the SDI acknowledged that he had no evidence to refute Respondent's statement. *Id.* at 46. The ALJ thus found credible Respondent's denial of the allegation that he re-dispensed controlled substances.[7] R.D. at 12.

The Government nonetheless argues that the empty prescription vials, three of which bore labels indicating they had

[6] ''In short, this is not a contest in which score is kept; the Agency is not required to mechanically count up the factors and determine how many favor the Government and how many favor the registrant. Rather, it is an inquiry which focuses on protecting the public interest; what matters is the seriousness of the registrant's misconduct.'' *Jayam Krishna-Iyer,* 74 FR 459, 462 (2009). Accordingly, as the Tenth Circuit has recognized, findings under a single factor can support the revocation of a registration. *MacKay,* 664 F.3d at 821.

[7] Respondent also denied that he was personally using the controlled substances. Here again, there is absolutely no evidence to refute his testimony.

previously held controlled substances, ''shows that the controlled substances were re-dispensed to his patients because there is no reasonable, practical, or valid explanation as to why anyone would take back empty medication vials.'' Gov. Br. 26. The Government, however, offered no proof that the vials contained controlled substances at the time Respondent acquired possession of them. In short, the Government's evidence merely creates a suspicion that the vials contained controlled substances, which were subsequently re-dispensed. As such, the Government's evidence does not constitute substantial evidence and is manifestly insufficient to support rejecting the ALJ's finding. *See NLRB* v. *Columbian Enameling & Stamping Co.,* 306 U.S. 292, 300 (1939). This conclusion likewise puts to rest the Government's contention that Respondent acted as an unregistered pharmacy.

The Government further argues that Respondent illegally possessed the controlled substances that were ''returned . . . from his patients.'' Gov. Br. 21. On point here, the CSA provides that ''[i]t shall be unlawful for any person knowingly or intentionally to possess a controlled substance unless such substance was obtained directly, or pursuant to a valid prescription or order, from a practitioner, while acting in the course of his professional practice, or except as otherwise authorized by this subchapter.'' 21 U.S.C. 844(a). The CSA created a closed system of distribution which generally contemplates that a controlled substance can only be lawfully acquired from a registrant; in the case of a practitioner, the Act generally allows a registered practitioner to obtain a controlled substance only from a registrant who is authorized to distribute a controlled substance. Moreover, while an Agency regulation provides that ''[a]ny person lawfully in possession of a controlled substance listed in any schedule may distribute (without being registered to distribute) that substance to the person from whom he/she obtained it[,]'' 21 CFR 1307.12(a), this regulation does not authorize a practitioner to acquire a controlled substance which has been dispensed to his patient by another practitioner. Nor, by its plain language, does the regulation even allow a practitioner to acquire a controlled substance which the practitioner dispensed through his own prescription.

The record contains evidence of at least seven instances in which Respondent obtained possession of controlled substances which had been prescribed by another physician. *See* GX 10, at 13–14 (pt. SL, prescriber Dr. KS, drug oxazepam); *id.* at 19–22 (pt. DC, prescriber Dr. JL, two prescriptions for liquid oxycodone); *id.* at 23–24 (pt. SA, prescriber Dr. AW, drug methylphenidate hcl); *id.* at 55–56 (pt. DC, prescriber Dr. JL, drug methadone hcl); *id.* at 57–58 (pt. GN, prescriber Dr. ZH, drug oxycodone); *id.* at 87–88 (pt. KC, prescriber Dr. CS, drug triazolam). This evidence is sufficient to establish that Respondent unlawfully possessed controlled substances. 21 U.S.C. 844(a).

The Allegations That Respondent Failed To Maintain Required Records

The evidence further shows that Respondent violated numerous recordkeeping requirements. Indeed, notwithstanding that he has been practicing medicine for nearly four decades and a DEA registrant for much (if not all) of this time, *see* GX 1, at 2, Tr. 129; Respondent testified that he was unaware of the various recordkeeping requirements imposed by both the CSA and New Mexico law. Tr. 169.

Under the CSA, Respondent was required to take an initial inventory of the controlled substances he had on hand ''as soon'' as he ''first engage[d]'' in the dispensing of controlled substances, and ''every second year thereafter, make a complete and accurate record of all stocks thereof on hand.'' 21 U.S.C. 827(a)(1). Respondent was also required to ''maintain, on a current basis, a complete and accurate record of each such substance . . . received, sold delivered, or otherwise disposed of by him.'' *Id.* § 827(a)(3).

Respondent did not, however, have an inventory of the controlled substances he had on hand at the time of the November 2009 inspection. Nor did he maintain a record of the controlled substances he received from either his patients or from the manufacturers/distributors who provided him with samples. He also did not have a dispensing log for the controlled substance samples he dispensed to his patients.

Finally, Respondent was required to maintain a record of his prescribing of controlled substances ''in the course of maintenance or detoxification treatment of an individual.'' *Id.* § 827(c)(1)(A); 21 CFR 1304.03(c). While Respondent was providing maintenance and/or detoxification treatment to patients, he did not maintain a log of the Suboxone/Subutex he dispensed to them. Tr. 70–73. Rather, Respondent testified that he documented his dispensing of these drugs in the patient records and neither the SDI nor the DI testified that they asked to see his charts. *Id.* at 47, 103. However, here again, with the exception of a single patient who was obtaining Suboxone through a patient assistance program which shipped the drug to Respondent, the Government did not establish that Respondent was engaged in the direct dispensing of Suboxone/Subutex.

As his basis for finding Respondent's testimony not credible, the ALJ cited testimony to the effect ''that Respondent never provided the patient charts'' to the Investigators and that he claimed that he documented the dispensing in the charts only after being informed ''that he was in violation of the federal regulations.'' R.D. at 21. The ALJ thus reasoned that ''[t]he delayed timing of Respondent's uncorroborated revelation that all his record-keeping was located in patient charts is plainly incredible, particularly given other credible testimony of record that Respondent was unaware of any record-keeping requirements for controlled substances for over thirty-five years.'' *Id.* at 21–22.

Respondent's lack of awareness of controlled substance recordkeeping requirements aside, I reject the ALJ's finding because physicians routinely document the prescriptions they write in their patient charts. As for ''[t]he delayed timing'' of his response, *id.* at 21, the ALJ ignored that where a physician merely prescribes Suboxone, DEA regulations only require that a record of the prescription be kept and do not mandate what form it must be in. Accordingly, a physician can comply with federal law by: (1) Keeping a copy of the prescription, (2) keeping a logbook of the prescriptions he issued, or (3) by noting the prescription in the patient's chart. Thus, that Respondent did not immediately explain that he was documenting the prescriptions in the patient chart (whether by making a copy of it or noting it), can easily be explained by the fact that he did not understand how he could demonstrate his compliance with the regulation. His lack of understanding does not, however, establish that he was not in compliance.

As for the ALJ's observation that Respondent ''never provided the patient charts,'' *id.,* neither of the Government's witnesses conclusively testified that they actually asked for them. Tr. 47 (SDI's testimony that he did not recall if he had asked Respondent to provide the charts); *id.* at 103 (DI's testimony that she did not ask to see any of the charts). And ultimately, it is the Government which bore the burden of proving Respondent's non-compliance and not Respondent's to prove he was compliant.

Accordingly, I reject this allegation as unsupported by substantial evidence. However, as explained above, I do find that Respondent violated the CSA and DEA regulations by: (1) Failing to maintain the required inventories, (2) failing to retain records of the controlled substances he received from both patients and the drug samples he received from distributors/manufacturers, and (3) failing to document his dispensing of controlled substance samples.

The ALJ's Findings That Respondent Violated 21 CFR 1306.04(a)

As explained above, the State Board made extensive findings regarding Respondent's prescribing of controlled substances to five patients, and concluded that he had engaged in the ''injudicious prescribing of drugs'' and thus committed ''unprofessional or dishonorable conduct.'' GX 5, at 13 (citing N.M. Stat. Ann. § 61–6–15(D)(26)). Based on these findings, and notwithstanding his acknowledgment that this was ''not a central issue of the Government's case,'' the ALJ found that Respondent ''issued prescriptions outside of the usual course of professional practice in violation of federal and state law.'' R.D. at 24; *see also id.* at 22 (quoting 21 CFR 1306.04(a)). I reject the ALJ's finding.

It is certainly true—if not an understatement—to say that Respondents' prescribing to the five patients was ''not a central issue of the Government's case.'' Indeed, the Government never properly put this conduct in issue at all. As explained above, following the remand, and notwithstanding its representation that it intended to file an amended show cause order, the Government did not do so. And while it is settled (and has been upheld by various federal courts of appeals) that Due Process is satisfied provided the Government, through its prehearing statements, provides adequate notice that it intends to litigate an issue, at no point in its pleadings did the Government state that it was alleging that Respondent violated 21 CFR 1306.04(a) and intended to use the State Board's order as proof. Rather, in its prehearing statements, the Government merely stated that it intended to put on evidence that the Board had restricted his state authority to handle controlled substances and that his DEA ''registration is not a restricted registration and includes the authority to handle all controlled substances in Schedules II through V which is different from and inconsistent with the Respondent's limited/restricted state authority to handle controlled substances.'' ALJ Ex. 11, at 6; *see also id.* at 9 (noting Respondent would testify that ''he is currently on an indefinite term of probation with the Board'' and ''that he is not authorized by the State of New Mexico to handle all controlled substances in Schedules II through V'').

Moreover, even in its post-hearing brief, the Government never argued that Respondent's prescribing to the five patients identified in the Board's Order establishes that he violated 21 CFR 1306.04(a), which prohibits the issuance of prescriptions without a legitimate medical purpose and outside of the usual course of professional practice. *See* Gov. Br. 21–32. Indeed, the only reference to the Board's findings contained in the Government's brief is the statement that ''[t]he Board's findings of fact and disciplinary actions are included in Government exhibits two, three, four, five, and eleven . . . and show the history of discipline imposed on [Respondent] by the Board.'' *Id.* at 19–20.

In its brief, the Government also notes Respondent's testimony, in which he referred to the State Board's suspension as his ''sabbatical,'' to argue that he ''accepts no responsibility whatsoever for his bad medical practices because he believes that the state suspension of his medical license is a sabbatical as opposed to a mandatory suspension that was imposed . . . because of his bad medical practices.'' *Id.* at 20. However, here again, the Government does not argue that Respondent's ''bad medical practices'' also constituted violations of 21 CFR 1306.04(a). Thus, there is also no basis to conclude that the issue was litigated by consent.[8] *See CBS Wholesale Distributors,* 74 FR 36746, 36750 (2009) (''where the Government's case 'focus[es] on another issue and [the] evidence of [an] uncharged violation [is] ''at most incidental,'' ' the Government has not satisfied its constitutional obligation to provide a full and fair opportunity to litigate the issue and it cannot rely on the incidental issue as a basis for imposing a sanction'') (quoting *Pergament United Sales, Inc.,* v. *NLRB,* 920 F.2d 130, 136 (2d Cir. 1990) (quoting *NLRB* v. *Majestic Weaving Co.,* 355 F.2d 854, 861–62 (2d Cir. 1966))). *See also Yellow Freight System, Inc.,* v. *Martin,* 954 F.2d 353, 358 (6th Cir. 1992) (''An agency may not base its decision upon an issue the parties tried inadvertently. Implied consent is not established merely because one party introduced evidence relevant to an unpleaded issue and the opposing party failed to object to its introduction. It must appear that the parties understood the evidence to be aimed at the unpleaded issue.'') (citation omitted). In short, given that the Government neither alleged, nor argued that Respondent's prescribing to the five patients identified in the Board's order violated 21 CFR 1306.04(a), the ALJ erred in holding that he violated the regulation.[9]

[8] It is acknowledged that during her cross-examination of the SDI, Respondent's counsel asked him whether he had any evidence that Respondent had harmed or injured any of his patients or diverted drugs. *See* Tr. 45–46. However, the questions posed by Respondent's counsel to the SDI were directed at the allegations that gave rise to the Pharmacy Board's (and not the Medical Board's) investigation and the evidence the SDI obtained in the course of the former's investigation. *See id.*

Subsequently, after the SDI testified in essence that he had no knowledge as to whether the Medical Board investigated Respondent because he had harmed patients or diverted medications, the Government moved into evidence various board orders, arguing that they were relevant because they address ''the issue that counsel brought up with [the SDI], were any patients harmed, were any patients injured, was there any diversion,'' and ''[t]his specifically goes to [Respondent's] activities along those lines and has become relevant through [the] questioning'' of the SDI. Tr. 92. Not only did Respondent's counsel object to the admission of most of these exhibits, I conclude that because her questioning of the SDI was limited to asking him about the basis for the Pharmacy Board's investigation and its findings, this did not make the Medical Board's findings relevant and does not excuse the Government from its obligation to provide notice. And I further conclude that the limited questioning undertaken by Respondent's counsel on these issues does not establish that Respondent consented to litigate the issue of whether the Medical Board's findings establish that he violated 21 CFR 1306.04(a).

[9] Even if the Government had properly raised the allegation, I would nonetheless reject the ALJ's conclusion. While a violation of the standards of professional practice may constitute evidence that a practitioner has also acted outside of the usual course of professional practice and lacked a legitimate medical purpose in prescribing a controlled substance, the federal courts have made clear that proof of intentional or knowing diversion requires more than proof that a practitioner committed civil negligence. *See United States* v. *McIver,* 470 F.3d 550, 559 (4th Cir. 2006) (quoted in *Laurence T. McKinney,* 73 FR 43260, 43266 (2008) (the offense of unlawful distribution requires proof that the practitioner's conduct went '' 'beyond the bounds of any legitimate medical practice, including that which would constitute civil negligence' '')); *see also McIver,* 470 F.3d at 559 (''the scope of unlawful conduct under [21 U.S.C.] 841(a)(1) [requires proof that a physician] used his authority to prescribe controlled substances . . . not for treatment of a patient, but for the purpose of assisting another in the maintenance of a drug habit or some other illegitimate purposes, such as his own personal profit''); *United States* v. *Feingold,* 454 F.3d 1001, 1010 (9th Cir. 2006) (''[T]he *Moore* Court based its decision not merely on the fact that the doctor had committed malpractice, or even intentional malpractice, but rather on the fact that his actions completely betrayed any semblance of legitimate medical treatment.'').

Here, while the State Board found that Respondent had engaged in the ''injudicious prescribing'' of drugs and thus committed ''unprofessional or dishonorable conduct'' in violation of N.M. Stat. Ann. § 61–6–15(D)(26), notably, the Board did not find that Respondent had engaged in ''the prescribing, administering or

Summary of Factors Two and Four

As explained above, I find that Respondent unlawfully possessed controlled substances which he obtained from his patients. I also find that Respondent failed to maintain required records. I thus conclude that the Government has satisfied its *prima facie* burden of showing that Respondent has committed acts that render his registration inconsistent with the public interest. 21 U.S.C. 824(a)(4).

Sanction

Where the Government has met its *prima facie* burden of showing that a registrant has committed acts which render his registration inconsistent with the public interest, the burden then shifts to the applicant to ''present sufficient mitigating evidence'' to show why he can be entrusted with a registration. *Medicine Shoppe-Jonesborough,* 73 FR 364, 387 (2008) (quoting *Samuel S. Jackson,* 72 FR 23848, 23853 (2007) (quoting *Leo R. Miller,* 53 FR 21931, 21932 (1988))). ''Moreover, because 'past performance is the best predictor of future performance,' *ALRA Labs, Inc.* v. *DEA,* 54 F.3d 450, 452 (7th Cir. 1995), [DEA] has repeatedly held that where a registrant has committed acts inconsistent with the public interest, the registrant must accept responsibility for [his] actions and demonstrate that [he] will not engage in future misconduct.'' *Medicine Shoppe,* 73 FR at 387; *see also Jackson,* 72 FR at 23853; *John H. Kennedy,* 71 FR 35705, 35709 (2006); *Cuong Tron Tran,* 63 FR 64280, 64283 (1998); *Prince George Daniels,* 60 FR 62884, 62887 (1995); *Hoxie* v. *DEA,* 419 F.3d at 483 (''admitting fault'' is ''properly consider[ed]'' by DEA to be an ''important factor[]'' in the public interest determination).

Here, although the ALJ noted that ''Respondent's acceptance of responsibility was somewhat mixed,'' he nonetheless concluded that ''when considering the record as a whole, [he] has failed to demonstrate that he will not engage in future misconduct.'' R.D. at 25. I reject the ALJ's conclusion because contrary to his statement, he did not consider the record as a whole, but rather, ignored relevant evidence to the contrary. And he further erred when he required Respondent to accept responsibility for conduct which the Government never properly put at issue.

For example, with respect to the recordkeeping violations, the ALJ noted that Respondent admitted that he had failed to keep required records. *Id.* (citing Tr. 169). However, the ALJ apparently concluded that Respondent had not provided adequate assurance that he would comply in the future, noting that when asked by the Government to state what recordkeeping requirements he was now familiar with ''for anything to do with controlled substances that you dispense or prescribe,'' he answered: ''[t]he initial document is in the patient's chart and to my knowledge that all that's required.'' *Id.* (quoting Tr. 180). The ALJ, however, ignored the rest of Respondent's answer to this question: ''For medications that I would dispense that I had, *i.e.,* samples of Ambien or Lunesta, Lyrica, whatever, that I have a log of, in terms of the medications that have been received and then as they're dispensed.'' Tr. 180–81. Respondent thus acknowledged his obligation to keep a record of his dispensings.

Moreover, the ALJ entirely ignored Respondent's testimony that following the November 2009 inspection he had stopped accepting drugs from his patients. *See* Tr. 146. The ALJ also ignored Respondent's testimony that he was now keeping a log of any samples he received from drug companies. *See id.*

Next, although it is not clearly stated in his recommended decision, the ALJ apparently found that Respondent lacked candor, based on his finding not credible, Respondent's testimony that he documented the medications he was providing his patients in their charts. R.D. at 25. Because for reasons explained above, I reject the ALJ's credibility finding, I conclude that his testimony on this issue does not establish that he lacks candor.

The ALJ then noted that ''Respondent also admitted that he was unaware that Ambien, Lunesta and Lyrica are controlled substances, but appeared to blame the pharmaceutical companies for failing to inform him.'' *Id.* (citing Tr. 181–82). While this aspect of Respondent's testimony—which he offered to justify his failure to maintain the records for these drugs—does not impress, the ALJ once again ignored the rest of his testimony, in which he stated: ''I'm not saying that I . . . shouldn't take some responsibility for it, because of course, *I do take responsibility for it.'' Id.* at 182 (emphasis added). Moreover, it is undisputed that following the November 2009 inspection, Respondent commenced maintaining a log of the controlled substances he received.

Finally, the ALJ cited Respondent's testimony regarding the Medical Board's findings, including his testimony to the effect that while he acknowledges his obligation to comply with the Board's order, ''he does not agree with the Medical Board's findings pertaining to his prescribing practices.'' R.D. at 26 (citing Tr. 166). However, because as explained above, the Government failed to raise the issue, Respondent was not obligated to address it in the proceeding.

As for what was properly at issue in the proceeding, Respondent has substantially complied with the requirement that he accept responsibility for his misconduct and demonstrate that he will not engage in future misconduct. However, even where a registrant satisfies this obligation, in fashioning an appropriate sanction, the Agency is still entitled to consider the egregiousness of the proven misconduct and its deterrence interests. *See Joseph Gaudio,* 74 FR 10083, 10095 (2009); *see also Paul Weir Battershell,* 76 FR 44359, 44368–69 (2011); *Roni Dreszer,* 76 FR 19434, 19435 (2011); *Mark DeLalama,* 76 FR 20011, 20020 (2011); *Janet L. Thornton,* 73 FR 50354, 50356 (2008).

Given the unrefuted evidence that he acted out of a benign motivation, I place little weight on Respondent's unlawful conduct in obtaining possession of the controlled substances from his patients. Respondent's recordkeeping violations are, however, a different matter. Indeed, I find it remarkable—and inexcusable—that Respondent was unaware of both the CSA's and the State's recordkeeping requirements. ''Recordkeeping is one of the CSA's central features'' for maintaining accountability of the distribution and dispensing of controlled substances; ''a registrant's accurate and diligent adherence to this obligation is absolutely essential to protect against the diversion of controlled substances.'' *Paul H. Volkman,* 73 FR 30630, 30644 (2008).

It should be obvious to anyone that the lawful handling of controlled substances is a highly regulated activity, and having voluntarily chosen to become a registrant, Respondent cannot reasonably claim ignorance of the legal requirements applicable to his controlled substance activities. *See United States* v. *Southern Union Co.,*

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dispensing of narcotic, stimulant or hypnotic drugs for other than accepted therapeutic purposes.'' N.M. Stat. Ann. § 61–6–15(D)(17). Given the existence of the latter standard, it is clear that the State's ''injudicious prescribing'' standard is not equivalent to the standard imposed under 21 CFR 1306.04(a). Accordingly, the State Board's ultimate finding does not support the ALJ's conclusion that Respondent violated the CSA's prescription requirement.

While it may be that the State Board's findings establish reckless or negligent conduct in the handling of controlled substances, which is a basis to revoke a registration under Agency precedent, *see Paul J. Caragine,* 63 FR 51592, 51601 (1998); here again, the Government made no such allegation. The conduct therefore cannot support the ALJ's proposed sanction.

630 F.3d 17, 31 (1st Cir. 2010). The recordkeeping requirements at issue here have been part of federal law since the enactment of the CSA in 1971. Surely, at some point during the thirty-seven years of his medical career, and preferably before he first started handling controlled substances, Respondent should have familiarized himself with the CSA and DEA regulations.

By themselves, recordkeeping violations can support the revocation of a registration. *See Volkman,* 73 FR at 30644. Here, however, the scope of the proven violations is limited, given that there is no evidence that he dispensed any of the controlled substances he obtained from his patients and that the other evidence in the case suggests that his dispensing activity was limited in scope. So too, while Respondent did not maintain an inventory of the controlled substances he had on hand, the quantities found during the inspection were limited. I thus conclude that Respondent's recordkeeping violations do not warrant revocation but are nonetheless sufficiently egregious to warrant the suspension of his registration.

Moreover, pursuant to the Medical Board's order, Respondent no longer holds authority under state law to prescribe ''narcotics, including but not limited to, all opioid analgesics, including buprenorphine and all synthetic opioid analgesics.'' GX 5, at 13. As explained in the discussion of factor one, under the CSA, the Board's revocation of his authority to prescribe these drugs likewise mandates that the same restriction be imposed on his DEA registration. Therefore, his registration will be restricted to bar him from prescribing the aforementioned drugs and his Identification Number as a DATA-Waiver physician must also be revoked.

Accordingly, I will order that Respondent's application to renew his new registration be granted subject to the following conditions:

(1) Effective on the date on which Respondent's registration is renewed, his registration shall be suspended for period of six months.

(2) Respondent's registration shall be restricted to authorize the dispensing of only non-narcotic controlled substances.

(3) Respondent's Identification Number as a DATA-Waiver physician shall be revoked.

Order

Pursuant to the authority vested in me by 21 U.S.C. 823(f) and 824(a)(4), as well as 28 CFR 0.100(b), I order that the application of Kenneth Harold Bull, M.D., to renew his DEA Certificate of Registration as a practitioner be, and it hereby is, granted subject to the condition that he be authorized to dispense only non-narcotic controlled substances. I also order that the Identification Number as a DATA-Waiver physician issued to Kenneth Harold Bull, M.D., be, and it hereby is, revoked. I further order that upon the effective date of this Order, the DEA Certificate of Registration issued to Kenneth Harold Bull, M.D., be, and it hereby is, suspended for a period of six months. This Order is effective November 21, 2013.

Dated: September 22, 2013.

Michele M. Leonhart,

Administrator.

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DEPARTMENT OF JUSTICE

Drug Enforcement Administration

Anthony E. Wicks, M.D. Decision and Order

On June 6, 2012, the Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration, issued an Order to Show Cause to Anthony E. Wicks, M.D. (Applicant), of Tampa, Florida. Show Cause Order at 1. The Show Cause Order proposed the denial of Applicant's application for a DEA Certificate of Registration, because granting his application would be ''inconsistent with the public interest.'' *See id.;* 21 U.S.C. 823(f).

The Show Cause Order specifically alleged that in approximately December 2010, Applicant discontinued his practice in Visalia, California and began practicing in Winter Springs, Florida, and that he issued more than 2,290 controlled-substance prescriptions without being registered at this location, in violation of 21 U.S.C. 822(e) and 21 CFR 1301.12; and that he also failed to notify DEA of the change in his practice location pursuant to 21 CFR 1301.51. Show Cause Order at 1. The Show Cause Order also alleged that after Applicant's registration expired on May 31, 2011, he issued more than 270 controlled-substance prescriptions, in violation of 21 U.S.C. 841(a) and 843(a)(2). *Id.* at 2.

The Show Cause Order further notified Applicant that within thirty days of the date of his receipt of the Order, he had the right to either request a hearing, or to file a waiver of his right to a hearing, together with a written statement of his position on the matters of fact and law asserted by the Government. *Id.* (citing 21 CFR 1301.43(a) & (c)). In addition, the Order notified applicant that should he ''request a hearing and then fail to appear at the . . . hearing, [he would] be deemed to have waived his right to a hearing'' and that a final order may be entered ''without a hearing based upon the evidence presented to'' me. *Id.* (citing 21 CFR 1301.43(d) & (e)).

The Government served the Show Cause Order on Applicant by certified mail addressed to him at the address of his proposed registered location. GXs 1, 16, 17. As evidenced by the signed return receipt card, service was accomplished on June 9, 2012. GX 17.

On July 5, 2012, Applicant, through his counsel, filed a timely request for a hearing. GX 18. The matter was placed on the docket of the Office of Administrative Law Judges (ALJ) and assigned to an ALJ, who proceeded to conduct pre-hearing procedures. GX 22. However, on September 26, 2012, Applicant withdrew his request for a hearing. GX 21. The same day, the ALJ issued an Order granting Applicant's request and cancelled the hearing. GX 22.

On March 13, 2013, the Government submitted the Investigative Record and a Request for Final Agency Action to my Office. As an initial matter, I find that Applicant, by withdrawing his request for a hearing, has waived his right to a hearing on the allegations. *See* 21 CFR 1301.43(d). I therefore issue this Decision and Order based on relevant evidence found in the Investigative Record submitted by the Government. *See id.* 1301.43(e). I make the following findings.

Findings

Applicant previously held DEA Certificate of Registration BW7987184, which authorized him to dispense controlled substances in Schedules II through V, as a practitioner, at the registered address of 400 West Mineral King Blvd., Department of Anesthesia, Visalia, California.[1] GX 2. This registration was issued on April 11, 2008 and expired on May 31, 2011. *Id.* While Applicant was sent two renewal notices, as well as a delinquency notice (after his registration had expired), he failed to renew the registration, and on

[1] Applicant had also previously held a registration which authorized him to dispense controlled substances at the registered location of: Department of Anesthesia, St. Joseph's Hospital, 1105 Shipwatch Circle, Tampa, Florida. GX 4, at 1. This registration expired on May 31, 2005 and was retired when Applicant failed to renew it. *Id.* at 2.

July 1, 2011, it was retired by the Agency. GX 3, at 1; GX 15, at 3, ¶ 11.

On July 19, 2011, Applicant applied for a new registration. GX 1. Applicant sought authority to dispense controlled substances in Schedules II—V at the registered address of 1105 Shipwatch Circle, Tampa, Florida. *Id.*

A Diversion Investigator (DI) subsequently determined that beginning in December 2010, Applicant had begun practicing at a pain clinic located in Winter Springs, Florida. GX 15. However, Applicant neither obtained a registration for this location, nor sought to modify the address of his then-existing registration. Instead, during the ensuing period, which lasted through at least most of June 2011, Applicant issued 3,120 controlled-substance prescriptions,[2] using DEA registration BW7987184, while listing his address as Pain Management of Winter Springs, 165 W. SR 434, Winter Springs, Florida. GX 15, at 2, ¶¶ 5–6. Applicant never notified the Agency that he had changed his practice address. *Id.* at 2, ¶ 5.

The DI also found that Applicant had issued at least 341 [3] controlled-substance prescriptions after his registration had expired. GX 15, at 2, ¶ 7; *see also* GX 13. Applicant wrote the prescriptions for oxycodone,[4] diazepam, and lorazepam.[5] GX 15, at 2, ¶ 7; GX 13.

Discussion

Under the Controlled Substances Act (CSA), an application for a practitioner's registration may be denied if ''the issuance of such registration . . . would be inconsistent with the public interest.'' 21 U.S.C. 823(f). In making the public interest determination, Congress directed that the following factors be considered:

(1) The recommendation of the appropriate State licensing board or professional disciplinary authority;

(2) The applicant's experience in dispensing, or conducting research with respect to controlled substances;

(3) The applicant's conviction record under Federal or State laws relating to the manufacture, distribution, or dispensing of controlled substances;

(4) Compliance with applicable State, Federal, or local laws relating to controlled substances; and

(5) Such other conduct, which may threaten the public health and safety.

21 U.S.C. 823(f).[6]

''[T]hese factors are considered in the disjunctive.'' *Robert A. Leslie,* 68 FR 15227, 15230 (2003). I may rely on any one or a combination of factors and may give each factor the weight I deem appropriate in determining whether to revoke an existing registration or to deny an application. *Id.* Moreover, while I ''must consider each of these factors, [I] 'need not make explicit findings as to each one.''' *MacKay* v. *DEA,* 664 F.3d 808, 816 (10th Cir. 2011) (quoting *Volkman* v. *DEA,* 567 F.3d 215, 222 (6th Cir. 2009)); *see also Hoxie* v. *DEA,* 419 F.3d 477, 482 (6th Cir. 2005) (citing *Morall* v. *DEA,* 412 F.3d 165, 173–74 (D.C. Cir. 2005)).

The Government has ''the burden of proving that the requirements for . . . registration . . . are not satisfied.'' 21 CFR 1301.44(d). In this matter, I have considered all of the factors and conclude that the evidence with respect to factors two and four supports the conclusion that granting the application ''would be inconsistent with the public interest.'' [7] 21 U.S.C. 823(f).

Factors Two and Four—Respondent's Experience in Dispensing Controlled Substances and Compliance with Applicable Federal and State Laws Related to Controlled Substances

A. The Applicant's Issuance of Prescriptions at an Unregistered Location

Under the CSA, ''[e]very person who dispenses [8] . . . any controlled substance, shall obtain from the Attorney General a registration issued in accordance with the rules and regulations promulgated by him.'' 21 U.S.C. 822(a)(2). Moreover, ''[a] separate registration [is] required at each principal place of business or professional practice where the applicant . . . dispenses controlled substances.'' *Id.* § 822(e); *see* 21 CFR 1301.12(a).

In a rulemaking, DEA has explained that ''DEA individual practitioner registrations are based on a [s]tate license to practice medicine and prescribe controlled substances.'' DEA, *Clarification of Registration Requirements for Individual Practitioners,* 71 FR 69478 (2006) (final rule); *see also* 21 U.S.C. 823(f) (''The Attorney General shall register practitioners . . . to dispense . . . controlled substances . . . if the applicant is authorized to dispense . . . controlled substances under the laws of the State in which he practices.'').[9] Therein, the Agency further explained that ''[s]tate authority to conduct the above-referenced activities only confers rights and privileges within the issuing State; consequently, the DEA registration based on a [s]tate license cannot authorize controlled substance dispensing outside the State.'' 71 FR at 69478.

The evidence shows that Applicant issued thousands of controlled-substance prescriptions while practicing medicine at the Winter Springs, Florida pain clinic and did so over the course of a seven-month period. The evidence thus establishes that Applicant

[2] Documentary evidence, which the Government acquired through administrative subpoena, includes copies of some of the prescriptions Respondent wrote for controlled substances while practicing at the Winter Springs pain clinic. *See* GXs 7–11. Walgreens' and Albertsons' pharmacies provided the documents. *Id.* Additionally, Walgreens provided a chart summarizing all of Applicant's prescriptions that were filled at their pharmacies after he started practicing at the Winter Springs pain clinic. *See* GX 14.

[3] The documentary evidence offered by the Government in support of this figure is contained within GX 13. This exhibit contains 439 pages of documents which were obtained from Walgreens; however, the exhibit contains prescriptions, as well as the labels that were generated for the prescriptions and which are typically placed in the pharmacy's dispensing log. However, even if this exhibit does not support the exact number of controlled substance prescriptions Applicant issued as alleged by the DI, it still provides evidence that he issued several hundred prescriptions after the expiration of his registration. Moreover, in *Holiday CVS, L.L.C., d/b/a CVS/Pharmacy Nos. 219 and 519,* 77 FR 62315, 62316, 62328 (2012), I adopted the ALJ's finding that these stores had dispensed a total of 55 controlled-substance prescriptions for oxycodone 30mg, which Applicant issued after the expiration of his registration.

[4] Oxycodone is a schedule II controlled substance. *See* 21 CFR 1308.12(b)(1).

[5] Both Diazepam (Valium) and Lorazepam (Ativan) are schedule IV depressants. 21 CFR 1308.14(c).

[6] Pursuant to 21 U.S.C. 871(a), the Attorney General has delegated this authority to the DEA Administrator. *See* 28 CFR 0.100(b).

[7] It is acknowledged that the Government offered no evidence regarding factors one, three, and five. While I have assumed that there is no evidence under any of these three factors that would support the denial of Applicant's application, the Agency has held that findings under a single factor can support the denial of an application. *See MacKay,* 664 F.3d at 817–18 (quoting *Dewey C. MacKay,* 75 FR 49956, 49973 (2010)); *see also Hoxie v. DEA,* 419 F.3d 477, 482 (6th Cir. 2005); *Jayam Krishna-Iyer,* 74 FR 4590, 462 (2009).

[8] *See* 21 U.S.C. § 802(10) (''The term 'dispense' means to deliver a controlled substance to an ultimate user . . . by, or pursuant to the lawful order of, a practitioner, including the prescribing and administering of a controlled substance . . ..'').

[9] *See also* 21 U.S.C. § 802(21) (defining ''[t]he term 'practitioner' [as] a physician . . . licensed, registered, or otherwise permitted, by the United States or the jurisdiction in which he practices . . . to . . . dispense . . . a controlled substance in the course of professional practice''); *id.* § 824(a)(3) (authorizing the suspension or revocation of a registration based ''upon a finding that the registrant . . . has had his State license or registration suspended, revoked, or denied by competent State authority and is no longer authorized by State law to engage in the . . . dispensing of controlled substances'').

maintained a principal place of professional practice at the Winter Springs pain clinic. Because the evidence further shows that during this period, Applicant was not registered at this location, or any other location in the State of Florida, I conclude that Applicant violated the CSA's separate registration requirement. 21 U.S.C. 822(e).[10]

The CSA further provides that ''[e]very registrant . . . shall be required to report any change of professional or business address in such manner as the Attorney General shall by regulation require.'' 21 U.S.C. 827(g). Under a DEA regulation, ''[a]ny registrant may apply to modify his/her registration . . . to change his/her name or address, by submitting a letter of request to the Registration Unit, Drug Enforcement Administration.'' 21 CFR 1301.51. Of consequence, this regulation further provides that ''[t]he request for modification shall be handled in the same manner as an application for registration.'' *Id.* Moreover, under 21 CFR 1301.13(a), ''[n]o person required to be registered shall engage in any activity for which registration is required until the application for registration is granted and a Certificate of Registration is issued by the Administrator to such person.''

Because section 827(g) clearly creates a substantive obligation on the part of a registrant to notify the Agency if he changes his professional address, the regulation's use of the words ''may apply to modify'' cannot alter (and cannot reasonably be read as altering) the binding nature of a registrant's obligation to notify the Agency. *Cf. Chevron, U.S.A., Inc.* v. *NRDC,* 467 U.S. 837, 842–43& n.9 (1984); *see also United States* v. *Marte,* 356 F.3d 1336, 1341 (11th Cir. 2004) (''When a regulation implements a statute, the regulation must be construed in light of the statute[.]'') (citation omitted). Indeed, because the regulation itself further states that a modification is ''handled in the same manner as an application for registration,'' and thus, a registrant may ''not engage in any activity for which registration is required until the application . . . is granted and a . . .[r]egistration is issued,'' 21 CFR 1301.13(a), the regulation is also properly construed as imposing, on a registrant who changes his professional address, the binding obligations to both: 1) Notify the Agency, and 2) refrain from dispensing activities until his request is approved. Accordingly, I also conclude that Respondent violated the CSA and DEA regulations when he failed to notify the Agency of the change of his professional address and yet proceeded to dispense controlled substances at his new practice location. *See* 21 U.S.C. § 827(g); 21 CFR 1301.13(a) and 1301.51. These findings, particularly when considered in light of the extent of the Applicant's violations, support the conclusion that granting Applicant's application ''would be inconsistent with the public interest.'' *Id.* § 823(f).

B. The Applicant's Issuance of Prescriptions After His DEA Registration Expired

Under the CSA, it is unlawful for a practitioner to ''knowingly or intentionally . . . use in the course of the distribution[] or dispensing of a controlled substance, . . . a registration number which is . . . expired.'' 21 U.S.C. 843(a)(2); *see also* 21 CFR 1306.03(a) (''A prescription for a controlled substance may be issued only by an individual practitioner who is . . . registered . . . .''). Notably, a DEA Certificate of Registration states on its face the date it expires; with respect to Applicant, his registration stated that it expired on May 31, 2011. *See* GX 2. Moreover, other evidence submitted by the Government shows that the Agency sent notices (on March 25 and April 10, 2011) to Applicant notifying him of the impending expiration of his registration. GX 3, at 2.

Here, the evidence shows that while Applicant's registration expired on May 31, 2011, he nonetheless proceeded to use the registration to issue several hundred controlled-substance prescriptions for drugs such as oxycodone 30mg. and Valium 10mg. *See* GX 13. In the absence of any evidence to the contrary, I further find that Applicant knew that his registration had expired and thus violated the CSA and DEA regulations when he continued to use it to issue the prescriptions. 21 U.S.C. 843(a)(2); 21 CFR 1306.03(a).

Here again, the extent of Applicant's misconduct in using an expired registration to issue prescriptions provides reason to deny his application. *See Larry E. Davenport, M.D.,* 68 FR 70534, 70537–38 (2003), *pet. for rev. denied Davenport* v. *U.S. Dep't of Justice,* 122 F. App'x 224 (6th Cir. 2005); *James C. LaJevic, D.M.D.,* 64 FR 55962, 55964 (1999). These violations, coupled with the thousands of violations Applicant committed in issuing prescriptions at the Winter Springs pain clinic without being registered at this location, strongly support the conclusion that granting Respondent's application for a new registration ''would be inconsistent with the public interest.'' 21 U.S.C. 823(f). Accordingly, I will order that Applicant's application be denied.

Order

Pursuant to the authority vested in me by 21 U.S.C. 823(f) and 28 CFR 0.100(b), I order that the application of Anthony E. Wicks, M.D., for a DEA Certificate of Registration as a practitioner be, and it hereby is, denied. This Order is effective immediately.

Dated: September 30, 2013.

Thomas M. Harrigan,

Deputy Administrator.

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[10] As support for its contention that, ''[u]nder DEA regulations, a practitioner is required to report a change of registered address to DEA,'' the Government cites 21 CFR 823(f)(2). Request for Final Agency Action, at 6. However, a review of the Code of Federal Regulations reveals that the provision cited by the Government does not even exist, and to the extent the Government mistakenly cited to the Code of Federal Regulations rather than the United States Code, 21 U.S.C. 823(f)(2) provides no support for its contention because it is simply a factor to be considered in determining the public interest and is not an independent requirement for registration. *See Penick Corp., Inc.,* v. *DEA,* 491 F.3d 483, 490 (D.C. Cir. 2007) (citation omitted). Indeed, the text of factor two simply directs the Agency to consider ''[t]he applicant's experience in dispensing . . . controlled substances'' and imposes (unlike numerous other provisions of the CSA) no substantive obligation on an applicant or registrant.

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

[Docket No. 13–17]

Morris W. Cochran, M.D.; Decision and Order

On July 9, 2013, Administrative Law Judge Gail A. Randall (hereinafter, ALJ) issued the attached Recommended Decision. Therein, the ALJ found that there was no dispute over the material fact that Respondent does not hold authority under the laws of the State of Alabama, the State in which he seeks registration with the Agency, to dispense controlled substances. R.D. at 12–13. Applying longstanding agency precedent, which holds that the possession of authority to dispense controlled substances under the laws of the State in which a practitioner engages in professional practice is a prerequisite for obtaining a registration under the Controlled Substances Act (CSA), *id.* at 8–10, the ALJ granted the Government's motion for summary disposition and recommended that I deny Respondent's application for a registration. *Id.* at 13. Neither party filed exceptions to the ALJ's Recommended Decision.

Thereafter, the ALJ forwarded the record to me for Final Agency Action.

Having considered the entire record, I have decided to adopt the ALJ's factual findings, legal conclusions, and recommended order. However, I do not adopt the ALJ's reasoning that ''[w]here the state has suspended or revoked a registrant's license to handle controlled substances, summary disposition of a registrant's case is only appropriate if the registrant is afforded some mechanism to challenge the state action.'' R.D. at 11 (citing *Kamal Tiwari,* 76 FR 76 FR 71604, 71605 (2011)). This is an oversimplification of the Agency's rule. As noted in *Tiwari,* the only case in which the Agency has held that summary disposition based on a registrant's lack of state authority was inappropriate was where the Agency issued a registrant an Immediate Suspension Order (thereby, suspending the practitioner's registration before providing a hearing on the underlying allegations), the State then suspended the Registrant's state authority based solely on the Agency's issuance of the Immediate Suspension Order, and the State's law specifically provided that a hearing was not available to challenge a state suspension when it was based on a finding that the practitioner's federal registration had been suspended. *See* 76 FR at 71606 (discussing unpublished interlocutory order in *Odette Louise Campbell,* No. 09–62; also citing Tex. Health & Safety Code §§ 481.063(e)(3), 481.063(h), 481.066(g), and Tex. Admin. Code § 13.272(h)).

Thus, when the Agency subsequently sought summary disposition on the ground that the practitioner no longer held state authority, the Administrator noted that granting the Government's motion ''would effectively preclude [the practitioner] from ever being able to challenge the basis of the Immediate Suspension order and regain both her [f]ederal and [s]tate registrations were the allegations without merit.'' *Campbell,* Order Remanding for Further Proceedings, at 9. Notwithstanding that much of the reason for that predicament stemmed from Texas law, the Administrator noted that she had no authority to order the State to give the practitioner a hearing and that because the Agency initiated this process when it issued the Immediate Suspension order, it was incumbent on the Agency to provide the practitioner ''with a meaningful opportunity to challenge the allegations which supported the Immediate Suspension.'' [1] *Id.* at 10.

Here, by contrast, DEA previously provided Respondent with a hearing on the merits of the Agency's allegations that he committed various acts which rendered his registration inconsistent with the public interest. *See Morris W. Cochran,* 77 FR 17505 (2012). Following the hearing, which lasted three days, the ALJ issued a recommended decision, which the Administrator adopted in large part. More specifically, the Administrator found that Respondent violated federal law by: (1) Prescribing methadone to treat substance abuse when he was not registered as a narcotic treatment program, *see* 21 U.S.C. 823(g)(1); (2) prescribing methadone to treat substance abuse, *see* 21 CFR 1306.04(c) and 1306.07; (3) prescribing controlled substances without a legitimate medical purpose, *see id.* 1306.04(a); (4) post-dating prescriptions, in violation of 21 CFR 1306.05(a); and (5) prescribing controlled substances when his registration had been suspended, *see* 21 U.S.C. 843(a)(2). *See* 77 FR at 17517–22. Further finding that Respondent had not rebutted the Government's *prima facie* case, the Administrator revoked his registration.

Respondent nonetheless maintains that both DEA and the State ''will continue to deny [him] access to prescribing medications based on the other's actions,'' and that ''[t]his is an unjust an [sic] inequitable situation as [he] fully complied with all the requirements set forth by the Medical Licensure Commission [MLC] after the charges were first brought against him.'' Resp. to Govt's Mot. for Summ. Disp. at 4. However, as explained in the ALJ's decision (*see* R.D. at 8–9), the CSA makes the possession of state authority a prerequisite for obtaining and maintaining a DEA practitioner's registration. *See also* 21 U.S.C. 823(f) (''[t]he Attorney General shall register practitioners . . . to dispense . . . controlled substances in schedules II, III, IV, or V . . . *if the applicant is authorized to dispense . . . controlled substances under the laws of the State in which he practices.''*) (emphasis added); *id.* § 802(21) (''The term 'practitioner' means a physician, dentist, veterinarian, scientific investigator . . . or other person *licensed, registered, or otherwise permitted, by the United States or the jurisdiction in which he practices or does research, to distribute, dispense,* conduct research with respect to, administer, or use in teaching or chemical analysis, a controlled substance in the course of professional practice or research.'') (emphasis added); *see also Hooper* v. *Holder,* 2012 WL 2020079, at *2 (4th Cir. 2012) (unpublished) (''Because § 823(f) and § (802)(21) make clear that a practitioner's registration is dependent upon the practitioner having state authority to dispense controlled substances, the [Administrator's] decision to construe § 824(a)(3) as mandating revocation upon suspension of a state license is not an unreasonable interpretation of the CSA.'').[2]

As for whether this Agency has placed Respondent in an unjust position, Respondent ignores that in the previous DEA proceeding, he had a full and fair opportunity to contest the allegations, as well as to put on evidence (including his evidence that he had fully complied with the requirements of the MLC's order) to refute the Government's contention that his continued registration is inconsistent with the public interest. *See* 77 FR at 17522. Notably, Respondent did not seek review of the Agency's decision.

And as for whether the MLC has placed him in an unjust position (or has acted arbitrarily or capriciously), because notwithstanding his compliance with its order, it proceeded to revoke his state authority based on the Administrator's order, this is a matter for the Alabama courts to decide.[3] However, until such time as the State grants him a new Alabama Controlled Substances Certificate, Respondent remains without authority

[1] The Agency assumed that, if, following the hearing, the Immediate Suspension was vacated, the State would also vacate its suspension. However, in the event the State declined to vacate its suspension, the CSA's requirement that a practitioner must possess state authority in order to be registered with DEA, *see* 21 U.S.C. 802(21) & 823(f), would still have precluded the Agency from issuing a registration to the practitioner and the practitioner's sole remedy would have been to challenge the State's order in the state courts.

[2] *See also* 21 U.S.C. 824(a)(3) (authorizing the suspension or revocation of a registration ''upon a finding that the registrant . . . has had his State license or registration suspended, revoked, or denied by competent State authority and is no longer authorized by State law to engage in the manufacturing, distribution, or dispensing of controlled substances'').

[3] It is noted that the Board of Medical Examiners' regulations for the Conduct of Hearings In Contested Cases provide that:

After the Board has reached a determination, from consideration of all of the evidence on the question of guilt or innocence of the registrant with respect to the grounds specified in the complaint, and before the Board determines the appropriate penalty, if any, to be imposed, the Board may, but is not required to, receive and consider all prior actions of the Board with respect to the registrant's certificate of registration and any matters in mitigation or extenuation which the registrant desires to submit.

Ala. Admin. Code r.540–x–6–.02(2). It is further noted that under the Board's regulations, the Board had available to it a range of sanctions, including sanctions short of revocation or outright suspension, yet chose to revoke Respondent's state registration. *See id.* r. 540–X–6–.04(9).

to prescribe controlled substances under the laws of the State in which he engages in professional practice. Because the possession of state authority to dispense controlled substances is a prerequisite for obtaining a registration under the CSA, I hold that the ALJ properly granted the Government's motion for summary disposition and will therefore deny Respondent's application.[4]

Order

Pursuant to the authority vested in me by 21 U.S.C. 823(f), as well as 28 CFR 0.100(b) and 0.104, I order that the application of Morris W. Cochran, M.D., for a DEA Certificate of Registration as a practitioner be, and it hereby is, denied. This Order is effective immediately.

Dated: September 26, 2013.

Thomas M. Harrigan,

Deputy Administrator.

Brian Bayly, Esq., for the Government
Mark W. Lee, Esq., for the Respondent

Recommended Rulings, Findings of Fact, Conclusions of Law, And Decision of the Administrative Law Judge

Gail A. Randall, Administrative Law Judge:

I. Facts

The Deputy Assistant Administrator, Drug Enforcement Administration (''DEA'' or ''Government''), issued an Order to Show Cause (''Order'') dated January 11, 2013,[1] proposing to deny the DEA Certificate of Registration (''COR'') application, of Morris W. Cochran, M.D. (''Dr. Cochran'' or ''Respondent''), as a practitioner, pursuant to 21 U.S.C. 823(f) and 824(a)(3) (2011), because Respondent does not ''have authority to practice medicine or handle controlled substances in the [s]tate of Alabama'' and because the Respondent's registration would be inconsistent with the public interest, as that term is used in 21 U.S.C. 823(f). [Order, at 1].

The Order specifically alleged that, on February 12, 2012, Respondent's Schedule II and IIN state registration for controlled substances had been revoked by the Alabama Board of Medical Examiners and Respondent was prohibited from treating patients for pain management or drug addiction. [*Id.* at 2]. The Government further alleged that, on October 9, 2012, Respondent's state controlled substance license was revoked in its entirety.[2] [*Id.*]. As a result, the Government concluded that Respondent is currently without state authority to handle controlled substances in Alabama, the state in which Respondent is registered with the DEA. [*Id.*]. The Government requested that I recommend to the Administrator the denial of Respondent's pending application for a DEA COR. [*Id.* at 3].

On February 11, 2013, the Respondent, through counsel, filed a timely request for hearing in the above-captioned matter.

Later, on February 11, 2013, this Court issued an Order for Prehearing Statements in which the Government was directed to file its Prehearing Statement on or before February 25, 2013, and the Respondent was directed to file his Prehearing Statement on or before March 4, 2013.

On February 25, 2013, the Government filed its Motion for Summary Judgment and Motion to Stay the Proceedings (''Government's Motion''). Therein, the Government moved this Court to summarily dispose of the above-captioned matter and stay the proceedings while the Government's Motion was pending. [Gov't Mot. I, at 1].

Specifically, the Government argued that ''summary judgment'' is warranted in this case because the Respondent currently lacks authority to handle controlled substances in the state of Alabama and thus, the Respondent's application for a DEA COR should be denied. [*Id.* at 4–8]. Additionally, the Government contended that ''summary judgment'' is appropriate because the Respondent had adequate opportunity to challenge the state revocation of his controlled substance registration in Alabama. [*Id.* at 4–7]. To this point, the Government added that the Respondent was afforded due process under Alabama state law because he had a hearing before the state medical board regarding the revocation of his state controlled substances registration. [*Id.* at 6–7]. Therefore, the Government requested this Court grant its motion for ''summary judgment'' and recommended that the Respondent's ''application for a DEA registration . . . be summarily denied. . . .'' [*Id.* at 8]. The Government further requested that ''the ALJ stay the proceedings until an order and recommended decision is issued based on this summary judgment motion.'' [*Id.*].

On March 4, 2013, Government counsel filed its Second Motion to Stay the Proceedings while Respondent's Request to Withdraw his Application is Pending (''Government's Second Motion''). Therein, Government requested that the Court stay the above-captioned matter because Dr. Cochran submitted a request to withdraw his pending application. [Gov't Mot. II, at 1; *see also* Gov't Mot. II, Attachment at 1]. The Government requested the stay of these proceedings pending the Deputy Assistant Administrator's decision on the Respondent's request to withdraw his application for a DEA registration, pursuant to 21 CFR 1301.16(a) (2012). [*Id.*]. This Court granted Government's Motion on March 5, 2013.

On March 20, 2013, this Court ordered the parties to file a Joint Status Report on or before April 15, 2013, regarding Respondent's request to withdraw his application.

On April 12, 2013, the Respondent filed his Status Update (''Respondent's Status Report I''). Therein, he explained to this Court that he had not yet been ''informed as to the DEA's decision on his request to withdraw the application.'' [Resp't Status Report I, at 1]. Accordingly, the Respondent requested ''that the ALJ continue to stay this action until the DEA reaches a decision on Dr. Cochran's request to withdraw his application.'' [*Id.*].

On April 15, 2013, the Government filed its Status Report (''Government's Status Report I''). Therein, the Government informed this Court that the Government had sent the Respondent's request to withdraw his application to the Deputy Assistant Administrator, Office of Diversion Control, but had not yet received a decision from him. [Gov't Status Report I, at 1–2].

On April 16, 2013, this Court ordered the parties to file a second Joint Status Report on or before April 29, 2013.

On April 29, 2013, the Respondent filed his Status Update (''Respondent's

[4] Before the ALJ, Respondent also argued that the Agency ''has acted in an arbitrary and unreasonable manner'' because when he sought to withdraw his application, the relevant Agency official would only accept his request if he agreed not to reapply for five years. Resp. Opp. at 3–4. Respondent should have been provided with a written explanation as to why his request was rejected. *See* 5 U.S.C. 555(e) (''Prompt notice shall be given of the denial in whole or in part of a written application, petitioner or other request of an interested person made in connections with any agency proceedings. Except in affirming a prior denial or when the denial is self-explanatory, the notice shall be accompanied by a brief statement of the grounds for the denial.'').

Respondent has not, however, identified how he has been adversely affected by the refusal to grant his request to withdraw his application, and under the rules of the Agency, Respondent can reapply for a new registration at any time. However, because under federal law, the possession of state authority is a prerequisite for obtaining a registration, Respondent is not entitled to be registered, or to challenge the Government's contention that his registration is inconsistent with the public interest, until he obtains state authority. 21 U.S.C. 823(f).

[1] The Order to Show Cause was served on the Respondent on January 22, 2013. [*See* Government's Notice of Service of an Order to Show Cause.].

[2] Government attached to its initial motion for summary disposition (''Government's Motion''), which was filed February 27, 2013, a copy of the state of Alabama's order that revoked Respondent's registration in its entirety. [Gov't Mot. I, Attach. 3, at 1].

Status Report II''). Therein, the Respondent explained to the Court that ''[t]o date, Dr. Cochran has not been informed as to the DEA's decision on his request to withdraw the application.'' [Resp't Status Report II, at 1]. Accordingly, the Respondent ''request[ed] that the ALJ continue to stay this action until the DEA reaches a decision on Dr. Cochran's request to withdraw his application.'' [*Id.*]

Later, on April 29, 2013, the Government filed its Status Report and Second Request to Stay Proceedings while Respondent's Request to Withdraw his Application is Pending with the Deputy Assistant Administrator's Office (''Government's Status Report II''). Therein, the Government confirmed that the ''Deputy Assistant Administrator still has this matter and [Government counsel] has been informed that a decision will come shortly.'' [Gov't Status Report II, at 1]. Accordingly, the Government requests ''that the proceedings be stayed until the Deputy Assistant Administrator issues a decision.'' [*Id.*]

On April 30, 2013, this Court ordered the parties to file a third Joint Status Report no later than May 13, 2013 regarding Respondent's request to withdraw his application for a DEA registration.

On May 6, 2013, Respondent filed a Status Update, wherein the Respondent indicated that he, once again, ''has not been informed as to the DEA's decision on his request to withdraw the application.'' [Resp't Status Report III, at 1]. Respondent requested that the ALJ continue this action until the DEA reaches a decision on Respondent's withdrawal request. [*Id.*].

On May 14, 2013, Government filed a Status Report, Third Request to Stay Proceedings While Respondent's Request to Withdraw His Application is Pending with the Deputy Assistant Administrator's Office, and Request to Accept this Status Report One Day Late. Government confirmed that the Deputy Assistant Administrator had not yet made a decision on Respondent's withdrawal request. [Gov't Status Report III, at 1]. Government's untimely filing was the result of waiting until late afternoon for a response from the Deputy Assistant Administrator's office about this matter. [*Id.*]. Government requested that I stay the proceedings until a decision is reached. [*Id.*].

On May 17, 2013, this Court continued the stay on the above-captioned matter and ordered the parties to file a fourth Joint Status Report no later than June 13, 2013.

On June 11, 2013, Government filed a Status Report (''Government's Status Report IV'') indicating that on ''May 17, 2012 (sic), the Deputy Assistant Administrator's office notified [Government Counsel] that DEA' (sic) Office of Diversion will let Dr. Cochran withdraw his application 'only on the condition that [Dr.] Cochran not re-apply for a period of five years.''' [Gov't Status Report IV, at 2]. Government's Status Report IV did not, however, indicate whether Respondent had accepted the offer. [*See id.*]. Government also renewed its request that I ''grant the Government's Motion for Summary Judgment and issue a Recommendation that Respondent's DEA registration be revoked.'' [3] [*Id.*].

On June 12, 2013, this Court ordered Respondent to respond to Government's Status Report IV, which contained the Deputy Assistant Administrator's offer for Respondent's withdrawal of his application. Specifically, I asked the Respondent to address the Deputy Assistant Administrator's withdrawal offer and the current status of his authority to handle controlled substances in the state of Alabama.

Later, on June 12, 2013, the Respondent, through counsel, filed a Response to Government's Status Report IV. [Resp't Resp., at 1]. Respondent noted that the Government's most recent filing ''was the first time that the [Respondent had] been notified that the DEA Office of Diversion would only allow Dr. Cochran to withdraw his application for DEA registration if he waited five years before he applied again.'' [*Id.*]. Additionally, Respondent requested documentation of the DEA Office of Diversion's offer, which was allegedly provided to the Government counsel on May 17, 2013.[4] [*Id.*].

On June 14, 2013, I held a telephonic conference with the parties. The parties represented their positions on the issue of Respondent's request to withdraw his application, including whether I should order the disclosure of the email from the Deputy Assistant Administrator that contained the withdrawal offer.

On June 24, 2013, the Respondent, through counsel, filed a Response to Government's Motion for Summary Judgment. [Resp't Resp. II, at 1]. Respondent explained that on January 25, 2012, Respondent appeared before the Alabama Medical Licensure Commission (''AMLC'') concerning the same actions that resulted in the suspension of Respondent's former DEA COR on September 22, 2010. [*Id.*]. AMLC initially permitted Respondent to maintain his state registration for Schedules III–V, subject to several conditions, with which Respondent said he complied. [*Id.*]. However, Respondent indicated that DEA subsequently revoked his registration, which prompted the AMLC to move to revoke Respondent's state registration. [*Id.* at 2]. Respondent explained that his state registration was revoked October 19, 2012.[5] [*Id.*]. Thus, when DEA reviewed his new application for registration, which was filed September 27, 2012, the Agency instituted action to deny it based on Respondent's lack of state authority to handle controlled substances. [*Id.*].

Respondent also contended that he has ''been placed in an indefinite back and forth between the DEA and the Alabama Board of Medical Examiners.'' [*Id.* at 3]. Furthermore, Respondent said he appealed the ALMC's ''decision to revoke his prescribing authority'' in the Alabama Court of Civil Appeals. [*Id.* at 4]. Respondent requested I deny the Government's motion for summary disposition, or in the alternative, order the Government to accept Respondent's request for withdrawal without any restrictions on his reapplication. [*Id.*].

Later, on June 24, 2013, I issued a Memorandum and Order (''MO'') addressing the statutory and regulatory basis for withdrawing an application for a DEA COR. [MO, at 4–6]. I also explained that it would not be appropriate in this case to permit Respondent to file an interlocutory appeal with the Administrator for review of the withdrawal offer terms. [*Id.* at 6]. I then ordered Respondent to notify this Court no later than Friday, June 28, 2013 of whether he wants to move forward with this administrative proceeding or accept the Deputy Assistant Administrator's offer for withdrawal. [*Id.* at 7].

Respondent has failed to notify this Court of his decision as to how he plans to proceed with his case. I interpret Respondent's silence to indicate that he has waived his opportunity to accept the Deputy Assistant Administrator's withdrawal offer. I further interpret his silence to mean that he plans to pursue his case through the administrative process. As a result, I will now address Government's motion for summary disposition, which was contained in the February 25, 2013 motion and renewed

[3] Government counsel must have intended to recommend that I deny Respondent's application for a DEA COR, instead of revoke Respondent's registration. [*See* Order, at 2 ¶ 4].

[4] Government counsel acknowledged on June 14, 2013, during a telephonic conference with the parties, that he had intended to write *May 17, 2013,* rather than May 17, 2012, in the filing. [Gov't Status Report IV, at 2].

[5] The actual date of the revocation was October 9, 2012, as evidenced by the order itself. [Gov't Mot I., Attach. 3, at 1].

in the June 11, 2013 status report. [Gov't Mot. I, at 1; Gov't Status Report IV, at 2]. I will also consider the arguments Respondent raised in his Response to Government's motion for summary disposition. [*See generally* Resp't Resp. II].

II. Discussion

A. State Authority To Handle Controlled Substances

The Controlled Substances Act (''CSA'') and long-standing agency precedent provide that having state authority to handle controlled substances is a prerequisite to obtaining a DEA registration. *See* 21 U.S.C. 823(f) (''the Attorney General shall register practitioners . . . if the applicant is authorized to dispense . . . controlled substances under the laws of the State in which he practices''); 21 U.S.C. 802(21) (2011) (defining ''practitioner'' as ''a physician . . . licensed, registered, or otherwise permitted, by . . . the jurisdiction in which he practices . . . to distribute, dispense, [or] administer . . . a controlled substance in the course of professional practice''); *see also Romeo J. Perez, M.D.,* 62 FR 16,193, 16,193 (DEA 1997); *Demetris A. Green, M.D.,* 61 FR 60,728, 60, 729 (DEA 1996); *Dominick A. Ricci, M.D.,* 58 FR 51,104, 51,105 (DEA 1993).

Therefore, the DEA does not have statutory authority under the CSA to grant the application of a practitioner, who lacks state authority to handle controlled substances. *Graham Travers Schuler, M.D.,* 65 FR 50,570, 50,571 (DEA 2000); *see also* 21 U.S.C. 823(f); 21 U.S.C. 824(a)(3) (stating a registration may be suspended or revoked by the Attorney General upon a finding that the registrant ''has had his State license or registration suspended, revoked or denied by competent State authority''); *Joseph Baumstarck,* 74 FR 17,525, 17,527 (DEA 2009) (stating that the ''ALJ applied the Agency's long-settled ruled (sic) that a practitioner may not maintain [a] DEA registration if he lacks authority to handle controlled substances under the laws of the state in which he practices'').

Consequently, the Deputy Administrator has found that denial of an application for registration through summary disposition is appropriate where a respondent lacks state authority to handle controlled substances. *George Thomas, PA–C,* 64 FR 15,811, 15,812 (DEA 1999) (denying Respondent's application for registration upon finding that the ALJ properly granted Government's motion for summary disposition because Respondent was without state authority to handle controlled substances in the state where he sought DEA registration); *Robert G. Crummie, M.D.,* 76 FR 71,369, 71,369–70 (DEA 2011) (denying any pending applications for registration upon adopting the ALJ's recommended decision, which granted Government's motion for summary disposition on the basis that Respondent lacked state authority to handle controlled substances).

Here, the Respondent does not dispute that he currently lacks state authority to handle controlled substances. Respondent indicated that his state registration was revoked October 19, 2012.[6] [Resp't Resp. II, at 2]. According to agency precedent, even though Respondent is appealing the AMLC decision in state court, he currently lacks state authority to handle controlled substances for the purpose of obtaining a DEA registration. Therefore, I find that summary disposition, which recommends denial of Respondent's application, is appropriate.

B. Right to Hearing and Due Process Rights

With the central issue of state authority resolved, I turn to Respondent's additional argument that he has ''been placed in an indefinite back and forth between the DEA and the Alabama Board of Medical Examiners.'' [Resp't Resp. II, at 2]. Although not explicitly styled as a due process argument, I find that Respondent is impliedly arguing that his inability to obtain a state registration without a DEA registration, and vice versa, is a denial of his due process rights. *See Kamal Tiwari, M.D.,* 76 FR 71,604, 71,605 (DEA 2011).

A respondent has a constitutionally protected property interest in his DEA registration. *See Lujan* v. *G & G Fire Sprinklers, Inc.,* 532 U.S. 189, 196 (2001) (finding that a claimant has a right to due process where ''the claimant was denied a right by virtue of which he was presently entitled either to exercise ownership dominion over real or personal property, or to pursue a gainful occupation''); *see also Wedgewood Village Pharmacy* v. *Aschcroft,* 293 F. Supp. 2d 462, 469–70 (D. N.J. 2003) (finding that ''[d]epriving [a company] of its rights to dispense and receive controlled drugs without notice and a hearing would violate . . . due process'').

Where the state has suspended or revoked a registrant's license to handle controlled substances, summary disposition of a registrant's case is only appropriate if the registrant is afforded some mechanism to challenge the state action. *Kawal Tiwari, M.D.,* 76 FR at 71,605 (finding summary disposition was appropriate because the ALJ correctly concluded that Respondent had a basis for seeking substantive review of his state suspension under state law, even though Respondent argued he could not request a hearing until the state administrative board issued an order to show cause, which it had not); *Hichman K. Riba, D.D.S.,* 73 FR 75,773, 75,774 (DEA 2008) (finding summary disposition appropriate where Respondent was seeking judicial review of state proceedings); *Bourne Pharmacy, Inc.,* 72 FR 18,273, 18,274 (DEA 2007) (finding summary disposition appropriate where the state revocation was ''pending a final decision on the merits'').

The state of Alabama affords the Respondent due process through a hearing entitlement and opportunity for appellate review. Specifically, the Code of Alabama provides that ''[b]efore denying, suspending, or revoking a registration . . . the certifying boards shall serve upon the applicant or registrant an order to show cause.'' Ala. Code § 20–2–53(a) (2013). The statute indicates that the order to show cause ''call[s] upon the applicant or registrant to appear before the certifying board.'' *Id.* Such proceedings are ''conducted in accordance with the Alabama Administrative Procedure Act. . . .'' *Id.* After a decision is rendered by the state administrative board, an applicant or registrant may then ''obtain judicial review thereof by filing a written petition for review. . . .'' *Id.* § 20–2–53(b). The proper court for appealing such matters is the Alabama Court of Civil Appeals. *Id.* § 34–24–380; *see also Brunson, M.D.* v. *Alabama State Board of Medical Examiners,* 69 So.3d 913, 914 (Ala. Civ. App. 2011).

Here, Respondent had an opportunity to appear before the AMLC during a hearing about his state authority to handle controlled substances. [Resp't Resp. II, at 1; Gov't Mot. I, at 6–7]. Thus, I find that Respondent's due process rights are protected, even if I recommend denial of his application for DEA COR through summary disposition. With regards to Respondent's appeal of the AMLC decision that revoked his state registration, I find that it is within the discretion of the Alabama Court of Civil Appeals to decide whether Respondent's case will be heard or resolved through summary judgment. Finally, I acknowledge that Respondent's Alabama registration was

[6] Documentary evidence provided by the Government indicates that the state order for revocation actually occurred on October 9, 2012. [Gov't Mot. I, Attach. 3, at 1].

revoked in response to DEA's revocation and Respondent alleges he cannot obtain a new state registration without a DEA COR. However, Respondent's due process rights have not been denied because he previously had an opportunity to be heard at a state administrative hearing before the AMLC. Further, the Respondent is actively pursuing his state court appellate right.

C. Material Question of Fact

It is well-settled that when there is no material question of fact involved, or when the facts are agreed upon, there is no need for a plenary, administrative hearing. *See Larry Elbert Perry, M.D.,* 77 FR 67,671 (DEA 2012); *Treasure Coast Specialty Pharmacy,* 76 FR 66,965 (DEA 2011); *Jesus R. Juarez, M.D.,* 62 FR 14,945 (DEA 1997); *Dominick A. Ricci, M.D.,* 58 FR 51,104 (DEA 1993). Congress did not intend for administrative agencies to perform meaningless tasks. *See Puerto Rico Aqueduct & Sewer Auth.* v. *EPA,* 35 F.3d 600, 604–05 (1st Cir. 1994); *NLRB* v. *Int'l Assoc. of Bridge, Structural & Ornamental Ironworks, AFL–CIO,* 549 F.2d 634 (9th Cir. 1977); *Philip E. Kirk, M.D.,* 48 FR 32,887 (1983), aff'd sub nom. *Kirk* v. *Mullen,* 749 F.2d 297 (6th Cir. 1984).

Here, the parties do not dispute that the Respondent lacks state authority to handle controlled substances in Alabama. Thus, there is no material question of fact to be adjudicated.

III. Conclusion, Order, and Recommendation

DEA is bound by federal statute to deny applications for a DEA COR, where an applicant lacks state authority. 21 U.S.C. 823(f), 824(a)(3); *see also Graham Travers Schuler,* 65 FR at 50,571; *George Thomas, PA–C,* 64 FR at 15,812. Here, there is no genuine dispute of material fact that Respondent lacks state authority to handle controlled substances in the state where he seeks to obtain a DEA registration. Furthermore, Respondent's due process rights are protected, since he had an opportunity to be heard by the AMLC regarding his state authority to handle controlled substances. Therefore, summary disposition for the Government is appropriate.[7]

Accordingly, I hereby

Grant the Government's motion for summary disposition.

I also forward this case to the Deputy Administrator for final disposition. I recommend that the Deputy Administrator deny Respondent's pending application for a DEA COR.

Dated: July 9, 2013.

Gail A. Randall,

Administrative Law Judge.

[FR Doc. 2013–24696 Filed 10–21–13; 8:45 am]

BILLING CODE 4410–09–P

[7] This opinion does not reach the other factual issues made in the Order to Show Cause. Rather, this opinion solely addresses the Respondent's loss of his ability to handle controlled substances in the state of Alabama.

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

[Docket No. 12–43]

Mark G. Medinnus, D.D.S.; Decision and Order

On October 17, 2012, Administrative Law Judge (ALJ) Gail A. Randall issued the attached Recommended Decision (hereinafter, cited as R.D.[1]). The Government filed Exceptions to the Recommended Decision.

Having reviewed the record in its entirety, I reject the Government's Exceptions and adopt the ALJ's findings of fact and conclusions of law except as discussed below. I also adopt in part, and reject in part, the ALJ's recommended order. A discussion of the Government's Exceptions follows.

The Government's Exceptions

The Unauthorized Purchase Allegation

The Government first takes exception to the ALJ's finding that it failed to prove that Respondent, while serving as the dental director of the Round Valley Indian Health Clinic (RVIHC), made an unauthorized purchase of two controlled substances (hydrocodone and codeine). Exceptions at 2. The contention is not well taken as either a factual or legal matter.

The evidence showed that on November 29, 2010, Respondent prepared a purchase order for various dental supplies, including one bottle of 500 tablets of hydrocodone/acetaminophen and one bottle of 500 tablets of codeine/acetaminophen. GX 10, at 1–3; Tr. 151. The purchase order comprised all of one page and listed a total of eleven items; the order was approved by Jan Scribner, the deputy director of the RVIHC. *Id.;* Tr. 158. The evidence further showed that Ms. Scribner had authority to approve purchase orders in the absence of the RVIHC's executive director. GX 21.

In challenging this finding, the Government takes issue with the ALJ's credibility findings. Citing *Ryan* v. *CFTC,* 145 F.3d 910, 918 (7th Cir. 1998), it argues that I am ''free to discount the weight that the ALJ placed on the testimony when the record would support an alternative finding.'' Exceptions at 1 (also citing *Universal Camera Corp.* v. *NLRB,* 340 U.S. 474 (1951)).[2]

More specifically, the Government requests that I reject the ALJ's credibility findings regarding the testimony of both Respondent (whom she found credible on the issue of whether a dental clinic employee had told him that the executive director had approved the purchase order, *see* R.D. at 12, 27) and the clinic employee (whom she found not credible when she testified that the executive director did not think it was a good idea because of Respondent's history of substance abuse, *see id.*). *See* Exceptions at 2–6. While the Government clearly misreads *Ryan,*[3] I conclude that it is not

[1] All citations to the R.D. are to the ALJ's slip opinion.

[2] In the Show Cause Order, the Government alleged both that Respondent made an unauthorized purchase of controlled substances, and that he stored and dispensed controlled substances at the RVIHC's dental clinic in violation of the RVIHC's guidelines for storing and dispensing controlled substances. ALJ Ex. 1, at 2. The ALJ reasoned that because Respondent ''reasonably believed the purchase order was duly approved, the Government's allegation that he failed to abide by RVIHC policies regarding the storage and dispensing of controlled substances, also fails.'' R.D. at 28. It is, however, far from clear why, even if Respondent had authority to order controlled substances, this would necessarily lead to the conclusion that he also had authority to store and dispense controlled substances out of the dental clinic.

In taking exception to the ALJ's findings regarding the purchase, the Government also takes issue with the ALJ's finding that Respondent ''honestly and reasonably believed he possessed the necessary authority to store and dispense controlled substances in [the RVIHC] dental department.'' Exceptions at 2. To the extent the Government has even properly put this finding at issue, I reject its contention, because, by itself, it does not establish a violation of the CSA or state law, or otherwise actionable misconduct under the public interest standard.

[3] At issue in *Ryan* was whether an Agency was required to defer to an ALJ's finding that an applicant for a trader's license ''was fully rehabilitated and not a threat to the integrity of the [commodities] markets,'' which was based on the ALJ having found credible the testimony of the applicant's character witnesses. *See* 145 F.3d at 918. The Commission discredited the testimony because ''almost every one can produce'' a character witness who will testify as to his/her ''belief that the defendant will not repeat his violative conduct,'' and because the ''testimony reflected at most a perfunctory concern with the customers harmed by Ryan's wrongdoing.'' *Id.* (internal citation omitted).

The Seventh Circuit held that the Commission could ''discredit the weight of a witness's testimony without impinging on an ALJ's credibility determinations.'' *Id.* As the court of appeals further explained:

The Commission must attribute significant weight to an ALJ's findings based on a witness's demeanor

Continued

necessary to either adopt or reject the ALJ's credibility findings, because even were I to reject the findings with respect to both Respondent and the clinic employee, the Government cannot overcome the evidence that the purchase order was approved by an official of the clinic, who indisputably had authority to do so. R.D. at 12, 27; Tr. 158.

The Government attempts to overcome this evidence, arguing that in an affidavit, the deputy director ''unequivocally states that she was not aware [that] the purchase order, which contained a number of items, also contained an order for controlled substances.'' Exceptions at 7. The Government then argues that ''[a] review of the purchase order shows that . . . the controlled substances order is buried in the middle/end of the purchase order.'' *Id.*

The Government's argument is wholly unpersuasive. Notably, the purchase order was but a single page in length and listed all of eleven items. GX 10, at 1. Moreover, the purchase order clearly described the respective controlled substances as ''1 bottle'' of ''Hydrocodone'' and ''1 bottle'' of ''APAP w/codeine.'' *Id.* Thus, even a cursory review of the purchase order by the deputy director should have revealed that it contained controlled substances. I thus give no weight to the assertion of the deputy director that she inadvertently approved the order and reject the Government's contention that Respondent's purchase of controlled substances was unauthorized.[4] *Cf. Consolidated Edison Co.* v. *United States,* 221 F.3d 364, 371 (2d Cir. 2000) (''In general, individuals are charged with knowledge of the contents of documents they sign—that is, they have 'constructive knowledge' of those contents.'').[5]

Even if the Government's contention was supported by substantial evidence, I would nonetheless reject the exception. Notably, while the Government argues—as an afterthought—that Respondent used the clinic's ''DEA registration without authorization from RVIHC executive personnel,'' it does not go so far as to maintain that this constitutes a violation of the Controlled Substances Act. *See* Exceptions at 10, *but see* 21 U.S.C. 843(a)(2) (''It shall be unlawful for any person knowingly or intentionally . . . to use for the purpose of acquiring or obtaining a controlled substance, a registration number which is . . . issued to another person.''). Indeed, notwithstanding that Respondent could not account for forty tablets of hydrocodone, the evidence showed that the drugs were generally dispensed to patients in the course of providing dental treatment. Finally, while in its post-hearing brief, the Government notes that both factors four (compliance with applicable controlled substance laws, 21 U.S.C. 823(f)(4)) and five (such other conduct which may threaten public health and safety, *id.* § 823(f)(5)), are to be considered in determining the public interest, it does not cite to any provision of state law that Respondent violated in making the purported unauthorized purchase.[6] Nor does it cite to any Agency decision holding that a violation of a clinic's internal operating policies, which does not otherwise violate the CSA or state law, constitutes conduct ''inconsistent with the public interest.'' 21 U.S.C. 824(a)(4). Thus, even if the Government had proved that Respondent made an unauthorized purchase of the two drugs, I would reject the exception because it fails to establish actionable misconduct under the public interest standard.

The ALJ's Finding That Respondent Has Accepted Responsibility

The ALJ found that Respondent took responsibility for his actions and ''repeatedly demonstrated remorse for his conduct at the RVIHC.'' R.D. at 29. The Government takes exception to this finding, arguing that while Respondent acknowledged the misconduct he committed prior to 2008, he ''was not candid and not willing to accept *actual responsibility* for his [more recent] violations,'' which included his ''inaccurate dispensing records, the unlawful dispensing to an unknown patient, and the failure to keep a dispensing log as required by'' the probation imposed by the Dental Board of California when it issued him a new license. Exceptions at 8 (emphasis added).

Respondent is, however, only required to accept responsibility for the misconduct which the Government has proven on the record. *See Jeffrey P. Gunderson,* 61 FR 26208, 26211 (1996) (a respondent must ''admit to the full extent of his involvement in documented misconduct''). With respect to the alleged ''unlawful dispensing to an unknown patient,'' Exceptions at 8, the Government points to evidence that Respondent ''dispensed hydrocodone to a transient without eve [sic] documenting that he ever saw this person as a patient at the time he dispensed the Vicodin.'' Gov't Post-Hrng. Br. at 23. The Government argues that ''[t]his incident is not just a 'documentation' error but is tantamount to outright diversion.'' *Id.* Yet, the ALJ found that Respondent ''credibly testified that he had examined the patient on January 20, 2011, and observed that he needed a surgical extraction,'' that ''[w]hen the patient returned to [the clinic] on January 24, 2011, [Respondent] could not perform the extraction because of his busy schedule,'' and that ''[w]hen the patient reported experiencing pain symptoms, [he] agreed to provide him with hydrocodone to temporarily alleviate his symptoms.'' R.D. at 14.

The Government did not, however, take exception to these findings.[7] Thus, while in its post-hearing brief, the Government argued that Respondent engaged in ''outright diversion'' when he provided hydrocodone to this patient, and in its Exceptions, it argues that he has failed to accept

because it does not have the opportunity to observe a testifying witness. This recognition, however, does not preclude the Commission from discounting the weight that an ALJ places on witness's testimony when the Commission questions the witness's basis of knowledge.

Id. In short, *Ryan* provides no support for the Government's contention, which ignores that the ALJ's finding involves an issue of historical fact and involves a classic situation in which an assessment of each witness's demeanor is essential in making a factual finding.

[4] In her affidavit, the Deputy Director also stated that ''RVIHC does not order controlled substances from Henry Schein,'' that it ''orders all controlled substances from other government suppliers by RVIHC contracts with those venders [sic],'' and that ''[t]his procedure has been long standing and well known to all relevant staff.'' GX 21, at 1. The Government, however, produced no evidence that these purported procedures have been memorialized in writing. Nor did the Government establish that Respondent was aware of any such policy. Beyond this, the Deputy Director's assertion that the procedure is well known undermines any claim that she is a disinterested witness, which, given that her testimony constitutes hearsay, is a relevant consideration in determining the reliability of her statement.

[5] Given that the purchase order was but a single page, listed only eleven items, and clearly listed hydrocodone and codeine as among the items to be purchased, *see* GX 10, it is fair to draw the inference that the Deputy Director had *actual* knowledge that Respondent was seeking controlled substances.

[6] Indeed, in its brief containing its proposed findings of fact and conclusions of law, the only provisions of law or regulations cited by the Government are various recordkeeping requirements, which it is undisputed that Respondent violated. Gov't Prop. Findings of Fact, Conclusions of Law, and Argument (hereinafter, Gov't Post-Hrng. Br.) at 19 (citing 21 U.S.C. 827(a)(3); 21 CFR 1304.22(c)).

[7] Nor did the Government offer any evidence at the hearing as to the standards of dental practice and establishing that Respondent acted outside of the usual course of professional practice when he dispensed hydrocodone to this patient. *See* 21 CFR 1306.04(a).

responsibility for the ''unlawful dispensing,'' I conclude that Government has offered no reason to reject the ALJ's findings. Moreover, Respondent acknowledged that he failed to properly document the dispensing. Tr. 523. Because Respondent accepted responsibility with respect to the only misconduct the Government proved with respect to this patient, I reject the Government's contention to the extent it relies on Respondent's act of dispensing a controlled substance to this patient.

The record, however, does establish that Respondent failed to maintain accurate dispensing records, as well as a dispensing log, which was required under the terms of the Dental Board's order, which restored his dental license. While there is some evidence to support the Government's contention that Respondent did not accept responsibility for his failure to maintain accurate records, I conclude that the ALJ's finding is supported by the record as a whole.

At the hearing, Government counsel asked Respondent whether it was correct that he did not keep ''a separate dispensing record when [he] started to use the Vicodin . . . that [he] had ordered.'' Tr. 491. Respondent answered that this was ''[a]bsolutely correct.'' *Id.* When asked by the Government whether he had ''the legal duty to keep accurate records of th[e] Vicodin supply,'' Respondent answered: ''I do.'' *Id.* at 498. And when asked whether it was correct that because he ''had the supply, . . . did the dispensing directly to the patients, . . . [he] had the obligations to keep an accurate patient chart as well as a log,'' Respondent answered: ''Absolutely. That's why I say I didn't do it right.'' *Id.* at 499.

Subsequently, the Government asked Respondent whether ''hav[ing] shortages and . . . overages'' is ''a violation of DEA law?'' *Id.* at 509. Respondent answered that he knew that he had violated the State Board's order but that he did not know if this was a violation of federal law. *Id.* The Government then asked Respondent if it was ''a violation of DEA law not to keep a separate dispensing log for narcotic controlled substances?'' *Id.* at 509–10. Respondent answered:

> I don't know, but I do know that I violated [the State] order. I'm willing to stipulate that I violated that too. However you want to characterize it, they wouldn't have happened if I hadn't made my mistakes. There would be no three separate logs. So if you want to say that I violated a couple of steps, of course, I'm willing to stipulate that there was a tough time in my life. I'm sorry. I don't mean, if I get argumentative, I ask the Court's forgiveness.

Id.

Respondent also testified that he had abused the public trust in his handling of Vicodin while at the RVIHC. Tr. 539–40. While Respondent subsequently testified that there was a difference in degree between his previous violations and the violations he committed at RVIHC, he testified that ''I abused the public trust here'' and ''I screwed up.'' *Id.* And while his closing statement is not technically evidence, therein, Respondent stated: ''I'm sorry that I made the mistakes in the past and then more recently.'' *Id.* at 554.

Ignoring nearly all of the evidence which supports the ALJ's finding, the Government argues that ''Respondent repeatedly minimized the significance of his dispensing-record violations.'' Exceptions at 10. As support for this contention, it quotes Respondent's testimony that ''we're talking about 40 tabs. . . . so I'm going to jeopardize my licenses for 40 Vicodin tabs . . . [f]or forty tabs?'' [8] Respondent did not, however, offer this testimony to downplay the dispensing record violations but rather to respond to the insinuation (which permeates the proceeding but which is unproven on the record) that he had resumed self-abusing controlled substances. Accordingly, I reject the Government's contention that Respondent has failed to accept responsibility for his misconduct.

However, while I adopt the ALJ's finding that Respondent has accepted responsibility for his misconduct, I nonetheless conclude that the ALJ's proposed sanction does not adequately protect the public interest. As noted above, pursuant to the Dental Board's order which restored his dental license, Respondent was required to ''maintain a record of all controlled substances prescribed, dispensed or administered by [him] during probation.'' GX 7, at 7. This record was required to be maintained ''in a separate file or ledger,'' and to include, ''in chronological order,'' each patient's name and address, the date, the controlled substances and quantity, and ''the pathology and purpose for which the controlled substance was furnished.'' *Id.* Moreover, under federal law, Respondent was required to maintain a complete and accurate record of all controlled substances he dispensed. 21 U.S.C. 827(a)(3); 21 CFR 1304.22(c).

Notwithstanding the egregiousness of his prior misconduct, Respondent did not appreciate the forbearance shown by the Board [9] and this Agency in granting him a second chance. Accordingly, while Respondent's application will be granted, his registration will be subject to the following conditions:

1. Upon the granting of Respondent's application, his registration will be suspended outright for a period of six months. Thereafter, Respondent's

[8] The Government points to several other portions of Respondent's testimony which it asserts provide evidence that he has not admitted to his misconduct. *See* Exceptions at 8–9. As support for these assertions, the Government did not cite to the specific pages of the transcript or exhibits, as is required by DEA's regulation, *see* 21 CFR 1316.66(a), but to a document which is abbreviated as ''FCA.'' *Id.* Nowhere in its Exceptions does the Government identify what this term means, and while it may be a reference to the Government's proposed findings of fact, conclusion of law, and argument, the Agency has previously held that citation to a post-hearing brief does not comply with the regulation and is ground to reject an exception. *See Carlos Gonzales,* 76 FR 63118, 63119 (2011).

In any event, I have considered the entirety of Respondent's testimony in reviewing the ALJ's finding and conclude that much of the testimony cited by the Government is not probative of whether he has accepted responsibility for his failure to maintain accurate records. For example, the Government contends that ''Respondent did not admit to wrongdoing when he was asked during cross-examination whether the audit shortages could be partially attributable to the hydrocodone he gave to the transient patient.'' Exceptions at 9. A review of what appears to be the relevant portion of the transcript shows that the Government asked Respondent whether the forty dosage unit shortage ''could be accounted for, if not in total, at least in part based on the amount of Vicodin that [he] dispensed to [the] transient that did not get charted.'' Tr. 528. Respondent answered: ''I suppose some of the Vicodin, some of those 40 tabs could have been it. I don't know. I'm confused. Do you want me to confess to something?'' *Id.* The Government offers no further explanation as to why this testimony supports rejection of the ALJ's finding.

The Government also points to a question it asked Respondent about an email to the RVIHC Executive Director, in which he wrote that he ''desperately wanted to be liked by the natives so I prescribed Vicodin too liberally.'' Exceptions at 9; *see also* Tr. 506. When asked whether this was ''a true statement,'' Respondent answered: ''No, I was being disingenuous.'' Tr. 506. While this answer does not inspire confidence in Respondent's credibility, the Government neither alleged, nor established that he acted outside of the usual course of professional practice and lacked a legitimate medical purpose with respect to any of the dispensings he made to the clinic's patients, and by itself, the testimony is insufficient to support rejection of the ALJ's credibility findings.

[9] As the ALJ found, Respondent has a history of substance abuse and in February 2003, pled guilty to one felony count of obtaining controlled substances by fraud in violation of Cal. Health & Safety Code § 11173(a). R.D. at 8. While upon Respondent's successful completion of his probation, the conviction was reduced to a misdemeanor and then dismissed entirely, the record shows that Respondent unlawfully obtained approximately 30,000 dosage units of controlled substances. GX 3; GX 4, at 4–5; GX 5, at 2.

Based on this misconduct, in September 2002, the Dental Board of California (DBC) filed an accusation against Respondent and he surrendered his state dental license. GX 5. On May 26, 2006, Respondent filed a petition to reinstate his dental license; on June 12, 2007, the DBC granted the petition. GX 7.

registration will be suspended through the expiration of his registration; however, this portion of the suspension shall be stayed provided Respondent fully complies with the conditions imposed on his registration, the conditions of any existing or future Dental Board order which relate to the use or handling of controlled substances, as well as all federal and state controlled-substance laws and regulations.

2. Respondent is prohibited from administering or dispensing directly controlled substances. Respondent is authorized only to prescribe controlled substances.

3. Respondent is required to maintain a log, in chronological order, of all controlled-substance prescriptions he issues. The log must include the following information: (1) the date; (2) the patient's name and address; (3) the drug name, its strength, and quantity; and (4) the pathology and purpose of the prescription. Respondent shall maintain the log at his registered address. In addition, Respondent must provide a copy of the log to the nearest DEA field division office, on a quarterly basis, within seven calendar days of the last day of each quarter ending on March 31st, June 30th, September 30th, and December 31st.

4. Respondent shall not prescribe any controlled substance to himself or a family member.

5. Respondent is required to notify the nearest DEA field division office within 72 hours of any violation of this Order, any Dental Board Order, or any provision of federal or state law related to controlled substances.

Order

Pursuant to the authority vested in me by 21 U.S.C. 823(f), as well as 28 CFR 0.100(b), I order that the application of Mark G. Medinnus, D.D.S., for a DEA Certificate of Registration as a practitioner, be, and it hereby is, granted, subject to the conditions set forth above. This Order is effective November 21, 2013.

Dated: September 22, 2013.

Michele M. Leonhart,

Administrator.

Brian Bayly, Esq., for the Government

Mark Medinnus, D.D.S., pro se, for the Respondent

Recommended Rulings, Findings of Fact, Conclusions of Law, and Decision of the Administrative Law Judge

I. Procedural Background

Gail A. Randall, Administrative Law Judge. The Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration (''DEA'' or ''Government''), issued an Order to Show Cause (''Order'' or ''OSC'') dated March 22, 2012, proposing to deny the application of Mark G. Medinnus, D.D.S. (''Respondent'' or ''Dr. Medinnus'') for a DEA Certificate of Registration pursuant to 21 U.S.C. 824(a)(2)–(4) and § 823(f)(2)–(5), because the registration of the Respondent would be inconsistent with the public interest, as that term is used in 21 U.S.C. 823(f). [Administrative Law Judge Exhibit (''ALJ Exh.'') 1 at 1].

The Order stated that Respondent had been previously registered with the DEA as a practitioner with authority to handle controlled substances in Schedules II–IV under DEA Certificate of Registration BM0207678. [*Id.*]. The Order stated that Respondent had voluntarily surrendered this registration on January 16, 2002. [*Id.*].

The Order further stated that on July 30, 2008, Respondent had been granted a DEA Certificate of Registration FM0982808 as a practitioner with authority to handle controlled substances in Schedules II–IV. [*Id.*]. The Order stated that this registration expired without a timely renewal on January 31, 2011. [*Id.*].

The Order also stated that on December 18, 2002, Respondent entered into a Stipulated Surrender of License and Order with the Dental Board of California wherein Dr. Medinnus surrendered his rights and privileges as a dentist in the state of California. [*Id.*]. The Order went on to state that on June 12, 2007, Respondent's dental license was reinstated subject to probationary conditions for a period of five years, including that he maintain a controlled substance dispensing log in chronological order. [*Id.* at 2]. The Order alleged that Respondent failed to maintain this required dispensing log. [*Id.*].

The Order also stated that on February 23, 2003, Respondent pled guilty to a felony violation of Cal. Health & Safety Code § 11173(a) (West 2012) for obtaining controlled substances by fraud. [*Id.*]. The Order stated that the basis of this conviction was Respondent's use of DEA Certificate of Registration BM0207678 to divert more than 30,000 dosage units of hydrocodone, lorazepam, and diazepam for his personal use from approximately January 2000 through November 2001. [*Id.*].

Lastly, the Order alleged that in December 2010, while Respondent was an employee of the Round Valley Indian Health Center (''RVIHC''), Dr. Medinnus made an unauthorized purchase of bottles of hydrocodone and codeine using RVIHC's DEA registration. [*Id.*]. In addition, the Order alleged that in January 2011, Respondent failed to comply with RVIHC's guidelines regarding the storage and dispensing of controlled substances and that Respondent could not account for approximately sixty-eight tablets of hydrocodone/apap which he allegedly dispensed. [*Id.*]. The Deputy Assistant Administrator then gave the Respondent the opportunity to show cause as to why his application should not be denied on the basis of these allegations. [*Id.*].

On April 5, 2012, Respondent timely filed a request for a hearing in the above-captioned matter. [ALJ Exh. 2].

After authorized delays, the hearing was conducted on July 10–11, 2012, in Sacramento, California. [ALJ Exh. 5]. At the hearing, counsel for the DEA called four witnesses to testify and introduced documentary evidence. [Transcript (''Tr.'') Volume I–II]. The Respondent called two witnesses to testify, including himself, and introduced documentary evidence. [*Id.*].

After the hearing, the Government and the Respondent submitted Proposed Findings of Fact, Conclusions of Law and Argument (''Govt. Brief'' and ''Resp. Brief'').

II. Issue

The issue in this proceeding is whether or not the record as a whole establishes by a preponderance of the evidence that the Drug Enforcement Administration should deny the application for a DEA Certificate of Registration of Mark G. Medinnus, D.D.S. as a practitioner, pursuant to 21 U.S.C. 824(a)(2)–(4) (2006), and pursuant to 21 U.S.C. 823(f)(2)–(5), because the Respondent's registration would be inconsistent with the public interest, as that term is used in 21 U.S.C. 823(f). [ALJ Exh. 4; Tr. 7].

III. Findings of Fact

A. Stipulated Facts

1. On September 19, 2011, Dr. Medinnus applied for registration with DEA as a practitioner in Schedules II through V at 9024 Sniktaw Lane, Fort Jones, CA 96032.

2. Dr. Medinnus was previously registered with DEA as a practitioner in Schedules II through IV under DEA Certificate of Registration BM0207678 at 1680 Westwood Drive, Suite C, San Jose, CA 95125. Dr. Medinnus voluntarily surrendered this registration on January 16, 2002.

3. On July 30, 2008, Dr. Medinnus was granted DEA Certificate of Registration FM0982808 as a

practitioner, in Schedules II through IV, at P.O. Box 459, Lewiston, CA 96052. This registration expired without a timely renewal on January 31, 2011.

4. On September 3, 2002, the Dental Board of California, Department of Consumer Affairs, (hereinafter ''Dental Board'') issued an ''Accusation'' which sought to revoke or suspend Dr. Medinnus' dental license. The ''Accusation'' alleged that Dr. Medinnus ordered controlled substances in order for his own and others illegal use and not in the course of his dental practice.

5. On September 20, 2002, Dr. Medinnus entered into a ''Stipulated Surrender of License and Order'' with the Dental Board as a result of the September 3, 2002, Dental Board ''Accusation.'' In the September 20, 2002, ''Stipulated Surrender of License and Order,'' Dr. Medinnus agreed to surrender his California dental license.

6. Effective December 18, 2002, the Dental Board adopted the September 20, 2002, ''Stipulated Surrender of License and Order.''

7. On February 27, 2003, Dr. Medinnus pled guilty in Santa Clara County to one felony count of a violation of California Health & Safety Code 11173, obtaining controlled substances by fraud. Dr. Medinnus was sentenced to probation.

8. On April 27, 2006, Dr. Medinnus' felony conviction of California Health & Safety Code 11173 was reduced to a misdemeanor conviction under California Penal Code, Section 17, and then the conviction was dismissed under California Penal Code, Section 1203.4.

9. On or about May 26, 2006, Dr. Medinnus petitioned the Dental Board to re-instate his license. On March 15, 2007, a Dental Board Administrative Law Judge submitted a ''Proposed Decision'' to grant Dr. Medinnus' petition to re-instate his dental license subject to probation for five years. The ''Proposed Decision'' was adopted by the Dental Board in a ''Decision'' on May 10, 2007. The ''Decision'' became effective on June 12, 2007.

10. Hydrocodone, in combination dosage unit form, is a Schedule III narcotic controlled substance. Its brands, *inter alia,* include Lortab, Lorcet and Vicodin.

11. Codeine with apap, in dosage unit form, is a Schedule III narcotic controlled substance.

12. Lorazepam and diazepam are both Schedule IV depressant controlled substances.

13. The Respondent stipulates that the Government can establish a *prima facie* case supporting the denial of his pending DEA Certificate of Registration application. [ALJ Exh. 6].

B. Respondent's Registration History

The Respondent was first licensed to practice dentistry in 1985. [Govt. Exh. 5]. On November 25, 1985, the Agency issued a Certificate of Registration Number BM0207678 to Respondent as a practitioner with authority to handle controlled substances in schedules II–IV. [Govt. Exh. 2; Tr. 323]. Respondent voluntarily surrendered this registration for cause on January 18, 2002. [Govt. Exh. 2; Tr. 323–24].

On July 23, 2008, Respondent applied for a new DEA Certificate of Registration. [Tr. 326]. This application was granted and the Agency issued Certificate of Registration Number FM0982808 to Respondent as a practitioner with authority to handle controlled substances in schedules II–IV. [Govt. Exh. 3; Resp. Exh. A74; Tr. 325–326]. This registration expired on January 31, 2011 and was retired from the DEA computer system on December 5, 2011. [Govt. Exh. 3].

On September 19, 2011, Respondent submitted a new application for registration under DEA control number W11065544C. [Govt. Exh. 1; Tr. 321]. This application is the subject of these proceedings. [*Id.*].

C. Respondent's Addiction History

Respondent began experiencing headaches and tinnitus in approximately 1996 while he was working in a private family dentistry practice in San Jose, California. [Govt. Exh. 7 at 2]. To treat these conditions, Dr. Medinnus began to take Vicodin tablets from his office. [*Id.*]. By 1999, Respondent was addicted to Vicodin and he had begun to supply his family members with Vicodin for non-dental medical conditions. [*Id.*]. Respondent's headaches were eventually diagnosed as resulting from cataracts, and he underwent surgery. [*Id.*]. During his recovery from surgery and while suffering from depression, Respondent closed his dental practice in June 2000. [*Id.*]. Despite the closure of his practice, Dr. Medinnus continued to order large quantities of controlled substances to support his addiction and provide pills for his family members from approximately 2000 to 2001. [*Id.;* Tr. 426–427]. When confronted by a Dental Board of California (''DBC'' or ''the Board'') investigator in January 2002 regarding these orders, Respondent admitted to illegally obtaining these controlled substances and using them to support his addiction. [Govt. Exh. 7 at 2]. Dr. Medinnus voluntarily surrendered his DEA registration on January 18, 2002 by signing a DEA Form 104. [Tr. 323].

D. 2002 DBC Action Against Respondent

On September 3, 2002, the Dental Board of California (''DBC'' or ''the Board'') filed an accusation against Respondent seeking to suspend or revoke his California dental license. [Govt. Exh. 4; Tr. 327]. Therein, the DBC alleged that Respondent had ordered significant quantities of controlled substances, including hydrocodone, lorazepam, and diazepam, from approximately January 2000 to November 2001, for his own personal use and to unlawfully distribute to others. [Govt. Exh. 4 at 3–5]. Respondent entered into a Stipulated Surrender of License and Order with the Board on September 20, 2002, wherein he admitted to the allegations contained in the DBC's accusation and surrendered his dental license to the Board. [Govt. Exh. 5; Tr. 328]. On November 18, 2002, the Board adopted the Stipulated Surrender of License and Order in a Decision and Order which became effective on December 18, 2002. [Govt. Exh. 6; Tr. 329].

E. Respondent's 2003 Felony Conviction and Subsequent Exclusion From Medicare

On February 27, 2003, Dr. Medinnus pled guilty in Santa Clara County, California to one felony count of a violation of Cal. Health & Safety Code § 11173(a) (West 2012) for obtaining controlled substances by fraud. [Resp. Exh. 3]. Dr. Medinnus was sentenced to three years' probation. [Govt. Exh. 7 at 2]. Respondent successfully complied with all his probationary conditions and on April 27, 2006, Dr. Medinnus successfully petitioned to reduce his felony conviction to a misdemeanor pursuant to Cal. Penal Code § 17(b)(3) (West 2012) and then dismissed pursuant to Cal. Penal Code § 1203.4(a) (West 2012). [Resp. Exh. A–17; Tr. 350–351].

Pursuant to this felony conviction, the Department of Health and Human Services (''HHS'') excluded Dr. Medinnus from participating as a healthcare provider in Medicare for a period of five years. [Resp. Exh. A86]. In addition, on June 23, 2004, the Office of Personnel Management (''OPM'') debarred Respondent from participating in the Federal Employees Health Benefits Program. [Resp. Exh. A87]. On April 20, 2009, HHS reinstated Respondent's eligibility to participate as a Medicare provider and OPM terminated Respondent's debarment from the Federal Employees Health

Benefits Program. [Resp. Exh. A86–87; Tr. 356–357].

F. Respondent's Rehabilitation Program and Dental License Reinstatement

Following Respondent's felony conviction, he began an intensive drug rehabilitation program. [Govt. Exh. 7 at 2–3]. This program included attending individual and group therapy sessions with a licensed therapist to address Respondent's mental health and substance abuse issues. [Resp. Exh. A5–8]. In addition, Respondent received psychiatric treatment, including medication, to treat his symptoms of depression. [Resp. Exh. A13–15]. Respondent also participated in frequent twelve-step program meetings and joined the board of a local transitional housing facility for recovering addicts. [Resp. Exh. A3–4; A9–11].

On May 26, 2006, Respondent filed a petition for reinstatement of his California dental license. [Govt. Exh. 7 at 2]. As part of his petition, Dr. Medinnus submitted letters of recommendations from fellow dentists regarding his clinical abilities. [Resp. Exh. A32–34]. Respondent also proffered evidence regarding his family life, involvement in his stepchildren's elementary school and athletics programs and his own volunteer activities. [Resp. Exh. A19, A21, A25, A26–27, A30–31, A91]. After an administrative hearing, a state administrative law judge recommended that the DBC reinstate Respondent's dental license and place the Respondent on probation for a period of five years. [Govt. Exh. 7 at 5; Tr. 292–293]. The ALJ made detailed factual findings regarding Dr. Medinnus' successful drug rehabilitation program. [Govt. Exh. 7 at 3–4]. These included maintaining his sobriety from March 7, 2003, receiving outpatient medical and psychotherapy treatment, attending NA and AA meetings, and completing continuing dental education courses. [*Id.*]. The ALJ further found that Respondent had complied with all the terms of his criminal probation, recovered completely from his cataract surgery, and had credibly addressed the triggers that led to his drug addiction and diversion to his family members. [*Id.*].

The ALJ recommended that Respondent's dental license be subject to several probationary conditions, including that he maintain a separate log of all controlled substances that he prescribed, dispensed or administered during his probationary period. [Govt. Exh. 7 at 7; 293–294]. Among other conditions, Dr. Medinnus was also required to pass a dental licensing examination, undergo a psychiatric evaluation, participate in a diversion program offered by the Board, and be subject to random drug screenings. [Govt. Exh. 7 at 5–9]. On May 10, 2007, the Board adopted the ALJ's Decision, which became effective on June 12, 2007. [Govt. Exh. 8; Tr. 330–331].

To regain his probationary dental license, Dr. Medinnus successfully completed the mandated dental licensing examination on July 14, 2007. [Resp. Exh. A61; A85]. Respondent also received a comprehensive psychiatric evaluation, which favorably reported his ongoing recovery. [Resp. Exh. A57]. In addition, on December 6, 2007, Respondent was released from the Board mandated diversion program. [Resp. Exh. A58; Resp. Exh. 6]. During this time, Dr. Medinnus took and passed numerous random drug screens as directed by the DBC. [Resp. Exh. A45–47; A49; A51; A53–54]. When his probationary dental license was issued, Dr. Medinnus performed volunteer dental consulting work at Milestones Health Center in Weaverville, California. [Resp. Exh. A68; A76].

G. Respondent's Employment at RVIHC

After the reinstatement of his dental license, Respondent negotiated an employment contract to work as the dental director at the Round Valley Indian Health Center, (''RVIHC'') which is located in Covelo, California. [Govt. Exh. 9; Tr. 31]. One of the terms of the employment contract was that the Respondent agreed to ''comply with all policies and procedures, rules and regulations of the RVIHC funding agencies and federal and state laws including all of the HIPPA requirements.'' [Govt. Exh. 9 at 2].

James Russ, the executive director of RVIHC, testified at the hearing, and I find his testimony credible and consistent with the documentary evidence. Mr. Russ testified that prior to the negotiation of his contract, Dr. Medinnus voluntarily and freely disclosed his history of substance abuse and the surrender of his dental license and DEA registration in 2002 and its subsequent reinstatement. [Tr. 34–35].

As RVIHC's executive director, Mr. Russ administers the day-to-day operations of the clinic's various departments. [Tr. 23–24]. Mr. Russ outlined RVIHC's operation and the services it provided including operating a medical center, dental clinic, outpatient physical or psychological treatment, and a group home. [Tr. 24–25]. He testified that all controlled substances ordered by RVIHC were stored in a central dispensary, which contained a locked safe. [Tr. 25–26]. Mr. Russ further testified that RVIHC's usual suppliers of controlled substances were McKesson and Pharmadex, and did not include Henry Schein, a supplier from whom RVIHC only ordered dental supplies. [Tr. 40–41].

Linda Lohne, a registered nurse and clinic manager at RVIHC, also testified at the hearing. [Tr. 186]. I find her testimony credible and consistent with the documentary evidence. As part of her clinic manager duties, Ms. Lohne oversaw RVIHC's ordering and dispensing of controlled substances. [Tr. 187]. She likewise testified that all controlled substances ordered under RVIHC's DEA registration were stored in the clinic's central dispensary. [*Id.*].

Mr. Russ testified that Dr. Medinnus had discussed with him the possibility of storing hydrocodone in the dental department to obviate the need for Respondent or his dental staff to pick up the controlled substances at the dispensary and then return to the dental department to dispense them to the patients. [Tr. 51, 90; Resp. Exh. A134–135, A148]. Mr. Russ discussed his concerns about this request with Respondent, including his belief that the controlled substances would be more secure if they remained in the central dispensary. [Tr. 70–71].

Dr. Medinnus testified that he sought to order controlled substances to store in the dental department because the dispensary would occasionally run low or out entirely of controlled substances. [Tr. 464–466]. But, Ms. Lohne testified that RVIHC never completely ran out of hydrocodone during 2010, although she did testify that the dispensary had run low on controlled substances, including having as little as five or seven dosage units on hand. [Tr. 240–241]. Ms. Lohne, however, also testified that RVIHC's dispensary might have run out of controlled substances by the end of some days. [Tr. 242–243].

H. November 29, 2010 Purchase Order

Kimberly Stillwell, a dental sterilization technician at RVIHC, also testified at the hearing. [Tr. 149]. I find her testimony only partially credible. Though called as a witness for Respondent, her testimony suggested that she bore Dr. Medinnus substantial animus from his employment at RVIHC. Her demeanor while testifying was consistent with this animus towards Respondent and was repeatedly demonstrated by her nonresponsive answers or unsolicited comments adverse to Respondent. Therefore, I decline to credit much of her testimony.

On November 29, 2010, Ms. Stillwell prepared a purchasing order to obtain supplies for RVIHC's dental department.

[Govt. Exh. 10; Tr. 151]. At the direction of Dr. Medinnus, she included one bottle of hydrocodone and one bottle of APAP with codeine along with other routine dental supplies in the order. [*Id.*]. Prior to preparing the order, Dr. Medinnus directed Ms. Stillwell to obtain authorization for the purchase order from Mr. Russ, specifically concerning the inclusion of controlled substances in the order. [Tr. 153, 155]. Ms. Stillwell testified that she spoke to Mr. Russ before placing the purchase order. [Tr. 155]. During this conversation, Ms. Stillwell testified that Mr. Russ said he ''did not feel it was a good idea'' to order controlled substances for the dental department to dispense directly to patients. [Tr. 157–158]. Mr. Russ though could not recall the substance of this conversation with Ms. Stillwell at the hearing. [Tr. 50–51]. Despite Mr. Russ's misgivings, Ms. Stillwell informed Respondent that Mr. Russ had given his permission for the purchase order. [Tr. 158; Resp. Exh. A140].

The purchase order was then ultimately approved by Jan Scribner, the deputy director of RVIHC, who possessed the ability to approve purchase orders in the absence of Mr. Russ. [Govt. Exh. 10; Govt. Exh. 21; Tr. 46]. Ms. Scribner did not realize that the order contained a request to purchase controlled substances. [Govt. Exh. 21]. Nor did Ms. Stillwell inform her that the order contained a request to purchase controlled substances for use in the dental department. [Tr. 164–165]. Ms. Stillwell received the controlled substances from the purchase order on December 7, 2010 [Govt. Exh. 10 at 4; Tr. 48–49, 150]. She stored the bottle of hydrocodone and the bottle of APAP with codeine in a locked cabinet in the dental department and informed Dr. Medinnus of their arrival. [Tr. 169–170, 173].

I. Respondent's Dispensing of Controlled Substances at RVIHC

Dr. Medinnus testified that he began to dispense hydrocodone directly to dental patients beginning on January 18, 2011. [Tr. 418]. Respondent did not dispense any of the APAP with codeine during this period. [Tr. 432]. Respondent testified that he only intended to dispense the hydrocodone on an emergency basis. [Tr. 418; 475–476]. He further testified that he was experiencing serious marital and personal problems during this period of time and that he was under a great deal of personal and professional stress due to the absence of dental department employees and the hospitalization of his mother-in-law. [Tr. 436–437; Resp. Exh. A117, A123, A138]. Ms. Stillwell testified that she never saw Dr. Medinnus self-abuse any of the hydrocodone kept in the dental department. [Tr. 179–180].

Dr. Medinnus did acknowledge that he did not keep a separate dispensing log for hydrocodone that he dispensed during this period. [Tr. 491; Govt. Exhs. 18, 19]. Instead, he notated the dispensing of hydrocodone in each patient's dental chart. [Tr. 68; Govt. Exh. 13]. He testified that by not keeping a separate dispensing log, he violated the conditions of his DBC probation. [Tr. 509].

Respondent also testified that he dispensed hydrocodone to one patient, a transient named ''JC'', without recording it in the patient's chart. [Tr. 519–525]. Again, due to concerns about the bias she displayed during her testimony and her lack of recall regarding this specific patient, I decline to credit Ms. Stillwell's account of the dispensing of hydrocodone to this patient. [Tr. 178, 180–184]. Dr. Medinnus credibly testified that he had examined the patient on January 20, 2011, and observed that he needed a surgical extraction on two of his teeth. [Tr. 421, 521–22]. When the patient returned to RVIHC on January 24, 2011, Dr. Medinnus could not perform the extraction because of his busy schedule. [*Id.;* Tr. 523]. When the patient reported experiencing pain symptoms, Dr. Medinnus agreed to provide him with hydrocodone to temporarily alleviate his symptoms. [Tr. 421–22, 522–523]. Although Ms. Stillwell offered to retrieve the patient's chart to record the dispensing, Dr. Medinnus testified that due to the clinic's busy schedule, he did not receive the patient chart and thus he did not record the dispensing of hydrocodone to this patient in the chart. [Tr. 422, 523–525].

The Respondent accepted responsibility for his failure to document this dispensing to ''JC''. [Tr. 523]. Further, the Respondent offered to stipulate to the audit numbers' discrepancy, concluding that ''[r]egardless, of course, the fault for this confusion is mine alone.'' [Resp. Brief at 7; *see also* Tr. 539–40; Govt. Exh. 19; ALJ Exh. 6].

J. Discovery of Respondent's Dispensing of Controlled Substances

On December 14, 2010, independent pharmacy consultant, Tom Reidenbach, performed a quarterly drug utilization audit for RVIHC. [Tr. 53–54; Govt. Exh. 15]. In that report, he wrote that ''I recommended to Dr. Medinnus that all controlled substances continue to be dispensed from the dispensary.'' [Govt. Exh. 15 at 2].

On January 27, 2011, Mr. Reidenbach conducted a chart audit related to the dispensing of hydrocodone. In his report, Mr. Reidenbach noted that there ''were several deficiencies in the dental clinic record keeping. There were 3 prescriptions that did not have chart orders evident. There were also 9 chart orders that were not dispensed from the dispensary. These were all after 1/20/11.''

After receiving Mr. Reidenbach's report, Mr. Russ attended a meeting on January 28, 2011, with RVIHC staff to discuss Mr. Reidenbach's findings. [Tr. 59–62, 82–84]. During this meeting, a RVIHC staff member observed that the dispensary had experienced a dramatic decline in orders for hydrocodone from the dental department. [Tr. 61–63]. Ms. Lohne, who was also at this meeting, had observed a similar gap in the patient orders for controlled substances from the dental department. [Tr. 193].

At the conclusion of this meeting, Mr. Russ went to Dr. Medinnus' office and asked him if he had any hydrocodone in his office. [Tr. 63]. Respondent acknowledged that he had a bottle of hydrocodone in the dental office and he informed Mr. Russ that RVIHC management had approved the purchase order containing the hydrocodone bottle. [*Id.*]. Mr. Russ instructed Dr. Medinnus to take the hydrocodone bottle to the dispensary. [Tr. 65]. That same day, Dr. Medinnus turned over the bottle of hydrocodone and the unopened bottle of APAP with codeine to Ms. Lohne in the dispensary. [Tr. 195–196]. He did not have a dispensing log at that time. [*Id.*].

One or two days later, Mr. Russ asked Dr. Medinnus if he had kept a dispensing log to track the hydrocodone he had dispensed. [Tr. 66–67]. Respondent said that he had not kept a dispensing log, so Mr. Russ instructed him to consult the patient charts and recreate a dispensing log to account for the dosage units he had dispensed. [Tr. 68]. Ms. Lohne also directed Dr. Medinnus to prepare a dispensing log for the bottle of hydrocodone. [Tr. 196]. Dr. Medinnus prepared this dispensing log for the hydrocodone he dispensed directly to patients from the dental department, and he provided the log to Ms. Lohne on February 2, 2011. [Govt. Exh. 11; Resp. Exh. A161; Tr. 69, 198–199, 203].

Mr. Russ then directed Ms. Lohne to account for the apparent discrepancies from Respondent's dispensing log to the number of dosage units left in the bottle when Dr. Medinnus turned it in to the dispensary. [Tr. 69–70, 188–189]. Ms.

Lohne began by determining that the bottle of hydrocodone originally contained five hundred dosage units when it was ordered from Henry Schein. [Tr. 198]. And when Dr. Medinnus provided the bottle to Ms. Lohne, she and another nurse physically counted the remaining pills and determined there were one hundred and forty dosage units left in the bottle. [*Id.*]. Then Ms. Lohne conducted a patient chart audit to verify the Respondent's dispensing log and she prepared a document summarizing the result of her review. [Govt. Exh. 12; Tr. 204–212].

Her audit revealed that the dental department patient charts showed that Dr. Medinnus had dispensed three hundred and eighty-eight dosage units of hydrocodone, even though the Respondent's dispensing log showed he only dispensed three hundred and sixty dosage units of hydrocodone. [Govt. Exh. 12; Govt. Exh. 13; 208–211]. Ms. Lohne then crosschecked the patient charts and Respondent's dispensing log with the carbon copy duplicates of the prescription orders for hydrocodone associated with each patient file, which showed that Respondent had only dispensed three hundred and twenty dosage units of hydrocodone. [Govt. Exh. 12; Tr. 206–207]. When Ms. Lohne reviewed the patient charts, she noticed that in some files, Dr. Medinnus had altered the number of dosage units he had dispensed. [Govt. Exhs. 13, 19–20; Tr. 221–236].

Unwilling to credit the patient files altered by Respondent, Ms. Lohne concluded that RVIHC could not account for approximately forty dosage units of hydrocodone from the bottle that Dr. Medinnus had ordered. [Tr. 237–238]. Thus, on February 4, 2011, RVIHC filed a DEA Form 106, a Report of Theft or Loss of Controlled Substances, for forty hydrocodone tablets. [Govt. Exh. 14; Tr. 238]. Ms. Lohne testified that this figure came from her audit, which showed three hundred and twenty dosage units dispensed from the dental department according to duplicate prescription orders from each patient file and one hundred and forty dosage units remaining in the bottle when it was returned to the dispensary. [Tr. 238; Govt. Exh. 12].

Following this report, Dr. Medinnus offered to report himself to his probation monitor, Shirley Boldrini, at the DBC. [Tr. 109]. On February 9, 2011, Respondent called and sent an email to Ms. Boldrini reporting a violation of his DBC probation. [Govt. Exhs. 18, 19]. That same day, Mr. Russ placed Dr. Medinnus on a thirty-day suspension. [Tr. 109–110, 145; Resp. Exh. 4 at 24]. Respondent offered to perform a number of conditions during this suspension, including weekly drug testing, weekly therapy and AA meetings, and taking continuing dental education courses. [Tr. 97–99; Govt. Exh. 18]. Mr. Russ did not agree to these conditions. [Tr. 91]. However, during his suspension, Dr. Medinnus notified Ms. Boldrini that he was completing these self-imposed conditions. [Resp. Exh. A125 at 1, 2, 11, and 17].

The record also contains an email dated February 11, 2011, from the RVIHC psychologist, Dr. Mack, who had been treating the Respondent since the Fall of 2010. He concluded that ''the recent documentation error [by the Respondent] was the result of acute stress and fatigue and not an attempt to be deceitful or abuse the medication.'' [Resp. Exh. A123].

On March 10, 2011, Dr. Medinnus resigned from RVIHC. [Resp. Exh. A126; Govt. Exh. 17].

K. DBC and DEA Investigation of Respondent

Geno Davis, a DBC investigator, also testified at the hearing. [Tr. 286]. I find his testimony credible and consistent with the documentary evidence. Mr. Davis serves as Respondent's current probation monitor for the Board. [Tr. 288]. When the Board was notified of a potential narcotic or drug discrepancy involving Dr. Medinnus while he was employed at RVIHC, Mr. Davis was assigned to be Respondent's probation monitor. [Tr. 289]. Mr. Davis interviewed Respondent at the Board's office in Sacramento, California in August 2011. [Tr. 294–295]. When asked about the discrepancies in Respondent's dispensing log for the hydrocodone, Dr. Medinnus told Mr. Davis that he had poured the hydrocodone tablets into a small envelope before giving it to each patient, which may have accounted for the discrepancies in the patient charts and his dispensing log because he may have inadvertently dispensed more tablets than he had intended. [Tr. 295–297].

Following this interview, Mr. Davis contacted the Respondent by phone and asked him if he had personally taken any of the hydrocodone. [Tr. 298]. Dr. Medinnus denied taking any of the hydrocodone. [*Id.*]. Mr. Davis further testified that Respondent had taken drug-screening tests at the direction of the Board in 2011 and that all of his tests were negative. [Tr. 315; Resp. Exh. A128]. Lastly, Mr. Davis testified that the Board has filed an accusation against Respondent with the California Attorney General's Office regarding the lack of documentation in a dispensing log, and that the accusation is currently pending with that office. [Tr. 316–317].

DEA Diversion Investigator Craig Tom also testified at the hearing. [Tr. 318—319]. I find his testimony credible and consistent with the documentary evidence. DI Tom was assigned to investigate Respondent's application for registration. [Tr. 320]. DI Tom coordinated his investigation with the DBC and also spoke with Mr. Russ regarding the Respondent's conduct at RVIHC. [Tr. 332–333]. DI Tom testified that Dr. Medinnus was truthful in the applications for registration that he submitted to the DEA. [Tr. 333]. DI Tom did not interview Dr. Medinnus. [*Id.*].

L. Respondent's Current Situation

Dr. Medinnus currently possesses an active California dental license, subject to the probationary conditions imposed by the DBC's June 12, 2007 order. He is currently employed as a dentist at the ANAV Tribal Health Clinic in Fort Jones, California, where he has worked since April 21, 2011. [Resp. Exh. A129; Tr. 541]. Dr. Medinnus has not dispensed or prescribed any controlled substances while working at the ANAV Tribal Health Clinic. [Tr. 545]. Respondent credibly testified that obtaining a DEA registration may be necessary for him to continue at his present position and to be eligible to become the dental director. [Tr. 547–548]. In addition, Respondent proffered two letters of recommendation regarding his application for a DEA Registration from his supervisors at the ANAV Tribal Health Clinic. [Resp. Exh. A151–152]. The ANAV Tribal Health Clinic does not store or dispense any narcotic medications and only faxes the prescriptions to neighboring pharmacies. [*Id.*].

IV. Statement of Law and Discussion

A. Position of the Parties

1. Government's Position

The Government asserts that the appropriate remedy in this matter is denial of the Respondent's application. [Govt. Brief at 25–26]. First, the Government argues that by procuring the order of the bottle of hydrocodone and then subsequently surreptitiously dispensing it to dental patients, Respondent violated federal law, the terms of his DBC probation and his RVIHC contract. [*Id.* at 20–21]. Next, the Government cites Respondent's failure to maintain accurate dispensing records as further evidence of his unfitness to possess a DEA Registration. [*Id.* at 23–24]. Lastly, the Government cites Agency precedent and argues that Respondent's lack of candor at the

hearing and his inability to accept responsibility for his conduct also supports the denial of Respondent's application. [*Id.* at 21–23].

The Government makes several arguments to justify the denial of Respondent's application. Primarily, the Government argues that Respondent violated federal law and his DBC probation by failing to maintain a contemporaneous dispensing log for the hydrocodone he dispensed to patients. [*Id.* at 20, 25]. Similarly, the Government contends that Respondent demonstrated his inability to comply with DEA recordkeeping requirements because he could not even recreate an accurate dispensing log from his own patient records. [*Id.* at 22, 24–25]. And the Government also highlighted Respondent's failure to record in the patient chart the dispensing of hydrocodone to one of his patients, ''JC''. [*Id.* at 23]. In addition, the Government strenuously argues that Respondent has not accepted responsibility or shown any remorse for his conduct. [*Id.* at 21–23]. Instead, the Government argues that Respondent has ''downplayed, indeed mischaracterized, his violations'' and ''has not been truthful as to what really happened.'' [*Id.* at 21]. Nor, the Government contends, was Respondent candid with RVIHC personnel regarding his ordering and usage of hydrocodone in the dental department. [*Id.* at 22–23].

In conclusion, the Government argues that Respondent's application for a DEA Certificate of Registration as practitioner is inconsistent with the public interest and that his application should be denied. [*Id.* at 25–26].

2. Respondent's Position

Respondent asserts that the appropriate remedy in this matter is the conditional granting of his application. [Resp. Brief at 34–35]. First, Dr. Medinnus acknowledges his misconduct in not maintaining the required dispensing log at RVIHC pursuant to his DBC probation. [*Id.* at 7–8, 20]. In mitigation, Respondent describes in detail the ''profound personal and professional hardship'' that he experienced during his employment at RVIHC. [*Id.* at 10–11, 20]. Respondent further notes that he self-reported his violations to the DBC and also fully disclosed the incident on his DEA application. [*Id.* at 20]. Respondent also argues that he has consistently taken responsibility for this misconduct, including in his testimony at the hearing. [*Id.* at 8–10, 20]. In addition, Dr. Medinnus argues that the record contains no evidence of self-abuse or diversion of controlled substances during his employment at RVIHC. [*Id.* at 9–10, 20].

Next, Respondent argues that the Government has failed to prove its allegations that he made an unauthorized purchase of hydrocodone or that he violated RVIHC's policies on storing and dispensing by directly dispensing to patients in the dental department. [*Id.* at 20–33]. Respondent's primary claim is that Mr. Russ verbally authorized the November 29, 2011 purchase order, which rendered Respondent's subsequent storing and dispensing of the hydrocodone compliant with RVIHC's policy. [*Id.* at 26–31]. To this point, Respondent meticulously details RVIHC's changing policy on the dispensing of controlled substances during late 2010 and early 2011 and the problems that the dispensary had in maintaining adequate supplies of controlled substances. [*Id.* at 21–26]. Dr. Medinnus also argues that these allegations concerning the purchase and dispensing of hydrocodone were never disclosed to him or discussed with him until the DEA initiated the Order to Show Cause proceedings. [*Id.* at 31–33].

Lastly, Respondent argues that denying his application for registration would be a disproportionate penalty for his conduct at RVIHC. [*Id.* at 20, 34]. Therefore, in light of Respondent's acceptance of responsibility, Respondent argues that granting his application for a restricted registration would be consistent with the public interest. [*Id.* at 34–35]. He recommends that his registration be subject to several conditions, including complying with the terms of his California dental license probation, being limited to only prescribing controlled substances and not administering, ordering, or dispensing them, being prohibited from prescribing controlled substances to himself or any family members, and maintaining a log of all controlled substances prescriptions he authorizes and providing this log to the local DEA office on a quarterly basis. [*Id.*].

B. Statement of Law and Analysis

Pursuant to 21 U.S.C. 823(f) (2006),[1] the Deputy Administrator may deny an application for a DEA Certificate of Registration if he determines that such registration would be inconsistent with the public interest. In determining the public interest, the following factors are considered:

(1) The recommendation of the appropriate State licensing board or professional disciplinary authority.

(2) The applicant's experience in dispensing, or conducting research with respect to controlled substances.

(3) The applicant's conviction record under Federal or State laws relating to the manufacture, distribution, or dispensing of controlled substances.

(4) Compliance with applicable State, Federal, or local laws relating to controlled substances.

(5) Such other conduct which may threaten the public health and safety.

21 U.S.C. 823(f) (2006).

These factors are to be considered in the disjunctive; the Deputy Administrator may rely on any one or a combination of factors and may give each factor the weight he deems appropriate in determining whether a registration should be revoked. *See Robert A. Leslie, M.D.,* 68 FR 15,227, 15,230 (DEA 2003). Moreover, the Deputy Administrator is ''not required to make findings as to all of the factors.'' *Hoxie* v. *DEA,* 419 F.3d 477, 482 (6th Cir. 2005); *see also Morall* v. *DEA,* 412 F.3d 165, 173–74 (D.C. Cir. 2005).

The Government bears the ultimate burden of proving that the requirements for registration are not satisfied. 21 CFR 1301.44(d) (2012). However, where the Government has made out a *prima facie* case that Respondent's application would be ''inconsistent with the public interest,'' the burden of production shifts to the applicant to ''present[] sufficient mitigating evidence'' to show why he can be entrusted with a new registration. *See Medicine Shoppe—Jonesborough,* 73 FR 364, 387 (DEA 2008). To this point, the Agency has repeatedly held that the ''registrant must accept responsibility for [his] actions and demonstrate that [he] will not engage in future misconduct.'' *Medicine Shoppe—Jonesborough,* 73 FR at 387; *see also Samuel S. Jackson, D.D.S.,* 72 FR 23,848, 23,853 (DEA 2007). In short, after the Government makes its *prima facie* case, the Respondent must produce sufficient evidence that he can be entrusted with the authority that a registration provides by demonstrating that he accepts responsibility for his misconduct and that the misconduct will not reoccur.

1. Factor One: Recommendation of Appropriate State Licensing Board

Although the recommendation of the applicable state licensing board is probative to this factor, the Agency possesses ''a separate oversight responsibility with respect to the handling of controlled substances'' and therefore must make an ''independent

[1] The Deputy Administrator has the authority to make such a determination pursuant to 28 CFR 0.100(b), 0.104 (2012).

determination as to whether the granting of [a registration] would be in the public interest.'' *Mortimer B. Levin, D.O.,* 55 FR 8,209, 8,210 (DEA 1990); *see also Jayam Krishna-Iyer,M.D.,* 74 FR 459, 461 (DEA 2009). The ultimate responsibility to determine whether a registration is consistent with the public interest has been delegated exclusively to the DEA, not to entities within state government. *Edmund Chein, M.D.,* 72 FR 6,580, 6,590 (DEA 2007), *aff'd, Chein* v. *DEA,* 533 F.3d 828 (D.C. Cir. 2008). So while not dispositive, state board recommendations are relevant on the issue of revoking or maintaining a DEA registration. *See Gregory D. Owens, D.D.S.,* 74 FR 36,751, 36,755 (DEA 2009); *Martha Hernandez, M.D.,* 62 FR 61,145, 61,147 (DEA 1997).

In this case, the DBC has not made a specific recommendation concerning the granting of a DEA registration to the Respondent. The DBC has reinstated Respondent's dental license, subject to a series of probationary conditions. [Govt. Exh. 7, 8; Tr. 330–331]. Thus, Dr. Medinnus currently possesses an active dental license in the state of California. [*Id.*]. Nevertheless, the Agency has consistently held that a practitioner's possession of state authority, while a prerequisite to seeking a registration, is not dispositive of the public interest determination. *Mark De La Lama, P.A.,* 76 FR 20,011, 20,018 (DEA 2011). Therefore, I find that this factor does not weigh in favor or against the granting of Respondent's application for a DEA Certificate of Registration.

2. Factor Three: Applicant's Conviction Record Relating to Controlled Substances

The record contains evidence that the Respondent has been convicted of an offense related to the manufacture, distribution or dispensing of controlled substances, namely his 2003 felony conviction for violating Cal. Health & Safety Code § 11173(a) (West 2012) for obtaining controlled substances by fraud. [Resp. Exh. 3]. Thus, I find that this factor weighs against the granting of Respondent's application for a DEA Certificate of Registration. *Scott H. Nearing,* 70 FR 33,200, 33,202 (DEA 2005).

3. Factor Five: Such Other Conduct Which May Threaten the Public Health and Safety

The Agency has long held that a practitioner's self-abuse of controlled substances constitutes ''conduct which may threaten public health and safety.'' 21 U.S.C. 823(f)(5) (2006); *see also Tony T. Bui, M.D.,* 75 FR 49,979, 49,990 (DEA 2010); *Kenneth Wayne Green, Jr., M.D.,* 59 FR 51,453 (DEA 1994); *David E. Trawick, D.D.S.,* 53 FR 5,326 (DEA 1988). Here, the Respondent self-abused and diverted to his family members significant quantities of hydrocodone, lorazepam, and diazepam from approximately January 2000 through November 2001. [Govt. Exhs. 5, 6, and 7]. Such unlawful ingestion and diversion of controlled substances clearly places the public health and safety in jeopardy. This unlawful conduct led to the surrender of Respondent's California dental license and initial DEA registration.

Yet, I find that the Respondent has successfully addressed his addiction problem and returned to the practice of dentistry by regaining his dental license in 2007. At the hearing, Dr. Medinnus proffered substantial and detailed evidence regarding his impressive recovery program, including numerous negative drug screens he has taken over the past nine years. [Resp. Brief at 2–7, 9–10]. As the Deputy Administrator has previously determined, ''[t]he paramount issue is not how much time has elapsed since [the Respondent's] unlawful conduct, but rather, whether during that time [the] Respondent has learned from past mistakes and has demonstrated that he would handle controlled substances properly if entrusted with a DEA registration.'' *Leonardo V. Lopez, M.D.,* 54 FR 36,915 (DEA 1989). Even though it has been previously found that time, alone, is not dispositive in such situations, it is certainly an appropriate factor to be considered. *See Robert G. Hallermeier, M.D.,* 62 FR 26,818 (DEA 1997) (four years); *John Porter Richards, D.O.,* 61 FR 13,878 (DEA 1996) (ten years); *Norman Alpert, M.D.,* 58 FR 67,420, 67,421 (DEA 1993) (seven years). In this case, Respondent has conclusively demonstrated his strong recovery from his previous addiction and his successful maintenance of his sobriety for the past nine years. Therefore, I find that Respondent's history of substance abuse does not weigh against the granting of Respondent's application for a DEA Certificate of Registration.

4. Factors Two and Four: Applicant's Experience With Controlled Substances and Compliance With Applicable State, Federal, or Local Laws Relating To Controlled Substances

Under the Controlled Substances Act (''CSA'' or ''the Act'') and Agency regulations, it is fundamental that a practitioner who directly dispenses controlled substances maintain an effective recordkeeping system. This includes maintaining inventories and other records pursuant to 21 U.S.C. 827(a) (2006). They are also required to hold a DEA registration at any location where they dispense controlled substances, *see* 21 CFR 1301.12 (2012), and to store controlled substances ''in a securely locked, substantially constructed cabinet,'' *id.* § 1301.75. Lastly, practitioners who provide controlled substances directly to patients must maintain written records of such dispensing covering a minimum of two years; take an initial inventory of all controlled substances on hand and biennial inventories thereafter; and maintain records of receipts, dispensings, and transfers of controlled substances. *See id.* §§ 1304.03(b), 1304.04, 1304.11, 1304.21, 1304.22(c); *see also Shawn M. Gallegos, D.D.S.,* 76 FR 66,986 (DEA 2011).

The Government brought three primary allegations to support the denial of Respondent's application, the unauthorized purchase order for the controlled substances, Respondent's failure to abide by RVIHC's storing and dispensing policies for controlled substances, and his failure to maintain the required dispensing log for the hydrocodone pursuant to his DBC probation. I decline to credit the Government's first two allegations although I find that the Government has met its burden of proof concerning Respondent's failure to maintain the required dispensing log pursuant to his DBC probation and Agency regulations.

First, with regards to the unauthorized purchase allegation, I find that the Government has not sustained its burden of proof. The testimony and evidence elicited at the hearing regarding this purchase order does not support the Government's claim that Respondent was unauthorized to place the order. Dr. Medinnus credibily maintained that Ms. Stillwell told him that Mr. Russ approved the order. [Tr. 158; Resp. Exh. A140; Resp. Brief at 28–31]. As explained above, I decline to credit much of Ms. Stillwell's testimony on her conversation with Mr. Russ regarding this order. Furthermore, I also note that Mr. Russ failed to recall many of the details surrounding this particular order including any conversation he had with Ms. Stillwell prior to the submission of the order to Ms. Scribner. Thus, the evidence in the record does not support a conclusion by a preponderance of the evidence that Dr. Medinnus was responsible for knowingly submitting an unauthorized purchase order for controlled substances. More tellingly, the submission of the purchase order on behalf of the dental department and its subsequent approval by Jan Scribner, a duly authorized RVIHC representative

who had the power to approve such orders, appears to belie any contention that the order itself was unauthorized by RVIHC management. While it is likely that RVIHC management, including Mr. Russ and Ms. Lohne, failed to remember that Dr. Medinnus had obtained a bottle of hydrocodone for emergency use, I conclude that the record does not show that the placement of the November 29, 2010 purchase order was unauthorized.

And as the Respondent persuasively argues, if Dr. Medinnus reasonably believed the purchase order was duly approved, the Government's allegation that he failed to abide by RVIHC policies regarding the storage and dispensing of controlled substances, also fails. [Resp. Brief at 20–21]. While the Government has elicited substantial testimony and evidence regarding RVIHC's policies and procedures related to dispensing controlled substances, it has failed to link these policies to any deliberate or knowing attempt on behalf of the Respondent to violate them. [Govt. Brief at 21–22]. Indeed, when Mr. Russ confronted Dr. Medinnus regarding the bottle of hydrocdone, Respondent promptly admitted to ordering and storing the controlled substances and pointed to the approval of the purchase order as justification for his conduct. [Tr. 63]. Such a response supports Respondent's consistent position that he honestly and reasonably believed he possessed the necessary authority to store and dispense controlled substances in the dental department. Therefore, I decline to credit the Government's allegation that Respondent violated RVIHC's policies on the storage and dispensing of controlled substances.

Both parties however, do acknowledge that Dr. Medinnus failed to maintain the required dispensing log for these controlled substances. [Resp. Brief at 7–8; Govt. Brief at 20]. In addition, I find that Dr. Medinnus failed to properly chart each dispensing of hydrocodone he gave to a patient, most notably with regards to his dispensing to ''JC'', which represents another serious violation of Agency recordkeeping regulations. Nor was Respondent's clumsy attempt to reconstruct a dispensing log and alteration of patient charts consistent with a registrant's duty to maintain complete and accurate records regarding controlled substances. Therefore, I find that Respondent committed several serious violations of the Act's recordkeeping requirement, Agency regulations, as well as the terms of his DBC probation. Thus, in light of Respondent's serious and undisputed violations of the CSA's recordkeeping requirements and his DBC probation, I conclude that the Government has presented a *prima facie* case that supports the denial of Respondent's application.

After the Government ''has proved that a registrant has committed acts inconsistent with the public interest, a registrant must 'present sufficient mitigating evidence to assure the Administrator that [he] can be entrusted with the responsibility carried by such a registration.' '' *Medicine Shoppe—Jonesborough,* 73 FR 364, 387 (DEA 2008) (*quoting Samuel S. Jackson, D.D.S.,* 72 FR 23,848, 23,853 (DEA 2007). ''Moreover, because 'past performance is the best predictor of future performance,' *Alra Labs., Inc.* v. *DEA,* 54 F.3d 450, 452 (7th Cir. 1995), ''[DEA] has repeatedly held that where a registrant has committed acts inconsistent with the public interest, the registrant must accept responsibility for his actions and demonstrate that he will not engage in future misconduct.'' *Medicine Shoppe—Jonesborough,* 73 FR at 387; *see also Samuel S. Jackson, D.D.S.,* 72 FR 23, 848, 23,853 (DEA 2007); *Hoxie* v. *DEA,* 419 F.3d 477, 483 (6th Cir. 2005) (''admitting fault'' is ''properly consider[ed]'' by DEA to be an ''important factor[]'' in the public interest determination).

Here, I find that Respondent has both taken responsibility for his actions and shown remorse for his conduct. During his testimony, Dr. Medinnus repeatedly demonstrated remorse for his conduct at the RVIHC. He also testified credibly and candidly about the circumstances surrounding the misconduct, including the various personal and professional challenges he faced during his employment at RVIHC.

The Government argues that the Respondent attempted to ''minimize'' his misconduct by testifying that he could only not account for forty dosage units of the hydrocodone. [Govt. Brief at 22]. I disagree. Instead, I find that while this evidence, along with the evidence regarding the circumstances surrounding Respondent's employment at RVIHC does not excuse Respondent's conduct, it does provide appropriate mitigating factors for this Court and the Deputy Administrator to consider. *See Martha Hernandez, M.D.,* 62 FR 61,145 (DEA 1997) (holding that, in exercising his discretion in determining the appropriate remedy, the Administrator should consider all of the facts and circumstances of a particular case).

In light of the substantial evidence that Respondent proffered regarding his acceptance of responsibility for the misconduct, I find that the Government's proposed sanction, the denial of Respondent's application, is too severe. As this Agency has repeatedly held, a proceeding under the Act '' 'is a remedial measure, based upon the public interest and the necessity to protect the public from those individuals who have misused . . . their DEA Certificate of Registration, and who have not presented sufficient mitigating evidence to assure the Administrator that they can be entrusted with the responsibility carried by such a registration.' '' *Jon Karl Dively, D.D.S.,* 72 FR 74,332, 74,334 (DEA 2007) (*quoting Samuel S. Jackson, D.D.S.,* 72 FR 23,848, 23,853 (DEA 2007)). Despite the Government's strenuous arguments to the contrary, I find that Dr. Medinnus' restricted registration does not represent a danger to the public interest. Indeed, Dr. Medinnus has sensibly requested the issuance of a restricted registration, which would ensure that he avoid any repeat of the recordkeeping violations he committed while at RVIHC. While his misconduct was indeed serious, Dr. Medinnus has now demonstrated that he understands the responsibilities and requirements of a DEA registrant.

V. Conclusion and Recommendation

Therefore, I conclude that the DEA has met its burden of proof and has established that grounds exist for denying the Respondent's application for a DEA Certificate of Registration. I do not condone nor minimize the seriousness of the Respondent's misconduct. However, based on this record, I recommend that the Respondent be afforded an opportunity to demonstrate that he can again responsibly handle controlled substance prescriptions by the granting of a restricted registration. *See Cecil E. Oakes, Jr., M.D.,* 63 FR 11,907, 11,910 (DEA 1998) (''Such a resolution will provide Respondent with the opportunity to demonstrate that he can responsibly handle controlled substances, while at the same time protect the public health and safety, by providing a mechanism for rapid detection of any improper activity.''). The Agency has previously held that ''such restrictions must be related to what the Government has alleged and proved in any case.'' *Janet L. Thornton, D.O.,* 73 FR 50,354, 50,356 (DEA 2008).

Consistently, I suggest that the conditions in this case be tailored to ensure that the Respondent does not personally handle or dispense controlled substances. Thus, they should include: That the registration restricts his handling of controlled substances to merely prescribing and not storing, administering or dispensing

such drugs and that he be prohibited from prescribing controlled substances to himself or any family member. Further, I recommend that the Respondent be ordered to comply with the terms of his DBC probation and promptly notify the DEA if the DBC takes any action against his dental license. Lastly, I recommend that he maintain and provide quarterly prescription logs for all controlled substances prescriptions he authorizes to the local DEA office for monitoring. I recommend these restrictions apply for three years from the date of the final order so directing this result. In this way, the Respondent may safely continue his return to the full practice of dentistry, and the DEA can assure itself of the Respondent's compliance with DEA regulations as well as the protection of the public interest.

Dated: October 17, 2012.

Gail A. Randall,
Administrative Law Judge.

[FR Doc. 2013–24697 Filed 10–21–13; 8:45 am]

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DEPARTMENT OF JUSTICE

Drug Enforcement Administration

Hoi Y. Kam, M.D.; Decision and Order

On August 29, 2012, the Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration, issued an Order to Show Cause to Hoi Y. Kam, M.D. (Respondent), of Fresh Meadows, New York. The Show Cause Order proposed the revocation of Respondent's DEA Certificate of Registration, which authorizes him to dispense controlled substances as a practitioner, as well as the denial of any pending applications to renew or modify his registration, on the grounds that he: (1) Materially falsified a renewal application, and (2) committed acts which render his registration inconsistent with the public interest. Show Cause Order at 1 (citing 21 U.S.C. 824(a)(1) & (4)).

More specifically, the Show Cause Order alleged that Respondent materially falsified his December 1, 2011 renewal application, by falsely answering the application question which asked if he had ''ever surrendered for cause or had a state professional license or controlled substance registration revoked, suspended, denied, restricted, or placed on probation or is any such action pending?'' *Id.* at 2. The Government alleged that Respondent gave a negative answer to this question, notwithstanding that on July 12, 2011, the New York State Department of Health, Office of Professional Misconduct and Discipline, had revoked his medical license, based on a finding that he had billed for Medicaid services which he did not perform and ''created false entries in [his patient] charts to conceal that fact.'' *Id.* at 1–2. However, the Government then alleged that Respondent's ''medical license was reinstated on October 27, 2011.'' *Id.* at 1.

The Government further alleged that between July 21 and October 4, 2011, Respondent violated federal law and regulations by ''issu[ing] at least six (6) prescriptions for controlled substances, despite lacking legal authority to do so.'' *Id.* (citing 21 U.S.C. 841(a)(1) & 21 CFR 1306.03). Specifically, the Government alleged that Respondent had issued a July 21, 2011 prescription for 240 dosage units of oxycodone 30mg; a September 16, 2011 prescription for 30 dosage units of alprazolam 2mg; two October 4, 2011 prescriptions for 30 dosage units of zolpidem tartrate 10mg; an October 4, 2011 prescription for 60 dosage units of alprazolam .25mg; and an October 4, 2011 prescription for 90 dosage units of oxycodone/acetaminophen 7.5/500mg. *Id.* at 2.

On August 31, 2012, a DEA Diversion Investigator (DI) ''attempted to personally serve the Order to Show Cause on Respondent at his registered address.'' GX 2, at 3. According to the DI, ''[s]ince no one appeared to be at the registered location, I left a copy of the Order to Show Cause in Respondent's mailbox.'' *Id.* Subsequently, on September 10, 2012, Respondent wrote a letter to DEA Counsel in which he denied the allegations of the Show Cause Order. GX 7.

Regarding the allegation that he had written six prescriptions between July 10 and October 27, 2011, Respondent denied writing them with the exception of ''the prescription dated July 21, 2011,'' which it was ''possible'' he ''predated.'' *Id.* Respondent contended that he was ''so sure someone stole my prescription pads without my knowledge'' and that he was ''the victim of prescription fraud.'' *Id.* He also urged the Government to check the handwriting on the prescriptions. *Id.*

As for the material falsification allegation, Respondent wrote that ''I probably did not pay attention to the box. I marked on the wrong box. I apologize for the mistake.'' *Id.* And regarding the basis for the action taken by the State against his medical license, Respondent wrote that he ''never billed for the Medicaid services,'' that ''[t]he Medicaid provider number is not mine,'' and that he ''did render the services.'' *Id.*[1]

However, while the Show Cause Order notified Respondent that he had a right to request a hearing and the procedure for doing so, Respondent did not request a hearing. Consistent with 21 CFR 1301.43(c), I deem Respondent's September 10, 2012 letter to be a statement of his ''position on the matters of fact and law'' asserted by the Show Cause Order.

On September 23, 2012, Respondent submitted a further letter to DEA counsel, which he titled as his ''response to'' a ''phone conversation'' he had with the DI. GX 8, at 1. Therein, Respondent asserted that the DI ''admitted there are false accusations of the prescriptions written.'' *Id.* Respondent also again admitted that he ''predated the prescription for a patient in June,''[2] and explained that he ''could not foresee my license revoked in early July and I had only seventy-two hours [sic] notice.'' *Id.* Respondent further wrote that there was ''[n]o way [the] patient was aware of what happened'' and that the ''patient is willing to testify for me.'' *Id.* Respondent included an unsworn letter of the patient (N.I.), who stated that he ''got the prescription on 6/28/12 and I had no time in July 2011,'' and that he ''requested[ ] Respondent to predate [sic] on July 28, 11.'' *Id.* at 2. The patient also wrote that he ''did not know [that] something happened to'' Respondent. *Id.*

Regarding the prescription, Respondent explained that ''pharmacist should call and verify each controlled substances [sic] prescription'' but that ''[n]o one called me.'' *Id.* at 1. Continuing, Respondent wrote that ''[s]ince July 11, 2011, no pharmacies accepted my prescriptions anymore. Why this pharmacy dispensed the medication without following the routine[?]'' *Id.* Respondent then asserted that the name of the drug was misspelled on the prescription, and that he ''had the intention to misspell to make sure the pharmacy . . . call[ed], then I know what happens to the prescriptions. Unfortunately, no pharmacies called regarding to the selling [sic] mistakes.'' *Id.* Here again, however, Respondent did not request a hearing and ended the letter by stating

[1] Respondent also disputed the findings of the State Board, but then noted that his ''[l]awyer told [him] to forget about it,'' that ''[t]he appeal will not change,'' and that he ''refused to beg [the State board] because I believed I did not do anything wrong.'' GX 7.

[2] If the prescription was written in June, it was actually post-dated.

that he did not ''think it is necessary to show cause or [sic] hearing[3].''

Based on Respondent's failure to request a hearing in either his September 10 or September 23 letter, I find that Respondent has waived his right to a hearing on the allegations of the Show Cause Order. 21 CFR 1301.43(c) & (d). Having reviewed the investigative record submitted by the Government, including Respondent's letters, I make the following findings of fact.

Findings

Respondent is the holder of a DEA Certificate of Registration, which authorizes him to dispense controlled substances in schedules II through V as a practitioner. GX 1. On December 1, 2011, Respondent submitted a renewal application, and on April 3, 2012, DEA issued Respondent a new registration, which does not expire until December 31, 2014. *Id.*

Respondent is also the holder of a medical license issued by the New York Department of Health (hereinafter, the Department). On February 10, 2011, the Department's Bureau of Professional Medical Conduct (hereinafter, BPMC) issued a Statement of Charges to Respondent, which alleged that on or about November 10, 2006, the Department had, following a hearing, ''sustained a decision to exclude Respondent from participation in the Medicaid program for five (5) years'' based on his violation of several state regulations. GX 3, at 6 (citations omitted). The BPMC alleged that these violations ''would constitute professional misconduct under the laws of New York State.'' *Id.*

On May 19, 2011, a committee of the BPMC held a hearing, after which it determined that Respondent's medical license should be revoked. *Id.* at 3, 9. On July 1, 2011, the BPMC committee issued its decision, which provided that it was effective upon service. *Id.* at 10. Therein, the BPMC explained that:

> This is a case about Medicaid fraud for which the Respondent has been excluded from the Medicaid program. The five-year exclusion was sustained by a decision after a hearing in 2006. The panel weighed all the facts and circumstances in this case and recognized that this was primarily a case of greed and dishonesty.[4]

Id. at 9. The BPMC further explained that while it had considered lesser sanctions than revocation, it concluded that revocation was appropriate because it ''was troubled and concerned by the Respondent's patent lack of respect for the truth.'' *Id.*

On July 5, 2011, the Department served the Determination and Order on Respondent and his attorney in that proceeding, by certified mail. *Id.* at 1. The letter specifically stated that the order was ''deemed effective upon [its] receipt or seven (7) days after mailing by certified mail.'' *Id.* (citation omitted). The letter also explained that a ''[r]equest for review of the . . . determination by the Administrative Review Board stays penalties *other than suspension or revocation* until final determination by that Board.'' *Id.* at 2.

Respondent sought review by the State's Administrative Review Board (ARB). On or about October 14, 2011, the ARB issued its Determination and Order. GX 2, at 2. Therein, the ARB vacated the revocation of Respondent's medical license, noting, *inter alia,* ''that the conduct at issue under the Medicaid Exclusion occurred between 2001 and 2004'' and that the State ''has offered no evidence that [he] has engaged in additional misconduct since and the Respondent has remained in practice during that time.'' GX 4, at 8. However, the ARB voted unanimously to suspend Respondent's license for five years, but ''to stay the suspension in full and to place [him] on probation,'' subject to various terms and conditions.

On October 27, 2011, the New York Diversion Program Manager sent a letter to Respondent by certified mail; the letter stated that the Government had been advised that his medical license had been revoked (even though it no longer was).[5] GX 5. After quoting the Agency's authority under section 824(a)(3) to revoke a registration where a registrant ''is no longer authorized by State law'' to dispense controlled substances, the letter stated that ''[i]n lieu of undergoing an Order to Show Cause proceeding against your DEA registration, we are providing you an opportunity to surrender your DEA registration by signing the enclosed DEA Voluntary Surrender of Controlled Substances Privileges form (DEA Form 104) for cause.'' *Id.* Respondent did not, however, claim the letter. GX 2, at 2.

As found above, on December 1, 2011, Respondent submitted an application to renew his DEA registration. GX 2, at 3. In completing the application, Respondent was required to answer several questions, including question three, which asked: ''Has the applicant ever surrendered for cause or had a state professional license or controlled substance registration revoked, suspended, denied, restricted, or placed on probation or is any such action pending?'' *Id.; see also* GX 1, at 4. Respondent answered no. GX 1, at 4.

On or about April 12, 2012, a DI issued a subpoena to the N.Y. Department of Health, requesting a summary of all controlled substance prescriptions issued by Respondent between July 12 and October 27, 2011. GX 2, at 3. On April 16, 2012, the State provided the DI with a report which listed six prescriptions as having been issued by Respondent during the above period. *Id.*

On September 14, 2012, the DI contacted the pharmacies which had filled the prescriptions listed on the report and obtained copies of the prescriptions. *Id.* Upon reviewing the prescriptions, the DI determined that only one of the six prescriptions had been issued by Respondent. *Id.* at 4. This prescription, which was dated July 28, 2011, was for 240 oxycodone 30mg and was issued to N.I.

As noted above, in his letter, Respondent denied writing the prescription after his state license was revoked. However, he did admit to pre-signing the prescription, and submitted an unsworn statement from N.I. which corroborates Respondent's story.

Discussion

Under the Controlled Substances Act, ''[a] registration pursuant to section 823 of this title to . . . dispense a controlled

[3] However, I have also deemed this letter to be a written statement of position on the matters of fact and law asserted in the Show Cause Order.

[4] As set forth in the Administrative Review Board's (ARB) discussion of the original exclusion proceeding:

> The Exclusion found that the Respondent's records failed to reflect accurately the examinations the Respondent performed on the Investigators. Such conduct amounted to misconduct under [N.Y. Educ. Law] § 6530(32) as failure to maintain accurate records. The Exclusion also concluded that the Respondent billed Medicaid for services the Respondent never provided. Such conduct amounted to fraud in practice under the misconduct definition at [N.Y. Educ. Law] § 6530(2). The Exclusion also found that the Respondent violated Title 18 NYCRR § 515.2(b)(12) by failing to furnish medical care according to professional recognized standards. The failure, on repeated occasions, to practice according to accepted medical standards amounted to practicing medicine with negligence on more than one occasion, a violation under [N.Y. Educ. Law] § 6530(3).

GX 4, at 7–8.

It is also noted that among the probationary terms imposed by the ARB was that ''Respondent shall maintain legible and complete medical records, which accurately reflect the evaluation and treatment of patients. The medical records shall contain all information required by State rules and regulations regarding controlled substances.'' *Id.* at 15.

[5] According to the DI's affidavit, shortly after the State revoked Respondent's medical license, she contacted Respondent's attorney and told him that because Respondent's ''medical license was revoked, he was required to surrender his DEA registration.'' GX 2, at 2. Several days later, the DI also sent a letter to Respondent's attorney, which included a Voluntary Surrender form. *Id.* However, ''[n]o response was received.'' *Id.*

substance . . . may be suspended or revoked by the Attorney General upon a finding that the registrant . . . has materially falsified any application filed pursuant to or required by'' the Act, or ''has committed such acts as would render his registration under section 823 of this title inconsistent with the public interest as determined under such section.'' 21 U.S.C. 824(a)(1) & (4). With respect to the latter provision, the CSA provides that the following factors are to be considered in the case of a practitioner:

(1) The recommendation of the appropriate State licensing board or professional disciplinary authority.

(2) The applicant's experience in dispensing . . . controlled substances.

(3) The applicant's conviction record under Federal or State laws relating to the manufacture, distribution, or dispensing of controlled substances.

(4) Compliance with applicable State, Federal, or local laws relating to controlled substances.

(5) Such other conduct which may threaten the public health and safety.

Id.

The public interest ''factors are . . . considered in the disjunctive.'' *Robert A. Leslie,* 68 FR 15227, 15230 (2003). I may rely on any one or a combination of factors and may give each factor the weight I deem appropriate in determining whether to revoke a registration or to deny an application for a registration. *Id.* Moreover, I am ''not required to make findings as to all of the factors.'' *Hoxie* v. *DEA,* 419 F.3d 477, 482 (6th Cir. 2005); *see also Morall* v. *DEA,* 412 F.3d 165, 173–74 (D.C. Cir. 2005).

Where the Government has met its *prima facie* burden of showing that grounds exist to revoke a registration, whether because a registrant (or applicant) materially falsified an application for registration or committed acts which render his registration inconsistent with the public interest, the burden of production shifts to the registrant to ''present sufficient mitigating evidence'' to show why he can be entrusted with a new registration. *Medicine Shoppe-Jonesborough,* 73 FR 364, 387 (2008) (quoting *Samuel S. Jackson,* 72 FR 23848, 23853 (2007) (quoting *Leo R. Miller,* 53 FR 21931, 21932 (1988))). ''Moreover, because 'past performance is the best predictor of future performance,' *ALRA Labs, Inc.* v. *DEA,* 54 F.3d 450, 452 (7th Cir. 1995), [DEA] has repeatedly held that where a registrant has committed acts inconsistent with the public interest, the registrant must accept responsibility for [his] actions and demonstrate that [he] will not engage in future misconduct.'' *Medicine Shoppe,* 73 FR at 387; *see also Jackson,* 72 FR at 23853; *John H. Kennedy,* 71 FR 35705, 35709 (2006); *Cuong Tron Tran,* 63 FR 64280, 64283 (1998); *Prince George Daniels,* 60 FR 62884, 62887 (1995).

The Material Falsification Allegation

The Government contends that Respondent materially falsified his December 1, 2011 application to renew his registration when he answered ''no'' to the question of whether he had ''ever surrendered (for cause) or had a state professional license or controlled substance registration revoked, suspended, denied, restricted, or placed on probation, or is any such action pending?'' Respondent's answer was clearly false, because his State medical license had not only been revoked for approximately three months (even if the revocation was ultimately vacated), his license was then suspended by the ARB (albeit the suspension was stayed), and he was also placed on probation. However, that Respondent's answer was false does not end the inquiry, because his answer must also have been material.

''The most common formulation'' of the concept of materiality is that ''a concealment or misrepresentation is material if it 'has a natural tendency to influence, or was capable of influencing, the decision of' the decisionmaking body to which it was addressed.'' *Kungys* v. *United States,* 485 U.S. 759, 770 (1988) (quoting *Weinstock* v. *United States,* 231 F.2d 699, 701 (D.C. Cir. 1956) (other citation omitted)) (quoted in *Samuel S. Jackson,* 72 FR 23848, 23852 (2007)); *see also United States* v. *Wells,* 519 U.S. 482, 489 (1997) (quoting *Kungys,* 485 U.S. at 770). The Supreme Court has further explained that ''[i]t has never been the test of materiality that the misrepresentation or concealment would more likely than not have produced an erroneous decision, *or even that it would more likely than not have triggered an investigation.''* *Kungys,* 485 U.S. at 771 (emphasis added). Rather, the test is ''whether the misrepresentation or concealment was predictably capable of affecting, *i.e.,* had a natural tendency to affect, the official decision.'' *Id.* '' '[T]he ultimate finding of materiality turns on an interpretation of substantive law,' '' *id.* at 772 (int. quotations and other citation omitted), and must be met ''by evidence that is clear, unequivocal, and convincing.'' [6] *Id.*

As the above makes clear, the relevant decision for assessing whether a false statement is material is the Agency's decision as to whether an applicant is entitled to be registered (or in the case of a current registrant, remain registered). In this regard, the Government argues that ''Respondent is not 'entitled to be registered' based upon the revocation and subsequent suspension/probation of his medical license, as well as the fact that he issued a prescription for controlled substances during the period where he was not legally authorized to do so.'' Req. for Final Agency Action, at 7–8.

Because possessing authority to dispense controlled substances under the laws of the State in which a physician practices medicine is a requirement for holding a DEA registration, *see* 21 U.S.C. 802(21) & 823(f), a false answer to the state license question is material where an applicant no longer holds authority to practice medicine (regardless of the reason for the State's action) or authority to dispense controlled substances, as well as where the state has placed restrictions on a practitioner's authority to prescribe controlled substances. So too, because in determining whether an application should be granted, Congress directed the Agency to consider the five public interest factors, even where an applicant currently holds unrestricted state authority to dispense controlled substances, the failure to disclose state action against his medical license may be material if the action was based on conduct (or on the status arising from such conduct, *i.e.,* a conviction for a controlled substance offense or mandatory exclusion from federal health care programs) which is actionable under either the public interest factors or the grounds for denial, suspension, and revocation set forth in section 824. *See Scott C. Bickman,* 76 FR 17694, 17701 (2011).

Here, however, the Government's contention ignores that the BPMC's revocation order had been vacated prior to Respondent's filing of the application. Moreover, while the ARB suspended Respondent's license, the suspension was stayed. Thus, Respondent was ''authorized'' to dispense controlled substances at the time he submitted the application. DEA therefore could not have revoked his registration and denied his application on the basis that Respondent lacked

[6] While *Kungys* involved a denaturalization proceeding, in other civil proceedings, courts have required that a party establish that a falsification is material by ''clear, unequivocal, and convincing evidence'' and not simply by a ''preponderance of the evidence.'' *Driscoll* v. *Cebalo,* 731 F.2d 878, 884 (Fed. Cir. 1984). In any event, the Government's evidence on materiality does not even meet the preponderance standard.

state authority. *See* 21 U.S.C. 823(f); *id.* § 824(a)(3) (authorizing the suspension or revocation of a registration upon a finding that ''the registrant . . . has had his State license or registration suspended, revoked, or denied by competent State authority and is no longer authorized by State law to engage in the . . . dispensing of controlled substances'').

In placing Respondent on probation, the ARB also noted the various findings of the order which had excluded him years earlier from the New York Medicaid program. However, because the exclusion order does not fall under the mandatory exclusion authority of 42 U.S.C. 1320a–7(a), but rather, the permissive exclusion authority of 42 U.S.C. 1320a–7(b), by itself, the exclusion does not fall within the Agency's authority to suspend or revoke a registration. *See* 21 U.S.C. 824(a)(5); *see also Terese, Inc., d/b/a Peach Orchard Drugs,* 76 FR 46843, 46848 (2011). Moreover, the Government offers no evidence that Respondent's Medicaid exclusion was based on findings that he committed acts, or had been convicted of criminal offenses, which provide actionable grounds to revoke his registration under either the public interest standard of sections 823(f) and 824(a)(4) or section 824(a)(2).

To be sure, the probationary terms imposed by the ARB included that Respondent maintain medical records that ''contain all information required by State rules and regulations regarding controlled substances.'' GX 4, at 15. The ARB's Order did not, however, discuss what evidence supported the imposition of this probationary term. *See generally* GX 14. And the Government offers no argument, let alone any evidence, that the truthful disclosure of the State's action against his medical license would have led it to evidence in the exclusion proceeding that Respondent violated any state rules or regulations regarding controlled substances and thus would have supported the denial of his application.[7] Indeed, in its Request for Final Agency Action, the Government concedes that ''the allegations underlying the disciplinary action did not involve controlled substances.'' Req. for Final Agency Action, at 8. I therefore conclude that the Government has failed to show that Respondent's false statement had the capacity to influence the Agency's decision to grant his application.

The Public Interest Allegations

The Government also asserts that Respondent has committed acts which render his registration inconsistent with the public interest. More specifically, the Government argues that factors two (Respondent's experience in dispensing controlled substances) and four (Respondent's compliance with applicable laws related to controlled substances) support the revocation of his registration.[8] *Id.* at 9.

More specifically, the Government contends that ''[i]n order to maintain a registration with DEA, a practitioner must be currently authorized to handle controlled substances in the jurisdiction in which he practices.'' *Id.* (citing 21 U.S.C. 802(21); 823(f) (internal quotations omitted)). The Government then maintains that ''[n]otwithstanding having lost his state authority to practice medicine, Respondent did not surrender his DEA'' registration. *Id.*

While the Government is correct that a practitioner must be currently authorized under the laws of the State in which he practices in order to maintain a DEA registration, it cites no support for the suggestion that a registrant *must surrender* his registration upon the loss of his state authority. Indeed, as the title of DEA Form 104 makes plain, surrendering one's registration is a ''voluntary'' act. *See* GX 5, at 2 (form entitled: ''VOLUNTARY SURRENDER OF CONTROLLED SUBSTANCES PRIVILEGES''); *see also id.* (first paragraph of form: ''After being fully advised of my rights, and understanding that I am not required to surrender my controlled substance privileges, I freely execute this document and choose to take the actions described herein.''). Even where a registrant no longer possesses state authority, as long as he does not use that registration to acquire, distribute, or dispense a controlled substance, he neither commits a violation of federal law, nor an act inconsistent with the public interest, when he refuses to voluntarily surrender his registration. Rather, as the Voluntary Surrender form—which was given that title for a reason—makes clear, a registrant is entitled to insist that the Government pursue the revocation of his registration through a proceeding brought under 21 U.S.C. 824(a)(3).

On the other hand, where a registrant no longer possesses state authority, he cannot lawfully prescribe a controlled substance. *See* 21 CFR 1306.03(a) (''A prescription for a controlled substance may be issued only by an individual practitioner who is . . . [a]uthorized to prescribe controlled substances by the jurisdiction in which he is licensed to practice his profession.''); *see also* 21 U.S.C. 802(10) (''The term 'dispense' means to deliver a controlled substance to an ultimate user . . . by, or pursuant to the lawful order of, a practitioner, including the prescribing and administering of a controlled substance. . . .''). And ''[e]xcept as authorized by this subchapter [*i.e.,* the Controlled Substances Act], it is ''unlawful for any person knowingly or intentionally . . . to distribute or dispense . . . a controlled substance.'' 21 U.S.C. 841(a)(1).

As found above, Respondent disputes the Government's contention that he violated the CSA by issuing a controlled substance prescription for 240 oxycodone 30mg. on July 28, 2011, after the revocation by the BPMC of his New York medical license. Rather, Respondent maintains that he actually wrote the prescription in June 2011, prior to the BPMC's issuance of its order. Respondent also submitted an unsworn hearsay statement from the patient who received the prescription, which supports his assertion.

However, even accepting Respondent's explanation that he pre-signed (and post-dated) the prescription, I conclude that he still violated the CSA. Under DEA's regulations, ''[a]ll prescriptions for controlled substances shall be dated as of, and signed on, the

[7] On October 27, 2011, more than a month prior to Respondent's submission of the application, the Government wrote Respondent, seeking the surrender of his registration. GX 5. Therein, the Government noted that on July 15, 2011, it had been informed that the BPMC had revoked his medical license ''pursuant to [his] exclusion from participating in the NYS Medical [sic] Program for five (5) years.'' *Id.* However, because the materiality of a statement is assessed based on ''the intrinsic capabilities of the false statement itself, rather than the possibility of the actual attainment of its end as measured by collateral circumstances,'' *United States* v. *Goldfine,* 538 F.2d 815, 820–21 (9th Cir. 1976) (internal quotations and citation omitted), it does not matter that certain employees of the Government already knew that the answer was false. That being said, the Government still bears the burden of showing, through evidence which is clear, convincing and unequivocal, that the false statement is material. As for its further contention that Respondent's false statement was material because ''he issued a prescription for controlled substances during the period where he was not legally authorized to do so,'' as explained below, the Government's evidence does not conclusively establish that the prescription was written after his state license was revoked, rather than written (as he maintains) before his license was revoked and post-dated.

[8] The Government correctly notes that there is no evidence that Respondent has been convicted of an offense under federal or state laws related to the manufacture, distribution, or dispensing of controlled substances. However, there are a number of reasons why even a person who has engaged in misconduct may never have been convicted of an offense under this factor, let alone prosecuted for one. *Dewey C. MacKay,* 75 FR 49956, 49973 (2010), *pet. for rev. denied MacKay* v. *DEA,* 664 F.3d 808 (10th Cir. 2011). The Agency has therefore held that ''the absence of such a conviction is of considerably less consequence in the public interest inquiry'' and is therefore not dispositive. *Id.*

day when issued.'' 21 CFR 1306.05(a). DEA has repeatedly held that the act of pre-signing a prescription violates the CSA. *See Alvin Darby,* 75 FR 26993, 26999 (2010) (collecting cases). Thus, whether I accept the Government's contention that Respondent issued a prescription when he lacked state authority to do so, or Respondent's assertion that he simply pre-signed a prescription, he still distributed a controlled substance in violation of 21 U.S.C. 841(a)(1). However, the record contains no evidence that Respondent acted outside of the usual course of professional practice and lacked a legitimate medical purpose in issuing the prescription.[9]

Sanction

The Government argues that it has ''establishe[d] by a preponderance of the evidence that Respondent's continued registration is inconsistent with the public interest'' and that Respondent has put on ''no evidence that could support a finding that [he] should be entrusted with a . . . registration.'' Req. for Final Agency Action, at 9–10 (citing cases). The Government thus seeks the revocation of Respondent's registration.[10]

Had the Government proved that Respondent materially falsified his application, I would grant the Government's request. The Government, however, has proved only that Respondent committed a single act of issuing a prescription in violation of DEA regulations (whether because he lacked state authority or pre-signed/post-dated the prescription). Moreover, the Government has produced no evidence that the prescription lacked a legitimate medical purpose. *See Dewey C. MacKay,* 75 FR 49956, 49977 (2010) (holding that DEA can revoke a practitioner's registration based on a single act of intentional diversion), *pet. for rev. denied MacKay* v. *DEA,* 664 F.3d 808 (10th Cir. 2011).

As I have previously held, in determining the appropriate sanction, DEA considers the egregiousness and the scope of the misconduct which has been proved on the record, as well as the need to deter similar misconduct on the part of others. *See Michael S. Moore,* 76 FR 45867, 45868 (2011); *Terese, Inc.,* 76 FR at 46848–49; *Janet L. Thornton,* 73 FR 50354, 50356 (2008).

In *Thornton,* the Government sought the revocation of a physician's registration, based on her having written two controlled substance prescriptions for former neighbors, when her license to practice in that State had been suspended. 73 FR at 50355. The physician, however, was practicing in another State, where she was licensed. *Id.* While the then-Deputy Administrator found that the prescriptions violated federal law because the physician engaged in the unlicensed practice of medicine and were thus issued outside of the usual course of professional practice (which the physician admitted in a state board proceeding), she declined to revoke the physician's registration, noting that there was no evidence that the physician had written the prescriptions ''for other than a legitimate medical purpose.'' *Id.* The Deputy Administrator also noted that a provision of state law created an exemption from the State's licensing requirements for ''occasional consultations or cases'' where a physician was ''lawfully practicing medicine in another state,'' and that while the State Board found that the physician violated the State's Medical Practice Act, the physician's case appeared to be one of first impression. *Id.* at 50356. Based on these circumstances, the Deputy Administrator concluded that the physician's violations did not warrant the revocation or suspension of her registration. *Id.*

Here, while the proven misconduct is limited to a single prescription, I conclude that a period of outright suspension is warranted. In contrast to *Thornton,* where the state law defining what constituted the unauthorized practice of medicine was arguably unclear, the applicable DEA regulations are clear, whether Respondent issued the prescription after his state license was revoked, *see* 21 CFR 1306.03(a), or whether he pre-signed (and post-dated) the prescription. *Id.* 1306.05(a). In either case, the evidence supports a finding that Respondent knowingly dispensed a controlled substance in violation of the Controlled Substances Act. *See* 21 U.S.C. 841(a)(1). Accordingly, I will order that Respondent's registration be suspended outright for a period of six months.

Order

Pursuant to the authority vested in me by 21 U.S.C. 824(a)(4), as well as 28 CFR 0.100(b), I order that the DEA Certificate of Registration issued to Hoi Y. Kam, M.D., be, and it hereby is, suspended for a period of six months. This Order is effective November 21, 2013.

Dated: October 9, 2013.

Thomas M. Harrigan,

Deputy Administrator.

[FR Doc. 2013–24627 Filed 10–21–13; 8:45 am]

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[9] The Government also argues that factor one—the recommendation of the state licensing board—supports its proposed sanction of revocation. According to the Government, ''[t]hough his medical license is not revoked, and the allegations underlying action did not involve controlled substances, such action still weighs in favor of revocation.'' Req. for Final Agency Action, at 8 (citing *George Mathew,* 75 FR 66138, 66145 (2010)).

While my decision in *Mathew* noted that the respondent there had been subject to two disciplinary proceedings by the state board, one of the proceedings (which resulted in a summary suspension) was based on the respondent's failure to properly treat emergency room patients and did not involve his prescribing of controlled substances. 75 FR at 66,145. However, at the time of this Agency's proceeding, the State had reinstated Respondent's medical license. *Id.* Accordingly, I placed no weight on that proceeding and relied only on the other proceeding, which sanctioned the respondent for prescribing controlled substances to patients he never physically examined. *Id.* Thus, the Government's reliance on *Mathew* is misplaced.

[10] The Government also argues that Respondent's renewal application should be denied. Req. for Final Agency Action, at 1. However, it is too late for that, as the Government renewed Respondent's registration on April 3, 2012. GX 1.

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

[Docket No. 08–6]

Lannett Company, Inc.; Grant of Registration To Import Schedule I Substance

On November 15, 2012, I, the Administrator of the Drug Enforcement Administration, issued a Declaratory Order in the above-captioned matter.[1] Therein, I held that Lannett Company, Incorporated's (hereinafter, Lannett) proposed importation of synthetic dronabinol (THC) in finished dosage form, a schedule I controlled substance, for the purpose of conducting stability and bioequivalency studies to support an Abbreviated New Drug Application (ANDA), constitutes ''scientific, analytical, or research uses'' and is therefore a permissible importation under 21 U.S.C. 952(a)(2)(C). Declaratory Order, at 36. However, I further held that Lannett had not justified that the quantities of the proposed importations (300,000 dosage units) were ''limited quantities'' as required by section 952(a)(2)(C). *Id.* at 35–36. I therefore ordered Lannett to provide justification for the quantities it sought to import. *Id.* at 40. I also held that upon Lannett's ''providing adequate justification for the quantit[ies] of the [proposed] importation[s],'' its ''registration would be consistent with

[1] All citations to the Declaratory Order are to the slip opinion and not to the Order as published here in the Appendix.

the public interest.'' *Id.* (citing 21 U.S.C. 823(a)).[2]

In response, Lannett filed a new application, seeking to import 10,000 dosage units for each of the three dosage strengths for which it intends to file an ANDA.[3] *See* Lannett Company, Inc.'s Response To The Administrator's Declaratory Order of November 15, 2012. Thereafter, the Government objected to Lannett's new proposed quantities, contending that Lannett had not adequately justified them. Government's Request To Have Lannett Company, Inc., Amend Its Import Application To Conform To The Administrator's Declaratory Order of November 15, 2012, at 2. Thereupon, I directed Lannett to file a response to the Government's request. Order (June 12, 2013).

On June 28, 2013, Lannett filed an amended application, explaining that it now needs 7,000 capsules of each dosage strength for which it intends to file an ANDA. Lannett Company, Inc.'s Response to the Administrator's Declaratory Order of June 11, 2013. Neither the Government, nor the firms which objected to Lannett's application, filed a response to the amended application. Having reviewed Lannett's amended application, I conclude that it should be granted.

Order

Pursuant to the authority vested in me by 21 U.S.C. 958(a) and 28 CFR 0.100(b), I order that the application of Lannett Company, Incorporated, for a DEA Certificate of Registration authorizing it to import Tetrahydrocannibinols (Drug Code 7370) for the purpose of conducting research be, and it hereby is, granted. Pursuant to the authority vested in me by 21 U.S.C. 952(a)(2)(C), I further order that a rule be, and it hereby is, issued, authorizing Lannett Company, Incorporated, to import the amounts of Tetrahydrocannibinols set forth in its amended application.[4]

[2] However, I held that Lannett's application for a registration to import THC should be held in abeyance.

[3] Neither of the firms which objected to Lannett's application (Rhodes Technologies and Mallinckrodt) filed a response to its submission. *See* Declaratory Order at n.32.

[4] As stated in the Declaratory Order, the quantities of Tetrahydrocannibinols imported pursuant to this rule may only be used for the purpose of conducting research in support of its ANDA and may not be commercially distributed.

Dated: October 8, 2013.

Michele M. Leonhart,

Administrator.

Appendix

Docket No. 08–6

LANNETT COMPANY, INC.

DECLARATORY ORDER

Introduction

Under the Controlled Substances Import Export Act (hereinafter, ''CSIEA''), a person seeking to lawfully import a schedule I or II controlled substance into the United States must obtain from the Drug Enforcement Administration both a registration as an importer and permission to import the substance. *See* 21 U.S.C. §§ 952(a); 958(a). Under section 952(a), other than in the case of narcotic raw materials, it is unlawful ''to import into the United States'' any schedule I or II controlled substance ''except that such amounts of any controlled substance in schedule I or II . . . that the Attorney General finds to be necessary to provide for the medical, scientific, or legitimate needs of the United States'' may be imported pursuant to ''such regulations as the Attorney General shall prescribe'' if one of three conditions is satisfied. *Id.* § 952(a)(2).

Relevant here are subparagraphs (2)(B) and (2)(C). The former provision authorizes an importation ''[i]n any case in which the Attorney General finds that competition among domestic manufacturers is inadequate and will not be rendered adequate by the registration of additional manufacturers under [21 U.S.C. §] 823.'' *Id.* § 952(a)(2)(B). The latter provision authorizes an importation ''in any case in which the Attorney General finds that such controlled substance is in limited quantities exclusively for scientific, analytical, or research uses.'' *Id.* § 952(a)(2)(C).

Procedural History

On October 10, 2006, Lannett Company, Inc., of Philadelphia, Pennsylvania (hereinafter, Lannett), applied for a DEA Certificate of Registration authorizing it to import tetrahydrocannabinols (THC), a schedule I controlled substance.[1] ALJ Ex. 1, at 1. Lannett sought to import the THC ''for analytical testing on a formulated product for submission to the U.S. Food and Drug Administration (FDA) for generic product approval.'' *Id.* While Lannett's application is not in the record, according to the affidavit of its Chief Executive Officer, the company sought to import three ''submission batches of . . . finished dronabinol capsules,'' comprised of 100,000 capsules each, which would be tested at both its facility ''and at a clinical laboratory that will conduct bioequivalency testing'' to provide data to support the filing of an Abbreviated New Drug Application (ANDA) with FDA. LX 1, at 6; Tr. 37.[2]

It is undisputed that the dronabinol, which is the subject of Lannett's application, is a schedule I controlled substance. 21 CFR 1308.11(d)(30). However, when synthetic dronabinol in sesame oil is encapsulated in a soft gel capsule, and is an FDA-approved drug, it is a schedule III controlled substance. *Id.* 1308.13(g).

On September 19, 2007, the Deputy Assistant Administrator, Office of Diversion Control, published the Notice of Application. ALJ Ex. 1, at 1. Therein, the Deputy Assistant Administrator specifically noted that ''[p]ursuant to 21 U.S.C. 958(i), the Attorney General shall, prior to issuing a registration under this Section to a bulk manufacturer of a controlled substance in schedule I or II and prior to issuing a registration[sic][3] under 21 U.S.C. 952(a) authorizing the importation of such substances, provide manufacturers holding registrations for the bulk manufacture of the substances an opportunity for a hearing.'' *Id.* (quoting 21 U.S.C. § 958(i)). The Notice of Application then stated that ''[a]ny manufacturer who is presently, or is applying to be, registered with DEA to manufacture such basic classes of controlled substances may 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.'' *Id.* at 1–2.

Thereafter, Rhodes Technologies timely requested a hearing on the application, noting that it is registered as a bulk manufacturer of THC and is therefore ''among the category of firms entitled to a hearing on the proposed registration pursuant to 21 CFR 1301.34(a).'' ALJ Ex. 2, at 1–2. Rhodes further explained that it sought ''to be heard on the issue of whether . . . the proposed registration of [Applicant] as an importer of THC . . . is consistent with the applicable legal standards reflected in the DEA regulations at 21 CFR 1301.34(b) and the Controlled Substances Act at 21 U.S.C. §§ 952(a), 958(a), and 823(a).'' *Id.* at 2.

Mallinckrodt, Inc., another registered manufacturer of THC, also filed comments and objections to the application.[4] ALJ Ex. 3,

[1] Lannett also applied for a registration authorizing it to import methylphenidate and morphine, both of which are schedule II controlled substances. ALJ Ex. 1, at 1. Lannett, however, subsequently withdrew its application to import these two substances. ALJ Ex. 7.

[2] According to the affidavit of Lannett's Chief Executive Officer (CEO), the company sought ''to import one (or possible [sic] two) submission batches of . . . approximately 3,000 capsules.'' LX1, at 6. However, at the hearing, its CEO testified that the Company was seeking permission to import (in finished dosage form) three batches of 100,000 units each. Tr. 37.

[3] The notice mistakenly used the word ''registration'' rather than ''regulation.'' *See* 21 U.S.C. § 958(i). Section 952 is not a registration provision; rather it requires that an importer establish that the proposed importation is permissible under one of the various provisions set forth therein. *See* 21 U.S.C. § 952(a).

[4] Mallinckrodt also requested a hearing on Lannett's applications for registrations as an importer of methylphenidate and morphine. ALJ Ex. 3, at 1. As noted above, *see* n.1, on March 18, 2009, Lannett withdrew its applications for registration to import these two controlled substances.

at 1. Mallinckrodt objected on the grounds that: 1) THC has no currently accepted medical use, and that therefore, it ''is not the type of controlled substance that should be imported unless necessary,'' *id.* at 6; 2) that ''a medical substitute [Marinol] readily exists in sufficient supply which is at least as effective and [which] is much less dangerous,'' and that therefore, Lannett's proposed importation of THC is not ''*necessary* to provided for the medical needs of the United States'' under 21 U.S.C. § 952(a), and that by denying Lannett's application, ''DEA can entirely avoid the risk of such international diversion.'' *Id.* at 7.

Thereafter, both Lannett and the Government moved to dismiss the proceeding on the ground that under 21 U.S.C. § 958(i), a third-party manufacturer such as Rhodes is entitled to request a hearing only where the applicant for an import registration is also a bulk manufacturer of the substance. Motion of Lannett to Dismiss and Terminate Proceedings, at 4. Lannett maintained that it is a ''finished dosage form'' manufacturer, and not a ''bulk manufacturer'' of controlled substances, *id.* at 3, and that therefore, ''there is no jurisdictional basis for a hearing in this matter.'' *Id.* at 2.[5] Relying on a **Federal Register** notice in which I directed an Administrative Law Judge to dismiss a hearing which was docketed when several companies sought to challenge an application to import narcotic raw materials because the objecting companies did not bulk manufacture these substances[6], *see* 72 FR 3417[7] (2007), Lannett also contended that while Rhodes and Mallinckrodt are bulk manufacturers of THC, it ''does not seek to import such substances in bulk form.'' Lannett's Mot. to Terminate, at 5.

The Government supported Lannett's motion, arguing that ''under the express terms of section § 958(i), the applicant also must be a bulk manufacturer'' of the controlled substance in order to trigger the right of another bulk manufacturer to challenge the application for an import registration. Gov. Mot. to Dismiss The Hearing Requested By the Intervenors at 3–4. According to the Government, because Lannett ''is not a bulk manufacturer of any of the controlled substances it seeks to import[,] . . . under the plain terms of Section 958(i) and the quoted language from the **Federal Register** decision [72 FR 3417], the interveners do not have the statutory authority to obtain a hearing.'' *Id.* at 4.

On May 28, 2008, the ALJ issued her ruling on the motion to dismiss. *See* Memorandum To Counsel and Ruling on Request for Hearing. Therein, the ALJ noted that ''[n]one of the parties has asserted that Lannett is a current bulk manufacturer, or is attempting to gain registration as a bulk manufacturer'' of THC. *Id.* at 20. Because ''Lannett is not a bulk manufacturer of tetrahydrocannabinols,'' the ALJ concluded that ''the hearing right provided by § 958(i) is not triggered prior to the DEA issuing a registration to Lannett to import tetrahydrocannabinols.'' *Id.*

The ALJ further noted, however, that ''[t]he rulemaking provision of § 958(i) provides manufacturers, who currently hold registrations as bulk manufactures of a Schedule I or II substances, the right to a hearing before the DEA issues a regulation under § 952(a) that authorizes the importation of a substance that those manufacturers are registered to bulk manufacture.'' *Id.* at 21. According to the ALJ, ''[b]y its plain language, this hearing right does not appear to be limited to situations in which the importer of the controlled substance is also a bulk manufacturer.'' *Id.* The ALJ reasoned, however, that ''[n]othing in the language of the statute signals Congress' intention that the rulemaking authorized by this provision be made after formal [on the record] proceedings,'' and that DEA is required to provide only for notice and comment rulemaking pursuant to 5 U.S.C. § 553(c). *Id.*

The ALJ then addressed whether the Objectors had a right to a hearing under 21 CFR 1301.34(a). *See id.* According to the ALJ, ''[p]ursuant to 21 CFR 1301.34(a) current bulk manufacturers of a Schedule I or II controlled substance are entitled to a hearing on an application for registration to import that substance, if the Administrator is acting under the authority of 21 U.S.C. § 952(a)(2)(B).'' *Id.* The ALJ noted that ''Lannett never explicitly asserted in any of its briefs that it was attempting to import any of the substances at issue under [the authority of section] 952(a)(2)(C),'' the provision which authorizes the importation of a schedule I controlled substance ''necessary to provide for the medical, scientific, or other legitimate needs of the United States . . . in any case in which the Attorney General finds that such controlled substance is in limited quantities exclusively for scientific, analytical, or research uses.'' *Id.* at 22 n.29.

While acknowledging that Lannett sought to use the substances to do various tests which are necessary to file an Abbreviated New Drug Application (ANDA) with the FDA, the ALJ relied on a DEA Policy Statement, which states that dosage form development activities do not constitute research for purposes of the CSA's registration provisions,[8] to conclude that Lannett's activities do not appear to constitute ''research'' for the purpose of section 952(a)(2)(C). *Id.* at 24. In the ALJ's view, this conclusion was significant because ''[i]f this import were under the authority of § 952(a)(2)(C), neither Rhodes nor Mallinckrodt would be entitled to a hearing to determine the details of the importation of the substances at issue or to examine any risks of possible diversion.'' *Id.* Noting that there was ''ambiguity'' as to ''the amounts that Lannett plans to import,'' and that this ''raises an issue of whether the import would preserve the closed system of distribution, or promote security, recordkeeping, and reporting requirements,'' the ALJ reasoned that the proposed importation could only be permitted ''under the authority of section 952(a)(2)(B) and therefore, [the objectors] are entitled to an on-the-record hearing'' pursuant to 21 CFR 1301.34(a).''[9] *Id.* at 25–26. The ALJ thus denied Lannett's and the Government's motions to terminate; she also denied the Government's request to take an interlocutory appeal. *Id.* at 26.

Thereafter, the ALJ conducted a hearing at which Lannett and Rhodes elicited the testimony of witnesses and introduced extensive exhibits into the record, and at which the Government also participated. Thereafter, the parties filed briefs containing their proposed findings of fact, conclusions of law, and argument.[10] Moreover, in its post-hearing brief, the Government again maintained that Rhodes was not entitled to an adjudicatory hearing under either 21 U.S.C. § 958(i) or 21 CFR 1301.34(a), but that it was ''entitled to an informal hearing under section 952(a)(2)(C) and 958(i).'' Gov. Post-Hearing Br. at 4.

On April 6, 2010, the ALJ issued her decision. Therein, the ALJ reiterated the conclusions of her May 2008 ruling that Rhodes was entitled to an on-the-record hearing. Moreover, noting that Lannett (and the Government) also maintained that the application should be considered under section 952(a)(2)(C), the ALJ turned to the question of whether Rhodes was entitled ''to a hearing if § 952(a)(2)(B) does not apply.'' ALJ at 49. The ALJ noted that in several instances, I directed the Office of Administrative Law Judges to dismiss requests for a hearing on the application of an entity to import a narcotic raw material on the ground that the entity which had requested the hearing was not registered as a bulk manufacturer of the same substance. *See id.* (citing 72 FR 3417). The ALJ further noted that subsequent to the publication of these two **Federal Register** notices, the Agency has published (as it did in this case) notices of application for import registrations which have continued to offer hearing rights ''on proposed importations of non-narcotic raw material Schedule I or II controlled substances.'' *Id.* at 51. Reasoning that an Agency has discretionary authority to grant

[5] In its motion, Lannett also represented that it sought to import only ''approximately 3,000 capsules for the purpose of testing them in its laboratory,'' and that it was not seeking to ''import those bulk substances.'' Motion of Lannett to Dismiss and Terminate, at 6–7. However, at the hearing, Lannett's Chief Executive Officer testified that the Company was seeking permission to import (in finished dosage form) three batches of 100,000 units each. Tr. 37.

[6] Indeed, no one in the United States does. *See* Authorized Sources of Narcotic Raw Materials, 73 FR 6843, 6844 (2008) (''The United States, based on long-standing policy, does not cultivate or produce [Narcotic Raw Materials], but relies solely on opium, poppy straw, and [concentrate of poppy straw] produced in other countries for the NRM necessary to meet the legitimate medical needs of the United States.'').

[7] *Importer of Controlled Substances: Correction to Notice of Application,* 72 FR 3417 (2007) (Cody); *Importer of Controlled Substances: Correction to Notice of Application,* 72 FR 3417 (2007) (Rhodes).

[8] *See Clarification of Coincident Activities for Researchers,* 60 FR 55310 (Oct. 31, 1995).

[9] The ALJ never asked Lannett to clarify whether it was seeking permission under subparagraph B, subparagraph C, or both provisions.

[10] In light of the lengthy titles of these briefs, they will be referred to as the respective party's ''Post-Hearing Brief.'' The parties' exceptions to the ALJ's recommended decision will be referred to as their ''Exceptions.''

an on-the-record hearing to the objectors, the ALJ explained that ''there is no purpose to publishing the notice of application and affording the opportunity to object, comment, or request a hearing, unless the [Agency] intends that other importers avail themselves of the opportunity.'' *Id.* The ALJ thus concluded that the Agency ''exercised this authority, and that holding the hearing in this matter was appropriate.'' *Id.* Turning to the merits, the ALJ held that Lannett had not established that its proposed importation was permissible under section 952(a)(2)(B) because it had not shown that ''competition in the domestic market for dronabinol is inadequate and will not be rendered adequate by the registration of additional manufacturers.'' *Id.* at 53. The ALJ further rejected Lannett's contention that it was entitled to import under section 952(a)(2)(C), explaining that the purpose of section 952(a)(2) is to ''establish a strong system of domestic controls, support the domestic manufacturers who bear the cost of these controls, and [to] discourage the expansion of foreign production under less stringent controls.'' *Id.* at 53. The ALJ then observed that the legislative history of the research exception shows that it ''was intended to allow importation of substances for comparative studies on compounds developed abroad.'' *Id.* Noting that ''Lannett seeks to import a total of some 300,000 capsules,'' the ALJ reasoned that ''[w]hatever the limit may be on the quantity that qualifies for the research exception, 300,000 dosage units would likely exceed it.'' *Id.* at 54. The ALJ thus concluded that the proposed importation was not permissible under section 952(a)(2)(C) and recommended that I decline to issue a rule permitting the importation. *Id.* at 58.[11]

While the ALJ recognized that a finding that the proposed importation is permissible under either exception (2)(B) or (2)(C) is a prerequisite to obtaining a registration as an importer, ALJ at 54, she also made findings under each of the public interest factors. With respect to factor one, which directs the Agency to consider the maintenance of effective controls against diversion ''by limiting the importation and bulk manufacture of such controlled substances to a number of establishments which can produce an adequate and uninterrupted supply . . . under adequately competitive conditions for legitimate medical, scientific, research and industrial purposes,'' the ALJ found that ''[t]here is no evidence that competition among [the] manufacturers'' of dronabinol ''or their products is inadequate.'' *Id.* at 56. The ALJ further found ''that there are currently enough registered bulk manufacturers of THC to produce an adequate and uninterrupted supply of this substance under adequately competitive conditions.'' *Id.*

With respect to factor two—the applicant's compliance with applicable State and local law—the ALJ found ''that there is not sufficient evidence in the record to make a finding.'' *Id.* As to factor three—whether the applicant's registration would promote technical advances in the art of manufacturing dronabinol or developing new substances—the ALJ found that there was no evidence on the issue. *Id.* at 57.

With respect to factor four—the applicant's conviction record of offenses related to the manufacture or distribution of controlled substances—the ALJ found that Lannett has never been convicted of such an offense and that this factor supported a finding that its registration ''would be consistent with the public interest.'' *Id.* at 57. Likewise, as to factor five—the applicant's experience in manufacturing controlled substances and the existence of effective controls against diversion—the ALJ found that Lannett ''has expertise in manufacturing and developing pharmaceutical products.'' *Id.* The ALJ also found that its security measures are adequate and ''that there is minimal risk of diversion of dronabinol at Lannett's facility.'' *Id.* The ALJ thus found that this factor supports a finding that its registration ''would be in the public interest.'' *Id.*

Finally, with respect to the sixth factor—''other factors as may be relevant to and consistent with the public health and safety''—the ALJ noted the testimony of Lannett's CEO that granting the application, ''would make more low cost generic drugs available to the public.'' *Id.* However, because Lannett did not produce ''any evidence that its proposed importation would reduce the price [of Dronabinol] to consumers,'' the ALJ concluded that ''the record does not support a finding that this factor weighs either in favor of or against'' the application. *Id.*

Summarizing her findings, the ALJ concluded that ''factor one weighs strongly against a finding that Lannett's registration would be in the public interest,'' and that while factors four and five supported granting the application, they ''are not dispositive.'' *Id.* ''[C]onclud[ing] that a preponderance of the record does not support a finding that Lannett's registration would be in the public interest,'' *id.,* the ALJ recommended that I direct the Office of Diversion Control to issue an Order to Show Cause proposing the denial of its application. *Id.* at 58.

Thereafter, both Lannett and the Government filed exceptions to the ALJ's Decision. The ALJ then forwarded the record to me for final agency action.

Having considered the record as a whole, I agree with the ALJ's holding that Rhodes was entitled to a hearing under section 958(i) even though Lannett is not a bulk manufacturer of THC. While I disagree with the ALJ's conclusion that Lannett has not established that the proposed importation is permissible under section 952(a)(2)(C), I conclude that Lannett has established that it is necessary to import only a portion of the dronabinol.

With respect to the public interest factors, while I generally agree with the ALJ's findings with respect to each of the factors, for reasons explained below, I reject her conclusion that ''factor one weighs strongly against a finding that Lannett's registration would be in the public interest.'' I further conclude that Lannett is entitled to a registration provided that it can adequately justify the amount it seeks to import; however, such registration shall be limited to authorizing it to import a quantity sufficient to conduct the studies necessary for filing an Abbreviated New Drug Application and barring it from subsequent commercial distribution of those quantities imported under this authority.

The Threshold Issue—Was Rhodes entitled to a hearing on either lannett's application for registration or its application for a rule authorizing the importation?

It is undisputed that Lannett does not hold a manufacturer's registration for THC and has never engaged in the bulk manufacture of this substance. Tr. 74. Moreover, it is undisputed that the dronabinol which Lannett seeks permission to import will be in finished dosage form. *Id.* at 37. The record also suggests that the dronabinol will have been bottled prior to the importation, that it will not be repackaged or relabeled, and that none of it will be sold commercially. Tr. 37, 164.

In their exceptions, both Lannett and the Government contend that Rhodes was not entitled to an on-the-record hearing to challenge Lannett's application. Lannett contends that because it is not a bulk manufacturer of THC, ''[t]here is no basis for a hearing under [section] 958(i)'' because this provision '' 'gives the right to request a hearing . . . only in those [cases] in which the applicant for the import registration is a bulk manufacturer and only where the person seeking the hearing is a bulk manufacturer.' '' Lannett Exc., at 2 (quoting 72 FR at 3419). Lanett further contends that the ALJ erred in construing 21 CFR 1301.34(a) to provide a hearing as doing so ''conflicts with the limitation in 21 U.S.C. § 958(i) of such hearings to cases where both the applicant and the party seeking a hearing are bulk manufacturers.'' *Id.* In Lannett's view, ''[e]ven if one considers 21 U.S.C. § 958(i) ambiguous on this issue, the ALJ's interpretation is impermissible and unsupported because it would grant to [the Agency] latitude to act in the absence of statutory prohibition rather than requiring statutory authority in the first instance.'' *Id.* (citing *Chevron U.S.A., Inc.,* v. *Natural Res. Def. Council,* 467 U.S. 837, 842–43 (1984)).

Lannett thus contends that because the regulation ''enacts 21 U.S.C. §§ 952 and 958[,] [it] cannot be read to permit what the statutes prohibit'' and that the Agency's grant of a right to a hearing to third party bulk manufacturers is an *ultra vires* act. *Id.* It likewise argues that the Agency has no discretion to grant a hearing on its application because ''there is no basis for the hearing in the statute and regulations.'' *Id.* at 3.

In its Exceptions, the Government states its agreement with the ALJ's holding that section 958(i) does not require an on-the-record hearing on either the issue of whether Lannett is entitled to be registered or whether it is entitled to a rule authorizing the importation. Gov. Exc. at 3. The Government also states that it agrees with the ALJ's holding that section 958(i) provides an

[11] *Cf. Johnson Matthey,* 67 FR 3904, 39042 (2002) (holding that applicant ''cannot be registered as an importer of NRMs unless the Deputy Administrator finds that Johnson Matthey will be allowed to import NRMs pursuant to 21 U.S.C. 952(a)(1)'').

objector with the right to a hearing on an application for an import registration, only when both the applicant and the objector are bulk manufacturers of the substances. *Id.* at 4.

The Government, however, disagrees with the ALJ's construction of section 958(i) as requiring a hearing on an application for a rule under section 952(a)(2) even where the applicant is not registered as a bulk manufacturer. *Id.* According to the Government, ''section 958(i) calls for 'a [one] hearing,' '' and ''[t]he ALJ's construction mandates a hearing under two separate circumstance, i.e.[,] when all parties are bulk manufacture[r]s and when just the objectors are bulk manufacturers.'' *Id.* The Government further reasons that because section 958(i) ''uses the conjunction 'and,' [this] indicates that both conditions, i.e.[,] the applicant being a bulk manufacturer for purpose of obtaining a registration under Section 958(a) and the objectors being bulk manufacturers for purposes of challenging the proposed importation under [section] 952(a), must be met.'' *Id.*

However, the Government then acknowledges that its argument ''may only highlight the ambiguity in the statute'' and that ''the ALJ's interpretation might be acceptable.'' *Id.* The Government further concedes that because ''it is important for DEA to scrutinize import applications under 21 U.S.C. §§ 958(a) and 823(a), the ALJ's interpretation may be preferable in terms of policy implications.'' *Id.* at 5.

The Government also takes issue with the ALJ's interpretation that 21 CFR 1301.34(a) does not require that an applicant be a bulk manufacturer to trigger the right of bulk manufacturers to a hearing on both the application for registration and the rule authorizing the import. *Id.* at 9. The Government contends that ''[w]hat the ALJ describes as 'discretion' to allow Rhodes to have a hearing under Rule 1301.34(a) (which would not otherwise be authorized under Section 958(i)) is really an interpretation of the rule to expand the persons who may obtain a hearing under Section 958(i),'' and that the Agency ''need not and should not interpret [the rule] to expand the persons who have authority to seek hearings under'' the statute. *Id.* The Government thus concludes that ''Section 958(i) and Rule 1301.34(a) do not give DEA [authority] to authorize hearings to objectors that are not authorized by law.'' *Id.*

Analysis

The resolution of this issue must, of course, begin with the language of the statute and the Agency's regulation. *Gonzales* v. *Oregon,* 546 U.S. 243, 258 (2006). Section 958(i) provides that:

Except in emergency situations as described in section 952(a)(2)(A) of this title, prior to issuing a registration under this section to a bulk manufacturer of a controlled substance in schedule I or II, *and prior* to issuing a regulation under section 952(a) of this title authorizing the importation of such a substance, the Attorney General shall give manufacturers holding registrations for the bulk manufacture of the substance an opportunity for a hearing.

21 U.S.C. § 958(i).

Shortly after the CSIEA's enactment, DEA promulgated the regulation which implements this provision and which is now codified at 21 CFR 1301.34(a). *See* Proposed Regulations Implementing the Comprehensive Drug Abuse Prevention and Control Act of 1970, 36 FR 4928, 4959 (Mar. 13, 1971).[12] In its current form, the rule (which has remained unchanged throughout this proceeding), provides in relevant part:

In the case of an application for registration or reregistration to import a controlled substance listed in Schedule I or II, under the authority of . . . . 21 U.S.C. 952(a)(2)(B), the Administrator shall, upon the filing of such application, publish in the **Federal Register** a notice naming the applicant and stating that such applicant has applied to be registered as an importer of a Schedule I or II controlled substance, which substance shall be identified. A copy of said notice shall be mailed simultaneously to each person registered as a bulk manufacturer of that controlled substance and to any other applicant therefor. Any such person may, within 30 days from the date of publication of the notice in the **Federal Register**, file written comments on or objections to the issuance of the proposed registration, and may, at the same time, file a written request for a hearing on the application . . . . If a hearing is requested, the Administrator shall hold a hearing on the application in accordance with § 1301.41.[13]

21 CFR 1301.34(a).

Also relevant to understanding the scope of section 958(i) and 21 CFR 1301.34(a), are the registration provisions of the Controlled Substances Act (CSA). *See* 21 U.S.C. § 823. Under the CSA, there are only two categories of registration under which a person may lawfully engage in the commercial distribution of schedule I or II controlled substances: 1) as a manufacturer, *see id.* § 823(a); and 2) as a distributor.[14] *Id.* § 823(b). However, neither the CSA nor DEA regulations define the term ''bulk manufacturer.'' *See generally id.* § 802; 21 CFR 1300.01. Nor has the Agency previously defined the term in an adjudication.

Congress did, however, define the terms ''manufacture'' and ''manufacturer.'' Under the CSA, the term ''manufacture'' is broad in scope and includes ''the production, preparation, propagation, compounding, or processing of a drug or other substance . . . and includes any packaging or repackaging of such substance or labeling or relabeling of its container.'' [15] *Id.* § 802(15); *see also id.* (''The term 'manufacturer' means a person who manufactures a drug or other substance.''). By contrast, ''[t]he term 'distribute' means to deliver (other than by administering or dispensing) a controlled substance.'' *Id.* § 802(11); *see also id.* (''The term 'distributor' means a person who so delivers a controlled substance . . . .''). Under an Agency regulation, a manufacturer can lawfully distribute a controlled substance which it is registered to manufacture. *See* 21 CFR 1301.13(e)(1) (table of authorized coincident activities). A distributor cannot, however, lawfully manufacture (even if the activity involves packaging, repackaging, labeling or relabeling) a controlled substance. *See id.*

In section 958(i), Congress clearly instructed the Agency to provide ''an opportunity for a hearing'' on two separate issues: 1) whether to grant an application for an import registration, and 2) whether ''to issu[e] a regulation under section 952(a) . . . authorizing the importation of such a substance.'' 21 U.S.C. § 958(i). Moreover, in enacting the provision, which was enacted at the same time as the CSA, Congress was well aware that under the CSA, both manufacturers registered under section 823(a) and distributors registered under section 823(b) would have authority to engage in the commercial distribution of schedule I or II controlled substances and thus could presumably seek a registration to import a schedule I or II controlled substance.[16] *See* 21 U.S.C. §§ 823(a), 823(b).

In section 958(i), however, Congress made it clear enough that a current bulk manufacturer of a schedule I or II controlled substance is entitled to a hearing on another entity's application for registration to import a schedule I or II controlled substance, only if the applicant is itself ''a bulk manufacturer of the substance.'' 21 U.S.C. § 958(i) (''prior to issuing a registration under this section to

[12] This provision was originally codified at 21 CFR 311.42. In promulgating the final rule, the Bureau of Narcotics and Dangerous Drugs (DEA's predecessor) noted that ''[s]everal manufacturers objected strongly to the proposed § 311.42(b), (c).'' Regulations Implementing the Comprehensive Drug Abuse Prevention and Control Act of 1970, 36 FR 7776, 7777 (Apr. 24, 1971). These provisions of the proposed rule, however, involved the substantive standards for determining whether competition is adequate among domestic manufacturers ''within the meaning'' of section 952(a)(2)(B). *See id.* By contrast, the notice promulgating the Final Rule made no mention of any objections to the language of the hearing provision of subsection(a). *See id.*

[13] This regulation provides that ''[i]n any case where the Administrator shall hold a hearing on any registration or application therefor, the procedures for such hearing shall be governed generally by the adjudication procedures set forth in the Administrative Procedure Act (5 U.S.C. 551–559) and . . . by §§ 1301.42–1301.46 of this part, and by the procedures for administrative hearings under the Act set forth in §§ 1316.41–1316.67 of this chapter.'' 21 CFR 1301.41.

[14] The CSA also authorizes practitioners (including pharmacies) to dispense controlled substances in schedule II (as well as practitioners conducting research with a schedule I controlled substance pursuant to an approved protocol). *See* 21 U.S.C. § 823(f). However, ''[t]he term 'distribute' means to deliver (other than by administering or dispensing) a controlled substance.'' 21 U.S.C. § 802(11). DEA's regulations do, however, allow a practitioner (such as a pharmacy) to engage in a limited amount of distributions to another practitioner, without being registered as a distributor, ''for the purpose of general dispensing by the practitioner to patients.'' 21 CFR 1307.11(a).

[15] The term, however, ''does not include the preparation, compounding, packaging, or labeling of a drug or other substance in conformity with applicable State or local law by a practitioner as an incident to his administration or dispensing of such drug or substances in the course of his professional practice.'' 21 U.S.C. § 802(15).

[16] As explained above, while a distributor's registration conveys only the authority to distribute, as long as the controlled substance is not being repackaged or relabeled, a distributor acts within the scope of its registration.

a bulk manufacturer of a controlled substance in schedule I or II . . . the Attorney General shall give manufacturers holding registrations for the bulk manufacturer of the substance an opportunity for a hearing'').

Indeed, had Congress intended to provide bulk manufacturers with the right to a hearing to challenge *any application* for an importer's registration, it could have simply used the phrase ''applicant to import'' instead of ''a bulk manufacturer'' as it did in subsection (a) of this provision. *See id.* § 958(a) (''The Attorney General shall register an applicant to import . . . a controlled substance in schedule I or II if he determines that such registration is consistent with the public interest . . . .''). This language would clearly have embraced not only the situation in which the applicant for an import registration is a ''bulk manufacturer,'' but also when the applicant is a distributor of the controlled substance. *See Barnhart* v. *Sigmon Coal Co., Inc.,* 534 U.S. 438, 452 (2002) (''[W]hen 'Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.'''') (quoting *Russello* v. *United States,* 464 U.S. 16, 23 (1983) (int. quotations and other citation omitted)).

As found above, Lannett is not a bulk manufacturer of THC. Moreover, as long as Lannett does not repackage or relabel the containers that the dronabinol has been packaged in by its manufacturer, Lannett does not need to hold a manufacturer's registration. Thus, it is clear that under the statute, Rhodes was not entitled to a hearing to challenge Lannett's application for a registration because the latter was not, and need not be, registered as a bulk manufacturer of THC to lawfully distribute the dronabinol for testing.[17]

By contrast, section 958(i) does not clearly provide that a bulk manufacturer's right to challenge the issuance of a regulation under section 952(a) is—as the Government and Lannett maintain—triggered only by the application of a bulk manufacturer (of the substance) to import. The relevant text of section 958(i), which immediately follows the ''prior to issuing a registration . . . to a bulk manufacturer'' clause, states: ''and prior to issuing a regulation under section 952(a) of this title authorizing the importation of such a substance, the Attorney General shall give manufacturers holding registrations for the bulk manufacture of the substance an opportunity for a hearing.'' 21 U.S.C. § 958(i). Construing this provision, the ALJ reasoned that ''[b]y its plain language, this hearing right does not appear to be limited to situations in which the importer of the controlled substance is also a bulk manufacturer.'' Memorandum to Counsel and Ruling on Request for Hearing, at 21.

The Government and Lannett disagree. As noted above, the Government maintains that the insertion of the word ''and'' between the two clauses manifests that the right to a hearing on the issuance of the regulation is also triggered only when the applicant for such a regulation is a bulk manufacturer. Contrary to the Government's contention, the clause is self-contained and seems clear enough. Absent other textual evidence of an intent to limit the hearing right to where the applicant is a bulk manufacturer, Congress's use of the word ''and'' (as opposed to ''or'') to conjoin the two clauses is too thin a reed to conclude that Congress intended for the right to a hearing to challenge the issuance of a regulation under section 952 to be triggered only where an applicant is a bulk manufacturer.

Indeed, had Congress intended to limit the right to challenge the issuance of a regulation only to the instance in which the importer was a bulk manufacturer, it could have clarified that by inserting the same limitation in this clause. Moreover, the Government's proposed construction would exclude from the hearing right any application by a distributor to import a schedule I or II controlled substance. Yet, as the Government then recognizes in its brief, ''it is important for DEA to scrutinize import applications'' to ensure that the proposed import complies with Federal law. Gov. Exc., at 5. This is so whether the importer holds a manufacturer's registration or a distributor's registration.

As for Lannett, it cites the 2007 **Federal Register** notices in which I directed the Office of Administrative Law Judges to dismiss two hearings which were docketed after bulk manufacturers sought to challenge the applications of two entities to import narcotic raw materials because the requesting parties were not registered to manufacturer these substances. Lannett Exc., at 2 (citing 72 FR at 3417–19). The applications were, however, filed under section 952(a)(1), and these notices did not address the separate issue of whether section 958(i) requires the Agency to provide a bulk manufacturer with ''an opportunity for a hearing'' to challenge whether an importation is permissible under section 952(a)(2).

Lannett also argues that ''there [was] no basis for a hearing under 21 CFR 1301.34(a),'' because section 958(i) limits the hearing right ''to cases where both the applicant and the party seeking a hearing are bulk manufacturers.' '' Lannett Exc., at 2. It further contends that ''21 CFR 1301.34(a) enacts 21 U.S.C. §§ 952 and 958 and thus cannot be read to permit what the statutes prohibit.'' *Id.* at 3. Finally, Lannett argues that the ALJ erred in holding that the Agency has discretion to provide the hearing which Rhodes requested. *Id.* According to Lannett, ''[if] there is no basis for the hearing in the statute and regulations, the [Agency's] offer of the hearing was erroneous in the first instance.'' *Id.*

I conclude that it is not necessary to decide whether the ALJ correctly held that Rhodes was entitled to a full evidentiary hearing under 21 CFR 1301.34(a) even though Lannett is not a bulk manufacturer. As held above, section 958(i) obligates the Agency to provide ''an opportunity for a hearing'' to challenge whether Lannett's proposed importation complies with section 952(a). Moreover, while 21 CFR 1301.34(a) appears to limit the Agency's obligation to publish notice of the application and to grant bulk manufacturers a hearing to those instances in which a rule authorizing the importation is sought under 952(a)(2)(B) (*i.e.,* where competition among domestic manufacturers is shown to be inadequate), Lannett ignores that under 958(i), the only instance in which the Agency is not obligated to provide a hearing is ''in emergency situations as described in section 952(a)(2)(A) of this title.'' 21 U.S.C. § 958(i); *see also id.* § 952(a)(2)(A) (authorizing importation of ''such amounts of any controlled substance in schedule I or II . . . that the Attorney General finds to be necessary to provide for the medical, scientific, or other legitimate needs . . . during an emergency in which domestic supplies of such substance or drug are found by the Attorney General to be inadequate''). Accordingly, the plain language of section 958(i) obligates the Agency to provide an opportunity for a hearing to a bulk manufacturer even when importation is sought ''in any case in which the Attorney General finds that such controlled substance is in limited quantities exclusively for scientific, analytical, or research uses[.]'' *Id.* § 952(a)(2)(C).[18]

[17] To make clear, if an applicant for an importer's registration will engage in an activity (such as repackaging or relabeling) which requires that it obtain a manufacturer's registration, it cannot circumvent the hearing requirement of 958(i) by failing to apply for a manufacturer's registration. However, Lannett's proposed activities with the dronabinol do not require that it obtain a manufacturer's registration.

It is noted that on DEA's Application for Registration (Form 225), the Agency recognizes both ''Manufacturer'' and ''Manufacturer BULK'' as different categories of ''Business Activity.'' The Application further recognizes four different stages of manufacturing: 1) ''Bulk synthesis/extraction,'' 2) ''Dosage Form manufacture,'' 3) ''Package/Repackage'' and ''Label/Relabel,'' and 4) ''Non-human consumption.'' However, the Agency has not defined by regulation the term ''Bulk Manufacturer'' and the Government has provided no guidance in this case as to the Agency's view on what distinguishes a ''Bulk Manufacturer'' from a ''Manufacturer'' and which of the above stages it considers to be bulk manufacturing. In any event, because Lannett need not engage in any of the four stages to conduct its tests, it is clear that it does not need to be registered as either a bulk manufacturer or manufacturer.

[18] Subparagraph (2)(C) was not part of the Act as originally enacted in 1970. *See* Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. 91–513, § 1002(a)(2), 84 Stat. 1236, 1285 (1970). Section 1008(h) of the 1970 Act provided the hearing requirement which is now codified at 21 U.S.C. § 958(i). *See* 84 Stat. 1289 (''prior to issuing a regulation under section 1002(a) authorizing the importation of such a substance, the Attorney General shall give manufacturers holding registrations for the bulk manufacture of the substance an opportunity for a hearing'').

In 1984, Congress amended the statute to add subparagraph (2)(C). *See* Continuing Appropriations, 1985-Comprehensive Crime Control Act of 1984, Pub. L. 98–473, § 520, 98 Stat. 1837, 2075 (1984) (codified at 21 U.S.C. § 952(a)(2)(C)). While in this statute, Congress redesignated subsection (h) as subsection (i), it did not amend the hearing requirement to limit it to those cases in which importation was sought on the ground that competition is inadequate. *See id.* § 525, 98 Stat. 2076–77.

As for Lannett's argument that the regulation is *ultra vires* because it provides for a hearing on the issue of its registration when the statute does not, it is noted that the ALJ's pre-hearing ruling was somewhat unclear as to whether Rhodes was

Continued

In her various rulings, the ALJ concluded that section 958 does not require that the Agency provide an ''on the record'' hearing as part of the rulemaking process under section 952(a). ALJ Memorandum to Counsel, at 21; ALJ at 48. This holding is amply supported by Supreme Court precedent. *See United States* v. *Florida East Coast Ry.,* 410 U.S. 224 (1973); *see also United States* v. *Allegheny-Ludlum Steel Corp.,* 406 U.S. 742 (1972).

To the extent Lannett contends that the Agency did not have discretion to grant Rhodes a formal hearing on its application (in essence, an argument that the Agency has granted too much process), the Supreme Court has long recognized that ''the formulation of procedures was basically left within the discretion of the agencies to which Congress had confided the responsibility for substantive judgments.'' *Vermont Yankee Nuclear Power Corp.,* v. *NRDC, Inc.,* 435 U.S. 519, 524 (1978). As the Court recognized, ''this principle [is] 'an outgrowth of the congressional determination that administrative agencies and administrators will be familiar with the industries which they regulate and will be in a better position than federal courts or Congress itself to design procedural rules adapted to the peculiarities of the industry and the tasks of the agency involved.'' *Id.* at 525 (quoting *FCC* v. *Schreiber,* 381 U.S. 279, 290 (1965)). *See also FCC* v. *Pottsville Broadcasting Co.,* 309 U.S. 134, 143 (1940) (administrative agencies ''should be free to fashion their own rules of procedure and to pursue methods of inquiry capable of permitting them to discharge their multitudinous duties''). Consistent with this authority, this Agency has long held that the Administrator has discretion under section 958(i) to grant or deny a hearing to any party on issues concerning the importation of controlled substances even where the party seeking the hearing was not entitled to a hearing because it did not hold a registration to manufacture the substance sought to be imported. *See Importation of Controlled Substances—Application,* 43 FR 35403 (1978) (McNeilab, Inc.).[19] Because it is clear that under section 958(i), Rhodes was entitled to a hearing on the issue of whether a regulation should issue authorizing the importation, I conclude that it is within the Agency's discretion to provide a formal hearing on the application.

Is Lannett's proposed importation permissible under Section 952(a)(2)?

Under section 952(a)(2), it is unlawful to import into the United States a schedule I or II controlled substance ''except that . . . such amounts of any controlled substance in schedule I or II . . . that the Attorney General finds to be necessary to provide for the medical, scientific, or other legitimate needs of the United States'' may be imported if one of three findings is made. 21 U.S.C. § 952(a)(2). These are:

(A) During an emergency in which domestic supplies of such substance or drug are found by the Attorney General to be inadequate,

(B) [i]n any case in which the Attorney General finds that competition among domestic manufacturers of the controlled substance is inadequate and will not be rendered adequate by the registration of additional manufacturers under section 823 of this title, or

(C) in any case in which the Attorney General finds that such controlled substance is in limited quantities exclusively for scientific, analytical, or research uses[.]

21 U.S.C. § 952(a)(2).

In its Post-Hearing Brief, Lannett contends that its proposed importation is permissible under both subparagraphs B and C.[20] Lannett's Post-Hearing Br., at 6–7. While the Government took no position on whether the importation is permissible under subparagraph B, it argues that ''Lannett's application should be assessed under'' subparagraph C and appears to endorse Lannett's position that the importation is permissible on this basis. Gov. Post-Hearing Br., at 11; *see also id.* at 12 (''The phrase 'limited quantities exclusively for . . . research uses' should not be construed to have a numerical limit. If the amounts are definitive and will be used for research, then Section 952(a)(2)(C) should apply.''). By contrast, Rhodes argues that Lannett has not established that the proposed importation is permissible under either provision. Rhode's Post-Hearing Br., at 66–77.

In its Exceptions, Lannett further argues that because its application presents ''no increased risk of diversion,'' the Agency can grant its application ''without regard to 21 U.S.C. § 952(a).'' Lannett's Exc., at 3. In Lannett's view, because the overarching purpose of the CSA and the CSIEA is to prevent the diversion of controlled substances, and there is no evidence that granting its application will increase the risk of diversion, DEA can disregard section 952(a). *Id.* at 3–4. As support for this proposition, Lannett cites *Penick Corp.* v. *DEA,* 491 F.3d 483, 489 n.8 (D.C. Cir. 2007), and *Noramco of Delaware, Inc.,* v. *DEA,* 375 F.3d 1148, 1153 (D.C. Cir. 2004), both of which upheld Agency decisions to grant registrations to importers of narcotic raw materials under 21 U.S.C. § 958(a) without analyzing the adequacy of competition under factor one of the public interest standard (21 U.S.C. § 823(a)(1)) because there was no evidence that granting the registration would increase the risk of diversion.

Lannett's argument fails, however, because both cases involved an application of the Agency's discretionary authority under the public interest standard used to determine whether to grant an application for registration, and not whether an importation was permissible under section 952(a)(2)(B). *See Penick,* 491 F.3d at 486–488 n.5;[21] *Noramco,* 375 F.3d at 1153. As the D.C. Circuit recognized in *Penick,* ''section 823(a)'s enumerated factors represent components of the public interest rather than independent requirements for registration and thus, the [Agency] may find a registration consistent with the public interest even if one (or possibly more) of the public interest factors is not satisfied.'' 491 F.3d at 490 (citing *Johnson Matthey, Inc.,* 60 FR 26050, 26052 (1995) (''It is well established that the Deputy Administrator is not required to make findings with respect to each of the [section 823(a)] factors, but has discretion to give each factor the weight he deems appropriate, depending upon the facts and circumstances in each case.'')); *cf. Air Line Pilots Ass'n* v. *Dep't of Transp.,* 791 F.2d 172, 177–78 (D.C. Cir. 1986).

By contrast, section 952(a)(2) sets forth the affirmative requirement that the Agency make one of three findings before issuing a regulation approving a proposed importation of a schedule I or II controlled substance. As section 952 makes plain, DEA does not have discretion under the statute to authorize an importation in the absence of a finding that one of the three conditions exists. Accordingly, I reject Lannett's argument that because there is no evidence that the importation will increase the risk of diversion, the Agency can grant its application without regard to whether its proposed importation is permissible under section 952.

A. Is Lannett's proposed importation permissible under Subparagraph B?

As the ALJ recognized, to import pursuant to this provision, an applicant must show that competition among domestic manufacturers of the controlled substance is inadequate and will not be rendered adequate by the registration of additional manufacturers. ALJ at 52. In her decision, the ALJ found that Lannett had failed to establish that competition among domestic manufactures of dronabinol is inadequate. ALJ at 52–53. More specifically, she noted that Lannett's evidence was largely confined to the testimony of its CEO as to several

entitled to a hearing on the issue. *See* Memorandum to Counsel and Ruling on Request for Hearing, at 26 (''I have found that the only exception to the general prohibition of importation of controlled substances that would apply here is an importation authorized under § 952(a)(2)(B). Therefore, I find that Rhodes [is] entitled to a formal 'on the record' hearing on the application[ ] to import the substance that [it] respectively holds registration to bulk manufacture.''). However, Lannett did not seek clarification from the ALJ as to whether the hearing would encompass the public interest factors applicable to the issue of its registration, and it chose to put on evidence on the factors. I thus conclude that it has waived its argument.

[19] I acknowledge that the 2007 Notice of Correction called into question the Agency's discretionary authority to hold hearings in cases involving narcotic raw materials where the parties who requested a hearing were not manufacturers of the substance as required under both section 958(i) and 21 CFR 1301.34(a). However, as explained above, under section 958(i), Rhodes was entitled to a hearing to challenge the issuance of a regulation authorizing the importation.

[20] Lannett does not claim that an emergency exists because domestic supplies of dronabinol are inadequate.

[21] Indeed, in *Penick,* the D.C. Circuit noted that the objectors did not challenge the rulemaking aspect of the proceeding. *See* 491 F.3d, at 488 n.5. Moreover, under section 952(a)(1), the importation of narcotic raw material does not require a finding of inadequate competition. *See* 21 U.S.C. § 952(a)(1) (authorizing importation of ''such amounts of crude opium, poppy straw, concentrate of poppy straw, and coca leaves . . . as the Attorney General finds to be necessary to provide for medical, scientific, or other legitimate purposes'').

unsuccessful efforts the company made to find a domestic manufacturer/supplier of dronabinol during the period of 2002–2003. ALJ at 53. The ALJ further noted that ''Lannett did not offer any evidence as to the market for bulk dronabinol in 2009,[22] about competition in that market, or about the factors'' set forth in the Agency's regulation for determining whether competition among the domestic manufacturers of bulk dronabinol is inadequate. *Id.* (citing 21 CFR 1301.34(d), (e), and (f)).[23]

As for Lannett's evidence regarding its inability (circa 2002–03) to find a domestic manufacturer to supply it, the ALJ properly held that this evidence was too stale to support a finding of inadequate competition. Notably, the statutory text requires a finding that competition ''*is inadequate and will not be rendered adequate* by the registration of additional manufacturers.'' 21 U.S.C. § 952(a)(2)(B) (emphasis added). Consistent with the statute, DEA has previously held that the relevant time period for assessing the adequacy of competition is at the time of the hearing. *Cf. Penick Corp., Inc.,* 68 FR 6947, 6950 (2003) (''The Deputy Administrator agrees with the ALJ that Penick has demonstrated that the opiate API market was not operating under 'adequately competitive conditions' as of the date of the hearing.''). Moreover, Lannett offered no evidence to rebut Rhode's contention that there are currently multiple domestic manufacturers which are able to supply the bulk dronabinol market. Tr. 387–88; RX 28, at 5–7. Accordingly, I agree with the ALJ that Lannett has failed to show that proposed importation is permissible under section 952(a)(2)(B).

A. Is Lannett's proposed importation permissible under Subparagraph C?

Lannett (supported by the Government) argues that the importation is nonetheless permissible under the exception for '' 'limited quantities exclusively for scientific, analytical, or research uses.' '' Lannett's Exc., at 7 (quoting 21 U.S.C. § 952(a)(2)(C)). As found above, the evidence shows that Lannett seeks to import three batches of 100,000 dosage units each for the purpose of conducting testing to establish the stability of the drug and to show that the dronabinol is bioequivalent to Marinol, the FDA-approved legend drug; Lannett will then submit the data to the FDA as part of an ANDA. Lannett also established that the reason why the test batches are 100,000 dosage units is because the FDA generally requires that the test batch be the same size as the eventual production batch and that if Lannett's ANDA is approved, it does not want to limit the production batches ''to less than 100,000 dosage units per batch.'' LX 1, at 3–4; LX 4, at 6 (''OGD's Procedure and Policy Guide . . . 22–90 . . . requires that the test batch size be determined based on the proposed production batch.''); *see also* 21 CFR 314.94(a)(9) (an ANDA ''shall contain the proposed or actual master production record . . . to be used for the manufacture of a commercial lot of the drug product'').

Lannett's CEO also testified that as a general matter, to comply with FDA's standards, three batches must be produced to validate the manufacturing process, although the batches need not necessarily be made consecutively. Tr. 37–39. However, the FDA's *Guidance on the Packaging of Test Batches* states that ''ANDAs . . . are usually approved based on data from a single test batch.'' LX 3, at 1. Moreover, it is not clear why the validation of the additional batches requires that they be imported into the United States.[24]

The ALJ concluded that the proposed importation is not permissible under subparagraph C. In so concluding, the ALJ relied on the testimony of a former agency official who was involved in drafting the provision and reasoned that the legislative history of the amendment indicates ''that (1) the purpose of the broad prohibition on importing Schedule I and II bulk active pharmaceutical ingredients was to establish a strong system of domestic controls, support the domestic manufacturer who bears the cost of these controls, and discourage the expansion of foreign production under less stringent controls; and (2) the research exception from the prohibition was intended to allow importation of substances for comparative studies on compounds developed abroad.'' ALJ at 53.

The ALJ also relied on a 1995 Policy Statement which was issued in response to the practice of some companies that were engaging in dosage-form development activities, including bulk manufacturing, without obtaining a manufacturer's registration; these firms claimed that their activities were coincident activities which could be lawfully performed under a researcher's registration. *Id.* at 54; *see also Clarification of Coincident Activities for Researchers,* 60 FR 55310, 55311 (1995).[25]

The ALJ observed that ''[a] major concern expressed in the *Clarification* was that some dosage form manufacturers had obtained large quantities of Schedule II substances under a researcher registration and did not have in place the safeguards required of a firm registered to manufacture. A continuing theme in discussions of the research exception is that the quantities involved are small.'' ALJ at 53–54. Noting that Lannett seeks to import 300,000 capsules, the ALJ reasoned that ''[w]hatever the limit may be on the quantity that qualifies for the research exception, 300,000 dosage units would likely exceed it.'' *Id.* The ALJ thus found that the importation ''does not qualify as an importation for research purposes within the meaning of 21 U.S.C. § 952(a)(2)(C).''

As originally enacted, subsection 952(a)(2) did not contain this provision. *See* 84 Stat. 1242. Rather, the exception was enacted as part of the Dangerous Drug Diversion Control Act of 1984. *See* Continuing Appropriations, 1985-Comprehensive Crime Control Act of 1984, Public Law 98–473, tit. V, § 520, 98

[22] It is acknowledged that Lannett introduce several exhibits providing data as to the price of dosage-form dronabinol over a multi-year period which concluded shortly before the hearing convened. This data included the average unit and wholesale prices of dronabinol (both generic and branded) sold by various manufacturers and distributors to non-retail settings, as well as the average retail price of a prescription for various strengths and quantities of both the generic and branded drugs (which were also listed by manufacturer) at retail and mail-order pharmacies. LX 5–8. Lannett did not, however, offer any evidence as to the costs of bulk dronabinol in the domestic market at the time of its application.

While the average wholesale and retail prices of dosage form dronabinol might provide some evidence that competition is inadequate among the domestic manufacturers of bulk dronabinol, Lannett did not put on any testimony, let alone that of an expert, to explain how this evidence shows that competition in the bulk dronabinol market is inadequate. Moreover, Lannett does not even cite this evidence in its brief.

[23] Summarized, these factors include: 1) ''[t]he extent of price rigidity''; 2) ''[t]he extent of service and quality competition among the domestic manufacturers for shares of the domestic market''; 3) ''[t]he existence of substantial differentials between domestic prices and the higher of prices generally prevailing in foreign markets or the price at which the applicant . . . is committed to undertake to provide such products in the domestic market in conformity with the Act''; 4) ''[t]he existence of competitive restraints imposed upon domestic manufacturers by governmental regulations''; and 5) ''[s]uch other factors as may be relevant to the determinations required under this paragraph.'' 21 CFR 1301.34(d).

DEA regulations further direct that ''[i]n considering the scope of the domestic market, consideration shall be given to substitute products which are reasonably interchangeable in terms of price, quality and use,'' *id.* § 1301.34(e); and ''[t]he fact that the number of existing manufacturers is small shall not demonstrate, in and of itself, that adequate competition among them does not exist.'' *Id.* § 1301.34(f).

[24] According to FDA's recently published *Guidance for Industry, Process Validation: General Principles and Practices* (Jan. 2011), of which I take official notice, FDA Current Good Manufacturing Process ''regulations define the various aspects of validation. For example, § 211.110(a), *Sampling and testing of in-process materials and drug products,* requires that control procedures '' . . . be established to monitor the output and *to validate* the performance of those manufacturing processes that may be responsible for causing variability in the characteristics of in-process material and the drug product.'' ' '' *Process Validation,* at 6. Continuing, the Guidance states that ''[u]nder this regulation, even well-designed processes must include *in-process* control procedures to assure final product quality.'' *Id.* (emphasis added).

[25] The *Clarification* specifically noted that some of these firms were engaged in the ''production of batches as mandated by the'' FDA and further stated that:

[f]or purposes of 21 CFR part 1301, the following dosage form development activities are not considered research and must be conducted under a manufacturer registration: (a) Activities for the purpose of satisfying regulatory requirements such as FDA submission or good manufacturing practice; (b) activities associated with establishing the manufacturing processes and procedures, including, but not limited to, production of material used for pilot, scale-up and reformulation studies, as well as the studies themselves; and (c) all activities associated with such development including, but not limited to, bioavailability, formulation, stability, and validation. While these activities may be considered research under FDA requirements, 21 CFR part 1301 must be read within the context of the CSA and its attendant requirements concerning quotas, recordkeeping, security and reporting. DEA does not consider such dosage form development to be a coincident research activity as contemplated by 21 CFR 1301.22(b); the production of material for such activities is manufacturing.

60 FR at 55311.

Stat. 1837, 2075 (1984). Significantly, neither the statute nor the Agency's regulations define the provision's critical terms of ''in limited quantities'' and ''exclusively for scientific, analytical, or research uses.'' 21 U.S.C. § 952(a)(2)(C). *See id.* § 951 (defining only the terms ''import'' and ''customs territory of the United States'' and otherwise providing that the definitions of the CSA apply); *id.* § 802 (CSA's definitions); *see also* 21 CFR Part 1300; *id.* § 1312.02.

Rhodes points to the legislative history of both the original CSIEA and the Amendment, as well as the testimony of the former DEA official who was involved in drafting the provision, and contends that subparagraph (2)(C) was only intended to address the statute's failure to provide a mechanism (as had a Treasury Department regulation enacted under the Narcotic Manufacturing Act of 1960) to allow researchers to import foreign-source materials to perform comparative studies on them when the domestic supply is inadequate because the foreign-source material is unique and/or to develop reference standards. Rhodes Post-Hearing Br. at 76; RX 31, at 20–23. Rhodes cites the written testimony of the former official, who, in turn, cites the Senate Report Committee Report, which states:

Under current 21 U.S.C. 952(a)(2), the importation of controlled substance in Schedules I and II . . . for medical, scientific, and other legitimate purposes is generally limited to those cases in which there is a finding that competition among domestic manufactures is inadequate. This requirement has created difficulties in situations which routinely arise when researchers need specific substances for comparative studies on foreign-developed compounds that are unique in their manufacture. Section 518 [this amendment] would accommodate the need to import such substances by adding a new provision to 21 U.S.C. 952(a)(2) that would allow importation of limited quantities of controlled substances for purposes exclusive of ultimate scientific, analytic, or research uses.

S. Rep. No. 98–225, at 269–70, *reprinted at* 1984 U.S.C.C.A.N. 3182, 3451–52.

According to the former official:

The principal purpose of this statutory amendment was . . . to restore an important exception to the prohibition that had (perhaps inadvertently) been left out of the 1970 Act. The commercial purposes for which Lannett wishes to import these substances merely to satisfy FDA regulatory requirements, in my view, certainly do not relate to the purpose for which this amendment is intended. These are not unique substances or laboratory standards, and are not being sought for any such characteristics or purposes.

RX 31, at 21. Rhodes thus argues that because Lannett's purpose in importing the dronabinol is to establish that it is bioequivalent to the domestically-produced innovator drug and not to show that it is a unique substance, ''its proposed importation does not fit within the purposes for which th[e] provision is intended.'' Rhodes Post-Hearing Br. at 75.

Rhodes also argues that its position is supported by 21 CFR 1312.13(a)(3) & (4), which were promulgated to implement section 952(a)(2)(C). *Id.* at 75–76. As Rhodes observes, this regulation ''requires a finding 'that the domestic supply of any controlled substance is inadequate for scientific studies, and that the importation of that substance for scientific purposes is only for delivery' '' to a person registered or exempt from registration under section 957 and 958, ''or 'that the importation of the controlled substance is for ballistics[26] or other analytical or scientific purposes, and that the importation of that substance is only for delivery''' to a person registered or exempt from registration under section 957 and 958. *Id.* (quoting 21 CFR 1312.13(a)(3) & (4)). According to the former agency official, ''it is no accident that the terminology used in subsections 1312.13(a)(3) and (a)(4) reflects the language previously cited in the Treasury Department regulations implementing the Narcotics Manufacturing Act of 1960.'' RX 31, at 22.[27] Rhodes further argues that a narrow reading of the term ''research'' is supported by the longstanding Federal policy which prohibited the importation of narcotic drugs with limited exceptions for narcotic raw materials as were necessary to provide for medical and other legitimate uses. Rhodes Resp. to Gov's. & Lannett's Exceptions, at 10–11 (citing Narcotic Drugs Import and Export Act, § 2(b), Public Law 67–227, 42 Stat. 596 (1922)).

It cannot be disputed that prior to the enactment of the CSIEA, longstanding Federal policy prohibited the importation of narcotics other than raw materials such as crude opium and coca leaves. The CSIEA, however, substantially modified this policy by allowing for the importation of additional controlled substances, including not only schedule I and II drugs, in accordance with the provisions of subsection 952(a)(2), but also nonnarcotic schedule III through V drugs, under the provisions of subsection 952(b). *See* 21 U.S.C. § 952(b). Significantly, in the case of a nonnarcotic schedule III controlled substance, the latter provision does not condition approval of a proposed importation upon a finding that competition among domestic manufacturers of the drug is inadequate. Rather, the statute requires only that the drugs be ''imported for medical, scientific, or other legitimates uses,'' and that ''in the case of any nonnarcotic controlled substance in schedule III, [pursuant to] such import permit, notification, or declaration, as the Attorney General may by regulation prescribe.'' *Id. See also* 21 CFR 1312.30(a) (requiring import permit for synthetic dronabinol in sesame oil encapsulated in soft gelatin in an FDA approved product). Given that the CSIEA fundamentally changed Federal policy as to the scope of permissible importations of controlled substances, its provisions, and not historical practice, are dispositive.[28]

Thus, even conceding Rhodes' contention that ''[t]he principal purpose'' of the provision was to restore the exception provided for under the Treasury Department regulation, that does not mean that this was Congress' *exclusive purpose.* To the contrary, the statutory text is the best evidence of Congress's purpose, *see West Va. Univ. Hospitals, Inc.,* v. *Casey,* 499 U.S. 83, 98 (1991); and section 952(a)(2)(C)'s text is substantially broader in scope than what was necessary to effectuate the purpose indicated in the legislative history of limiting the exception to allowing researchers to obtain ''specific substances for comparative studies on foreign-developed compounds that are unique in their manufacture.'' S. Rep. No. 98–225, at 269–70.

Moreover, under the former Treasury Department regulation, importation ''for the purpose of research or spot check analyses to establish or maintain proper chemical and therapeutical standards of their products'' was deemed to be ''for scientific purposes.'' 21 CFR 307.151 (1962). Other than the fact that Lannett seeks to do the stability and bioequivalence studies to support an ANDA (and eventually market a drug), there is little difference between the nature of these studies and those permitted under the former regulation. Indeed, as is made clear by the testimony of the former official, it is not the

[26] The former official explained that the term ''ballistics'' ''refers to the scientific examination of drugs, typically in dosage form, by forensic chemists to determine their origin, properties, identifying marks, or impurities, usually for evidentiary purposes.'' RX 31, at 22.

[27] Under former 21 CFR 307.151, the Commissioner of Narcotics was authorized to ''issue a formal permit to certain classes of persons desiring to import any narcotic drug or drugs . . . for scientific purposes only.'' Under this regulation, importation was ''limited to narcotic drugs not readily available to the applicant from sources within the United States, unless questions of origin, types or particular methods of productions are elements of the research objectives.''

The regulation, however, further provided that:

Applicants for import permits licensed under section 8 of the Narcotics Manufacturing Act of 1960, who as part of their manufacturing business maintain branch or subsidiary manufacturing establishments in foreign countries, or are themselves a branch or subsidiary of a foreign parent organization, may be issued import permits for occasional imports of samples of the products of these foreign branches, subsidiaries or parent organizations for the purpose of research or spot check analyses to establish or maintain proper chemical and therapeutical standards of their products. However, an applicant will not be granted import permits to make continuous or regular imports of samples of recurring batches or lots of the same product for routine factory controls.

Id. Section 8 of the 1960 Act was the predecessor of 21 U.S.C. § 823(a) and required that ''every person'' engaged in the manufacture of narcotic drugs obtain ''a separate license for the manufacture of each basic class of narcotic drug.'' Narcotics Manufacturing Act of 1960, § 8, Public Law 86–429, 74 Stat. 55, 62 (1960).

[28] As noted above, the ALJ also reasoned that ''the purpose of the broad prohibition on importing Schedule I and II bulk active pharmaceutical ingredients was to establish a strong system of domestic controls, support the domestic manufacturers who bear the cost of these controls, and discourage the expansion of foreign production under less stringent controls.'' ALJ at 54. However, Lannett is not seeking to import ''bulk active pharmaceutical ingredients,'' but rather a drug in finished dosage form. Moreover, both the manufacturers of the active pharmaceutical ingredient and the finished dosage form are located in Switzerland, a country which is a party to the Single Convention on Narcotic Drugs, and which has agreed to comply with extensive control measures.

nature of the activity which Lannett will use the dronabinol for, but the fact that it seeks to eventually commercially distribute the drug which, in Rhodes' view, bars the importation under the research exception.

However, performing stability and bioequivalence studies on a drug clearly constitutes a ''scientific, analytical or research use[]'' as required by the statute even if these activities are being done for the purpose of being able to obtain approval to commercially distribute a drug. While subsection (a)(2)(C) further requires that the importation be ''exclusively'' for these purposes, effectuating the statutory mandate can be accomplished by prohibiting the subsequent commercial distribution of any of the drugs imported under this provision.

Contrary to Rhodes' position, neither the Agency's regulation nor the 1995 Policy Statement preclude the Agency from construing 952(a)(2)(C) to permit the importation. Under the regulation, the Agency may authorize an importation upon a finding that ''the controlled substance is for ballistics *or other analytical or scientific purposes.*'' 21 CFR 1312.13(a)(4) (emphasis added). Notably, the regulation does not contain any language limiting the scope of what constitutes ''analytical or scientific purposes.'' *Id.* Thus, on its face, the regulation clearly permits importation to establish stability and bioequivalence of a drug.

The ALJ's reliance on the 1995 Policy Statement was also misplaced. Most significantly, the Policy Statement did not address the issue of what activities constitute ''scientific, analytical, or research uses'' under subsection 952(a)(2)(C), but rather the question of whether manufacturers could engage in ''the production of material'' in batch sizes for dosage-form development activities under a researcher's registration. 60 FR at 55311. The scale of the latter activity clearly raised a variety of concerns involving the security and recordkeeping of the bulk active pharmaceutical ingredients used in the manufacturing process, and DEA's regulations have long imposed far more extensive security and recordkeeping requirements on manufacturers than they have on researchers. *Compare* 21 CFR 1304.22(a) (recordkeeping requirement for manufacturers) *with id.* 1304.22(c) (recordkeeping requirements for researchers); *compare* 21 CFR 1301.72 and 1301.73 (physical security controls for non-practitioners) *with id.* 1301.75 (physical security controls for practitioners and researchers).

While these concerns remain valid, they are not implicated by Lannett's proposed importation. Notably, Lannett seeks to import controlled substances which are already in finished dosage form and packaged. The importation thus does not raise the same security and recordkeeping concerns as does the practice of manufacturing large batches of dosage form drugs from active pharmaceutical ingredients. Because the 1995 Policy Statement clearly did not consider this situation, I decline to give it any weight in the analysis. *Cf. Skidmore* v. *Swift & Co.,* 323 U.S. 134, 140 (1944).

Subsection (a)(2)(C) does, however, require that the importation be ''in limited quantities.'' Based on this requirement, the ALJ reasoned that ''[w]hatever the limit may be on the quantity that qualifies for the research exception, 300,000 dosage units would likely exceed it.'' ALJ at 54.

As noted above, in enacting this provision, Congress did not define the term ''limited quantities.'' I conclude that the best reading of this provision is that it does not impose an absolute numerical limit on the size of a permissible importation, but rather, requires an assessment of the quantity sought to be imported in light of the substance's intended use.

Accordingly, while the absolute size of a proposed importation does not necessarily render it impermissible, absent a clear justification to support the quantity, the importation does not comply with the ''limited quantities'' standard. An applicant must therefore justify the amount of the proposed importation based on the underlying purpose of the research.[29] However, where the applicant justifies the amount of the proposed importation, the importation qualifies as ''in limited quantities.''

Here, Lannett's evidence shows that FDA generally requires that the test batch be the same size as the eventual production batches and that these batches should be 100,000 dosage units. LX 1, at 3–4; LX 3, at 1–2. Moreover, according to the FDA Guidance, the samples which are used to conduct stability and bioequivalency tests should be selected from ''packaged product'' and should either ''be systematically selected at intervals from the packaging line,'' or selected by ''a random sampling procedure.'' LX 3, at 3–4. The same FDA Guidance Document includes a table for solid oral dosage form drugs indicating the number of bottles that should be selected based on the number of dosage units in a package. *Id.* at 4. This table suggests that where a drug is packaged in 100 dosage unit bottles, only twenty-eight bottles are needed for the requisite stability and bioequivalence studies and for reserves; this table thus also suggests that a figure closer to Lannett's original request to import 3,000 dosage units may suffice. *Id.* Moreover, even crediting the testimony that validating the manufacturing process requires the production of three batches, Lannett has not established why it is necessary for it to import the additional two batches.

It is further noted that under an FDA regulation, that Agency ''strongly recommends that . . . any person planning to conduct a bioavailability or bioequivalence study submit the proposed protocol for the study to FDA for review prior to the initiation of the study'' and that FDA ''will offer advice with respect to whether'' the design of the ''study is appropriate'' and whether ''[t]he proposed chemical and statistical analytical methods are adequate.'' 21 CFR 320.30. Lannett should therefore submit its protocol for review by the FDA and should obtain advice from FDA as to whether its study will be acceptable if the samples are selected prior to importation at the manufacturer (as the Guidance suggests) rather than selected after importation. Lannett should then submit its protocol and the FDA's review of the protocol to this Agency. If Lannett still seeks to import the remaining two batches, it must provide further evidence to support its contention that these batches need to be imported to validate the manufacturing process.

Accordingly, I conclude that conducting stability and bioequivalency testing constitutes ''scientific, analytical, or research uses'' and is a permissible basis for importing a schedule I or II controlled substance under section 952(a)(2)(C). However, before the Agency issues a regulation approving Lannett's proposed importation, Lannett must demonstrate that the quantity is ''limited'' in accordance with the above discussion.

* * * * *

While I hold that the importation of a schedule I or II controlled substance for the purpose of conducting stability and bioequivalency testing in support of an ANDA is permissible under section 952(a)(2)(C), the provision must be construed in a manner that also gives effect to the language of 952(a)(2)(B). Accordingly, any controlled substances which are imported under the authority of 952(a)(2)(C) cannot thereafter be commercially distributed. Moreover, where an importer succeeds in obtaining FDA approval to market a drug, subsequent importation of the drug for commercial distribution must comply with the applicable provision of section 952. Thus, where an FDA-approved drug has been placed in schedule II, or involves a narcotic drug in schedules III through V, an applicant will be granted permission to import only if it establishes ''that competition among domestic manufacturers is inadequate and will not be rendered adequate by the registration of additional manufacturers under section 823.'' 21 U.S.C. § 952(a)(2)(B).

Is Lannett entitled to a registration?

As held above, section 958(i) does not provide a bulk manufacturer with the right to a hearing on the issue of whether Lannett was entitled to a registration. While the ALJ recognized as much, she nonetheless allowed the objectors to litigate the issue and made recommended findings. *See* ALJ at 48, 55–58. The ALJ further concluded that granting Lannett's application for registration would be inconsistent with the public interest. *Id.* at 58.

Having concluded that the objectors were not entitled to a hearing on the issue of whether Lannett was entitled to be registered,

[29] DEA has extensive regulations governing the conduct of research using controlled substances. For example, under DEA's regulations, a researcher is required to submit a protocol setting forth, *inter alia,* a ''[d]escription of the research to be conducted, including the number and species of research subject, the dosage to be administered, the route and method of administration, and the duration of the project,'' as well as a ''[s]tatement of the security provisions for storing the controlled substances . . . and for dispensing [them] in order to prevent diversion.'' 21 CFR 1301.18(a). Moreover, ''[i]n the case of a clinical investigation with controlled substances listed in Schedule I, the application shall submit three copies of a Notice of Claimed Investigational Exemption for a New Drug (IND) together with a statement of the security provisions . . . to, and have such submission approved by, the'' FDA. *Id.* 1301.18(b).

the ALJ should not have allowed the objectors to litigate the issue. However, because Lannett may be entitled to the issuance of a rule authorizing the importation, I conclude that it is appropriate to issue a declaratory order on the issue of whether Lannett has established its entitlement to be registered. *See* 5 U.S.C. § 554(e) (''The agency, with like effect as in the case of other orders, and in its sound discretion, may issue a declaratory order to terminate a controversy or remove uncertainty.'').

Pursuant to section 303(a) of the CSA, ''[t]he Attorney General shall register an applicant to manufacture controlled substances in schedule I or II if he determines that such registration is consistent with the public interest and with the United States obligations under international treaties, conventions, or protocols in effect on May 1, 1971.'' 21 U.S.C. § 823(a). ''In determining the public interest,'' section 303(a) directs the Attorney General to consider the following factors:

(1) Maintenance of effective controls against diversion of particular controlled substances and any controlled substances in schedule I or II compounded there from into other than legitimate medical, scientific, research, or industrial channels, by limiting the importation and bulk manufacture of such controlled substances to a number of establishments which can produce an adequate and uninterrupted supply of these substances under adequately competitive conditions for legitimate medical, scientific, research, and industrial purposes;

(2) compliance with applicable State and local law;

(3) promotion of technical advances in the art of manufacturing these substances and the development of new substances;

(4) prior conviction record of applicant under Federal and State laws relating to the manufacture, distribution, or dispensing of such substances;

(5) past experience in the manufacture of controlled substances, and the existence in the establishment of effective controls against diversion; and

(6) such other factors as may be relevant to and consistent with public health and safety.

Id. It is well settled that the Agency need not make findings as to all of the factors and that it may give each factor the weight it deems appropriate in determining the public interest. *See Novelty, Inc.,* v. *DEA,* 571 F.3d 1176, 1181 (D.C. Cir. 2009).

While there is insufficient evidence to make findings with respect to factors two, three, and six, the record establishes that Lannett has experience in the manufacture and development of pharmaceutical products and that it maintains effective controls against diversion (factor five). The record also establishes that Lannett has not been convicted of an offense related to the manufacture or distribution of controlled substances (factor four). Both of these findings support the conclusion that granting Lannett's application for a registration would be consistent with the public interest.

The ALJ found that Lannett had not shown that competition among domestic manufactures of dronabinol is inadequate and that the current manufacturers were incapable of producing an adequate and uninterrupted supply of this substance (factor one). Relying on *Lyle E. Craker,* 74 FR 2101 (2009), the ALJ thus concluded this factor ''weighs strongly against a finding that Lannett's registration would be in the public interest,'' and concluded that the record does not support granting its application.

I conclude, however, that *Craker* does not require that Lannett's application be denied. As the D.C. Circuit has held, ''section 823(a)'s enumerated factors represent components of the public interest rather than independent requirements for registration and thus, the [Agency] may find a registration consistent with the public interest even if one (or possibly more) of the public interest factors is not satisfied.'' *Penick,* 491 F.3d at 490. As *Penick* recognized, the principal purpose of factor one is to provide the Agency with authority ''to maintain control over diversion 'by limiting the [number of firms engaged in the] importation and bulk manufacture' of controlled substances.'' *Id.* at 491.

Craker involved an application to manufacture a schedule I controlled substance on a continuing basis. By contrast, the activity for which Lannett seeks an importer's registration (to perform stability and bioequivalency testing) does not involve an activity of a continuing nature, but rather, three separate acts (at most) of importation. As such, granting its application does not raise the same concerns with respect to the Agency's ability to maintain effective controls against diversion.

Accordingly, I conclude that factor one does not preclude the issuance of an import registration to Lannett, subject to the condition that its authority to import dronabinol as a schedule I drug be limited to the quantity which is necessary to support an ANDA.[30] I therefore conclude that upon providing adequate justification for the quantity of the importation, Lannett's registration would be consistent with the public interest.[31] 21 U.S.C. § 823(a).

Order

Lannett is hereby directed to file with this Office its testing protocol and an itemization setting forth the various quantities it needs to import for bioequivalency and stability studies, as well as reserves. If FDA requires that it import the entire batch that will be used for bioequivalency and stability testing and will not permit it to select its test samples from the production batch and import only those quantities, Lannett should provide evidence supporting this. Finally, if Lannett intends to pursue importation of the additional batches, it must provide additional justification for doing so. Lannett must serve a copy of all filings on the objectors. Lannett's submission shall be due no later than 90 days from date of the issuance of this Order; Lannett shall timely inform this Office of any delays in obtaining a response from FDA.[32] It is further ordered that Lannett's application for a registration to import dronabinol be held in abeyance.

Dated: November 15, 2012

Michele M. Leonhart

Administrator

[FR Doc. 2013–24621 Filed 10–21–13; 8:45 am]

BILLING CODE 4410–09–P

[30] DEA has long held that it has authority to impose conditions on a registration. *See Alfred Khalily,* 64 FR 31289 (1999); *Gordon M. Acker, D.M.D.,* 53 FR 50309 (1988).

[31] Nor does the record establish any reason why granting Lannett's application would be inconsistent with the United States' obligations under international treaties and the Single Convention. *See Penick Corp.,* 491 F.3d at 492–93.

[32] The Objectors shall have thirty days from the date of receipt of Lannett's filing to submit a response.

DEPARTMENT OF LABOR

Employee Benefits Security Administration

169th Meeting of the Advisory Council on Employee Welfare and Pension Benefit Plans; Notice of Meeting

Pursuant to the authority contained in Section 512 of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. 1142, the 169th open meeting of the Advisory Council on Employee Welfare and Pension Benefit Plans (also known as the ERISA Advisory Council) will be held on November 4–5, 2013.

The meeting will take place in C5521 Room 4, U.S. Department of Labor, 200 Constitution Avenue NW., Washington, DC 20210 on November 4, from 1 p.m. to approximately 5:00 p.m. On November 5, the meeting will start at 8:30 a.m. and conclude at approximately 4:00 p.m., with a break for lunch. The morning session on November 5 will be in C5521 Room 1. The afternoon session on November 5 will take place in Room S–2508 at the same address. The purpose of the open meeting on November 4 and the morning of November 5 is for the Advisory Council members to finalize the recommendations they will present to the Secretary. At the November 5 afternoon session, the Council members will receive an update from the Assistant Secretary of Labor for the Employee Benefits Security Administration (EBSA) and present their recommendations.

The Council recommendations will be on the following issues: (1) Successful Retirement Plan Communications for Various Population Segments, (2) Locating Missing and Lost Participants, and (3) Private Sector Pension De-risking and Participant Protections. Descriptions of these topics are available on the Advisory Council page of the EBSA Web site at *http://www.dol.gov/ebsa/aboutebsa/erisa_advisory_council.html.*

Organizations or members of the public wishing to submit a written statement may do so by submitting 30 copies on or before October 28, 2013 to Larry Good, Executive Secretary, ERISA Advisory Council, U.S. Department of Labor, Suite N–5623, 200 Constitution Avenue NW., Washington, DC 20210. Statements also may be submitted as email attachments in text or pdf format transmitted to *good.larry@dol.gov*. It is requested that statements not be included in the body of an email. Statements deemed relevant by the Advisory Council and received on or before October 28 will be included in the record of the meeting and made available in the EBSA Public Disclosure Room. Do not include any personally identifiable information (such as name, address, or other contact information) or confidential business information that you do not want publicly disclosed.

Individuals or representatives of organizations wishing to address the Advisory Council should forward their requests to the Executive Secretary or telephone (202) 693–8668. Oral presentations will be limited to ten minutes, time permitting, but an extended statement may be submitted for the record. Individuals with disabilities who need special accommodations should contact the Executive Secretary by October 28, 2013 at the address indicated.

Signed at Washington, DC, this 17th day of October, 2013.

Phyllis C. Borzi,

Assistant Secretary, Employee Benefits Security Administration.

[FR Doc. 2013–24626 Filed 10–21–13; 8:45 am]

BILLING CODE 4510–29–P

OFFICE OF MANAGEMENT AND BUDGET

Calendar Year 2013 Cost of Outpatient Medical, Dental, and Cosmetic Surgery Services Furnished by Department of Defense Medical Treatment Facilities; Certain Rates Regarding Recovery From Tortiously Liable Third Persons

AGENCY: Office of Management and Budget, Executive Office of the President.

ACTION: Notice.

SUMMARY: By virtue of the authority vested in the President by section 2(a) of Public Law 87–603 (76 Stat. 593; 42 U.S.C. 2652), and delegated to the Director of the Office of Management and Budget (OMB) by the President through Executive Order No. 11541 of July 1, 1970, the rates referenced below are hereby established. These rates are for use in connection with the recovery from tortiously liable third persons for the cost of outpatient medical, dental and cosmetic surgery services furnished by military treatment facilities through the Department of Defense (DoD). The rates were established in accordance with the requirements of OMB Circular A–25, requiring reimbursement of the full cost of all services provided. *The CY13 Outpatient Medical, Dental, and Cosmetic Surgery rates* referenced are effective upon publication of this notice in the **Federal Register** and will remain in effect until further notice. Previously published inpatient rates remain in effect until further notice. Pharmacy rates are updated periodically. A full disclosure of the rates is posted at the DoD's Uniform Business Office Web site: *http://www.tricare.mil/ocfo/mcfs/ubo/mhs_rates.cfm.*

Sylvia M. Burwell,

Director.

[FR Doc. 2013–24330 Filed 10–21–13; 8:45 am]

BILLING CODE 3110–01–P

NUCLEAR REGULATORY COMMISSION

[Docket No. 50–391; NRC–2008–0369]

Tennessee Valley Authority; Watts Bar Nuclear Plant, Unit 2

AGENCY: Nuclear Regulatory Commission.

ACTION: Environmental assessment and finding of no significant impact; issuance.

SUMMARY: The U.S. Nuclear Regulatory Commission (NRC) is considering extending the latest construction completion date specified in Construction Permit No. CPPR–92 issued to Tennessee Valley Authority (permittee, TVA) for the Watts Bar Nuclear Plant (WBN), Unit 2.

ADDRESSES: Please refer to Docket ID NRC–2008–0369 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–2008–0369. 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.* 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 request to extend the construction permit expiration date, dated May 17, 2012, is available electronically in ADAMS under Accession No. ML12143A346.
- *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.

SUPPLEMENTARY INFORMATION:

I. Introduction

The NRC is considering extending the latest construction completion date specified in Construction Permit No. CPPR–92 issued to Tennessee Valley Authority (permittee, TVA) for the Watts Bar Nuclear Plant (WBN), Unit 2. The facility is located at the permittee's site on the west branch of the Tennessee River approximately 50 miles northeast of Chattanooga, Tennessee. Therefore, as required by section 51.21 of Title 10 of the *Code of Federal Regulations* (10 CFR), the NRC performed an environmental assessment. Based on the results of the environmental assessment that follows, the NRC has determined not to prepare an environmental impact statement for the action of extending the completion date of the construction permit, and is issuing a finding of no significant impact.

II. Environmental Assessment

Identification of the Proposed Action

The proposed action would extend the latest construction completion date of Construction Permit No. CPPR–92 from March 31, 2013, to September 30, 2016. TVA submitted the construction permit request by letter dated May 17, 2012 (ADAMS Accession No. ML12143A346). TVA submitted the request to extend the construction permit at least 30 days before the expiration of the existing permit, therefore, in accordance with 10 CFR 2.109(a), the existing construction permit will remain in effect until the NRC staff has completed the review of the request.

The proposed extension will not allow any work to be performed that is not already allowed by the existing construction permit. The extension will merely grant the permittee more time to complete construction in accordance with the previously approved construction permit.

The Need for the Proposed Action

The proposed action is necessary to give the permittee adequate time to complete construction of WBN Unit 2 given their latest estimate to completion. The construction permit for WBN Unit 2 was originally issued on January 23, 1973. The permit listed the earliest date for completing WBN Unit 2 as November 1, 1976, and the latest date for completion as May 1, 1977. The completion date of the WBN Unit 2 construction permit has been extended numerous times since 1977, mainly for construction delays.

In a July 14, 2000, letter, TVA confirmed that WBN Unit 2 met the NRC's definition of a deferred plant, as described in Generic Letter (GL) 87–15, ''Policy Statement on Deferred Plants.'' By letter dated, August 3, 2007, and in accordance with the policy specified in GL 87–15, TVA informed the Commission of its intent to complete construction and licensing of WBN Unit 2 by April 1, 2012. TVA provided the information requested in GL 87–15, and also informed the Commission that it would resume construction activities no sooner than December 3, 2007. These activities were within the scope of the construction permit, which was set to expire December 31, 2010. By letter dated May 8, 2008, TVA requested the construction permit completion date be extended from December 31, 2010, to March 31, 2013. The NRC granted the extension of the permit completion date by order dated July 7, 2008.

In March of 2012, TVA completed a detailed review of the status of WBN 2 construction and developed a revised estimate of the time necessary to complete the project. The results of the review came up with a completion range of September 2015 to June 2016, with the most likely date being December 2015. TVA is requesting September 30, 2016, to ensure the entire completion range is covered, including a few extra months in case of additional delay.

Environmental Impacts of the Proposed Action

The environmental impacts associated with the construction of the facility have been previously discussed and evaluated in TVA's Final Environmental Statement for construction (FES–CP) of WBN, Units 1 and 2, issued on November 9, 1972 (ADAMS Accession No. ML073470580). Since TVA is a corporate agency of the Federal government, the Atomic Energy Commission (AEC), the precursor agency to NRC, agreed that TVA was the lead agency for preparing and circulating detailed environmental statements for TVA nuclear plants. TVA consulted with the AEC in preparing the environmental statement and incorporated AEC's comments and recommendations in the final environmental statement.

The NRC staff evaluated the environmental impacts of construction and operation of this plant, issuing comments on TVA's FES–CP as part of its review. In December 1978, the NRC staff issued NUREG–0498, ''Final Environmental Statement Related to Operation of Watts Bar Nuclear Plant Units 1 and 2,'' (ADAMS Accession No. ML082540803) for the operating-license stage (FES–OL), which addressed environmental impacts of construction activities not addressed previously in TVA's FES–CP. The activities included: (1) Construction of the transmission route for the Watts Bar—Volunteer 500 kilovolt line, (2) construction of the settling pond for siltation control for construction runoff at a different location from that originally proposed in the FES–CP, and (3) the relocation of the blowdown diffuser from the originally proposed site indicated in the FES–CP. The staff addressed the terrestrial and aquatic environmental impacts in the FES–OL, as well as historic and archeological impacts, and concluded that the assessment presented in the FES–CP remains valid.

The NRC issued NUREG–0498, Supplement 1 (FES–95) in April 1995 (ADAMS Accession No. ML081430592) to re-evaluate the environmental issues before deciding to issue the operating license for WBN Unit 1. Environmental issues evaluated included changes to regional demography, natural resource use, meteorology, ecology, impacts to humans and the environment, severe accident mitigation design alternatives, and socioeconomic impacts, including environmental justice issues. The staff concluded that there were no significant changes to the environmental impacts discussed in the 1978 FES–OL due to changes in plant design or operation, or changes in the environment. Furthermore, the staff concluded that no additional impacts not previously discussed in the NRC's 1978 FES–OL related to construction of Unit 2 were expected.

On February 15, 2008, TVA submitted ''Watts Bar Nuclear Plant (WBN)—Unit 2—Final Supplemental Environmental Impact Statement [FSEIS] For the Completion and Operation of Unit 2,'' (ADAMS Accession No. ML080510469) to the NRC. This FSEIS was completed in June 2007, and was submitted in support of TVA's operating license application for WBN Unit 2. It also included TVA's evaluation of the environmental impacts of construction.

The NRC staff reviewed TVA's 2008 FEIS and in May 2013, the NRC issued NUREG–0498, Supplement 2 (FES–2013) (ADAMS Accession Nos. ML13144A092—Vol. 1 and ML13144A039—Vol. 2) to describe the environmental impacts associated with completing construction and subsequently operating, WBN Unit 2. Additionally, FES–2013 covers issues that have changed since the publication of 1978 FES–OL, or were introduced subsequent to the publication of FES–95. Issues that were either not included in the previous versions of NUREG–0498, or issues that needed updating, include groundwater quality, public services, noise, socioeconomic impacts, severe accident mitigation alternatives, cultural and historical resources, environmental justice, greenhouse gas emissions, and cumulative impacts.

FES–2013 reviews the impacts on the environment of operating WBN Unit 2 and since the majority of environmentally disruptive activities have been completed, the findings in FES–2013 will bound any further environmental impacts as a result of construction activities. In FES–2013, the NRC staff concluded that the impacts from operation of WBN Unit 2 associated with water use, aquatic ecology, terrestrial resources, design basis accidents, socioeconomics, the radiological exposure and nonradiological wastes and effluents, decommissioning, air quality and land use are generally consistent with the impacts disclosed in the FES–OL, and FES–95 documents. The NRC staff concluded that impacts associated with operation of WBN Unit 2 on groundwater quality, public services, noise, transportation infrastructure, cultural and historical resources, greenhouse gas emissions, and severe accidents would be small. The staff also concluded that operation of the WBN Unit 2 would not result in disproportionately high and adverse human health or environmental effect to any of the minority and low-income communities near the WBN site. The NRC staff also considered the cumulative impacts from past, present, and reasonably foreseeable future actions. The NRC staff concluded that the potential cumulative impacts from

the issues evaluated in FES–2013, with the exception of aquatic ecology, would be small. The staff concluded that the overall cumulative impact to the aquatic ecology from all past, present and future activities is large; however, the incremental impact from the operation of WBN Unit 2 would be minor and would not be noticeable in comparison.

The permittee has no plans to construct additional transmission lines or disturb any land not discussed in previous environmental reviews. Completed construction of WBN Unit 2 includes major structures such as the containment, turbine building, control building, and equipment such as the reactor pressure vessel, reactor coolant system piping, and steam generators. Installation of equipment shared with WBN Unit 1, such as diesel generators, was completed prior to issuance of the Unit 1 operating license in 1996. Therefore, most of the construction impacts discussed in the previous versions of environmental documents have already occurred. The remaining construction activities will take place within structures already completed. Therefore extending these types of construction activities an additional three and half years out from March 31, 2012, to September 31, 2016, as previously approved by order dated July 7, 2008, does not involve any different impacts or a significant change to those impacts described and analyzed in any of the previous environmental documents (FES–CP, FES–OL, FES–95, FES–2013).

Based on the foregoing, the NRC staff has concluded that the proposed action would have no significant environmental impact. Since this action would only extend the period of construction activities described in the FES, it does not involve any different impacts or a significant change to those impacts described and analyzed in any of the previous environmental documents (FES–CP, FES–OL, FES–95, FES–2013).

Environmental Impacts of the Alternatives to the Proposed Action

A possible alternative to the proposed action would be to deny the request, or the no-action alternative. This alternative would result in expiration of the construction permit for Watts Bar, Unit 2. This option would require submittal of another application for construction in order to allow the permittee to complete construction of the facility with no significant environmental benefit. The environmental impacts of the proposed action and alternative action are similar.

Alternative Use of Resources

Since the permittee has no plans to construct additional transmission lines or disturb any land not discussed in previous environmental reviews, the construction of major structures such as the containment, turbine building, control building, intake pumping station, and equipment such as the reactor pressure vessel, reactor coolant system piping, and steam generators and diesel generators were already completed prior to issuance of the Unit 1 operating license in 1996, the remaining construction activities will take place within structures already completed. Spreading these activities across three and half more years does not involve the use of resources not previously considered in the environmental documents already discussed for Watts Bar, Units 1 and 2 (FES–CP, FES–OL, FES–95, FES–2013).

Agencies and Persons Consulted

In accordance with its stated policy, on August 14, 2013, the staff consulted with officials from the State of Tennessee, including Anthony Hogan, Deputy Director of Radiological Health, Tennessee Department of Environment and Conservation, regarding the environmental impact of the proposed action. The State officials had no comments.

III. Finding of No Significant Impact

Based on the details provided in the environmental assessment, which is incorporated by reference, the NRC staff concludes that the proposed action of extending the latest construction completion date of Construction Permit No. CPPR–92 from March 31, 2013, to September 30, 2016, does not involve any different impacts or a significant change to those impacts described and analyzed in the original environmental impact statement or its supplements. Therefore, the NRC staff has determined that extending the construction completion date will not have a significant effect on the quality of the human environment because the major construction activities have already occurred, and the work being extended out for three and half more years is within previously disturbed areas at the site within the existing structures. Accordingly, the NRC has determined not to prepare an environmental impact statement for the proposed action.

This finding and documents related to this action such as the permittee's request for extension dated May 17, 2012 (ADAMS Accession No. ML12143A346) and related environmental documents (FES–CP, FES–OL, FES–95, and FES–2013 (ADAMS Accession Nos. ML073470580, ML082540803, ML081430592, and ML13144A092—Vol. 1/ ML13144A039—Vol. 2, respectively)), are available electronically at 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.*''

Dated at Rockville, Maryland this 27th day of September 2013.

For the Nuclear Regulatory Commission.

Farideh E. Saba,

Acting Chief, Plant Licensing Branch II–2, Division of Operating Reactor Licensing, Office of Nuclear Reactor Regulation.

[FR Doc. 2013–24275 Filed 10–21–13; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

[NRC–2013–0001]

Sunshine Act Meetings

DATES: Weeks of October 21, 28, November 4, 11, 18, 25, 2013.

PLACE: Commissioners' Conference Room, 11555 Rockville Pike, Rockville, Maryland.

STATUS: Public and Closed.

Week of October 21, 2013

There are no meetings scheduled for the week of October 21, 2013.

Week of October 28, 2013—Tentative

Thursday, October 31, 2013

10:00 a.m. NRC All Employees Meeting (Public Meeting); Marriott Bethesda North Hotel; 5701 Marinelli Road, Rockville, MD 20852

Week of November 4, 2013—Tentative

There are no meetings scheduled for the week of November 4, 2013.

Week of November 11, 2013—Tentative

There are no meetings scheduled for the week of November 11, 2013.

Week of November 18, 2013—Tentative

Thursday, November 21, 2013

9:00 a.m. Briefing on Spent Fuel Pool Safety and Consideration of Expedited Transfer to Dry Casks (Public Meeting); (Contact: Kevin Witt, 301–415–2145).

This meeting will be webcast live at the Web address—*http://www.nrc.gov/.*

Week of November 25, 2013—Tentative

There are no meetings scheduled for the week of November 25, 2013.

* * * * *

Additional Information

The Briefing on Flooding and Other Extreme Weather Events scheduled on October 16, 2013, was postponed. The Meeting with the Advisory Committee on the Medical Uses of Isotopes and the Briefing on Proposed Rulemaking Concerning the Medical Use of Byproduct Material scheduled on October 18, 2013, were postponed.

* * * * *

The schedule for Commission meetings is subject to change on short notice. To verify the status of meetings, call (recording)—301–415–1292. Contact person for more information: Rochelle Bavol, 301–415–1651.

* * * * *

The NRC Commission Meeting Schedule can be found on the Internet at: *http://www.nrc.gov/public-involve/public-meetings/schedule.html*.

* * * * *

The NRC provides reasonable accommodation to individuals with disabilities where appropriate. If you need a reasonable accommodation to participate in these public meetings, or need this meeting notice or the transcript or other information from the public meetings in another format (e.g. braille, large print), please notify Kimberly Meyer, NRC Disability Program Manager, at 301–287–0727, or by email at *Kimberly.Meyer-Chambers@nrc.gov*. Determinations on requests for reasonable accommodation will be made on a case-by-case basis.

* * * * *

Members of the public may request to receive this information electronically. If you would like to be added to the distribution, please contact the Office of the Secretary, Washington, DC 20555 (301–415–1969), or send an email to *Darlene.Wright@nrc.gov*.

Dated: October 17, 2013.

Rochelle C. Bavol,

Policy Coordinator, Office of the Secretary.

[FR Doc. 2013–24868 Filed 10–18–13; 4:15 pm]

BILLING CODE 7590–01–P

POSTAL REGULATORY COMMISSION

[Docket No. R2013–11; Order No. 1847]

Rate Adjustment

AGENCY: Postal Regulatory Commission.

ACTION: Notice.

SUMMARY: The Commission is noticing a recent Postal Service filing seeking postal rate adjustments based on exigent circumstances. This notice informs the public of the filing, invites public comment, and takes other administrative steps.

DATES: *Comments are due:* November 6, 2013. *Reply Comments are due:* November 20, 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:

Table of Contents

I. Introduction
II. Postal Service Filing
III. Subsequent Procedural Steps
IV. Ordering Paragraphs

I. Introduction

On September 26, 2013, the Postal Service filed an exigent rate request with the Commission pursuant to 39 U.S.C. 3622(d)(1)(E) and subpart E of 39 CFR 3010.60 *et seq.*[1] The Exigent Request seeks an ''across the board'' increase averaging 4.3 percent for market dominant postal products and services, effective January 26, 2014. Exigent Request at 2.

In a related case (a Type 1–A filing), also filed September 26, 2013, the Postal Service proposes an increase, on average, of 1.6 percent for the same set of products and services based on the annual adjustment allowed under 39 U.S.C. 3622(d)(1) and 39 CFR part 3010 subpart B.[2]

This Order provides public notice of the Exigent Request; establishes Docket No. R2013–11 for consideration of the Exigent Request; establishes an expedited procedural schedule consistent with the Commission's intention to issue a determination within 90 days of the Postal Service's filing; provides other information concerning the Exigent Request; and takes related administrative steps.

II. Postal Service Filing

Background. The Exigent Request is filed pursuant to 39 U.S.C. 3622(d)(1)(E) and the Commission's rules implementing that section, 39 CFR Part 3010, subpart E.

The Postal Service provides a procedural history leading to the filing of the Exigent Request. Exigent Request at 3–7. It indicates that the Exigent Request, which it characterizes ''as a complete update to its original request,'' is ''premised on the recent recession as an exigent event.'' *Id.* at 1, 2.

In Order No. 1059, the Commission stated:[3]

> If the Postal Service wishes to pursue its Exigent Request, it must complete the submission of its entire case to the Commission. A complete case would include all information, materials, and testimony on which the Postal Service would rely to demonstrate that its Exigent Request satisfies the causal nexus of ''due to,'' as interpreted by the Commission in Order No. 864, as well as the remaining requirements of section 3622(d)(1)(E).

The Postal Service represents that ''[t]he instant filing is intended to constitute an 'entire case,' as contemplated by Order No. 1059.'' Exigent Request at 7.

Although the Postal Service captioned the Exigent Request as Docket No. R2010–4R, it indicates that its filing constitutes an entire case as contemplated by Order No. 1059. Because the filing is complete and to avoid any ambiguity about the record concerning the instant Request, the Commission establishes Docket No. R2013–11 for consideration of the Postal Service's Exigent Request. The Commission concludes that such an approach is appropriate, given the 90-day statutory deadline for its decision, and its need not only to manage this proceeding on an expedited basis, but also in harmony with its need to manage its entire administrative calendar and other responsibilities.[4]

Proposed rates. The Postal Service proposes price increases to recover approximately $1.78 billion in annual contribution. *Id.* at 2. It characterizes this as ''a modest proportion'' of the total contribution lost as a result of the recession. *Id.* at 2, 11.

The proposed prices increase, on average, by 4.3 percent and are spread

[1] Renewed Exigent Request of the United States Postal Service in Response to Commission Order No. 1059, September 26, 2013 (Exigent Request). *See also* Docket Nos. R2010–4 and R2010–4(R). Subpart E, captioned Rules for Rate Adjustments in Extraordinary and Exceptional Circumstances (Type 3 Adjustments), consists of the set of provisions appearing at 39 CFR 3010.60 *et seq.*

[2] *Id.* at 7. *See* Docket No. R2013–10, United States Postal Service Notice of Market-Dominant Price Adjustment, September 26, 2013 (Notice).

[3] Docket No. R2010–4R, Order Addressing Motion to Supplement and Related Filing, December 20, 2011, at 6 (Order No. 1059).

[4] The documents filed by the Postal Service as part of its Exigent Request, will be transferred to and be included in this docket.

among the classes (and all products) as uniformly as practicable, *i.e.,* in an across-the-board fashion. *Id.* at 2, 12, 35. The Postal Service states that the Governors have determined that this approach represents ''a reasonable and equitable way of recovering contribution lost due to the recession . . . .'' *Id.* at 12.

The average increase by class and product appears in the table below. A full schedule of the proposed increases is provided in Attachment A to the Exigent Request.

POSTAL SERVICE'S PROPOSED EXIGENT PRICE INCREASES

Product or service	Percent change
First Class Mail:	
Single-Piece Letters & Cards	4.276
Presort Letters & Cards	4.291
Flats	4.627
Parcels	4.349
First-Class Mail International	2.393
Total First-Class Mail	4.281
Standard Mail:	
Letters	4.259
Flats	4.283
Parcels	4.335
High Density and Saturation Letters	4.212
High Density and Saturation Flats/Parcels	4.261
Carrier Route	4.288
EDDM—Retail	4.167
Total Standard Mail	4.264
Periodicals:	
Outside County	4.297
Within County	4.306
Total Periodicals	4.297
Package Services:	
Alaska Bypass	4.232
Bound Printed Matter Flats	4.626
Bound Printed Matter Parcels	4.484
Media Mail/Library Mail	4.304
Inbound Surface Parcel Post (at UPU Prices)	0.000
Total Package Services	4.303
Special Services:	
Total Ancillary Services	4.372
International Ancillary Services	4.188
Address Management Services	3.542
Caller Service	4.329
Credit Card Authentication	5.000
International Business Reply Mail Service	2.819
Money Orders	4.042
Post Office Box Service	4.177
Customized Postage	4.308
Stamp Fulfillment Services	5.005
Total Special Services	4.318

Id. at 7–8 (adapted from Table 1).

Contents. The Exigent Request includes an introduction summarizing the filing (Part I); a procedural history (Part II); a table of percentage rate changes (Part III); a discussion addressing the requirements of subpart E of part 3010 (Parts IV through IX); and a description of attachments (Part X). *Id.* at 9 through 45. The discussion in Parts IV through IX addresses extraordinary or exceptional circumstances (Part IV); the necessity of the requested contribution (Part V); honest, efficient, and economical management (Part VI); reasonable and equitable (Part VII); harmonization of exigent increases with past market dominant increases (Part VIII); and the timing of the Exigent Request (Part IX). *Id.* at 9 through 45.

In support of its Exigent Request, the Postal Service filed statements by Thomas E. Thress, Stephen J. Nickerson, and Altaf Taufique. The Postal Service states that the Thress statement is an update to his statement of November 2011, and estimates the effect of the recession on mail volumes. *Id.* at 3. It states that the Nickerson statement calculates the amount of contribution lost due to those volume losses, explains why the exigent price increases are necessary, and describes actions the Postal Service has taken to save costs. *Id.* It states that the Taufique statement presents the proposed price increases and explains why they are reasonable and equitable. *Id.*

The Exigent Request also includes thirteen supporting library references (of which ten are public and three are non-public); and two attachments. *Id.* Attachment A, captioned Changes to Mail Classification Schedule, is presented in legislative format and includes rate schedules and classification changes. Attachment B, captioned List of Supporting Materials, identifies three statements referred to above and the public and non-public library references. The library references include:

USPS–R2010–4R/2 First-Class Mail Worksheets
USPS–R2010–4R/3 Standard Mail Worksheets
USPS–R2010–4R/4 Periodicals Worksheets
USPS–R2010–4R/5 Package Services Worksheets
USPS–R2010–4R/6 Special Services Worksheets
USPS–R2010–4R/7 Product Cost & Contribution Estimation Model (Public Version)
USPS–R2010–4R/8 Cost Factor Development (Public Version)
USPS–R2010–4R/9 Revenue and Volume Forecast Materials (Public Version)
USPS–R2010–4R/10 Decomposition of Mail Volume Into Sources of Change
USPS–R2010–4R/11 Calculation of Contribution Lost from Recession-Related Volume Losses
USPS–R2010–4R/NP1 Product Cost & Contribution Estimation Model (Non-Public Version)
USPS–R2010–4R/NP2 Cost Factor Development (Non-Public Version)
USPS–R2010–4R/NP3 Revenue and Volume Forecast Materials (Non-Public Version)

Confidential treatment. In Attachment B, the Postal Service incorporates by reference the Application of the United States Postal Service for Nonpublic Treatment of Materials filed as Attachment D to its Docket No. R2010–4 Request (July 6, 2010).

III. Subsequent Procedural Steps

Additional information. The Commission may require the Postal Service to provide clarification of its request or to provide information to gain a better understanding of the request or the justification for specific rate adjustments. 39 CFR 3010.62.

Public hearing. The Commission will hold a public hearing on the request. 39 CFR 3010.65(b). The Commission preliminarily allocates three days for public hearings (October 30, October 31, and November 1, 2013); however, the actual number of days will depend on the nature of the circumstances giving rise to the request and the clarity and completeness of the supporting materials the Postal Service provides with its request. 39 CFR 3010.65(d).

Submission of questions. Interested persons may submit to the Commission suggested relevant questions that might be posed during the public hearing.[5] 39 CFR 3010.65(c). These questions, and any explanatory materials submitted to clarify the purpose of the questions, are to be filed in accordance with section 3001.9 no later than October 24, 2013, and will become part of the administrative record of this proceeding. 39 CFR 3010.65(c).

Post-hearing participation—initial and reply comments. Following the conclusion of public hearings and submission of any supplementary materials, interested persons may submit written comments, no later than November 6, 2013, on: (1) The sufficiency of the justification for an exigent rate adjustment; (2) the adequacy of the justification for adjustments in the amounts requested by the Postal Service; and (3) whether the specific rate adjustments requested are reasonable and equitable. 39 CFR 3010.65(f)(1) through 3010.65(f)(3).

[5] The procedures the Commission has established in subpart E do not include any provision for formal intervention. Interested persons submitting questions for the hearing and/or comments are to follow the procedures discussed in this Order and codified in 39 CFR 3001.9 (method of filing); 39 CFR 3010.65.

Reply comments may be filed by the Postal Service and other interested persons no later than November 20, 2013. 39 CFR 3010.65(g).

Filing method. To ensure inclusion in the formal docket, all submissions from interested persons in this proceeding must be filed online as provided by rule 9 of the Commission's rules of practice, unless a waiver is obtained. 39 CFR 3001.9. Submissions that do not conform to the rules of practice for online filings and do not obtain a waiver from the online filing requirements will be treated as informal statements of views and shall be placed in a separate file to be maintained by the Secretary as provided in 39 CFR 3001.20b.

Public Representative. Pursuant to 39 U.S.C. 505, the Commission hereby appoints James Waclawski to serve as an officer of the Commission (Public Representative) to represent the interests of the general public in this proceeding. Neither Mr. Waclawski nor any staff member assigned to assist him shall participate in or provide any advice on any Commission decision in this proceeding other than in their designated capacity.

Schedule. A schedule appears as an attachment to this order. Among other things, three technical conferences are scheduled to provide interested persons an opportunity to develop a better understanding of the Postal Service's proposal. The first technical conference will be held October 9, 2013 and be devoted to consideration of the Taufique statement. The second technical conference will be held October 17, 2013 and be devoted to consideration of the Thress statement. This conference will begin at 10:30 a.m. The third technical conference will be held October 18, 2013 and be devoted to consideration of the Nickerson statement. The Postal Service should have on hand sufficient, knowledgeable personnel to address interested persons' questions. Absent specific notice to the contrary, all technical conferences and hearings (other than the October 17th conference) will convene at 9:30 a.m., eastern daylight time in the Commission's hearing room in Suite 200, 901 New York Avenue NW., Washington, DC 20268–0001.

Developments may warrant adoption of additional procedural dates and/or requirements. If so, the Commission will issue further procedural orders as it deems advisable or necessary to ensure timely completion of its review. All such rulings will be published on the Commission Web site: (*http://www.prc.gov*). The technical conferences and public hearings, which are scheduled for October 30, 31, and November 1, 2013, will be webcast.

Posting of request; posting of other documents. The Commission has posted the public version of the Exigent Request on its Web site (*http://www.prc.gov*). 39 CFR 3010.65(a). The Commission encourages interested persons to review the Exigent Request to determine its impact on their concerns.

Access to nonpublic material. Information on the Commission practices with respect to material filed under seal, including how to obtain access to such material, appears in 39 CFR part 3007.

IV. Ordering Paragraphs

It is ordered:

1. The Commission establishes Docket No. R2013–11 to consider matters raised in the Postal Service's September 26, 2013 Exigent Request.

2. The Commission adopts the procedural schedule in the Attachment to this order, subject to further developments.

3. The Commission will sit *en banc* in this proceeding.

4. Comments by interested persons are due no later than November 6, 2013.

5. Reply comments may be filed by the Postal Service and other interested persons are due no later than November 20, 2013.

6. Pursuant to 39 U.S.C. 505, the Commission appoints James Waclawski to represent the interests of the general public in this proceeding.

7. The Secretary shall arrange for publication of this order in the **Federal Register**.

ATTACHMENT—DOCKET NO. R2013–11 SCHEDULE

All dates refer to 2013

Date	Action
Thursday, September 26	Filing of Exigent Request.
Wednesday, October 9	First Technical Conference Taufique.
Tuesday, October 17 (starting at 10:30 a.m.)	Second Technical Conference* Thress.
Friday, October 18	Third Technical Conference* Nickerson.
Thursday, October 24	Deadline for filing suggested questions to be asked of the Postal Service during the public hearing (39 CFR 3010.65(c)).
Wednesday–Friday Oct. 30, Oct. 31, Nov. 1	Public Hearings* (39 CFR 3010.65(b)).
Wednesday, November 6	Deadline for filing initial comments (39 CFR 3010.65(f)).
Wednesday, November 20	Deadline for filing reply comments (39 CFR 3010.65(g)).
Wednesday, December 25	90th day following filing of the Exigent Request.

By the Commission.

Shoshana M. Grove,

Secretary.

[FR Doc. 2013–24580 Filed 10–21–13; 8:45 am]

BILLING CODE 7710–FW–P

POSTAL SERVICE

Product Change—Priority Mail Negotiated Service Agreement

AGENCY: Postal Service™.

ACTION: Notice.

SUMMARY: The Postal Service gives notice of filing a request with the Postal Regulatory Commission to add a domestic shipping services contract to the list of Negotiated Service Agreements in the Mail Classification Schedule's Competitive Products List.

DATES: *Effective date:* October 22, 2013.

FOR FURTHER INFORMATION CONTACT: Elizabeth A. Reed, 202–268–3179.

SUPPLEMENTARY INFORMATION: The United States Postal Service® hereby gives notice that, pursuant to 39 U.S.C. 3642 and 3632(b)(3), on September 27, 2013, it filed with the Postal Regulatory Commission a *Request of the United States Postal Service to Add Priority Mail Contract 65 to Competitive Product List.* Documents are available at *www.prc.gov*, Docket Nos. MC2013–63, CP2013–83.

Stanley F. Mires,

Attorney, Legal Policy & Legislative Advice.

[FR Doc. 2013–24335 Filed 10–21–13; 8:45 am]

BILLING CODE 7710–12–P

SECURITIES AND EXCHANGE COMMISSION

Submission for OMB Review; Comment Request

Upon Written Request, Copies Available From: Securities and Exchange Commission, Office of Investor Education and Advocacy, Washington, DC 20549–0213.

Extension: Rule 15Ba2–5; SEC File No. 270–91, OMB Control No. 3235–0088.

Notice is hereby given that pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*), the Securities and Exchange Commission (''Commission'') has submitted to the Office of Management and Budget (''OMB'') a request for approval of extension of the existing collection of information provided for in Rule 15Ba2–5 (17 CFR 240.15Ba2–5), under the Securities Exchange Act of 1934 (15 U.S.C. 78a *et seq.*) (the ''Exchange Act'').

On July 7, 1976, effective July 16, 1976 (*see* 41 FR 28948, July 14, 1976), the Commission adopted Rule 15Ba2–5 under the Exchange Act to permit a duly-appointed fiduciary to assume immediate responsibility for the operation of a municipal securities dealer's business. Without the rule, the fiduciary would not be able to assume operation until it registered as a municipal securities dealer. Under the rule, the registration of a municipal securities dealer is deemed to be the registration of any executor, administrator, guardian, conservator, assignee for the benefit of creditors, receiver, trustee in insolvency or bankruptcy, or other fiduciary, appointed or qualified by order, judgment, or decree of a court of competent jurisdiction to continue the business of such municipal securities dealer, provided that such fiduciary files with the Commission, within 30 days after entering upon the performance of his duties, a statement setting forth as to such fiduciary substantially the same information required by Form MSD or Form BD. The statement is necessary to ensure that the Commission and the public have adequate information about the fiduciary.

There is approximately 1 respondent per year that requires an aggregate total of 4 hours to comply with this rule. This respondent makes an estimated 1 annual response. Each response takes approximately 4 hours to complete. Thus, the total compliance burden per year is 4 burden hours. The approximate cost per hour is $20, resulting in a total cost of compliance for the respondent of approximately $80 (*i.e.,* 4 hours × $20).

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information under the PRA unless it displays a currently valid OMB control number.

The public may view background documentation for this information collection at the following Web site: *www.reginfo.gov*. Comments should be directed to: (i) Desk Officer for the Securities and Exchange Commission, Office of Information and Regulatory Affairs, Office of Management and Budget, Room 10102, New Executive Office Building, Washington, DC 20503, or by sending an email to: *Shagufta_Ahmed@omb.eop.gov*; and (ii) Thomas Bayer, Director/Chief Information Officer, Securities and Exchange Commission, c/o Remi Pavlik-Simon, 100 F Street NE., Washington, DC 20549, or by sending an email to: *PRA_Mailbox@sec.gov*. Comments must be submitted to OMB within 30 days of this notice.

Dated: October 8, 2013.

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2013–24670 Filed 10–21–13; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

Submission for OMB Review; Comment Request

Upon Written Request, Copies Available From: Securities and Exchange Commission, Office of Investor Education and Advocacy, Washington, DC 20549–0213.

Extension: Rule 17a–1.

SEC File No. 270–244, OMB Control No. 3235–0208

Notice is hereby given that, pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*), the Securities and Exchange Commission (''Commission'') has submitted to the Office of Management and Budget a request for approval of extension of the previously approved collection of information provided for in Rule 17a–1 (17 CFR 240.17a–1) under the Securities Exchange Act of 1934, as amended (the ''Act'') (15 U.S.C. 78a *et seq.*).

Rule 17a–1 requires that every national securities exchange, national securities association, registered clearing agency, and the Municipal Securities Rulemaking Board keep on file for a period of not less than five years, the first two years in an easily accessible place, at least one copy of all documents, including all correspondence, memoranda, papers, books, notices, accounts, and other such records made or received by it in the course of its business as such and in the conduct of its self-regulatory activity, and that such documents be available for examination by the Commission.

There are 28 entities required to comply with the rule: 17 national securities exchanges, 1 national securities association, 9 registered clearing agencies, and the Municipal Securities Rulemaking Board. The Commission staff estimates that the average number of hours necessary for compliance with the requirements of Rule 17a–1 is 50 hours per year. In addition, 5 national securities exchanges notice-registered pursuant to Section 6(g) of the Act (15 U.S.C. 78f(g)) are required to preserve records of determinations made under Rule 3a55–1 under the Act (17 CFR 240.3a55–1), which the Commission staff estimates will take 1 hour per exchange, for a total of 5 hours. Accordingly, the Commission staff estimates that the total number of hours necessary to comply with the requirements of Rule 17a–1 is 1,405 hours. The average cost per hour is $63. Therefore, the total cost of compliance for the respondents is $88,515.

Compliance with Rule 17a–1 is mandatory. Rule 17a–1 does not assure confidentiality for the records maintained pursuant to the rule. The records required by Rule 17a–1 are available only for examination by the Commission staff, state securities authorities and the self-regulatory organizations. Subject to the provisions of the Freedom of Information Act, 5 U.S.C. 522, and the Commission's rules thereunder (17 CFR 200.80(b)(4)(iii)), the Commission does not generally publish or make available information contained in any reports, summaries, analyses, letters, or memoranda arising out of, in anticipation of, or in connection with an examination or inspection of the books and records of any person or any other investigation.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number.

The public may view background documentation for this information collection at the following Web site, *www.reginfo.gov.* Comments should be directed to: (1) Desk Officer for the Securities and Exchange Commission, Office of Information and Regulatory Affairs, Office of Management and Budget, Room 10102, New Executive

Office Building, Washington, DC 20503, or by sending an email to: *Shagufta_Ahmed@omb.eop.gov;* and (ii) Thomas Bayer, Director/Chief Information Officer, Securities and Exchange Commission, c/o Remi Pavlik-Simon, 100 F Street NE., Washington, DC 20549 or send an email to: *PRA_Mailbox@sec.gov.* Comments must be submitted to OMB within 30 days of this notice.

Dated: October 8, 2013.

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2013–24671 Filed 10–21–13; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. IC–30744; File No. 812–14141]

Pacific Life Insurance Company, et al; Notice of Application

October 17, 2013.

AGENCY: Securities and Exchange Commission (''SEC'' or ''Commission'').

ACTION: Notice of application for an order approving the substitution of certain securities pursuant to Section 26(c) of the Investment Company Act of 1940, as amended (the ''1940 Act'').

APPLICANTS: Pacific Life Insurance Company (''Pacific Life''), Pacific Life's Separate Account A (''Separate Account A''), Pacific Life's Pacific Select Variable Annuity Separate Account (''Select VA Account'' and, together with Separate Account A, the ''Pacific Life Separate Accounts''), Pacific Life & Annuity Company (''PL&A''), and PL&A's Separate Account A (''PL&A Separate Account A''). Pacific Life, PL&A, and the Separate Accounts are referred to collectively as the ''Applicants.'' The Pacific Life Separate Accounts and PL&A Separate Account A are referred to individually as a ''Separate Account'' and collectively as the ''Separate Accounts.'' Pacific Life and PL&A are referred to herein individually as an ''Insurer'' and collectively as the ''Insurers.''

SUMMARY OF APPLICATION: Each Insurer, on behalf of itself and its Separate Account(s), seeks an order pursuant to Section 26(c) of the 1940 Act, approving the substitution of Service Shares of the Janus Aspen Balanced Portfolio, a series of Janus Aspen Series (the ''Replacement Portfolio''), for Class B shares of the AllianceBernstein VPS Balanced Wealth Strategy Portfolio, a series of the AllianceBernstein Variable Product Series Fund, Inc. (the ''Replaced Portfolio'') (hereinafter, the ''Proposed Substitution''), under certain variable annuity contracts issued by the Insurers (collectively, the ''Contracts'').

DATES: *Filing Date:* The application was filed on March 29, 2013, and an amended and restated application was filed on September 25, 2013 and October 2, 2013.

HEARING OR NOTIFICATION OF HEARING: An order granting the application will be issued unless the Commission orders a hearing. Interested persons may request a hearing by writing to the Secretary of the Commission and serving the Applicants with a copy of the request, personally or by mail. Hearing requests should be received by the Commission by 5:30 p.m. on November 7, 2013, and should be accompanied by proof of service on the Applicants in the form of an affidavit or, for lawyers, a certificate of service. Hearing requests should state the nature of the requester's interest, the reason for the request, and the issues contested. Persons who wish to be notified of a hearing may request notification by writing to the Secretary of the Commission.

ADDRESSES: Secretary, SEC, 100 F Street NE., Washington, DC 20549–1090. Applicants: Pacific Life Insurance Company, Separate Account A of Pacific Life Insurance Company, Pacific Select Variable Annuity Separate Account of Pacific Life Insurance Company, Pacific Life & Annuity Company, and Pacific Life & Annuity Company Separate Account A, all located at 700 Newport Center Drive, Newport Beach, CA 92660.

FOR FURTHER INFORMATION CONTACT: Deborah D. Skeens, Senior Counsel, or Michael L. Kosoff, Branch Chief, Insured Investments Office, Division of Investment Management, at (202) 551–6795.

SUPPLEMENTARY INFORMATION: The following is a summary of the application. The complete application may be obtained via the Commission's Web site by searching for the file number, or for an applicant using the Company name box, at *http://www.sec.gov/search/search.htm,* or by calling (202) 551–8090.

Applicants' Representations

1. The Insurers, on their own behalf and on behalf of their respective Separate Accounts, propose to substitute Service Shares of the Replacement Portfolio for Class B shares of the Replaced Portfolio held by the Separate Account to fund the Contracts. Each Separate Account is divided into subaccounts (each a ''Subaccount,'' collectively, the ''Subaccounts''). Each Subaccount invests in the securities of a single portfolio of an underlying mutual fund (''Portfolio''). Contract owners (each a ''Contract Owner'' and collectively, the ''Contract Owners'') may allocate some or all of their Contract value to one or more Subaccounts that are available as investment options under the Contracts.

2. Pacific Life is the depositor and sponsor of the Pacific Life Separate Accounts. PL&A is the depositor and sponsor of PL&A Company Separate Account A.

3. Each of the Separate Accounts is a ''separate account'' as defined by Section 2(a)(37) of the 1940 Act and each is registered under the 1940 Act as a unit investment trust for the purpose of funding the Contracts. Security interests under the Contracts have been registered under the Securities Act of 1933. The application sets forth the registration statement file numbers for the Contracts and the Separate Accounts.

4. Each Insurer, on behalf of itself and its Separate Account(s), proposes to replace the Class B shares of the Replaced Portfolio that are held in Subaccounts of its Separate Account(s) with Service Shares of the Replacement Portfolio.

5. The Applicants state that the Proposed Substitution involves moving assets attributable to the Contracts from the Replaced Portfolio managed by AllianceBernstein L.P. (''AllianceBernstein'') to a Replacement Portfolio managed by Janus Capital Management LLC (''Janus Capital'') (each of Janus Capital and AllianceBernstein, an ''Investment Adviser'' and collectively, the ''Investment Advisers''). Each Investment Adviser is responsible for the day-to-day management of the assets of the Replaced or Replacement Portfolio, as the case may be. Neither the Replaced nor Replacement Portfolio employs a sub-adviser and neither Portfolio operates under a manager-of-managers arrangement that, among other things, would permit the Investment Adviser to engage a new or additional sub-adviser without the approval of the Portfolio's shareholders. The Applicants state that the Investment Advisers are not affiliates of the Insurers.

6. Applicants state that under the Contracts, the Insurers reserve the right to substitute, for the shares of a Portfolio held in any Subaccount, the shares of another Portfolio, shares of another investment company or series of another investment company, or another investment vehicle. The prospectuses for the Contracts include appropriate disclosure of this reservation of right.

7. The Applicants represent that the investment objectives of the Replaced and Replacement Portfolio are similar. The investment objective of the Replaced Portfolio is to maximize total return consistent with its Investment Adviser's determination of reasonable risk, whereas that of the Replacement Portfolio is long-term capital growth, consistent with preservation of capital and balanced by current income. The investment objectives of both Portfolios include a growth component as well as an income component. Additionally, the Applicants state that the principal investment strategies of the Replaced and Replacement Portfolios are similar. The principal investment strategies of both Portfolios include investment in a combination of equity and debt securities. The Replaced Portfolio targets a weighting of 60% equity securities and 40% debt securities, whereas the Replacement Portfolio normally invests 35–65% of its assets in equity securities and the remaining assets in debt securities and cash equivalents, with normally 25% of its assets invested in fixed-income senior securities. In addition, both Portfolios may invest in securities of non-U.S. issuers. The principal investment strategies of the Replaced Portfolio also include investment in fixed-income securities with below investment grade ratings (also called ''junk'' bonds), which is not a principal investment strategy of the Replacement Portfolio though it may invest in such bonds. The principal investment strategies of the Replaced Portfolio include investments in real estate investment trusts or REITS, whereas the same is not true for the Replacement Portfolio though it may invest in REITs. The principal investment strategies of the Replaced Portfolio include entering into forward commitments, the making of short sales of securities or maintaining a short position, and investments in rights or warrants, none of which is a principal investment strategy of the Replacement Portfolio, though it may engage in short sales and invest in securities on a forward commitment basis, and invest in warrants. The principal investment strategies of the Replacement Portfolio include investments in mortgage-backed and mortgage-related securities, which are not a principal investment strategy of the Replaced Portfolio, though it may investment in mortgage-backed securities. A comparison of the investing strategies, risks, and performance of the Replaced and Replacement Portfolios is included in the application.

8. The following table compares the fees and expenses of the Replaced Portfolio (Class B shares) and the Replacement Portfolio (Service Shares) as of the year ended December 31, 2012. As described below, the management fees of the Replaced Portfolio are subject to breakpoints whereas the management fees of the Replacement Portfolio are not.[1] In addition, as shown in the table below, the 12b–1 fee of the Service Class of the Replacement Portfolio is the same as the 12b–1 fee of the Class B shares of the Replaced Portfolio. In both cases, the 12b–1 fee is the current maximum permitted under the relevant plan. Furthermore, as shown in the table below, the annual operating expenses of the Replacement Portfolio are lower than those of the Replaced Portfolio.

PROPOSED SUBSTITUTION

	Replaced portfolio	Replacement portfolio
	AllianceBernstein VPS wealth strategies portfolio	Janus Aspen balanced portfolio
Class B/Service Class:		
Management Fee	.55 of 1% of the first $2.5 billion, .45 of 1% of the excess over $2.5 billion up to $5 billion, and .40 of 1% of the excess over $5 billion.	0.55%
12b–1 Fee	0.25%	0.25%
Other Expenses	0.10%	0.05%
Total Gross Expenses	0.90%	0.85%
Expense Waiver/Reimbursement.	0.00	0.00
Total Net Expenses.	0.90%	0.85%

9. The Applicants state that the performance for the Replacement Portfolio is generally better than that of the Replaced Portfolio for all periods shown.

10. The Applicants state that the Proposed Substitution is part of an ongoing effort by the Insurers to make their Contracts more attractive to existing and prospective Contract Owners. The Applicants believe the Proposed Substitution will help to accomplish these goals for the following reasons: (1) The total annual operating expenses (no expense waivers or reimbursements) for the Replacement Portfolio are lower than those of the Replaced Portfolio; (2) the historical performance of the Replacement Portfolio is generally better than that of the Replaced Portfolio; and (3) the Proposed Substitution will facilitate the ability of Contract Owners to elect certain optional living benefit riders; and (4) the Proposed Substitution will simplify the Subaccount offerings under the Contracts by eliminating an overlapping Investment Option that largely duplicates another Investment Option with similar investment objectives, principal investment strategies, and principal risks.

11. The Applicants represent that the Proposed Substitution will be described in supplements to the applicable prospectuses for the Contracts filed with the Commission or in other supplemental disclosure documents, (collectively, ''Supplements'') and delivered to all affected Contract Owners at least 30 days before the date the Proposed Substitution is effected (the ''Substitution Date''). Each Supplement will give the relevant Contract Owners notice of the

[1] The Applicants submit that the likelihood of the Replaced Portfolio achieving a breakpoint reduction in its management fee in the near future appears to be remote given the asset levels of the Replaced Portfolio at year end 2012.

applicable Insurer's intent to take the necessary actions, including seeking the order requested by the application, to substitute shares of the Replaced Portfolio as described in the application on the Substitution Date. Each Supplement also will advise Contract Owners that from the date of the Supplement until the Substitution Date, Contract Owners are permitted to transfer all of or a portion of their Contract value out of any Subaccount investing in the Replaced Portfolio (''Replaced Portfolio Subaccount'') to any other available Subaccounts offered under their Contracts without the transfer being counted as a transfer for purposes of transfer limitations and fees that would otherwise be applicable under the terms of the Contracts. In addition, each Supplement will (a) instruct Contract Owners how to submit transfer requests in light of the Proposed Substitution; (b) advise Contract Owners that any Contract value remaining in the Replaced Portfolio Subaccount on the Substitution Date will be transferred to a Subaccount investing in the Replacement Portfolio (''Replacement Portfolio Subaccount''), and that the Substitution will take place at relative net asset value; (c) inform Contract Owners that for at least thirty (30) days following the Substitution Date, the applicable Insurer will permit Contract Owners to make transfers of Contract value out of the Replacement Portfolio Subaccount to any other available Subaccounts offered under their Contracts without the transfer being counted as a transfer for purposes of transfer limitations that would otherwise be applicable under the terms of the Contracts; and (d) inform Contract Owners that, except as described in the market timing limitations section of the relevant prospectus, the applicable Insurer will not exercise any rights reserved by it under the Contracts to impose additional restrictions on transfers out of the Replacement Portfolio Subaccount for at least thirty (30) days after the Substitution Date.

12. The Proposed Substitution will take place at the applicable Replaced and Replacement Portfolios' relative per share net asset values determined on the Substitution Date in accordance with Section 22 of the 1940 Act and Rule 22c–1 thereunder. Accordingly, the Applicants submit that the Proposed Substitution will have no negative financial impact on any Contract Owner.

13. The Proposed Substitution will be effected by having the Replaced Portfolio Subaccount redeem its Replaced Portfolio shares in cash and/or in-kind (as determined by the Investment Adviser to the Replaced Portfolio) on the Substitution Date at net asset value per share and purchase shares of the Replacement Portfolio at net asset value per share calculated on the same date. In the event that the Investment Adviser of the Replacement Portfolio declines to accept, on behalf of the Replacement Portfolio, any securities redeemed in-kind by the Replaced Portfolio, the Replaced Portfolio shall instead provide cash equal to the value of the declined securities so that Contract Owners' Contract values will not be adversely impacted or diluted.

14. The Insurers or an affiliate thereof will pay all expenses and transaction costs reasonably related to the Proposed Substitution, including all legal, accounting, and brokerage expenses relating to the Proposed Substitution, the above described disclosure documents, and this application. No costs of the Proposed Substitution will be borne directly or indirectly by Contract Owners. Affected Contract Owners will not incur any fees or charges as a result of the Proposed Substitution, nor will their rights or the obligations of the Insurers under the Contracts be altered in any way. The Proposed Substitution will not cause the fees and charges under the Contracts currently being paid by Contract Owners to be greater after the Proposed Substitution than before the Proposed Substitution. In addition, no transfer charges will apply in connection with the Proposed Substitution.

15. The Applicants represent that will not receive, for three years from the date of the Proposed Substitution, any direct or indirect benefits from the Replacement Portfolio, its adviser or underwriter (or their affiliates), in connection with assets attributable to contracts affected by the Proposed Substitution, at a higher rate than it had received from the Replaced Portfolio, its adviser or underwriter (or their affiliates), including without limitation 12b-1 fees, revenue sharing, or other arrangements; and the Proposed Substitution and the selection of the Replacement Portfolio were not motivated by any financial consideration paid or to be paid to the Company or its affiliates by the Replacement Portfolio, its adviser or underwriter, or their affiliates.

Legal Analysis and Conditions

Section 26(c) Relief

1. The Applicants request that the Commission issue an order pursuant to Section 26(c) of the 1940 Act approving the Proposed Substitution. Section 26(c) of the 1940 Act makes it unlawful for any depositor or trustee of a registered unit investment trust holding the security of a single issuer to substitute another security for such security unless the Commission approves the substitution. Section 26(c) requires the Commission to issue an order approving a substitution if the evidence establishes that it is consistent with the protection of investors and the purposes fairly intended by the policy and provisions of the 1940 Act.

2. Applicants assert that the terms and conditions of the Proposed Substitution are consistent with the principles and purposes of Section 26(c) and do not entail any of the abuses that Section 26(c) is designed to prevent. Applicants further submit that the Proposed Substitution will not result in the type of costly forced redemption that Section 26(c) was intended to guard against and, for the following reasons, are consistent with the protection of investors and the purposes fairly intended by the 1940 Act:

(1) The costs reasonably related to the Proposed Substitution will be borne by the applicable Insurer or an affiliate and will not be borne by Contract Owners. No charges will be assessed to the Contract Owners to effect the Proposed Substitution.

(2) The Proposed Substitution will be effected, in all cases, at the relative net asset values of the shares of the Replaced and Replacement Portfolios, without the imposition of any transfer or similar charge and with no change in the amount of any Contract Owner's Contract value.

(3) The Proposed Substitution will not cause the fees and charges under the Contracts currently being paid by Contract Owners to be greater after the Proposed Substitution than before the Proposed Substitution, and will result in Contract Owners' Contract values being allocated to Subaccounts that invest in the Replacement Portfolio, which has lower total expenses than the Replaced Portfolio. Any changes in the charges for optional living benefit riders would be independent of the Proposed Substitution.

(4) All affected Contract Owners will be given notice of the Proposed Substitution prior to the Substitution Date and will have an opportunity to reallocate their Contract value among other available Subaccounts, including Subaccounts investing in the Replacement Portfolio, without the imposition of any charge or limitation (unless such transfers are made in connection with market timing or other disruptive trading activity), thereby minimizing the likelihood of being

invested through a Subaccount in an undesired Portfolio.

(5) The Proposed Substitution will in no way alter the insurance benefits to Contract Owners or the contractual obligations of the Insurers.

(6) The Proposed Substitution will in no way alter the tax treatment of Contract Owners in connection with their Contracts, and no tax liability will arise for Contract Owners as a result of the Proposed Substitution.

(7) The Proposed Substitution will not adversely affect existing Contract Owners who elected optional living benefit riders and allocated Contract value to Subaccounts investing in the Replaced Portfolio since the Replacement Portfolio is an allowable Investment Option for use with such riders.

Conclusion

For the reasons and upon the facts set forth above and in the application, the Applicants submit that the Proposed Substitution meets the standards of Section 26(c) of the 1940 Act and respectfully request that the Commission issue an order of approval pursuant to Section 26(c) of the 1940 Act and that such order be made effective as soon as possible.

For the Commission, by the Division of Investment Management, under delegated authority.

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2013–24604 Filed 10–21–13; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

Sunshine Act Meeting

Notice is hereby given, pursuant to the provisions of the Government in the Sunshine Act, Public Law 94–409, that the Securities and Exchange Commission will hold a Closed Meeting on Thursday, October 24, 2013 at 11:00 a.m.

Commissioners, Counsel to the Commissioners, the Secretary to the Commission, and recording secretaries will attend the Closed Meeting. Certain staff members who have an interest in the matters also may be present.

The General Counsel of the Commission, or her designee, has certified that, in her opinion, one or more of the exemptions set forth in 5 U.S.C. 552b(c)(3), (5), (7), 9(B) and (10) and 17 CFR 200.402(a)(3), (5), (7), 9(ii) and (10), permit consideration of the scheduled matter at the Closed Meeting.

Commissioner Aguilar, as duty officer, voted to consider the items listed for the Closed Meeting in a closed session.

The subject matter of the Closed Meeting will be: Institution and settlement of injunctive actions; institution and settlement of administrative proceedings; adjudicatory matters; amicus consideration; and other matters relating to enforcement proceedings.

At times, changes in Commission priorities require alterations in the scheduling of meeting items.

For further information and to ascertain what, if any, matters have been added, deleted or postponed, please contact the Office of the Secretary at (202) 551–5400.

Dated: October 17, 2013.

Elizabeth M. Murphy,

Secretary.

[FR Doc. 2013–24776 Filed 10–18–13; 11:15 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–70596; File No. SR–OCC–2013–806]

Self-Regulatory Organizations; The Options Clearing Corporation; Notice of Filing of Advance Notice of and No Objection to The Options Clearing Corporation's Proposal To Enter a New Credit Facility Agreement

October 2, 2013.

Notice is hereby given that, on September 12, 2013, The Options Clearing Corporation (''OCC'') filed an advance notice with the Securities and Exchange Commission (''Commission'') pursuant to Section 806(e) of Title VIII of the Dodd-Frank Wall Street Reform and Consumer Protection Act,[1] entitled the Payment, Clearing, and Settlement Supervision Act of 2010 (''Clearing Supervision Act''), and Rule 19b–4(n)(1)(i) of the Securities Exchange Act of 1934 (''Exchange Act'').[2] The advance notice is described in Items I, II, and III below, which Items have been prepared by OCC. The Commission is publishing this notice to solicit comments from interested persons, and to provide notice that the Commission has no objection to the changes set forth in the advance notice and authorizes OCC to implement those changes earlier than 60 days after the filing of the advance notice.

I. Clearing Agency's Statement of the Terms of Substance of the Advance Notice

In connection with a change to its operations (the ''Change''), OCC proposes to replace its credit facility with a new credit facility, which is designed to be used to meet obligations of OCC arising out of the default or suspension of a clearing member of OCC, in anticipation of a potential default by a clearing member or as a result of the insolvency of any bank or clearing organization doing business with OCC.

II. Clearing Agency's Statement of the Purpose of, and Statutory Basis for, the Advance Notice

In its filing with the Commission, OCC included statements concerning the purpose of and basis for the proposed change and discussed any comments it received, if any, on the advance notice. 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 and B below, of the most significant aspects of these statements.

A. Clearing Agency's Statement of the Purpose of, and Statutory Basis for, the Advance Notice

(i) Description of Change

The Change involves the replacement of a credit facility that OCC maintains for the purposes of meeting obligations arising out of the default or suspension of a clearing member or the failure of a bank or securities or commodities clearing organization to perform its obligations due to its bankruptcy, insolvency, receivership or suspension of operations. OCC's existing credit facility (the ''Existing Facility'') was implemented on October 11, 2012 through the execution of a Credit Agreement among OCC, JPMorgan Chase Bank, N.A. (''JPMorgan''), as administrative agent, and the lenders that are parties to the agreement from time to time, which provides short-term secured borrowings in an aggregate principal amount of $2 billion and may be increased to $3 billion.

The Existing Facility is set to expire on October 10, 2013 and OCC is therefore currently negotiating the terms of a new credit facility (the ''New

[1] Dodd-Frank Wall Street Reform and Consumer Protection Act, Public Law 111–203, 124 Stat. 1376 (2010). OCC was designated as a systemically important financial market utility by the Financial Stability Oversight Council on July 18, 2012. *See* Financial Stability Oversight Council 2012 Annual Report, Appendix A, *http://www.treasury.gov/initiatives/fsoc/Documents/2012%20Annual%20Report.pdf.* Therefore, OCC is required to comply with Title VIII of the Dodd-Frank Wall Street Reform and Consumer Protection Act.

[2] 17 CFR 240.19b–4(n)(1)(i).

Facility'') on substantially similar terms as the Existing Facility. On September 9, 2013, OCC received a Commitment Letter with regard to the New Facility from: JPMorgan, the administrative agent and collateral agent, and a lender, for the New Facility; J.P. Morgan Europe Limited (''JPM Europe''), the euro administrative agent; JPMorgan Securities LLC (''JPMorgan Securities''), the joint lead arranger for the New Facility; Merrill Lynch, Pierce, Fenner & Smith Incorporated (''MLPF&S''), the joint lead arranger for the New Facility; and Bank of America, N.A. (''BANA''), the syndication agent and a lender for the New Facility.

The terms and conditions applicable to the New Facility are set forth in the Commitment Letter and a Summary of Terms and Conditions attached as an exhibit to the Commitment Letter. The Commitment Letter, including the exhibit, is attached to this filing as Exhibit 3A. One of the conditions to the availability of the New Facility is the execution and delivery of a credit agreement and pledge agreement between OCC, JPMorgan, JPMorgan Securities, MLPF&S, BANA and the various lenders under the New Facility, which OCC anticipates will occur on or before October 9, 2013. Another condition is the successful syndication of the facility to a group of lenders who will in the aggregate provide commitments of $2 billion.

Under the New Facility, a syndicate of banks, financial institutions and other entities will make loans to OCC on request. The New Facility includes a tranche that may be drawn in dollars or euros and a dollar-only tranche. The aggregate amount of loans available under the facility, subject to the value of eligible collateral, is up to $2 billion. The dollar equivalent of the total loans denominated in euros under the euro/dollar tranche of the New Facility may not exceed $100 million. During the term of the New Facility, the amount of the New Facility may be increased to up to $3 billion if OCC so requests and if sufficient commitments from lenders are received and accepted.

The New Facility is available on a revolving basis for a 364-day term. OCC may request a loan under the New Facility on any business day by providing a notice to JPMorgan, as administrative agent, which will then notify the lenders, who will be required to fund their *pro rata* share of any requested loan within a specified period of time after receiving notice from JPMorgan. The funding deadline is designed to permit OCC to obtain funds on the date of the request, subject to a cutoff time after which funding will occur on the next business day. Each loan issued pursuant to the New Facility matures and is payable 30 days after the borrowing date, except for test borrowings under the facility, which mature and are payable one business day after the borrowing date. Proceeds of these loans must be used to meet the obligations of OCC arising out of the default or suspension of a clearing member, in anticipation of a potential default by a clearing member, or the failure of a bank or securities or commodities clearing organization to perform its obligations to OCC. In order to obtain a loan under the facility, OCC must pledge as collateral cash or securities issued or guaranteed by the U.S. Government or the Government of Canada, that are margin deposits of suspended members or that are held in OCC's clearing fund, and that in either case are not otherwise subject to liens, security interests or other encumbrances. Securities issued by the Government of Canada will only be eligible to be pledged as collateral if they have a minimum rating of AAA/Aaa as determined by S&P or Moody's. OCC has the authority to pledge these assets in connection with borrowings under Section 5(e) of Article VIII of its By-Laws and Rule 1104(b).

The amount available under the New Facility at any given point in time is equal to the lesser of (i) $2 billion, or the increased size of the facility, if applicable, and (ii) the sum of (A) 90% of the value of OCC's clearing fund that is not subject to liens or encumbrances granted by OCC other than in connection with the New Facility and (B) 90% of the value of unencumbered margin deposits of suspended clearing members that are not subject to liens or encumbrances granted by OCC other than in connection with the New Facility. If the aggregate principal amount of loans under the New Facility exceeds the amount available under this formula, OCC must prepay loans, obtain the release of liens and/or require additional margin and/or clearing fund deposits to cure the deficiency. A condition to the making of any loan under the New Facility is that, after giving effect to the loan, the sum of 100% of the dollar-denominated loans and 105% of the euro-denominated loans under the New Facility may not exceed the ''borrowing base.'' The borrowing base is determined by adding the value of all collateral pledged in connection with all loans under the New Facility, after applying ''haircuts'' to U.S. and Canadian Government securities based on their remaining maturity. If the borrowing base is less than the sum of 100% of the dollar-denominated loans and 105% of the euro-denominated loans under the New Facility, OCC must prepay loans or pledge additional collateral to cure the deficiency. There are additional customary conditions to the making of any loan under the New Facility, including that OCC is not in default. Importantly, however, the absence of a material adverse change affecting OCC is not a condition to the making of a loan. Loans may be prepaid at any time without penalty.

Events of default by OCC under the New Facility include, but are not limited to, non-payment of principal, interest, fees or other amounts when due; non-compliance with a daily borrowing base when loans are outstanding; material inaccuracy of representations and warranties; bankruptcy events; fundamental changes; and failure to maintain a first priority perfected security interest in collateral. In the event of a default, the interest rate applicable to outstanding loans would increase by 2.00%. The New Facility also includes customary defaulting lender provisions, including provisions that restrict the defaulting lender's voting rights, permit set-offs of payments against the defaulting lender and suspend the defaulting lender's right to receive commitment fees.

The New Facility involves a variety of customary fees payable by OCC, including: (1) A one-time arrangement fee payable to JPMorgan Securities and MLPF&S; (2) a one-time administrative and collateral agent fee payable to JPMorgan if the New Facility closes; (3) a one-time euro administrative fee payable to JPMorgan if the New Facility closes; (4) upfront commitment fees payable to the lenders based on the amount of their commitments; and (5) an ongoing quarterly commitment fee based on the unused amount of the New Facility.

(ii) Anticipated Effect on and Management of Risk

Overall, the New Facility reduces the risks to OCC, its clearing members and the options market in general because it will allow OCC to obtain short-term funds to address liquidity demands arising out of the default or suspension of a clearing member of OCC, in anticipation of a potential default of clearing members or the insolvency of a bank or another securities or commodities clearing organization. The existence of the New Facility could enable OCC to minimize losses in the event such a default, suspension or insolvency, by allowing it to obtain funds on extremely short notice to

ensure that the clearance and settlement of transactions in options and other contracts occurs without interruption. By drawing on the facility OCC would be able to avoid liquidating margin or clearing fund assets in what would likely be volatile market conditions, which would preserve funds available to cover any losses resulting from the failure of a clearing member, bank or another clearing organization. OCC's entering into the New Facility will not increase the risks associated with its clearing function because it is entered into on substantially the same terms as the Existing Facility.

Two new features of the New Facility have been added to enhance OCC liquidity and reduce risk. The inclusion of Canadian Government securities as eligible collateral will increase the amount of OCC collateral that can be pledged to support borrowings under the New Facility, resulting in increased availability of loans. The clarification that OCC may borrow under the New Facility in anticipation of a potential default by of a clearing member is subject to the condition that such provision will not become effective until an appropriate rule change is filed with and approved by the Commission.

While the New Facility will, in general, reduce the risks associated with OCC's clearing function, like any lending arrangement the New Facility involves risks. One of the primary risks to OCC and its clearing function associated with the New Facility is the risk that a lender fails to fund when OCC requests a loan, because of the lender's insolvency or otherwise. This risk is mitigated through the use of a syndicated facility, which does not depend on the creditworthiness of a small number of lenders. In addition, the New Facility has lender default provisions designed to discourage lenders from failing to fund loans. Moreover, OCC has the ability under the New Facility to replace a defaulting lender. Finally, in the event a particular lender fails to fund its portion of the requested loan, the New Facility includes provisions pursuant to which OCC may request ''covering'' loans from non-defaulting lenders to make up the shortfall, or OCC may simply make a second borrowing request for the shortfall amount that lenders are committed to make, subject to OCC's satisfying the borrowing conditions for the second loan, although in either case the total amount available for borrowing under the New Facility would be reduced by the unfunded commitment of the defaulting lender. The failure by one or more lenders to fund the first loan does not relieve the lenders of their commitment to fund the second loan.

A second risk associated with the New Facility is the risk that OCC is unable to repay a loan within 30 days, which would allow the lenders to seize the pledged collateral and liquidate it, potentially at depressed prices that would result in losses to OCC. OCC believes that this risk is at a manageable level, because 30 days should be an adequate period of time to allow OCC to generate funds to repay the loans under the New Facility, such as by liquidating clearing fund assets other than those pledged to secure the loans. As provided in Section 5(e) of Article VIII of its By-Laws, if the loans have not been repaid within 30 days, the amount of clearing fund assets used to secure the loans will be considered to be an actual loss to the clearing fund, which will be allocated in accordance with Section 5 of Article VIII, and the proceeds of such allocation can be used to repay the loans.

The New Facility will further the relevant objectives from Section 805(b) of the Payment, Clearing and Settlement Supervision Act of 2010 (''Clearing Supervision Act'')[3] while also promoting compliance with the clearing agency standards in Rule 17Ad-22 of the Securities Exchange Act of 1934.[4] The objectives and principles of Section 805 of the Clearing Supervision Act specify the promotion of robust risk management, promotion of safety and soundness, reduction of systemic risks and support of the stability of the broader financial system.[5] OCC believes the New Facility would promote these objectives because the New Facility would provide OCC with an additional source of liquidity to meet its settlement obligations while at the same time being structured to address certain risks, as described above, that arise in connection with the New Facility. OCC also believes that the New Facility would provide OCC with a mechanism to maintain sufficient financial resources that is consistent with Rule 17Ad–22(b)(3).[6] The New Facility could enable OCC to minimize losses in the event of a default, suspension or insolvency, by allowing it to obtain funds on extremely short notice to ensure that the clearance and settlement of transactions in options and other contracts occurs without interruption. Moreover, the New Facility would permit OCC to avoid liquidating margin or clearing fund assets in what would likely be volatile market conditions and preserve sufficient financial resources to cover any losses resulting from the failure of a clearing member, bank or other clearing organization.

(iii) Accelerated Commission Action Requested

Pursuant to Section 806(e)(1)(I) of Title VIII of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, OCC requests that the Commission notify OCC that it has no objection to the Change no later than October 3, 2013, which is one week prior to the October 10, 2013 effective date of the New Facility. OCC requests Commission action one week in advance of the effective date to ensure that there is no period of time that OCC operates without a credit facility, given the importance of the borrowing capacity in connection with OCC's risk management.

(B) Clearing Agency's Statement on Comments on the Advance Notice Received From Members, Participants or Others

Written comments were not and are not intended to be solicited with respect to the proposed Change and none have been received.

III. Date of Effectiveness of the Proposed Change and Timing for Commission Action

The proposed change may be implemented if the Commission does not object to the proposed change within 60 days of the later of (i) the date that the proposed change was filed with the Commission or (ii) the date that any additional information requested by the Commission is received. The clearing agency shall not implement the proposed change if the Commission has any objection to the proposed change.

The Commission may extend the period for review by an additional 60 days if the proposed change raises novel or complex issues, subject to the Commission providing the clearing agency with prompt written notice of the extension. A proposed change may be implemented in less than 60 days from the date the advance notice is filed, or the date further information requested by the Commission is received, if the Commission notifies the clearing agency in writing that it does not object to the proposed change and authorizes the clearing agency to implement the proposed change on an earlier date, subject to any conditions imposed by the Commission.

The clearing agency shall post notice on its Web site of proposed changes that are implemented.

[3] 12 U.S.C. 5464.

[4] 17 CFR 240.17Ad–22.

[5] 12 U.S.C. 5464(b).

[6] 17 CFR 240.17Ad–22(b)(3).

The proposal shall not take effect until all regulatory actions required with respect to the proposal are completed.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing. 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–2013–806 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–OCC–2013–806. 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 of submission. 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 change that are filed with the Commission, and all written communications relating to the proposed 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 Section, 100 F Street, NE., Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of such filing also will be available for inspection and copying at the principal office of OCC and on OCC's Web site at *http://www.optionsclearing.com/components/docs/legal/rules_and_bylaws/sr_occ_13_806.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–2013–806 and should be submitted on or before November 12, 2013.

V. Commission's Findings and Notice of No Objection

Section 806(e)(1)(G) of the Clearing Supervision Act provides that a designated financial market utility may implement a change if it has not received an objection from the Commission within 60 days of the later of (i) the date that the Commission receives notice of the proposed change or (ii) the date the Commission receives any further information it requests for consideration of the notice. A designated financial market utility may implement a proposed change in less than 60 days from the date of receipt of the notice of the change by the Commission, or the date the Commission receives any further information it requested, if the Commission notifies the designated financial market utility in writing that it does not object to the proposed change and authorizes the designated financial market utility to implement the proposed change on an earlier date, subject to any conditions imposed by the Commission.[7]

In its filing with the Commission, OCC requested that the Commission notify OCC that it has no objection to the change no later than October 3, 2013, which is one week before the October 10, 2013 effective date of the New Facility. OCC requested Commission action by this date to ensure that there is no period of time that OCC operates without a credit facility, given the importance of the borrowing capacity in connection with OCC's risk-management framework.

The Commission does not object to the proposed change. Ensuring that OCC has uninterrupted access to a credit facility will promote the safety and soundness of the broader financial system by providing OCC with an additional source of liquidity to meet its clearance and settlement obligations in the event of the failure of a clearing member, bank, or clearing organization doing business with OCC. Having access to a credit facility will help OCC minimize losses in the event of such a failure by allowing it to access funds on extremely short notice, and without having to liquidate assets at a time when market prices could be falling precipitously.

VI. Conclusion

Pursuant to Section 806(e)(1)(I) of the Clearing Supervision Act, the Commission does not object to the proposed change, and authorizes OCC to implement the change (SR–OCC–2013–806) as of the date of this Order.[8]

By the Commission.

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2013–24550 Filed 10–21–13; 8:45 am]

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[7] 12 U.S.C. 5465(e)(1)(I).

[8] 12 U.S.C. 5465(e)(1)(I).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–70619; File No. SR–FINRA–2013–027]

Self-Regulatory Organizations; Financial Industry Regulatory Authority, Inc.; Order Granting Approval of a Proposed Rule Change Relating to Amendments to FINRA Rules 2360 and 4210 in Connection With OCC Cleared Over-the-Counter Options

October 7, 2013.

I. Introduction

On June 28, 2013, Financial Industry Regulatory Authority, Inc. (''FINRA'') 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 provide for the treatment of over-the-counter (''OTC'') options cleared by The Options Clearing Corporation (''OCC'') under FINRA's rules. The proposed rule change was published for comment in the **Federal Register** on July 9, 2013.[3] The Commission received one comment letter on the proposal.[4] This order approves the proposed rule change.

II. Description

On December 14, 2012, the Commission approved new rules established by OCC to clear and guarantee OTC options on the S&P 500 index.[5] FINRA seeks to amend FINRA Rules 2360 (Options) and 4210 (Margin Requirements) to provide for the application of existing FINRA rules to

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 69913 (July 2, 2013), 78 FR 41149 (''Notice'').

[4] *See* Letter to Elizabeth M. Murphy, Secretary, Commission, from Alessandro Cocco, Managing Director, J.P. Morgan Clearing Corporation, dated July 30, 2013 (''JP Morgan Clearing Letter'').

[5] *See* Securities Exchange Act Release No. 68434 (December 14, 2012), 77 FR 75243 (December 19, 2012) (Order Approving Proposed Rule Change, as Modified by Amendment No. 1 Thereto, and Notice of No Objection to Advance Notice, Modified by Amendment No. 1 Thereto, Relating to the Clearance and Settlement of Over-the-Counter Options) (''OCC Notice'').

OTC options cleared by the OCC (''OCC Cleared OTC Options''). FINRA notes that, at this time, the OCC has only been approved by the Commission to clear OTC options on the S&P 500 index.[6] However, FINRA states that the proposed rule change is intended to apply to any OCC Cleared OTC Option.[7]

A. Amendments to Rule 2360 (Options)

FINRA Rule 2360 covers, among other things, the definitions, position limits, exercise limits, reporting, suitability, and disclosure requirements related to options and options trading.[8] Under FINRA Rule 2360, options are generally classified as either standardized,[9] conventional,[10] or as a FLEX Equity Option.[11] FINRA states that, historically, all standardized options have been traded on an exchange, and all conventional options have traded OTC.[12] FINRA proposes to amend Rule 2360 to treat OCC Cleared OTC Options as conventional options for purposes of the rule.[13] FINRA states that FINRA Rule 2360 generally treats the categories of options (*i.e.,* standardized, conventional, FLEX Equity Options) the same, except in the case of position limits, reporting, and the delivery of disclosure documents.[14] FINRA believes that in these enumerated areas it is appropriate to treat OCC Cleared OTC Options as conventional options.[15] FINRA states that OCC Cleared OTC Options will otherwise be subject to the same sales practice and other requirements that apply to transactions in any category of options (including, among other requirements, suitability, approval of account opening and supervision).[16]

Specifically, FINRA proposes to amend Rule 2360 to define an ''OCC Cleared OTC Option'' as ''any put, call, straddle or other option or privilege that meets the definition of an 'option' under Rule 2360(a)(21) and is cleared by The [OCC], is entered into other than on or through the facilities of a national securities exchange, and is entered into exclusively by persons who are 'eligible contract participants' as defined in the Exchange Act.'' [17] In addition, FINRA proposes to amend the definitions of ''conventional option'' and ''conventional index option'' to include OCC Cleared OTC Options,[18] and to amend the definitions of ''standardized equity option,'' ''standardized index option,'' and ''FLEX Equity Option'' to specifically exclude OCC Cleared OTC Options.[19] FINRA also proposes to amend the definition of ''expiration date'' to reflect that the expiration date of OCC Cleared OTC Options may be customized by the parties to the trade in accordance with the rules of the OCC, rather than fixed by the OCC's rules.[20]

In addition, FINRA proposes to amend Rule 2360 to provide that the Characteristics and Risks of Standardized Options, also known as the Options Disclosure Document (''ODD''), and the Special Statement for Uncovered Option Writers (''Special Written Statement''), as further described below, will not be required to be delivered to customers effecting transactions in OCC Cleared OTC Options, which is consistent with the treatment of conventional options under Rule 2360.[21]

Finally, FINRA proposes to make technical, non-substantive changes to FINRA Rule 2360 in order to renumber certain provisions to account for the proposed new rule text and to reflect FINRA Manual style convention.

1. Position Limits

FINRA Rule 2360(b)(3)(A) imposes position limits on the number of options contracts in each class on the same side of the market (*i.e.,* aggregating long calls and short puts, or long puts and short calls) that can be held or written by a member, a person associated with a member, a customer or a group of customers acting in concert.[22] In general, position limits for standardized equity options are determined according to a five-tiered system in which more actively traded stocks with larger public floats are subject to higher position limits.[23] FINRA Rule 2360 provides that the position limit established by the rules of an options exchange for a particular equity option is the applicable position limit for purposes of FINRA Rule 2360.[24]

In general, conventional equity options are subject to the same position limits as the standardized equity options overlying the same security.[25] In instances where the equity security is not subject to a standardized option, the applicable position limit for the conventional option is the lowest tier (25,000 contracts) unless the security is in an index designated by FINRA that meets the volume and float criteria specified by FINRA [26] or the member can otherwise demonstrate to FINRA's Market Regulation Department that the underlying security meets the standards for a higher position limit.[27]

[6] *See* Notice, *supra* note 3, at 41151. *See also* OCC Notice, *supra* note 5.

[7] *See* Notice, *supra* note 3, at 41151.

[8] *See* FINRA Rule 2360.

[9] *See* FINRA Rules 2360(a)(31) (defining ''standardized equity option'' as ''any equity options contract issued, or subject to issuance by, The [OCC] that is not a FLEX Equity Option'') and 2360(a)(32) (defining ''standardized index options'' as ''any options contract issued, or subject to issuance, by The [OCC] that is based upon an index'').

[10] *See* FINRA Rules 2360(a)(9) (defining ''conventional option'' as ''any option contract not issued, or subject to issuance, by The [OCC]'') and 2360(a)(8) (defining ''conventional index option'' as ''any options contract not issued, or subject to issuance, by The [OCC] that, as of the trade date, overlies a basket or index of securities that: (A) Underlies a standardized index option; or (B) Satisfies the following criteria: (i) The basket or index comprises 9 or more equity securities; (ii) No equity security comprises more than 30% of the equity security component of the basket's or index's weighting; and (iii) Each equity security comprising the basket or index: (a) Is a component security in either the Russell 3000 Index or the FTSE All-World Index Series; or (b) has (1) market capitalization of at least $75 million or, in the case of the lowest weighted component securities in the basket or index that in the aggregate account for no more than 10% of the weight of the index, $50 million; and (2) trading volume for each of the preceding six months of at least one million shares or, in the case of each of the lowest weighted component securities in the basket or index that in the aggregate account for no more than 10% of the weight of the index, 500,000 shares'').

[11] *See* FINRA Rule 2360(a)(16) (defining ''FLEX Equity Option'' as ''any options contract issued, or subject to issuance by, The [OCC] whereby the parties to the transaction have the ability to negotiate the terms of the contract consistent with the rules of the exchange on which the options contract is traded'').

[12] *See* Notice, *supra* note 3, at 41150. FLEX Equity Options are, by definition, traded on an exchange. *See supra* note 11.

[13] *See* Notice, *supra* note 3, at 41150.

[14] *See* Notice, *supra* note 3, at 41150. FINRA states that FINRA Rule 2360(b)(4) specifies exercise limits through incorporating by reference options position limits under the rule, and that the provision does not further differentiate by category of option. Accordingly, the treatment of an option with respect to its position limit is the same with respect to exercise limits. *See* Notice, *supra* note 3, at 41150, n. 7.

[15] *See* Notice, *supra* note 3, at 41152.

[16] *Id.*

[17] *See* proposed FINRA Rule 2360(a)(19).

[18] *See* proposed FINRA Rules 2360(a)(8) and (9).

[19] *See* proposed FINRA Rules 2360(a)(16), (32), and (33).

[20] *See* proposed FINRA Rule 2360(a)(14).

[21] *See* proposed FINRA Rules 2360(b)(11)(A)(i) and (ii) and 2360(b)(16)(D).

[22] *See* Notice, *supra* note 3, at 41150.

[23] *Id. See also* FINRA Rule 2360(b)(3)(A). The position limits for standardized and conventional options overlying specified exchange-traded funds are established in FINRA Rule 2360, Supplemental Material .03. *See* Notice, *supra* note 3, at41150, n.10.

[24] *See* Notice, *supra* note 3, at 41150. *See also* FINRA Rule 2360(b)(3)(A).

[25] *See* Notice, *supra* note 3, at 41150. *See also* FINRA Rule 2360(b)(3)(A)(viii). There are differences in the available equity option hedge exemptions for standardized options and conventional options. *See* Notice, *supra* note 3, at 41150, n.11. *See also* Rule 2360(b)(3)(A)(vii).

[26] *See e.g., Notice to Members* 07–03 (January 2007) (which provides that the FTSE All-World Index Series is a designated index for this purpose) and *Regulatory Notice* 13–20 (May 2013) (which provides that the NASDAQ Global Large Mid Cap Index is an additional designated index for this purpose).

[27] *See* Notice, *supra* note 3, at 41150. *See also* FINRA Rule 2360(b)(3)(A)(viii).

Conventional index options are not subject to position limits while standardized index options are subject to the position limit as specified on the exchange on which the option trades.[28] Position limits for FLEX Equity Options are governed by the rules of the exchange on which such options trade.[29]

Position limits for standardized equity options contracts of the put class and call class on the same side of the market overlying the same security are not aggregated with the conventional equity options contracts or FLEX Equity Options contracts overlying the same security on the same side of the market.[30]

FINRA proposes that OCC Cleared OTC Options be subject to the position limits applicable to conventional options.[31] FINRA states that OCC Cleared OTC Options are similar to FLEX Equity Options because they are cleared by the OCC, are non-uniform, and give investors the ability to designate certain terms of the option.[32] However, FINRA believes that OCC Cleared OTC Options are more analogous to conventional options, since they are not traded on an exchange.[33] FINRA also notes that that the counterparties to OCC Cleared OTC Options must be ''eligible contract participants'' as defined in the Act [34] and are thus more sophisticated investors likely to be aware of the risks of options trading.[35]

Accordingly, pursuant to the proposal, OCC Cleared OTC Options on an equity security will be subject to the position limit of the greater of (i) 25,000 contracts or (ii) any standardized equity options position limit for which the underlying security qualifies, and OCC Cleared OTC Options will not be aggregated with any standardized option counterpart.[36] OCC Cleared OTC Options on an index, consistent with the treatment of conventional index options, will not be subject to any position limits.

2. Reporting Obligations

FINRA Rule 2360(b)(5)(A)(i)(a) generally requires all members to report to FINRA with respect to each account that has established an aggregate position of 200 or more conventional option contracts (whether long or short) of the put class and the call class on the same side of the market covering the same underlying security or index.[37] Such reporting requirement with respect to positions in conventional index options, however, applies only to an option that is based on an index that underlies, or is substantially similar to an index that underlies, a standardized index option.[38] FINRA Rule 2330(b)(5)(A)(i)(b) generally requires only those members that are not members of the options exchange upon which the standardized options are listed to report to FINRA with respect to each account that has established an aggregate position of 200 or more conventional option contracts (whether long or short) of the put class and the call class on the same side of the market covering the same underlying security or index.[39] Because there is no comparable exchange regulatory regime that applies to members trading OCC Cleared OTC Options, FINRA believes that OCC Cleared OTC Options should be treated as conventional options so that all members must report positions of 200 or more contracts on the same side of the market covering the same underlying security or index to FINRA, as is the case for all conventional options.[40]

3. Disclosure Documents

FINRA Rule 2360(b)(11)(A)(1) requires members to deliver the ODD to customers at or prior to the time the customer's account is approved for trading options issued by the OCC, and thereafter to deliver to customers applicable amendments to the ODD.[41] The ODD describes standardized options and FLEX Equity Options, but does not address OTC options, and members are not required to deliver the ODD with respect to such options.[42] In addition, FINRA Rule 2360(b)(11)(A)(2) requires members to deliver the Special Written Statement, which describes the risks related to writing uncovered short options, to customers approved to write uncovered short options transactions.[43] Similar to the ODD delivery requirements, the requirement to deliver the Special Written Statement only applies to transactions in options issued by the OCC (historically listed options).[44]

Pursuant to the proposal, and consistent with the treatment of transactions in conventional options, FINRA members will not be required to deliver the ODD or Special Written Statement to customers that engage in transactions in OCC Cleared OTC Options.[45] FINRA states that it believes such delivery requirements are unnecessary because the counterparties to OCC Cleared OTC Options must be ''eligible contract participants'' as defined in the Act,[46] and thus, are more sophisticated investors who are likely to be aware of the risks associated with trading OTC options.[47]

B. Amendments to Rule 4210 (Margin Requirements)

FINRA Rules 4210(f)(2) and 4210(g) set forth the strategy-based margin and portfolio margin requirements for transactions in options.[48] FINRA states that, in general, the margin requirements for options listed on an exchange (*i.e.,* cleared and guaranteed by the OCC) are lower than the margin requirements for conventional options (*i.e.,* OTC options).[49] For the purposes of margin requirements, FINRA proposes to treat OCC Cleared OTC Options the same as other cleared and guaranteed options (historically ''listed options''), in light of the clearing and guaranteeing functions performed by the OCC.[50] FINRA notes that the proposed beneficial margin treatment for OCC Cleared OTC Options may only be applied by a member after the OTC

[28] *See* Notice, *supra* note 3, at 41150. *See also Notice to Members* 94–46 (June 1994) (relating to conventional index options) and FINRA Rule 2360(b)(3)(B) (relating to standardized index options).

[29] *See* Notice, *supra* note 3, at 41150. *See also* FINRA Rule 2360(b)(2).

[30] *See* Notice, *supra* note 3, at 41151. *See* also FINRA Rule 2360(b)(3)(A)(viii). Because conventional index options are not subject to any position limits, FINRA Rule 2360 does not address aggregation of conventional index options with standardized index options overlying the same index. *See* Notice, *supra* note 3, at 41151, n. 16.

[31] *See* Notice, *supra* note 3, at 41151.

[32] *Id.*

[33] *Id.*

[34] *See* 15 U.S.C. 78c(a)(65) which states that an ''eligible contract participant has the same meaning as in section 1a of the Commodity Exchange Act.'' The Commodity Exchange Act details the requirements for eligibility as an ''eligible contract participant'' which generally require a sufficient regulated status or a specified minimum amount of assets. *See* 7 U.S.C. 1(a)(18). *See also* the OCC By-Laws, Article XVII, Section 6(f)(iv) (requiring that where a transaction in an OCC Cleared OTC Option is effected for the account of a customer, the customer is an ''eligible contract participant''); and OCC Notice, *supra* note 5 at 75244.

[35] *See* Notice, *supra* note 3, at 41151.

[36] *Id.*

[37] *Id.*

[38] *Id. See also* FINRA Rule 2360(b)(5)(A)(i)(a).

[39] *See* Notice, *supra* note 3, at 41151.

[40] *Id.*

[41] *Id.*

[42] *See* Notice, *supra* note 3, at 41151–41152.

[43] *See* Notice, *supra* note 3, at 41152.

[44] *See* FINRA Rule 2360(b)(11)(A)(2). *See also* Notice, *supra* note 3, at 41152.

[45] *Id.*

[46] *See supra* note 34.

[47] *See* Notice, *supra* note 3, at 41152.

[48] *Id.*

[49] *Id. See also* FINRA Rules 4210(f)(2)(A)(xxiv) and 4210(g)(2)(A) for the definitions of ''listed'' and ''listed option,'' respectively, and FINRA Rules 4210(f)(2)(A)(xxvii) and 4210(g)(2)(H) for the definitions of ''OTC'' and ''unlisted derivative,'' respectively.

[50] *See* Notice, *supra* note 3, at 41152.

option has been accepted for clearing and is guaranteed by the OCC.[51]

FINRA proposes to amend certain existing definitions under FINRA Rule 4210 in order to provide for the same margin treatment for OCC Cleared OTC Options as other cleared and guaranteed options. Specifically, FINRA proposes to amend the definition of ''listed'' in Rule 4210(f)(2)(A)(xxiv) to include OCC Cleared OTC Options and to amend the definition of ''OTC'' in Rule 4210(f)(2)(A)(xxvii) to specifically exclude OCC Cleared OTC Options.[52] FINRA also proposes conforming amendments to Rule 4210(g)(2)(A) regarding portfolio margin requirements to provide that a ''listed option'' includes options issued and guaranteed by a registered clearing agency, including OCC Cleared OTC Options, and to Rule 4210(g)(2)(H) to provide that an ''unlisted derivative'' includes, among other things, an option that is neither traded on a national securities exchange, nor issued and guaranteed by a registered clearing agency, and shall not include an OCC Cleared OTC Option.[53]

III. Comment Letter

As previously noted, the Commission received one comment letter on the proposal.[54] The commenter expresses support for FINRA's proposal to treat OCC Cleared OTC Options the same as other cleared and guaranteed options under FINRA Rule 4210 governing margin requirements.[55] The commenter states that it concurs with FINRA's belief that the risk posed by OCC Cleared OTC Options is similar to that of other cleared and guaranteed options, and that it is, therefore, appropriate to afford OCC Cleared OTC Options the same margin treatment as listed options.[56]

IV. Discussion

After careful review of the proposed rule change and the comment letter received, the Commission finds that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder that are applicable to a national securities association.[57] In particular, the Commission finds that the proposed rule change is consistent with Section 15A(b)(6) of the Act,[58] which requires, among other things, that the rules of a national securities association 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 finds the proposed treatment of OCC Cleared OTC Options under FINRA Rule 2360 is consistent with the Act. FINRA represents that, other than with respect to the requirements relating to position limits, reporting, and the delivery of disclosure documents, OCC Cleared OTC Options will be subject to the same options sale practice and other requirements (such as account opening procedures and standards for supervision and suitability) as apply to all categories of options.[59] FINRA also notes that the proposed rule change fosters innovation in the market by accommodating a new product in OCC Cleared OTC Options while balancing the need to protect investors and the public interest by regulating such product in a rational regulatory framework.

As previously stated by the Commission, position limits are intended to prevent the establishment of options positions that can be used or might create incentives to manipulate or disrupt the underlying market so as to benefit the options position, are designed to minimize the potential for mini-manipulation and for corners or squeezes of the underlying market, and serve to reduce the possibility for disruption of the options market itself, especially in illiquid options classes.[60] FINRA states that its proposal for OCC Cleared OTC Options is consistent with the purposes of position limits highlighted above. Additionally, FINRA notes that it uses the options position information reported to it as part of its ongoing market surveillance operations and to support its monitoring efforts for any market manipulation or disruption related to the accumulation or disposition of large options positions, and that the information reported enables FINRA to identify large positions held or written by a member that could pose a financial risk to the member or its clearing firm.[61] As such, the Commission finds that FINRA's proposal to subject OCC Cleared OTC Options to the position limits and reporting requirements applicable to conventional options is consistent with the Act.

With respect to the delivery of disclosure documents, the Commission finds that it is consistent with the Act to treat transactions in OCC Cleared OTC Options consistent with conventional options and to not require delivery of the ODD or Special Written Statement to customers transacting in OCC Cleared OTC Options. As noted by FINRA, OTC options are not addressed in the ODD. Furthermore, the counterparties to transactions in OCC Cleared OTC Options must be ''eligible contract participants'' as defined in the Act and, therefore, are more sophisticated investors likely to be aware of the risks of options trading.[62]

Finally, the Commission finds the proposed margin treatment of OCC Cleared OTC Options under FINRA Rule 4120 is consistent with the Act. As noted by FINRA, the margin requirement for options listed on an exchange (and cleared and guaranteed by the OCC) generally is lower than the margin requirement for OTC options (not cleared or guaranteed by the OCC). As noted by FINRA, the reasons underlying the more favorable margin treatment for listed (and OCC cleared and guaranteed) options apply with equal force to OCC Cleared OTC Options because the clearing and guaranteeing functions performed by the OCC reduce the counterparty credit risk of these OTC options, likening them to the same level of risk as listed options.[63]

V. Conclusion

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,[64] that the proposed rule change (SR–FINRA–2013–027) be, and hereby is, approved.

[51] *Id.*

[52] *See* Notice, *supra* note 3, at 41153.

[53] *Id.*

[54] *See supra* note 4.

[55] *See* JP Morgan Clearing Letter, *supra* note 4, at 1.

[56] *Id.*

[57] In approving the proposed rule change, the Commission has considered the proposed rule change's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[58] 15 U.S.C. 78o–3(b)(6)

[59] *See supra* notes 14–16 and accompanying text.

[60] *See* Securities Exchange Act Release No. 40087 (June 12, 1998), 63 FR 33746, 33748 (June 19, 1998) (Order Granting Approval and Notice of Filing and Order Granting Accelerated Approval to Amendment No.1 and Amendment No. 2 to Proposed Rule Change Relating to an Amendment to the NASD's Options Position Limit Rule File No. SR–NASD–98–23).

[61] *See* Notice, *supra* note 3, at 41151.

[62] *See supra* note 34.

[63] The Commission notes that the sole comment letter received on the proposal supported FINRA's proposed margin treatment of OCC Cleared OTC Options and agreed with FINRA that the risks related to OCC Cleared OTC Options are similar to the risks related to listed options, and, thus, similar margin requirements would be appropriate. *See* JP Morgan Clearing Letter, *supra* note 4.

[64] 15 U.S.C. 78s(b)(2).

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[65]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2013–24631 Filed 10–21–13; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–70627; File No. SR–NASDAQ–2013–130]

Self-Regulatory Organizations; The NASDAQ Stock Market LLC; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Adopt New Regulatory Fees Payable by Certain Listed Companies and Applicants

October 8, 2013.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'')[1], and Rule 19b–4[2] thereunder, notice is hereby given that on October 2, 2013, The NASDAQ Stock Market LLC (''NASDAQ'' or ''Exchange'') filed with the Securities and Exchange Commission (''SEC'' or ''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by NASDAQ. 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

NASDAQ is proposing to adopt new regulatory fees payable by certain listed companies and applicants.

The text of the proposed rule change is available on the Exchange's Web site at *http://nasdaq.cchwallstreet.com*, at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

NASDAQ proposes to adopt new regulatory fees applicable to certain listed companies and applicants. Specifically, NASDAQ proposes to require that an acquisition company that completes a business combination pay a $15,000 substitution listing fee in connection with the acquisition transaction. In addition, NASDAQ proposes to require that an applicant that does not list within 12 months of submitting its application pay a $5,000 additional application fee each subsequent 12 month period that the application remains pending. NASDAQ also proposes to impose a $5,000 application fee on companies that transfer from the NASDAQ Global or Global Select Market to the NASDAQ Capital Market. Finally, NASDAQ proposes to impose a $5,000 review fee on companies that submit a plan to regain compliance with certain listing requirements.

Acquisition Companies

NASDAQ Rule IM–5101–2 provides rules for the listing of a company whose business plan is to complete one or more acquisitions. These companies are required to maintain most of the proceeds of their initial public offering in a deposit account until the company completes one or more acquisitions representing at least 80% of the value of the deposit account. In connection with each acquisition made during this period, the acquisition company must notify NASDAQ about the acquisition and NASDAQ staff must determine whether the combined company will meet the requirements for initial listing. In conducting this review, NASDAQ staff considers the quantitative requirements for listing and also reviews for any public interest concerns the new officers, directors and shareholders that will become associated with the listed company as a result of the transaction.

When NASDAQ initially adopted rules concerning the listing of acquisition companies it determined not to charge an entry fee when the company completes a business combination.[3] As a result, because the application review fee is a component of the entry fee, NASDAQ also does not collect an application fee in connection with its review of whether the acquisition company satisfies the initial listing standards.[4] However, while the acquisition company is already a listed company, there are significant changes in its business, management and ownership structure at the time of the acquisition, necessitating a review that is substantially similar to the review conducted for newly listing companies. NASDAQ staff spends considerable time on such reviews.

Accordingly, NASDAQ now proposes to include a business combination described in IM–5101–2 in the definition of ''Substitution Listing Events,'' and thus subject these transactions to the $15,000 fee imposed on a Subsitution [sic] Listing Event in Rules 5910(f) and 5920(e). NASDAQ believes that this is appropriate, as the business combination by an acquisition company is similar to other Substitution Listing Events for which a fee is charged, such as a technical change whereby the shareholders of the original company receive a share-for-share interest in a new company.

NASDAQ will implement this fee immediately. However, NASDAQ will not charge this fee in connection with its review of any transaction that was publicly announced in a press release or Form 8–K prior to October 15, 2013.

Additional Application Fee

NASDAQ Rules 5910(a) and 5920(a) impose application fees on companies listing on NASDAQ. These fees are designed to recoup a portion of the costs associated with NASDAQ's review of the company.

NASDAQ has observed that when a company lists a substantial period of time after it first submitted its applications, NASDAQ must complete additional reviews of the application prior to the listing. These additional reviews are substantially equivalent to the review for a newly applying company and include, for example, additional reviews of individuals associated with the company, staff monitoring of disclosures and public filings by the applicant while its application is pending, and often extensive discussions with the applicant. To offset the costs associated with the ongoing monitoring and additional reviews for companies whose application remains open for an extended period, NASDAQ proposes to

[65] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 57685 (April 18, 2008), 73 FR 22191 (April 24, 2008) (Notice of Filing for SR–NASDAQ–2008–013, proposing additional initial listing standards for Special Purpose Acquisition Vehicles) at footnote 9 (noting that companies would not be required to pay a new listing fee at the time of an acquisition transaction).

[4] *See* Rules 5910(a) and 5920(a).

require that an applicant that does not list within 12 months of submitting its application pay an additional $5,000 application fee each subsequent 12 month period. NASDAQ believes that the proposed additional application fee may result in companies closing unrealistic applications rather than maintaining such applications indefinitely.

Like the current application fee, the proposed additional application fee would be credited towards the entry fee payable upon listing if the application remains open until such listing. Thus, for a company that ultimately lists on NASDAQ, there would be no change in the overall fee paid. If a company does not timely pay the additional application fee, its application will be closed and it will be required to submit a new application, and pay a new application fee, if it subsequently reapplies.

NASDAQ will implement this fee immediately, but will not charge any company until October 15, 2014. This will assure that any company with an application pending at the time of this filing will have at least one year to list before they are charged the fee.

Capital Market Transfer Fee

NASDAQ does not impose an entry fee on a company that transfers from the NASDAQ Global Market to the NASDAQ Capital Market.[5] As a result, because the application fee is a component of the entry fee, similar to the case noted above involving acquisition companies, NASDAQ also has not collected an application fee for companies that transfer from the Global to the Capital Market. However, the review of such applications is often complicated and companies transferring from the Global Market to the Capital Market are often experiencing business challenges.[6] As a result, to help offset a portion of the costs associated with such reviews, NASDAQ now proposes to impose a $5,000 application fee for a company that submits an application to transfer from the Global to the Capital Market.

NASDAQ will implement this fee for transfer applications submitted after October 15, 2013. This period before implementation will allow companies with an application in progress to finalize and submit that application before the new fee is applicable.

NASDAQ will implement this fee for transfer applications submitted after October 15, 2013. This period before implementation will allow companies with an application in progress to finalize and submit that application before the new fee is applicable. [sic]

Compliance Plan Review Fee

NASDAQ proposes to impose a $5,000 review fee on non-compliant companies that submit a plan to regain compliance with certain of the listing requirements. Rule 5810(c)(2) allows a listed company to submit a plan to regain compliance when it fails to meet certain listing requirements. NASDAQ dedicates considerable staff resources to reviewing these plans of compliance. At present, the cost of that time is allocated across all companies as part of the listing fee. In order to allocate this cost more equitably to the individual companies who directly benefit, NASDAQ proposes to adopt a $5,000 review fee for the review of certain compliance plans.

NASDAQ believes that the proposed compliance plan review fee is appropriate because companies often have the ability to foresee non-compliance with these listing requirements and take appropriate action before becoming non-compliant. In addition, companies have a period of time, generally either 45 or 60 days, before they must submit a plan to regain compliance[7] and, if a company achieves compliance during this time, it would not be required to submit a plan or pay the proposed compliance plan review fee. When a company does become non-compliant and cannot cure the deficiency before the plan is due, NASDAQ's experience is that the company's plan often requires detailed analysis by staff to determine whether the plan can enable the company to regain compliance in the near term.[8] Depending on the underlying listing requirement, NASDAQ staff may also need to expend time discussing the viability of the plan with the company's outside auditor and advisors and/or reviewing transactional documents.

NASDAQ does not propose to impose the compliance plan review fee on plans to regain compliance with deficiencies from board of director and board committee requirements where the company is not eligible for a cure period, as described in Rule 5810(c)(2)(A)(iii) [sic]. NASDAQ's experience is that these types of deficiencies often arise unexpectedly from events outside the control of the company, such as the death or resignation of a director. Further, NASDAQ has observed that the plans to regain compliance with these deficiencies are typically straight forward and do not require significant staff analysis. For example, a typical plan might describe the hiring of a director search firm or providing the resume of a director candidate who is concluding his or her own due diligence on the company before agreeing to join the board. As such, NASDAQ does not believe it is necessary to impose a plan review fee in these situations.

NASDAQ will implement this fee for plans submitted in response to deficiency notifications sent after October 15, 2013.

2. Statutory Basis

NASDAQ believes that the proposed rule change is consistent with the provisions of Section 6 of the Act,[9] in general and with Sections 6(b)(4) and (5) of the Act,[10] in particular, in that it provides for the equitable allocation of reasonable dues, fees, and other charges among its members, issuers and other persons using its facilities, and does not unfairly discriminate between customers, issuers, brokers or dealers.

NASDAQ believes that the proposed fees are reasonable because they will better reflect NASDAQ's costs in reviewing applications and compliance plans and help ensure adequate resources for NASDAQ's listing compliance program. In addition, NASDAQ believes that such fees are reasonable and that none of the proposed fees are unduly burdensome or would discourage any company from pursuing an application or submitting a plan of compliance, as applicable.

The proposed changes are equitable and not unfairly discriminatory because they would apply equally to all similarly situated companies. In addition, aligning NASDAQ's fees with the costs incurred for specific actions will help minimize the extent that companies that do not utilize the application process, or which are compliant with all listing standards, may subsidize the costs of review for other companies. NASDAQ believes that excluding companies that submit a plan for a board or committee deficiency

[5] Rule 5920(a)(7)(i). The NASDAQ Global Market also includes the Global Select tier.

[6] In fact, many companies making such transfers do so in connection with their failure to meet a Global Market continued listing standard. Such companies would not also be subject to the proposed compliance plan review fee discussed below.

[7] Rule 5810(c)(2)(A).

[8] A company's plan with respect to a quantitative deficiency may be for it to transfer from the Global Market to the Capital Market, which has lower quantitative listing requirements. In this case, the company must submit the application transfer fee in proposed Rule 5920(a)(11), described above, but would not also pay a compliance plan review fee.

[9] 15 U.S.C. 78f.

[10] 15 U.S.C. 78f(b)(4) and (5).

from the compliance plan review fee is not unfairly discriminatory because these plans are generally simpler and require fewer resources and less time to review.

NASDAQ also believes that the proposed fees are consistent with the investor protection objectives of Section 6(b)(5) of the Act [11] in that they are designed to promote just and equitable principles of trade, to remove impediments to a free and open market and national market systems, and in general to protect investors and the public interest. Specifically, the fees are designed to ensure that there are adequate resources for NASDAQ's listing compliance program, which helps to assure that listing standards are properly enforced and investors are protected.

B. Self-Regulatory Organization's Statement on Burden on Competition

NASDAQ does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act, as amended. The market for listing services is extremely competitive and listed companies may freely choose alternative venues based on the aggregate fees assessed, and the value provided by each listing. This rule proposal does not burden competition with other listing venues, which are similarly free to align their fees on the costs incurred by the process they offer. For these reasons, NASDAQ does not believe that the proposed rule change will result in any burden on competition for listings.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were either solicited or received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A) of the Act [12] and paragraph (f) of Rule 19b-4 thereunder.[13] 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–NASDAQ–2013–130 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–NASDAQ–2013–130. 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–NASDAQ–2013–130* and should be submitted on or before November 12, 2013

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[14]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2013–24636 Filed 10–21–13; 8:45 am]

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[11] 15 U.S.C. 78f(b)(5).

[12] 15 U.S.C. 78s(b)(3)(A).

[13] 17 CFR 240.19b–4(f).

[14] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–70597; File No. SR–CHX–2013–14]

Self Regulatory Organizations; Chicago Stock Exchange, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Relating to Registration, Qualification, Supervision, and Continuing Education of Individuals Associated with Participant Firms

October 2, 2013.

Pursuant to Section 19(b)(1) [1] of the Securities Exchange Act of 1934 (''Act'') [2] and Rule 19b–4 thereunder,[3] notice is hereby given that on September 24, 2013, the Chicago Stock Exchange, Inc. (''CHX'' or ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I and II below, which Items have been prepared by the 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

CHX proposes to amend Exchange Rules relating to the registration and qualification and continuing education of individuals associated with CHX Participant Firms, and the supervision of registered persons and firm activity. The text of this proposed rule change is available on the Exchange's Web site at *http://www.chx.com/rules/proposed_rules.htm*, 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

[1] 15 U.S.C. 78s(b)(1).

[2] 15 U.S.C. 78a.

[3] 17 CFR 240.19b–4.

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 rules in Article 6 regarding the qualification, registration, supervision and Continuing Education (''CE'') of CHX Participant Firms and their associated persons [4] to be virtually consistent with the requirements of the Financial Industry Regulatory Authority (''FINRA'').[5] The Exchange believes that the proposed amendments are also consistent with Exchange Act Rule 15b7–1, which provides: ''[n]o registered broker or dealer shall effect any transaction in . . . any security unless any natural person associated with such broker or dealer who effects or is involved in effecting such transaction is registered or approved in accordance with the standards of training, experience, competence, and other qualification standards . . . established by the rules of any national securities exchange.'' [6]

i. Exchange Membership Overview

Exchange Participants are considered ''members'' of the Exchange for purposes of the Exchange Act and are defined as Firms that hold a valid Trading Permit and any person associated with a Participant Firm who is registered with the Exchange under Articles 16 and 17 as a Market Maker Trader or Institutional Broker Representative, respectively.[7] If a Participant is not a natural person, the Participant may also be referred to as a ''Participant Firm,'' but unless the context requires otherwise, the term Participant refers to an individual Participant and/or a Participant Firm.[8] The Exchange's Participant Firms have varying business models. For example, some conduct solely proprietary trading; others conduct solely agency transactions, while still others conduct a mixture of both.

Participants may also elect to register under a Participant subcategory such as the Institutional Broker category of Participants. ''Institutional Broker'' means a member of the Exchange who is registered as an Institutional Broker pursuant to the provisions of Article 17 and has satisfied all Exchange requirements to operate as an Institutional Broker on the Exchange.[9] Like those firms registered solely as an Exchange Participant, firms that also elect to register as Institutional Brokers also have varying business models ranging, for example, from proprietary to agency trading or a mixture of both.

The rule changes proposed herein will apply to all Participant Firms. Individual associated persons registered at Participant Firms, including Participant Firms registered as Institutional Brokers will be required to pass the appropriate examinations as defined in the proposed rules. The appropriate examinations for associated persons at all categories of Participant Firms will depend on the Firm's business, size, and other factors as described below. The only varying requirement regarding examinations between Participant Firms and Institutional Broker firms is that individuals registered as Institutional Broker Representatives at Institutional Broker firms are required to pass the Exchange's internal Institutional Broker Examination.[10] The proposed rules clarify that Institutional Broker Representatives will need to pass the internal Institutional Broker Examination as under current requirements, and, like all Participant Firms [sic], will be required to pass either the Series 7 or Series 56 examinations depending on the firm's business model.[11]

ii. Current Rules

Exchange rules currently require that persons associated with CHX Participants meet the registration and qualification requirements in Article 6, Rules 2 and 3. According to Article 6, Rule 2, all Representatives of a Participant must be registered with the Exchange. A Representative is defined as a person, who is engaged or will be engaged in the securities business of a Participant.[12] According to Article 6, Rule 3, the Exchange may require the successful completion of a training course or an examination, or both, in connection with the registration of Participants and persons associated with a Participant, and may charge fees for such registration and examination. CHX also requires that a Participant shall not make application for the registration of any person associated with the Participant where there is no intent to employ such person in the securities business of the Participant.[13] This requirement thereby prohibits Participants from ''parking'' registrations. Notably, under the current rule structure, the registration requirements apply only to Participant Firms for which the Exchange is the Designated Examining Authority (''DEA'') [14] and to associated persons of other Participant Firms where the associated persons act as Institutional Broker Representatives or Market Maker Traders on the Exchange.[15]

Current Exchange rules recognize four qualification examinations for registration with the Exchange.[16] Those examinations are (1) the Series 7 qualification examination administered by FINRA to conduct a public business, (2) the Series 7A examination historically administered by NYSE to conduct a public business limited to accepting orders from professional customers for execution on the Exchange, (3) the Institutional Broker Exam administered by CHX to conduct business on behalf of an Institutional Broker, and (4) the Market Maker Trader Exam administered by CHX to qualify as a Market Maker Trader.[17]

Current Exchange rules also require that members that are Joint Back Office

[4] Under Article 1, Rule 1(d) of the Exchange's rules, the term ''Associated Person'' has the meaning set forth in Section 3(a)(21) of the Exchange Act. That section provides that ''[t]he term 'persons associated with a member' or 'associated person of a member' when used with respect to a member of a national securities exchange or registered securities association means any partner, officer, director, or branch manager of such member (or any person occupying a similar status or performing similar functions), any person directly or indirectly controlling, controlled by, or under common control with such member, or any employee of such member.'' For purposes of these provisions, a CHX Participant Firm is considered a member of the Exchange.

[5] Other self-regulatory organizations (''SROs'') have made similar rule changes. *See* e.g., Securities Exchange Act Release Nos. 63314 (November 12, 2010), 75 FR 70957 (November 19, 2010) (SR–CBOE–2010–084); 63843 (February 4, 2011), 76 FR 7884 (February 11, 2011) (SR–ISE–2010–115); 64958 (July 25, 2011), 76 FR 45629 (July 29, 2011) (SR–NASDAQ–2011–095); 66453 (February 23, 2012), 77 FR 12345 (February 29, 2012) (SR–NYSEAMEX–2012–11); and 66452 (February 23, 2012), 77 FR 12347 (February 29, 2012) (SR–NYSEARCA–2012–15).

[6] 17 CFR.240.15b7–1.

[7] Article 1, Rule 1(s).

[8] *Id.*

[9] Article 1, Rule 1(n).

[10] Proposed Article 6, Rule 3(d).

[11] *Id.*

[12] Article 6, Rule 2(b).

[13] Article 6, Rule 2(d).

[14] NYSE Arca, Inc. (''NYSE Arca'') historically limited its Options registrations requirements to traders of member organizations for which NYSE Arca was the DEA but removed the limitation in a 2012 rule change. *See* SR–NYSEARCA–2012–15, NYSE Arca Options Rule 2.

[15] Article 6, Rule 2, Interpretations and Policies .03.

[16] Article 6, Rule 3, Interpretations and Policies .01.

[17] *Id.*

(''JBO'') Participants designate a Financial Operations Principal (''FINOP'') who must pass the Series 27 Exam administered by FINRA. The Exchange also currently requires all Participant Firms for which the Exchange is the DEA to designate a person or persons responsible for supervision and compliance at the firm.[18]

Through this filing, the Exchange proposes to require that all persons that function as Representatives of a Participant under Article 6, Rule 2(b) register, pass appropriate examinations and participate in CE requirements. In this regard, the Exchange proposes to make a number of amendments to its registration and qualification standards including (1) expanding its registration requirements to all Participant Firms rather than solely Firms for which CHX is the DEA, (2) recognizing the Proprietary Traders Qualification Examination (Series 56) as one of the applicable qualification examinations,[19] and (3) requiring each Participant Firm to register at least two officers or partners as principals with respect to each aspect of the Participant's securities business.[20] According to the proposed rules, Principals are persons associated with a Participant who are actively engaged in the management of the Participants' securities business, including supervision, solicitation, conduct of business or the training of persons associated with a member for any of these functions are designated as Principals.[21]

iii. Registration of Representatives

First, CHX proposes to amend Article 6, Rule 2 to require that all persons associated with a Participant who are engaged or will be engaged in the securities business of a Participant register as a [sic] Representative.[22] This will ensure that all associated persons who conduct business at the Exchange must be registered, including proprietary traders and their supervisors, and will ensure that all are appropriately qualified and supervised.[23]

iv. Registration of Principals

To strengthen the supervisory systems of Participant Firms and thereby enhance investor protection, the Exchange proposes to require each Participant Firm to have at least two officers or partners who are registered as Principals with respect to each aspect of the Participant's securities business.[24] In addition to the two registered Principals, Participants shall also have at least one person registered as a Limited Principal FINOP. Thus, each individual supervising the securities businesses and associated persons of Participant Firms must qualify for registration as a Principal by passing the relevant Principal examination as listed in Article 6, Rule 3.

Notably, the proposed rules allow the Exchange to waive the two-principal requirement and only require Participant Firms to have one Principal under certain enumerated circumstances. Such circumstances include when a Participant demonstrates conclusively, upon written application, that only one individual should be required to register. Also, a Participant that conducts a proprietary trading business only and has 25 or fewer Representatives shall only be required to have one officer or partner who is registered as a Principal. According to proposed Article 6 Rule 2(c)(vi), a Participant shall be considered to conduct only proprietary trading if the Participant has the following characteristics: (1) The Participant is not required by Section 15(b)(8) of the Exchange Act to become a FINRA member; (2) All funds used or proposed to be used by the Participant are the Participant's own capital, traded through the Participant's own accounts; (3) The Participant does not, and will not, have customers; and (4) All persons registered on behalf of the Participant acting or to be acting in the capacity of a trader must be owners of, employees of, or contractors to the Participant. According to proposed Article 6, Rule 3(a)(ii), a proprietary trader is a person who only enters or executes orders on behalf of the Participant and does not handle or execute transactions for customers. The Exchange notes that these provisions are similar to the registration requirements of other exchanges and believes that they are appropriate given the limited size and scope of activities of such firms.[25]

a. Financial and Operations Principals

The Exchange proposes that all CHX Participant Firms designate at least one individual as a FINOP who must maintain the appropriate registration status.[26] The designated FINOP must pass the Series 27.[27] The Exchange currently requires FINOPs associated with Participant Firms that maintain a JBO to maintain a Series 27 license.[28] However, as the Exchange sees no compelling reason to limit the registration of FINOPs to JBO firms, the Exchange is proposing to broaden the registration requirement for FINOPs to all Participant Firms. The Exchange also proposes to add a basic description of the responsibilities of a person registered as a FINOP, as well as the related notices which the Participant Firm must make to the Exchange.[29]

[18] Article 6, Rule 5.

[19] According to proposed Article 6, Rule 3(a)(ii), a proprietary trader is a person who does not handle or execute transactions for customers and only enters or executes orders on behalf of the Participant.

[20] Proposed Article 6, Rule 2(c)(v).

[21] Proposed Article 6, Rule 2(c)(i).

[22] The Exchange is also proposing to change the term ''registered person(s)'' as used throughout Article 6 and in Article 7, Rule 3A to ''Representative(s)'' as part of this filing.

[23] Notably, persons engaged in the supervision of a Participant's securities business will also be required to register as Principals under the provisions of Article 6, Rule 2(c).

[24] Proposed Article 6, Rule 2(c)(i). These categories include Sole Proprietors; Officers; Partners; Branch office managers; and Directors. This proposed requirement is also consistent with the registration requirements set forth in other SRO rules such as NASD Rule 1021(e) and BATS Rule 2.5 Interpretations and Policies .01(d).

[25] *See* NASD Rule 1021(e) and Chicago Board Options Exchange (''CBOE'') Rule 3.6A, Interpretations and Policies .07.

[26] Proposed Article 6, Rule 3(c). *See also,* CBOE Rule 3.6A(b), NASD Rule 1021(e) for examples of similar requirements.

[27] The Exchange proposes to delete the existing requirement that only FINOPs for JBO firms pass the Series 27 examination.

[28] Article 6, Rule 3, Interpretation and Policy .01(e). JBO arrangements and the obligations related thereto are described in Article 7, Rule 3A, which provides that ''[a]n arrangement may be established between two or more registered broker-dealers pursuant to Regulation T Section 220.7 to form a JBO arrangement for carrying and clearing accounts of participating broker-dealers.'' Section 220.7(c) of Regulation T authorizes the creation of JBO arrangements which permit a creditor to effect or finance transactions of any of its owners if the creditor is a clearing and servicing broker or dealer owned jointly or individually by other creditors (12 CFR 220.7(c)). Under CHX Article 7, Rule 3A(a), each JBO Participant is required to (1) be registered as a broker-dealer pursuant to Section 15 of the Securities Exchange Act of 1934, (2) be subject to the capital requirements prescribed by Rule 15c3–1 therein, and shall not be eligible to operate under the provisions of SEC Rule 15c3–1(b)(i), (3) meet and maintain a minimum account equity requirement of $1,000,000 with each clearing broker-dealer where an account of the JBO Participant is carried, (4) meet and maintain the ownership standards established by the carrying broker-dealer and (5) designate one registered person associated with such Participant as a financial and operations principal (Series 27).

[29] Proposed Article 6, Rule 2(c)(iii). The duties of a FINOP shall include taking appropriate actions to assure that the Participant Firm complies with applicable financial and operational requirements under the Rules of the Exchange and the Exchange Act, including but not limited to those requirements relating to the submission of financial reports and the maintenance of books and records. A FINOP may be a full-time employee, a part-time employee or independent contractor of the Participant Firm. Participant Firms for which CHX is the Designated Examining Authority (''DEA'') must provide prompt written notice to the Exchange's Member Regulation Department for each person designated as a FINOP. The Exchange utilizes such information as part of its examination process.

b. Chief Compliance Officers

In accordance with other SROs, the Exchange proposes to require Participant Firms to designate a Chief Compliance Officer (''CCO'').[30] The CCO must pass the Series 24 examination unless the Participant Firm with which the CCO is associated meets the requirements to take, in the alternative, the Compliance Officer Exam (Series 14).[31]

A Compliance Officer at such Participant Firm would qualify for the alternate exam if the firm, (1) engages solely in proprietary trading, (2) otherwise meets the registration requirements for Principals as defined in Article 6, Rule 2(c), and (3) meets the supervisory requirements in Rule 3(b). The Compliance Officer Exam is intended to ensure that the individuals who have compliance responsibilities for their respective firms or who supervise ten or more people engaged in compliance activities have the knowledge necessary to carry out their job responsibilities. Therefore, the Series 14 measures the knowledge and skills related to the position of a compliance official. Accordingly, compliance officials at Participant Firms that meet the above requirements would be permitted to take the compliance-focused Series 14 examination rather than the broader Series 24 examination. Notably, if the CCO passed the Series 24 examination, they [sic] would qualify as one of the two registered Principals as outlined in Article 6, Rule 2(v). A CCO that does not also pass the Series 24 would not qualify as a Principal for purposes of the two principal requirement in Article 6, Rule 2(c)(v). The Exchange believes that it is important that CCOs demonstrate heightened knowledge with respect to compliance responsibilities for their respective firms.

v. Exemption From Registration

The Exchange proposes to enumerate in its rules the list of persons exempt from any registration requirements to include such persons not actively engaged in the securities business or, in some circumstances, individuals who are already registered at other exchanges.[32] The proposed list includes those individuals whose functions are related solely and exclusively to the Participant's need for nominal corporate officers or for capital participation, or whose functions are related solely and exclusively to transactions in commodities, security futures; and/or who effect transactions on the floor of another national securities exchange. In the latter case, such individuals would already be registered as members with the other national securities exchange. The Exchange believes the registration exemption for individuals registered on another national securities exchange is appropriate to avoid the burden of dual registration. The Exchange also believes that incorporating these exemptions into the rule provides additional clarity for individual Participants and associated persons as to who will be required to register under the proposed rule.[33]

vi. Other Registration Requirements

The Exchange also proposes to clarify the circumstances under which a Participant is prohibited from seeking registration for an individual person. In addition to the existing limitations precluding a Participant from applying for registration for an associated person where there is no intent to employ the individual in the Participant's securities business, the amendments would preclude a Participant Firm from maintaining a registration with the Exchange of a person, (1) who is no longer active in the Participant's securities business; (2) who is no longer functioning in the registered capacity; or (3) where the sole purpose is to avoid an examination requirement. The Exchange believes that these provisions appropriately prohibit Participant Firms from ''warehousing'' registrations for persons who are not actively engaged in the securities business.

A Participant may, however, maintain or make application for registration of an individual who performs legal, compliance, internal audit, back-office operations, or similar responsibilities for the Participant. The rule will also allow application for registration for a person who performs administrative support functions for registered personnel, as well as a person engaged in the securities business of a foreign securities affiliate or subsidiary of the Participant. The Exchange believes that in allowing persons who perform legal, compliance, audit or similar functions to apply for registration, such persons will receive additional training and expertise to better perform their functions.

vii. Lapse and Waivers of Registration

After an individual's registration lapses, the amended rules will require the individual to pass an appropriate qualification examination. A lapse in registration occurs when the registration has been revoked by the Exchange or when an individual's registration has been terminated for a period of two or more years. The Exchange believes that these provisions reasonably permit an individual to transfer his or her registrations when changing firms or looking for employment if the individual is also within the two-year time period. Such individual will still meet the requirement of active involvement in the securities industry.

The proposed amendments provide that the Exchange may, in exceptional cases and where good cause is shown, waive the applicable qualification examination and accept other standards as evidence of an applicant's qualification for registration. Advanced age or physical infirmity will not individually of themselves constitute sufficient grounds to waive a qualification examination. Experience in fields ancillary to the securities business may constitute sufficient grounds to waive a qualification examination.[34] The Exchange notes that other exchanges and SROs have the same waiver provisions in their registration rules.[35] The Exchange will keep documentation related to all waiver requests whether granted or not.

viii. Training and Examination of Registrants

a. General Securities Representatives and Proprietary Traders

Persons associated with a CHX Participant who meet the definition of a Representative must pass the Series 7 General Securities Representative Qualification Examination unless such individuals meet the definition of Proprietary Trader.[36] A Representative will qualify for the Proprietary Trader category if the Representative's activities are confined to making trading decisions regarding, or otherwise engaging in, proprietary trading for the broker-dealer with which he or she is associated. Proprietary Traders may satisfy the qualification requirements by passing either the Series 7 or the Series 56 Proprietary Traders Qualification

[30] *See* FINRA Rule 3130 and ISE Rule 313(c).

[31] Proposed Article 6, Rules 2(c)(iv) and 3(b). Participant Firms that conduct solely proprietary trading and otherwise meet the two-principal requirement may allow their Compliance Officer to take the less broad Series 14 examination rather than the comprehensive Series 24 examination for General Securities Principals.

[32] Proposed Article 6, Rule 2(d).

[33] The Exchange notes that its proposed changes are similar to the rules of FINRA, NASD Rule 1060.

[34] This rule is substantially similar to NASD Rule 1070 and CBOE Rule 3.6A(e) Interpretation and Policies .05.

[35] *Id.*

[36] Proposed Article 6, Rule 3(a).

Examination.[37] The proposed rule change is not intended to replace the Series 7 requirement for all traders,[38] but simply to offer an alternative to that requirement for those qualified individuals who solely conduct a business in proprietary trading and have shown their proficiency by passing the Series 56.

The Exchange also proposes to delete the references to the Series 7A examination in the new exam requirements of Rule 3. The Series 7A examination is obsolete with the retirement of the CHX trading ''floor'' and is therefore no longer appropriate for Participants.

b. Supervisory Requirements

As part of this proposal, the Exchange will require all supervisors at all Participant Firms to pass the Series 24 examination for General Securities Principals.[39] The Exchange currently requires only Participant Firms for which the Exchange is the DEA to designate a person or persons responsible for supervision and compliance at the firm.[40] This current limitation would be eliminated and the requirement would be extended to all Participant Firms. Extending the requirement will provide for uniformity among supervisors at Participant Firms and, as all supervisors will be subject to a heightened standard under the new rules [sic]. The Exchange believes that the new standard will benefit the industry as a whole as well as the public.

c. Compliance Date

Proposed Article 6, Rule 3(e) provides that all Participants shall be in compliance with the examination qualification language by no later than four months after the Effective Date of these provisions for associated persons who only need to take one exam.[41] For associated persons who need to take more than one exam, the Rule would allow a period of six months to come into compliance with the registration requirements.[42] The Exchange believes that these periods should afford Participants adequate time to ensure that their designated Principals pass the appropriate qualifications exams.

ix. Supervision of Representatives

The Exchange further proposes to amend its existing supervision rule (Article 6, Rule 5) to include a basic declaration that CHX Participants are responsible for adherence with the federal securities laws and Exchange rules, and that they must reasonably supervise their operations and associated persons to prevent violations thereof. These obligations already exist under Section 15 of the Exchange Act and Article 8, Rule 1 of the CHX rules, but the Exchange believes that the inclusion of the proposed additions will provide direction to Participant Firms designing their supervisory systems and reinforce the importance of having adequate supervisory programs. Such reinforcement will be beneficial to Participants and the marketplace in general.

The Exchange believes that the imposition of the additional registration, examination, training and CE requirements implicit in Series 24 and 27 registrations will strengthen existing supervisory and compliance structures and help to assure that its Participants are conducting their businesses in compliance with all applicable rules and regulations.

x. Continuing Education

The Exchange is also proposing to amend Article 6, Rule 11 (''Rule 11'') to specify the different CE requirements for registered persons based upon their registration with the Exchange. This change will authorize the Exchange to administer different CE programs to differently registered individuals while bringing clarity to Exchange Participants about what CE requirement they must fulfill. More specifically, the Exchange is proposing to: (1) enumerate the required Regulatory Element programs, (2) add language to Rule 11 that would outline which program Exchange registered persons engaging in proprietary trading must take, and (3) add language to Rule 11(b) specifying that registered persons with a Series 56 registration must complete the Firm Element of the CE requirement.

Background

Currently, Exchange Rule 11 states that ''[n]o member or member organization shall permit any registered person to continue to, and no registered person shall continue to, perform duties as a registered person, unless such person has complied with the continuing education requirements of Section (a) of this Rule.''[43] Exchange Rule 11(a) specifies the CE requirements for registered persons subsequent to their initial qualification and registration with the Exchange. The requirements consist of a Regulatory Element and a Firm Element.[44] The Regulatory Element is a computer-based education program administered by FINRA to help ensure that registered persons are kept up to date on regulatory, compliance and sales practice matters in the industry. Currently, there are two Regulatory Element programs: the S201 Supervisor Program for registered principals and supervisors and the S101 General Program for Series 7 and all other registered persons.[45] The Exchange is proposing to enumerate these programs in the Exchange Rulebook along with adding the S501 Series 56 Proprietary Trader Continuing Education Program for Series 56 registered persons.

[37] The Exchange's current rules require that associated persons of Participant Firms for which CHX acts as the DEA and who enter orders or make trading decisions, whether or not such orders are in a principal or proprietary capacity, must maintain a Series 7 registration. *See,* Interpretations and Policies .02 of Article 6, Rule 3. This requirement is being moved to Rule 3(a). Pursuant to this proposal, a proprietary trader could satisfy the testing and examination requirements by successfully completing either the Series 7 or Series 56 exam to align with the requirements of other exchanges. The limitation of this requirement to Participant Firms for which the Exchange acts as the DEA is being eliminated as part of this filing. Given these changes, the Exchange is also deleting as unnecessary the references to a ''public business examination'' in Article 6, Rule 3(c), Interpretation and Policy .01(c).

[38] Currently, some associated persons of CHX-registered Institutional Broker firms may not have to pass the Series 7 examination if they do not engage in a customer business and would instead pass the Series 56. The Exchange is proposing to add a definition of the term ''customer'' to its rules. Customer shall mean any person or entity other than a broker or dealer registered with the Commission. Proposed Article 1, Rule 1(hh).

[39] Proposed Article 6, Rule 3(b).

[40] Article 6, Rule 5.

[41] These provisions are the requirements for Representatives to pass and maintain the Series 7 or Series 56, or for Supervisors to pass the Series 24 examination or Series 14 and, finally, for FINOPs to pass and maintain the Series 27 examination.

[42] Some CHX Institutional Broker firms that handle no public customer business have no Representatives with a Series 7 Qualification. To designate a Principal under proposed Article 6, Rule 2(h), a Representative at those firms will have to pass both the Series 7 and Series 24 examinations. The Exchange believes that six months is necessary to afford those persons a reasonable opportunity to pass both those examinations.

[43] Rule 11(a).

[44] Currently, the Firm Element of the CE Program applies to any person registered with a Participant who has direct contact with customers in the conduct of the Participant's securities sales, trading and investment banking activities, and to the immediate supervisors of such persons (collectively called ''covered registered persons''). The requirement stipulates that each Participant must maintain a continuing education program for its covered registered persons to enhance their securities knowledge, skill and professionalism. Each Participant has the requirement to annually conduct a training needs analysis, develop a written training plan, and implement the plan.

[45] FINRA also offers the S106 Series 6 Program for Series 6 registered persons. However, as the Exchange does not currently enumerate the Series 6 exam in its rules, the S106 is inapplicable.

Introduction of the Proprietary Trading Continuing Education Program

The Exchange is proposing to introduce a new CE Program for proprietary traders registered with the Exchange who have passed the Series 56 and who have no other registrations. As discussed above, proposed Article 6, Rule 3 outlines the registration and qualification requirements (including prerequisite examinations) for Participants conducting proprietary trading, market-making and/or effecting transactions on behalf of other broker dealers. According to proposed Article 6 Rule 3(a)(ii), if the activities of the registered person are confined to making trading decisions regarding, or otherwise engaging in, proprietary trading for the broker-dealer with which he or she is associated, however, he or she may register with the Exchange as a Proprietary Trader and shall pass the Series 56 Proprietary Trader exam before such registration may become effective. The Proprietary Trader Continuing Education Program (S501) is a computer-based education program developed by many of the SROs [46] and administered by FINRA to ensure that registered persons are kept current on regulatory, compliance and trading practice matters in the industry. Unlike the other offered CE Programs, the Proprietary Trader Continuing Education Program is not part of the Uniform Continuing Education Program, which is developed and maintained by the Securities Industry Regulatory Council on Continuing Education.

The Proprietary Trader Continuing Education Program will logistically operate as the currently offered CE Programs do. Specifically, registered persons will be required, through CRD, to complete the Regulatory Element of the CE on the second anniversary of the base date and then every three years thereafter. While creating the S501, the Participating SROs [47] believe that the current procedures of the other CE programs work well. The Securities Industry Regulatory Council on Continuing Education has tailored the process of the other CE Programs since its inception to a process that has been successful. Thus, as proposed, the S501 will work in the same manner. In addition, consistency between the different programs will avoid creating confusion amongst the registered persons and FINRA.

The Proprietary Trader Continuing Education Program (S501) is required for those registrants who registered as Proprietary Traders and do not maintain any other registration through CRD.[48] Individuals that are registered under any other registration are required to maintain the CE obligations associated with those registrations. For example, an individual that is registered as a Proprietary Trader with the Exchange and has a Series 7 registration will be required to continue taking the Series 7 Continuing Education Program (S101).[49] Though such individual may be engaging in the same capacity as one registered as a Proprietary Trader, because the Series 7 examination is a more comprehensive exam, the Exchange believes that this individual continuing to maintain a Series 7 registration should complete a CE that covers all aspects of his or her registration.

As part of the new Proprietary Trader CE, registered persons will also be required to complete the Firm Element outlined in Exchange Rule 9.3A(c). Though proprietary traders with a Series 56 registration do not interact with the public, the Exchange believes this requirement is appropriate as it ensures these registered persons continue to enhance their securities knowledge, skill and professionalism. As stated in Exchange Rule 11(b)(2)(ii), the program should be tailored to fit the business of the Participant. Thus, the Exchange believes it is appropriate that these individuals also complete the Firm Element.

The introduction of the Proprietary Trader Continuing Education Program allows the Exchange to tailor its CE requirements more closely to those registered individuals who are registered as Series 56. More specifically, the Exchange believes allowing individuals engaging in proprietary trading and registered under the Series 56 to complete a separate CE Program than those maintaining a Series 7 registration is appropriate as all individuals have the option of taking either test. In comparison to the Series 7, the Series 56 Examination is more closely tailored to the practice of proprietary trading while the Series 7 is more comprehensive. As such, the Exchange believes a Series 56 CE Program should be tailored as well. At the same time, if an individual would like to remain registered as a Series 7, the Exchange believes it is appropriate they [sic] continue to be required to complete the broader CE program. As stated above, though an individual maintaining a Series 7 registration may be engaging in the same capacity as one registered as a Proprietary Trader, because the Series 7 examination is a more comprehensive exam, the Exchange believes that such individual that continues to maintain a Series 7 registration should complete a CE that covers all aspects of his or her registration.

xi. Fee Changes

The Exchange proposes to amend Section J.5 of the Fee Schedule to include the registration fees for the Series 14 and Series 56 exams.[50] Specifically, the Exchange proposes to insert the following information:

- $335 registration fee for the Series 14 Examination;[51] and
- $195 registration fee for the Series 56 Examination.[52]

CHX also proposes to adopt a fee applicable to Proprietary Trader Regulatory Element. Currently, the applicable fee for the Regulatory Element (S101 and S201) is $100. CHX proposes to adopt a $60 fee for the S501. FINRA administers these programs on behalf of the exchanges and therefore the fees are payable directly to FINRA.[53]

[46] The Participating SROs that have assisted with the development of, and plan to administer, the S501 are the Exchange, C2 Options Exchange, Incorporated (''C2''), the Chicago Board Options Exchange, Inc. (''CBOE''), the New York Stock Exchange, LLC (''NYSE''), NYSE Arca, Inc. (''Arca''), NYSE Amex, LLC (''Amex''), the NASDAQ Stock Market LLC (''NASDAQ''), the National Stock Exchange, Inc. (''NSX''), NASDAQ OMX BX, Inc. (''BX''), NASDAQ OMX PHLX, LLC. (''PHLX''), BATS YExchange, Inc.(''BATS Y''), BATS Exchange, Inc. (''BATS''), EDGA Exchange, Inc. (''EDGA''), EDGX Exchange, Inc. (''EDGX''), International Securities Exchange, LLC (''ISE''), and BOX Options Exchange, LLC (''BOX'').

[47] *Id.*

[48] Any registered person who receives a waiver of the Series 56 under Exchange Article 6, Rule 3, Interpretations and Policies .02 and does not maintain any other registrations in CRD, will be required to complete the Proprietary Trader Continuing Education Program (S501). Such individuals will also be required to complete the Firm Element which is currently described in Exchange Rule 9.3A(b).

[49] If a registered person has received a Series 56 waiver under Exchange Article 6, Rule 3, Interpretations and Policies .02 but continues to maintain a Series 7 registration (that predates the introduction of the Series 56 on the Exchange) that registered individual will only be required to continue taking the Series 7 CE Program (S101). Through CRD, FINRA will recognize the Series 56 as waived while still requiring the Series 7 CE completion.

[50] *See* CHX Article 6, Rules 3(b)(i); *See also* CHX Article 6, Rule 3(a)(ii); and CHX Article 6, Rule 11(a)(3).

[51] *See* Section 4(c) of Schedule A to the FINRA By-Laws.

[52] *See* FINRA, *FINRA Administered Qualification Examinations, available at http://www.finra.org/Industry/Compliance/Registration/QualificationsExams/Qualifications/p011096.*

[53] The S501 was established for those registrants who have passed the Series 56 Qualification Exam as reflected in WebCRD. WebCRD is the central licensing and registration system for the U.S. securities industry. The CRD system enables individuals and firms seeking registration with multiple states and self-regulatory organizations to

Continued

The $60 fee will only be used for the administration of the S501 versus the S101 which utilizes the $100 fee for both development and administration. The costs associated with the development of the S501 are included in the examination fee. The Exchange notes that the proposed changes are not otherwise intended to address any other issues surrounding regulatory fees and that the Exchange is not aware of any problems that Participants would have in complying with the proposed changes.

2. Statutory Basis

The Exchange has proposed the above rule changes for the purpose of requiring certain persons associated with CHX Participants to maintain appropriate licenses and registrations. These changes will help to assure competency of Representatives and provide for more effective supervision and oversight of the Participant's activities.

The Exchange believes that the proposed rule change is consistent with Section 6(b) of the Act [54] in general, and furthers the objectives of Sections 6(b)(5) of the Act in particular to aid in preventing ''fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest; and [to] not permit unfair discrimination between customers, issuers, brokers, or dealers'' by ensuring individuals are properly registered and supervised.[55]

The Exchange believes that the proposed amendment requiring that all persons associated with a Participant and who are engaged or will be engaged in the securities business register as a Representative will continue to promote the development and maintenance of adequate training and supervisory programs by CHX Participants.[56] This change in Representative registration will ensure that such persons are appropriately qualified and supervised to aid in preventing fraudulent and manipulative practices, further just and equitable principles of trade and protect investors and the public interest in general.[57]

The Exchange also believes that adding the Proprietary Trader (Series 56) examination to its list of qualifying exams will allow individuals who solely conduct a business in proprietary trading to demonstrate their proficiency in that area. In offering an alternative to the Series 7 examination, CHX will permit proprietary traders who pass the Series 56 to trade on a proprietary basis. As stated above, Representatives will qualify for the Proprietary Trader category at CHX if the Representative is a person who does not handle or execute transactions for customers and only enters or executes orders on behalf of the Participant. Further, and as noted above, other SROs have similarly recognized the Proprietary Trader registration category and the Series 56 exam.[58]

As the Exchange is continuing to strengthen the supervisory systems of Participant Firms and thereby contribute to greater investor protection through the proposed changes, the Exchange has proposed to require each Participant Firm to register as representatives with the Exchange at least two Principals in specified categories as described above. In addition to the requirement of two registered Principals, each Participant would also be required to register an additional associated person as a FINOP. Further, the Exchange proposes to require Participant Firms to designate a CCO.[59] To qualify for registration, the CCO must pass the Series 24 examination unless the Participant Firm met the requirements to take, in the alternative, the Compliance Officer Exam (Series 14).[60] A Compliance Officer at such Participant Firm would qualify for the alternative examination if the firm engaged solely in proprietary trading; and it otherwise meets the applicable registration and supervisory requirements for Principals. Thus, all individuals supervising the securities businesses and associated persons of Participant Firms must qualify for registration as Principals by passing the relevant Principal examination as listed in Article 6, Rule 3. The Exchange believes that adding the proposed rules related to firm supervision helps prevent fraudulent and manipulative acts and protect investors and the public interest in general, and notes that CHX's proposed provisions are similar to those of other SROs.[61]

In addition, the Exchange believes that the proposed amendments are consistent with Section 6(c) of the Exchange Act,[62] in general, and furthers [sic] the objectives of Section 6(c)(3) of the Exchange Act,[63] which allows the Exchange to stipulate qualification, training, experience and competence standards for persons associated with Exchange Participants. This filing proposes to amend and clarify the registration and qualification requirements to ensure that industry standards are met.

The Exchange also believes that the proposed changes are not unfairly discriminatory as CHX is not only conforming to the rules set forth by other SROs, but the proposed changes will be applied to all associated persons of all CHX Participants.[64] Under current rules, only CHX Participants for which CHX is the DEA are subject to the rules regarding registration and qualification. By applying the registration and qualification rules to all CHX Participants, the rules will not unfairly discriminate against any Participant class.

The proposed rule also introduces a new CE program for the Series 56 registered persons as described above. We believe the content of the 501 education is tailored to the job the proprietary trader performs. The Exchange believes the proposed changes are reasonable and set forth the appropriate CE requirements for an individual Participant or individual associated person who is required to

do so by submitting a single form, fingerprint card and a combined payment of fees to FINRA. Through the CRD system, FINRA maintains the qualification, employment and disciplinary histories of registered associated persons of broker-dealers.

[54] 15 U.S.C. 78f(b).

[55] 15 U.S.C. 78f(b)(5).

[56] The Exchange is also proposing to change the term ''registered person(s)'' as used throughout Article 6 and in Article 7, Rule 3A to ''Representative(s)'' as part of this filing.

[57] Notably, persons engaged in the supervision of a Participant's securities business will also be required to register as Principals under the provisions of Article 6, Rule 2(c).

[58] *See e.g.,* Securities Exchange Act Release Nos. 63314 (November 12, 2010), 75 FR 70957 (November 19, 2010) (SR–CBOE–2010–084); 63843 (February 4, 2011), 76 FR 7884 (February 11, 2011) (SR–ISE–2010–115); 66453 (February 23, 2012), 77 FR 12345 (February 29, 2012) (SR–NYSEAMEX–2012–11); and 66452 (February 23, 2012), 77 FR 12347 (February 29, 2012) (SR–NYSEARCA–2012–15).

[59] *See* FINRA Rule 3130 and International Stock Exchange (''ISE'') Rule 313(c) for similar requirements.

[60] Proposed Article 6, Rules 2(c)(iv) and 3(b). Participant Firms that conduct solely proprietary trading and otherwise meet the two-principal requirement may allow their Compliance Officer to take the less broad Series 14 examination rather than the comprehensive Series 24 examination for General Securities Principals.

[61] *See,* for example, NASD Rule 1021(e) and BATS Rule 2.5 Interpretations and Policies .01(d).

[62] 15 U.S.C. 78f(c).

[63] 15 U.S.C. 78f(c)(3).

[64] To comply with the proposed Exchange rules, the number and types of examinations taken by individuals at Participant Firms will likely vary between Participant Firms depending on each Participant Firm's business model.

register under Exchange Article 6, Rule 2.

The Exchange believes that the proposed registration fees for the CE and Series 14 and Series 56 exams are consistent with Section 6(b) of the Act [65] in general, and, in particular, furthers [sic] the objectives of Section 6(b)(4) of the Act,[66] in that it [sic] provides for the equitable allocation of reasonable dues, fees and other charges among its members. As discussed above, the Exchange believes that the fee changes are reasonable because the proposed fees are identical to those adopted by FINRA for its members and that the proposed fees are equitably allocated because they apply to all similarly situated Non-FINRA Participants. As discussed above, the CE programs and the Series 14 and 56 exams are used across the industry. Further, the new $60 fee is applicable to persons registered as a Proprietary Trader, which is a limited registration under CHX rules. Accordingly, the proposed S501 Regulatory Element specifically correlates to the rules and obligations applicable to Proprietary Traders, which are fewer than those applicable to persons registered in other categories. Thus, the S501 is a more limited form of continuing education. Further, as discussed above, the $60 fee will only be used for the administration of the S501 versus the S101 which utilizes the $100 fee for both development and administration. The costs associated with the development of the S501 are included in the examination fee. Therefore, CHX believes that the lower fee ($60 rather than $100) is reasonable. The proposed fee is equitable, because it applies equally to all persons registered solely as Proprietary Traders.

Finally, the Exchange notes that it operates in a highly competitive market in which market participants can readily favor competing venues. In such an environment, the Exchange must continually review, and consider adjusting, its rules to remain competitive with other exchanges. The Exchange notes that the rule change is reasonable in comparison to similar rule changes by certain other SROs. For the reasons described above, the Exchange believes that the proposed rule change reflects this competitive environment.

B. Self-Regulatory Organization's Statement of Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. The rule change is designed to amend its current registration and qualification rules to require that persons associated with CHX Participants maintain appropriate licenses and registrations. These rule changes will help to assure competency and provide for more effective supervision and oversight of a CHX Participant's activities and will not impose any burden on competition.

The Exchange also does not believe the administrative changes being made nor the introduction of the Proprietary Trader Continuing Education Program (S501) will affect intermarket competition as the Exchange believes all Exchanges offering the same CE requirements will file similar rules addressing those CE Programs. In addition, the Exchange does not believe the proposed changes will affect intramarket competition because all similarly situated registered persons, *e.g.* registered persons maintaining the same registrations, are required to complete the same CE requirements. For example, all individuals maintaining a Series 7 registration will be required to complete the Series 7 CE while all individuals maintaining a Series 56 registration (and no other registrations) will be required to complete the new Series 56 CE.

The Exchange believes that the fee changes proposed herein will not impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. Specifically, the Exchange believes that the proposed change will result in the same Series 14 and Series 56 registration fees being charged to all FINRA and Non-FINRA firms.

In addition, the Exchange notes that it operates in a highly competitive market in which market participants can readily favor competing venues. In such an environment, the Exchange must continually review, and consider adjusting, its rules to remain competitive with other exchanges. As noted above, many SROs have adopted similar rules relating to the registrations and qualifications of their members.[67] Therefore, and for the reasons described above, the Exchange believes that the proposed rule change aligns CHX rules with the rules of other SROs and promotes a 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 does not affect a change that (A) significantly affects the protection of investors or the public interest; (B) impose any significant burden on competition; and (C) by its terms, becomes operative for 30 days after the date of the filing, or such shorter time as the Commission may designate if consistent with the protection of investors and the public interest; provided that the self-regulatory organization has given the Commission 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 proposed rule change will become effective pursuant to Section 19(b)(3)(A) of the Act [68] and Rule 19b–4(f)(6) [69] thereunder.

The Exchange has given the Commission 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 respectfully requests that the Commission waive the 30-day operative delay period after which a proposed rule change under Rule 19b–4(f)(6) becomes operative. The Commission believes that the proposed rule change described herein will strengthen existing supervisory and compliance structures and align CHX's registration, qualification, and CE rules with those of other SROs. Waiving the 30-day operative delay will enable CHX to implement the changes without delay. Therefore, the Commission designates the proposal operative upon filing.[70]

At any time within 60 days of the filing of this proposed rule change, the Commission summarily may

[65] 15 U.S.C. 78f(b).

[66] 15 U.S.C. 78f(b)(4).

[67] *See supra* footnote 6 [sic].

[68] 15 U.S.C. 78s(b)(3)(A).

[69] 17 CFR 240.19b–4(f)(6).

[70] For purposes only of waiving the 30-day operative delay, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission will institute proceedings to determine whether the proposed rule change should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–CHX–2013–14 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–CHX–2013–14. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet 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. Copies of the filing will also be available for Web site viewing and printing at the CHX's principal office and on its Internet Web site at *www.chx.com.* 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–CHX–2013–14 and should be submitted on or before November 12, 2013.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[71]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2013–24551 Filed 10–21–13; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–70607; File No. SR–MSRB–2013–08]

Self-Regulatory Organizations; Municipal Securities Rulemaking Board; Notice of Filing of a Proposed Rule Change Consisting of Amendments to MSRB Rule G–11, on Primary Offering Practices, Relating to Changes in a Bond Authorizing Document

October 3, 2013.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the ''Act'')[1] and Rule 19b–4 thereunder,[2] notice is hereby given that, on September 19, 2013, the Municipal Securities Rulemaking Board (the ''MSRB'' or ''Board'') filed with the Securities and Exchange Commission (the ''SEC'' or ''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the MSRB. 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 MSRB is filing with the Commission a proposed rule change consisting of amendments to MSRB Rule G–11, on primary offering practices (the ''proposed rule change''). The MSRB requests an effective date for the proposed rule change of 60 days following the date of SEC approval.

The text of the proposed rule change is available on the MSRB's Web site at *www.msrb.org/Rules-and-Interpretations/SEC-Filings/2013-Filings.aspx,* at the MSRB's principal office, 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 MSRB included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The MSRB has prepared summaries, set forth in Sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The proposed rule change would amend MSRB Rule G–11 to prohibit, with carefully defined exceptions, brokers, dealers and municipal securities dealers (''dealers'') from providing consents to changes in a bond authorizing document, such as trust indentures and bond resolutions (''authorizing document'' or ''bond authorizing document''). The proposed rule change would enhance protections for existing owners of bonds (''owners'' or ''bond owners'') from changes to authorizing documents consented to by a dealer in lieu of bond owners by prescriptively prohibiting such consents in certain circumstances.

Background

Amendments to authorizing documents are often requested by municipal entity issuers (''issuers'') or bond owners to modernize outdated provisions or to address operational or other concerns that have arisen after the initial issuance of bonds. Such amendments are typically achieved by the vote of owners of a specified percentage of the aggregate principal amount of bonds, as determined by the authorizing document. The principal amount necessary usually will vary, depending upon the type of amendments sought.

The process of obtaining consents from bond owners and related costs can be significant. Since many municipal securities are issued in book-entry form and registered as a single ''global'' certificate in the name of a depository, the identity of beneficial owners of the bonds is frequently unknown to issuers and trustees. Identifying such owners and obtaining consents requires an extensive process of inquiry through layers of nominee ownership and often

[71] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

results in cost and delay in achieving the requisite number of consents.

To address some of these burdens, issuers frequently have requested underwriters, as temporary owners of bonds during the initial distribution period and representing the aggregate principal amount of bonds underwritten, to provide consents to changes to authorizing documents. This alternative allows issuers to avoid the potential cost and delay of obtaining consents from beneficial owners by direct solicitation.

Although this lessens the burdens on issuers, the MSRB is concerned about the practice of having a dealer, acting as an underwriter or in some cases a remarketing agent, consent to changes in authorizing documents that adversely affect the interests of existing bond owners. The MSRB believes that while existing bond owners may be considered as having agreed to provisions relating to amendments to the authorizing documents at the time of purchase, such owners are not likely to have contemplated that a dealer, acting as an underwriter or remarketing agent with no prior or future long-term economic interest in the bonds could provide such consent unless such ability had been specifically authorized in the authorizing documents and disclosed to bond owners.

The MSRB believes that the proposed rule change will protect investors and balance the concerns of issuers about the cost and efficiency of obtaining consents to their authorizing documents. The proposed rule change does not grant an affirmative right to dealers to provide consents, and does not alter the dealer's obligations applicable under other MSRB rules, including its fair dealing obligations under Rule G–17. Rather, the proposed rule change will limit the circumstances under which a dealer may provide consents at the request of an issuer to amendments to bond authorizing documents within the context of the dealer's fair dealing obligations.

Requests for comment. The MSRB published a series of requests for comment concerning the practice of dealers providing consents to changes to authorizing documents. The first request for comment [3] concerned the application of MSRB Rule G–17 to the provision of bond owner consents by underwriters of municipal securities (''Draft G–17 Notice''). The Draft G–17 Notice would have provided that, where a proposed amendment reduced the security for existing bond owners, the provision of consents by underwriters would be a violation of their Rule G–17 duty of fair dealing unless: (i) The authorizing document expressly provided that bond owner consents could be provided by an underwriter and (ii) the offering documents for the existing securities expressly disclosed that bond owner consents could be provided by underwriters of other securities issued under the authorizing document. The MSRB believed that while existing bond owners typically were aware of the consent provisions in authorizing documents, they would not have contemplated (without such express disclosure) that an owner with no prior or future long-term economic interest in the bonds, such as an underwriter or a remarketing agent, could provide a bond owner's consent and thereby affect the security for existing bond owners.

The MSRB received 10 comment letters on the Draft G–17 Notice, discussed in more detail in Part 5 below. Commenters said, among other things, that restricting the use of underwriters to provide consents could result in potential cost and inefficiency to issuers when seeking to modernize outdated provisions in their authorizing documents. Commenters also said that identifying a ''reduction in security'' could be difficult and could result in varying interpretations, depending on the underwriter or the issuer, and also could lead to unintended consequences by prohibiting amendments that, while technically could be considered a reduction in security, were nevertheless seen by bond owners as being in their long-term best interest.[4]

The MSRB acknowledged the issues raised by commenters in response to the Draft G–17 Notice but remained concerned about protecting the rights of existing bond owners that could be materially affected by amendments consented to by a party that had no prior or future long-term economic interest in the bonds. The MSRB also recognized the need for greater clarity in identifying the particular types of consents and circumstances under which dealers may not provide such consents. Moreover, because the formulation of Draft Rule G–17, as well as some comments suggested that the provisions of Draft G–17 Notice could be read to waive a dealer's fair dealing obligations under certain circumstances, the MSRB ultimately determined that such issues would be more effectively addressed as an amendment to MSRB Rule G–11. By including the proposed rule change as an amendment to Rule G–11, the MSRB intends to clarify that the proposed rule does not eliminate the obligation of a dealer under Rule G–17, when considering requests from an issuer to consent to changes to an authorizing document, and a dealer, in such circumstances, would also be required to consider whether such action is consistent with its duties of fair dealing.

The MSRB subsequently published two additional requests for comment proposing amendments to MSRB Rule G–11 (''G–11 Amendments''). The G–11 Amendments would limit the ability of dealers to provide consents to changes in authorizing documents except in specified circumstances. The first request for comment [5] proposed amending Rule G–11 by adding new section (k) (now proposed section (l)) to the rule. The second request [6] proposed adding two further exceptions. The G–11 Amendments and the comments to both requests for comment are discussed collectively below in Part 5.

Summary of Proposed Rule Change

The G–11 Amendments would prohibit a dealer from providing consent to any amendment to authorizing documents for municipal securities, either as an underwriter, a remarketing agent, an agent for owners, or in lieu of owners, except that this particular prohibition would not apply in the limited circumstances set forth in proposed section (l) of Rule G–11.

Proposed subparagraph (l)(i)(A) would except from the prohibition a dealer, acting as an underwriter, that provides bond owner consents to changes in authorizing documents if such documents expressly allowed an underwriter to provide such consents and the offering documents for the issuer's existing securities expressly disclosed that consents could be provided by underwriters of other

[3] MSRB Notice 2012–04 (February 7, 2012).

[4] *See* undated letter from the Michael J. Smith, Assistant Treasurer, Los Angeles County Metropolitan Transportation Authority, to Ronald W. Smith, Corporate Secretary, Municipal Securities Rulemaking Board. Another commenter argued that there could be a technical reduction in security even though the overall financial strength of the issuer could be improved by such action (*see* Comments of Haynsworth Sinkler Boyd, P.A. Regarding Draft Interpretation of MSRB Rule G–17 Restricting Underwriter Consents to Amendments to Outstanding Security Documents dated March 5, 2012 from Kathleen Crum McKinney and Theodore B. DuBose). Examples of technical reductions in security noted in this comment letter included the release of real estate securing the bonds to implement projects expected to result in increased tax benefits or revenue to the issuer, or amendments relating to the funding of debt service reserve funds with cash or credit facilities. Depending upon facts and circumstances, an underwriter or an issuer could view a short-term reduction in security as a long-term benefit for the bond owners.

[5] MSRB Notice 2012–36 (July 5, 2012).

[6] MSRB Notice 2012–58 (November 21, 2012).

securities issued under the same authorizing documents. This provision acknowledges the types of provisions currently included in some issuers' authorizing documents that specifically allow underwriters to provide bond owner consents. Without including this exception, the proposed rule change could be read to limit the ability of issuers to recognize the benefits and flexibility of the provisions in their own authorizing documents where otherwise permissible.

Proposed subparagraph (l)(i)(B) would except from the prohibition a dealer that owns the relevant securities other than in the capacity of an underwriter or a remarketing agent. This provision acknowledges the rights of dealers as owners of securities and avoids any unintended derogation of a dealer's rights as owner. Whether a dealer owns the securities for the purposes of the proposed rule change will depend on whether it purchased such securities without a view to distribution.

Proposed subparagraph (l)(i)(C) would except a dealer acting as a remarketing agent to whom the relevant securities had been tendered as a result of a mandatory tender, provided that all securities affected by the amendment (other than securities retained by an owner in lieu of a tender and for which such bond owner had delivered consent) had been tendered. If a bond owner elected to exercise its right to ''hold'' bonds subject to a mandatory tender in lieu of tendering, the remarketing agent would be prohibited from providing consents to any amendment to an authorizing document unless it also received the specific written consent of such bond owner to such change.

Proposed subparagraph (l)(i)(D) would except an underwriter that provides an ''omnibus'' consent to changes to authorizing documents solely as agent for and on behalf of bond owners that delivered separate written consents to such amendments. An underwriter providing an ''omnibus'' consent under this subparagraph would not be viewed as substituting its judgment for that of bond owners, but rather as an agent facilitating the collection and delivery of consents. This exception would benefit the issuer and the existing bond owners in that the underwriter, in tabulating consents to support its ''omnibus'' consent, would be required to authenticate ownership and requisite corporate authority of the purchaser of bonds to provide a consent, thereby reducing the burden on the issuer and its trustee of such duty.

Proposed subparagraph (l)(i)(E) would except an underwriter that provides consent on behalf of prospective purchasers to amendments to authorizing documents if the amendments would not become effective until all existing bond owners (other than the prospective purchasers for whom the underwriter had provided consent) had also consented.[7]

Proposed paragraph (l)(ii) would define certain terms for purposes of proposed section (l), specifically the terms ''authorizing document,'' ''bond owner,'' and ''bond owner consent.''

Consents not affected by the G–11 Amendments. Consents from dealers solely in their capacity as an underwriter or a remarking agent and required or permitted in connection with their administrative duties under authorizing documents would not be subject to the proposed rule change. For example, if an authorizing document provided that a dealer, in its role as remarketing agent, was required to consent to a change relating to the manner or timing for tendering bonds prior to such provision becoming effective, the dealer serving as remarketing agent would not be prohibited by the G–11 Amendments from providing such consent. However, if the authorizing document also required consent from bond owners to such change, the remarketing agent would be prohibited under the Rule G–11 Amendments from providing consent on behalf of bond owners unless it came within an exception.[8]

The G–11 Amendments would not affect other methods used by issuers to obtain consents from owners of newly issued bonds, such as consents received from bond owners upon initial purchase of the bonds. However, the G–11 Amendments would prohibit the dealer from providing any consent for or in lieu of bond owners except as provided by the proposed rule change.

Application of MSRB Rule G–17. The proposed rule change is designed to ensure that consents obtained from dealers when acting as an underwriter or remarketing agent are obtained in a fair manner. As noted above, the proposed rule change would not grant an affirmative right to dealers to provide consents to changes to authorizing documents, but rather would prohibit such consents subject to limited exceptions. As such, it would not alter or supplant the dealer's obligations applicable under other MSRB rules, including its fair dealing obligations under Rule G–17.[9] As with other rules of the MSRB, both prescriptive and principles based, dealers are required to observe the duty of fair dealing to all persons, even in the absence of fraud and compliance with the specific provisions of any rule does not limit this duty.

Given the limited circumstances in the proposed rule change in which a dealer may provide consent to changes to authorizing documents, the MSRB does not consider it necessary at this time to provide guidance describing the application of Rule G–17 to particular instances. It may, upon evidence of potential violations of Rule G–17 in the context of the proposed rule change, consider more explicit guidance concerning the application of Rule G–17 to the proposed rule change.

2. Statutory Basis

The MSRB believes The MSRB believes [sic] that the proposed rule change is consistent with Section 15B(b)(2)(C) of the Act,[10] which provides that the MSRB's rules shall:

[7] This exception recognizes a limited circumstance in which an underwriter's consent to amendments to authorizing documents, provided in lieu and on behalf of new purchasers of bonds, would be permitted. In this case, the underwriter's consent would not become effective until existing owners of all bonds (other than the prospective purchasers for whom the underwriter had provided consent) affected by such amendment and outstanding at the time such consent became effective had also provided consent. As a practical matter, this alternative might be considered when an issuer was in the process of accumulating consents from all owners of outstanding bonds and had not completed acquiring the consents prior to issuing a new series of bonds. In that case, an underwriter's consent on behalf of new purchasers would not become effective until all other bond owners affected by the amendment had also provided their consent, and such other consents were currently effective. This exception would not affect an underwriter's ability to provide consents as permitted in subparagraph (l)(i)(D) of the proposed rule change.

[8] A dealer would be required, however, to consider whether such action is consistent with its duties of fair dealing.

[9] The proposed rule change and the concurrent application of Rule G–17 will address the possible conflicts of interest on the part of a dealer when consenting to changes at the request of an issuer. A conflict of interest may arise when a dealer, with a financial interest in completing the transaction, is asked by an issuer to consent to changes in its authorizing documents that may adversely affect existing bond owners. In this case, the interest of the dealer may be in conflict with the dealer's duty of fair dealing to all persons in connection with the conduct of its municipal securities business. This duty extends to all persons, not just to those with whom a dealer is transacting business (*see* Notice of Filing of Fair Practice Rules, Municipal Securities Rulemaking Board Manual (CCH 1977–1987 Transfer Binder, ¶10,030, September 20, 1977), and Notice of Approval of Fair Practice Rules, Municipal Securities Rulemaking Board Manual (CCH 1977–1987 Transfer Binder, ¶10,090, October 24, 1978). By limiting the circumstances under which a dealer could provide consent to narrowly defined exceptions that also require a continuing consideration of and compliance with its G–17 obligations, the proposed rule change will aid the dealer in managing any potential conflict that may arise in this context.

[10] 15 U.S.C. 78o–4(b)(2)(C).

be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in municipal securities and municipal financial products, to remove impediments to and perfect the mechanism of a free and open market in municipal securities and municipal financial products, and, in general, to protect investors, municipal entities, obligated persons, and the public interest.

The MSRB believes that the proposed rule change is consistent with the Act. Protecting investors is a key component of the Act and its protections apply equally to existing bond owners and new purchasers of municipal securities. The proposed rule change will protect investors by prohibiting consents from a dealer that does not share a bond owner's prior or long-term economic interest in the bonds, except under carefully prescribed circumstances. As described above, the proposed rule change will protect the expectation of investors that amendments would be affected in compliance with the terms of the authorizing documents or, in certain instances, with the specific consent by owners having comparable long-term economic interests in the bonds.

The MSRB believes that the protections afforded investors by the proposed rule change will also aid in perfecting the mechanism of an open market by improving investor confidence in the process of amending authorizing documents and making such process more transparent.

B. Self-Regulatory Organization's Statement on Burden on Competition

The MSRB does not believe that the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act.

In the first request for comment on the G–11 Amendments, the MSRB solicited comments on, among other topics, the potential benefits and burdens of and alternatives to the proposed rule change. On these points, the MSRB asked:

- Would the Draft Rule G–11 Amendment help to protect investors, and are there other benefits that would be realized from adopting the Draft Rule G–11 Amendment?
- Would the Draft Rule G–11 Amendment have any negative effects on issuers, investors or other market participants?
- Are issuers able to obtain consents from beneficial holders of bonds effectively and efficiently through existing mechanisms?
- What would be the burdens on issuers or other market participants of adopting a rule that limits obtaining bond owner consents in the manner contemplated by the Draft Rule G–11 Amendment?
- Are there alternative methods the MSRB should consider to providing the protections sought under the Draft Rule G–11 Amendment that would be more effective and/or less burdensome, resulting in an appropriate balance between the need for a cost effective and efficient manner of obtaining consents and the duty of dealers under Rule G–17 to deal fairly with all persons?

Potential burdens of the proposed rule change. The specific comments and responses received on the request for comment are discussed in Part 5. The commenters addressing the question of burdens arising from the G–11 Amendments cited the potential cost and delay in effecting amendments by limiting the ability of underwriters to provide consents, and noted that as a result both investors and issuers would be precluded from realizing the benefits of the G–11 Amendments. Another cited a possible burden on issuers because of the lack of clarity concerning the question of which party would bear the cost of obtaining consents. Others noted the lack of cost effective alternatives.

In proposing the G–11 Amendments and the resulting proposed rule change, the MSRB recognized a potential burden on issuers if they were limited in their ability to request consents from underwriters and remarketing agents to changes they believed were necessary to modernize their authorizing documents. The MSRB recognized that issuers may incur additional costs when preparing authorization and disclosure provisions for the authorizing and offering documents, or if required to increase efforts to remarket bonds with amended features following a mandatory tender of bonds. Other costs may be associated with the provisions of the proposed rule change affecting an issuer's options when accumulating consents over time, requiring it or its trustee to maintain records of outstanding bond owners and related consents. However, since maintaining these records is currently required under an authorizing document, costs associated with this alternative, if chosen by an issuer, should not impose an additional burden.

The proposed rule change also may impose burdens on dealers by: (i) Requiring a remarketing agent to obtain written consents from bond owners that elect to ''hold'' in lieu of tendering their bonds in a mandatory tender and (ii) requiring an underwriter to obtain consents from new purchasers at the time of purchase. In both cases, the proposed rule change may require the remarketing agent or underwriter, as the case may be, to obtain consents from appropriately authorized representatives of the new purchasers which may require identifying persons other than those placing the purchase order with the underwriter or remarketing agent.

The MSRB does not believe that the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act. The MSRB believes that the proposed rule change protects existing bond owners while addressing the concerns raised by commenters by providing a range of potential options to allow issuers to obtain bond owner consents from dealers. The proposed rule change and any resulting burden, are appropriate in furtherance of the purposes of the Act.

Expected benefits of the proposed rule change. The proposed rule change is expected to protect investors by prohibiting consents to changes to authorizing documents by parties with no long-term economic interest in the bonds, except in specified circumstances. The proposed rule change is also expected to provide a benefit to issuers and dealers because it will provide clarity about the practice of obtaining bond owner consents from dealers to changes in the authorizing documents, and will provide issuers with a range of potential alternatives to obtain bond owner consents without the anticipated delay and cost of a direct solicitation of existing bond owners.

Potential alternatives to proposed rule change. The MSRB considered various alternatives to address the issue of dealers providing consents in lieu of bond owners to changes in authorizing documents. The MSRB first considered relying solely on the fair dealing component of Rule G–17, but believed that without interpretive guidance, this alternative would not be likely to result in any change in the behavior of dealers. The MSRB next considered the alternative presented in the G–17 Notice, which provided that an underwriter would be in violation of Rule G–17 if it consented to changes that would result in a ''reduction in security'' unless the authorizing documents allowed an underwriter to provide consent and the practice was disclosed in the related offering document. Some commenters to the G–17 Notice were concerned about the lack of a definition of a ''reduction in security'' and, given the range of possible interpretations, their ability to comply with the provision. Further, the

MSRB recognized that the G–17 Notice limited the violation to a ''reduction in security'' and did not address consents by dealers to other types of amendments. The MSRB believes that the proposed rule change simplifies matters by prohibiting the practice entirely except in narrowly defined circumstances. While a dealer continues to be obligated to consider and comply with its Rule G–17 obligations in the context of the exceptions, the circumstances are limited and the Rule G–17 considerations are not limited to a ''reduction in security.''

As another alternative, the MSRB could retain the prohibition in the proposed rule change and reduce or eliminate entirely the exceptions. The MSRB does not consider this approach to be in the best interest of investors or issuers, since issuers will be precluded from adopting amendments necessary to modernize their authorizing documents except by direct solicitation of bond owners. Also, issuers whose authorizing documents already included provisions allowing underwriters to consent to amendments will not be able to rely on those provisions. Investors might also be precluded from realizing the benefits of modernized documents. The MSRB believes that the exceptions noted in the proposed rule change will provide dealers a range of potential options to provide the necessary consents while recognizing the concerns of both issuers and existing bond owners.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

As noted above, the proposed rule change was informed by comments received from market participants to the Draft G–17 Notice and the G–11 Amendments. The MSRB received 10 comment letters to the Draft G–17 Notice,[11] and 11 comment letters to the G–11 Amendments. While the G–11 Amendments adopted a different approach to addressing the issue of dealers providing bond owner consents to amendments to authorizing documents, many of the comments received in response to the Draft G–17 Notice influenced the drafting of the proposed rule change and are discussed below.

Discussion of Comments

Support for the Draft G–17 Notice

Comment. BondView and NFMA supported the Draft G–17 Notice. BondView commended the leadership of the MSRB on improving market transparency because retail investors do not have the same tools as institutional investors. NFMA said that it supported the Draft G–17 Notice because it attempts to prevent consents by underwriters that diminish security for bond owners. It noted that prospective purchasers have the choice whether to purchase the bonds with the amended security features and existing bond owners do not have this choice.

MSRB Response. The MSRB believes that the G–11 Amendments similarly will improve market transparency and enhance protections for existing bond owners.

Draft G–17 Notice Too Broad; May Have Unintended Consequences

Comment. Some commenters said that the Draft G–17 Notice was too broad, and may have unintended consequences that would harm investors.[12] GFOA said that the Draft G–17 Notice would prohibit amendments that would be beneficial to both bond owners and issuers, and Haynsworth and MTA said that it would preclude amendments where there was a technical reduction in security but the financial strength of the enterprise was likely to be enhanced. Haynsworth said that the Draft G–17 Notice would create an ambiguity because it failed to take into account consideration of the entire credit analysis and looked at the ''reduction in security'' in isolation. NFMA said that while some changes to authorizing documents might not seem immediately important, if the credit were to deteriorate, the impact of the change may increase. MTA said that the facts and circumstances in day-to-day transactions were too complex and varied to resolve through an interpretive statement to Rule G–17.

Comment. Ice Miller, IHCDA and IAA suggested that the Draft G–17 Notice be narrowly drafted to address specific problems, and GFOA suggested that the Draft G–17 Notice include examples of acceptable and unacceptable practices. Ice Miller, IHCDA and IAA suggested that the Draft G–17 Notice address only amendments where the fundamental security for the bonds was deleted, released or substantially reduced, and that it include a definition of a reduction in fundamental security, or define a security that could not be changed or reduced.

MSRB Response. The MSRB believes that the proposed rule change will address a number of these issues. The proposed rule change does not specify a reduction in security as a factor to be included when considering a proposed amendment to an authorizing document. Rather, the revised approach prohibits dealers from providing consent to any proposed amendment to an authorizing document, irrespective of the type of amendment, except in specified instances and in the context of a dealer's fair dealing obligations. Thus, while a ''reduction in security'' and its short- and long-term implications may be part of a dealer's fair dealing analysis, it may not be the sole factor in its analysis.

Terms of Governing Instruments Should Control; Prior Bond Owners Consented to Amendment Provisions

Comment. Various commenters said that to the extent the terms of the authorizing documents included provisions for amendments, existing bond owners had agreed to such provisions and those provisions should control. NABL said that the provisions of authorizing documents allowing an issuer to rely on consents from any bond owner to amend its authorizing documents are not limited by the length of time the bond owner has owned the bonds. This commenter and others said that the Draft G–17 Notice implied that the consents were being obtained unfairly, even though the consents were obtained in accordance with the authorizing documents and state law.[13] NABL said that, where purchasers had not bargained for certain protections, the MSRB should not be adding such protections to the business terms of transactions.

Comment. NABL said that the Draft G–17 Notice could adversely affect issuers and obligated persons and impair their rights under existing bond documents. This commenter also said that the scope of the Draft G–17 Notice could be read to cause an underwriter to breach a Rule G–17 duty if it participated in a new transaction that may be adverse to bond owners but permitted under the bond documents.

MSRB Response. The MSRB believes that the proposed rule change will address many of these issues. The proposed rule change does not alter an issuer's contractual right to request an underwriter to consent to changes to an

[11] Comment letters were received from: BondView.com (''BondView''); Government Finance Officers Association (''GFOA''); Haynsworth Sinkler Boyd, P.A. (''Haynsworth''); Ice Miller LLP (''Ice Miller''); Indiana Housing & Community Development Authority (''IHCDA''); Indianapolis Airport Authority (''IAA''); Los Angeles County Metropolitan Transportation Authority (''MTA''); National Association of Bond Lawyers (''NABL''); National Federation of Municipal Analysts (''NFMA''); and Squire Sanders LLP (''Squire Sanders'').

[12] GFOA, Haynsworth, Ice Miller, IHCDA, IAA and MTA.

[13] NABL, Ice Miller, IHCDA and IAA.

authorizing document. The proposed rule change addresses the ability of an underwriter to provide consents under limited circumstances. The proposed rule change does not waive a dealer's fair dealing obligation when considering such request. The MSRB believes that the proposed rule change, articulated, as with other MSRB rules, as a prohibition with specified exceptions, will clarify the permitted behavior without interfering with the application of Rule G–17, which applies to all of a dealer's municipal securities activities.

Draft G–17 Notice Would Interfere With an Issuer's Ability To Modernize Indentures and Obtain Consents in an Efficient Manner

Comment. Ice Miller, IHCDA and IAA said that issuers should be able to modernize their indentures and amend other authorizing documents in an efficient manner, and that having an underwriter provide consents to amendments was an efficient way to accomplish this goal. These commenters also said that an underwriter is only facilitating the issuer's and new bond owners' ability to exercise a right to which they were entitled, and the Draft G–17 Notice would interfere with that process. NABL said that issuers should be able to obtain consents in accordance with their bargained-for rights under their authorizing documents and state law, and should not be forced to pursue a lengthier and costly process.

Comment. NFMA said that it recognized that issuers have a legitimate need to update and modernize their authorizing documents and that it understood the difficulty in obtaining consent of a majority of bond owners. It suggested that more detail and guidance be provided to help define acceptable thresholds for changes to authorizing documents. GFOA also suggested providing more examples of acceptable and unacceptable practices in obtaining bond owner consents through underwriters.

Comment. GFOA, Ice Miller, IHCDA and IAA noted the expense and difficulty of locating and obtaining consents from bond owners because most bonds are held in a book entry system.

MSRB Response. The MSRB recognizes the need of issuers to modernize their authorizing documents and the difficulty of obtaining consents when bonds are held in a book-entry system. As noted above, the G–11 Amendments would not alter the issuer's contractual right to request consent from an underwriter to changes to an authorizing document. The G–11 Amendments would prohibit a dealer's ability to provide consents to changes in authorizing documents except under specified circumstances. The MSRB believes that the proposed rule change will achieve an appropriate balance between the interests of issuers to amend their authorizing documents in a timely and efficient manner and the obligations of an underwriter or dealer, including its fair dealing obligations, when asked to provide such consent.

Obtaining Consents From Underwriters Is an Accepted Practice

Comment. NABL and Squire Sanders said that the practice of underwriters consenting to amendments as initial bond owners was a long standing practice, and Ice Miller, IHCDA and IAA said that there had been no significant resistance to the practice on the part of existing bond owners. NABL noted that in such cases the new bonds were issued with full disclosure of the amendment process, and that any requisite filings had been made under SEC Rule 15c2–12. Ice Miller, IHCDA and IAA said that they were unaware of any ratings decline or other controversies that had resulted from this practice and that the Draft G–17 Notice may have the effect of questioning the validity of prior votes or the long standing practice of obtaining underwriter consents.

MSRB Response. Protecting investors is a key component of the Act and applies equally to existing bond owners and new purchasers of municipal securities. The MSRB believes that amendments to authorizing documents by those that do not share existing bond owners' long-term economic interests, except in specified circumstances, generally are not consistent with the Act, irrespective of prior practice. The MSRB also recognizes that, while limiting the practice may result in added costs and other consequences to issuers, the proposed rule change, as noted above, allows issuers a range of potential cost-effective options and will achieve an appropriate balance, for purposes of Rule G–11, between the rights of existing bond owners and the interests of issuers to amend their authorizing documents in a timely and efficient manner.

DTC Process

Comment. Various commenters noted that the process of verifying bond ownership through DTC, as well as effectively explaining proposed amendments to existing bond owners, was difficult and that there was no simple way to confirm the beneficial ownership or to communicate with beneficial owners except at the time of purchase.[14] NABL suggested that some changes be made to the DTC process to improve consent solicitations, such as a solicitation process similar to the one used for corporate securities.

MSRB Response. The MSRB recognizes that the process used by DTC might benefit from streamlining, but notes that it is not in a position to amend the DTC process.[15] The MSRB believes that the proposed rule change will provide issuers a range of potential options to obtain consents other than by a direct solicitation of bond owners and the proposed rule change will not foreclose future collaboration with issuers and DTC on ways to create a more effective process.

Underwriters Do Not Owe a Duty Under Rule G–17 to Existing Bond Owners

Comment. Ice Miller, IHCDA and IAA said that an underwriter did not owe a duty under Rule G–17 to prior bond owners because it was not dealing with those bond owners within the meaning of Rule G–17. These commenters said that an underwriter owed a duty of fair dealing only to new bond owners. NABL said that an issuer did not owe a duty to owners of its bonds under state law except to comply with the terms of the authorizing documents. Further, this commenter said that the Draft G–17 Notice was inconsistent with the parties' ability to freely negotiate benefits and protections.

MSRB Response. MSRB Rule G–17 on fair dealing applies to dealers in the conduct of their municipal securities business when dealing with all persons and is not limited in the manner suggested by some of the commenters. Further, as noted above, the MSRB does not believe the Draft G–17 Notice was inconsistent with the parties' rights to negotiate protections since it only limited the exercise of certain rights by other parties, such as underwriters, not bond owners. The proposed rule change similarly will address the duties only of dealers and not other market participants under Rule G–11 and will provide a range of potential options allowing issuers to amend authorizing documents. The proposed rule change would not alter a dealer's fair dealing obligations in connection with these activities.

Suggested Alternatives

Comment. NABL suggested that, because of the material adverse impact on issuers of the Draft G–17 Notice,

[14] Squire Sanders, Ice Miller, IHCDA and IAA.

[15] The MSRB notes that explaining amendments to authorizing documents to existing bond owners should not be more difficult than explaining the same provisions to new bond owners.

comments should be conducted under a rulemaking process so that market participants and other affected parties would have a better opportunity to review the issues and bring their concerns to the MSRB and the SEC. Squire Sanders suggested alternative language to the Draft G–17 Notice.[16]

MSRB Response. The proposed rule change is part of a rulemaking process that provides extensive opportunity for review and public comment. Indeed, the MSRB solicited comments three times in developing the proposed rule change. With respect to the alternative language proposed by a commenter, the MSRB notes that this language would serve only as notice to new purchasers and would not protect existing bond owners.

Disclosure of Ability of Underwriter To Consent to Amendments

Comment. BondView suggested that the ability of an underwriter to consent to a material dilution of a security should be prominently displayed and explicitly stated in the official statement or preliminary official statement in the risk section and, if possible, in a separate section. This commenter also said that the existence of the process should be made known by any bond salesperson to any prospective purchaser prior to purchase. Ice Miller, IHCDA and IAA noted that the placement of disclosure of the ability of underwriters to consent to changes needs to be consistent across industry practice.

MSRB Response. The MSRB does not disagree with the suggestions from these commenters, but does not believe that the suggestions are, by themselves, sufficient to address concerns of existing holders about consents provided by dealers with no prior or future long-term economic interest in the bonds. For that reason, subparagraph (l)(i)(A) of the proposed rule change would require not only explicit disclosure in an offering document of the ability of an underwriter to provide consent to changes in an authorizing document, but would also require specific authorization in the bond authorizing document for such underwriter's consent. In addition, and as noted above, a dealer would also have to consider whether a proposed change under these circumstances would be consistent with its fair dealing obligations.

G–11 Amendments

As noted above, the MSRB published two additional requests for comment on proposed amendments to MSRB Rule G–11 concerning a dealer's ability to provide consents to amendments to authorizing documents. The MSRB received 11 comment letters[17] to the first and second requests for comment on the G–11 Amendments. The commenters' responses are addressed below.

Support for the Proposed Rule Change

Comment. Various commenters supported the proposed rule change[18] and others generally opposed it or expressed reservations.[19] ICI said that limiting the practice of underwriters providing consent to changes in authorizing documents would result in greater protection for the interests of existing bonds owners. Standish Mellon said that underwriters do not necessarily share the interests of investors about the legal provisions of municipal bond issues. Nuveen said allowing underwriters to consent to changes violated a sense of fairness since they have no continued financial interest in the securities being affected.

Comment. RI said that the practice of underwriters providing consent may be unfair and deceptive and that there was no need for the underwriter to perform any role in giving consent. NFMA said that the practice of underwriters obtaining consents is unfair because it is exercising a right not explicitly contemplated by existing bond owners.

MSRB Response. The MSRB believes that the proposed rule change achieves a balance between the needs of issuers to effect changes to their authorizing documents in an efficient and cost effective manner, and the interests of existing bond owners to be able to have a voice in the amendment process. The proposed rule change will limit the ability of dealers to provide consents except in specified circumstances and will provide a range of potential options to issuers to obtain consents.

Underwriters Providing Consents Is a Long Standing Practice; Alternatives Costly

Comment. MEAG said that obtaining underwriter consents is a long standing and common practice in the municipal securities market and there are no other reasonable and cost-effective alternatives. This commenter also said that, without the ability of an underwriter (as an initial owner of new bonds) to consent to changes, some amendments to authorizing documents would be delayed or would force an issuer to undertake a costly and time consuming general consent solicitation.

MSRB Response. As noted above, the proposed rule change does not alter an issuer's contractual right to request an underwriter to consent to changes to an authorizing document. The proposed rule change permits such consents under specified conditions, assuming that such consent is consistent with an underwriter's fair dealing obligation. The MSRB believes that this range of potential options will address issuers' concerns about cost and delay in obtaining consents.

G–11 Amendments Would Impose Additional Contractual Obligations

Comment. MEAG said that the procedure for amending an authorizing document is a matter of state law and the terms of the document. This commenter also noted that proposed paragraph (k)(iii) (now proposed subparagraph (l)(i)(E)) was too onerous, and that to require all bond owners that would be affected by an amendment to consent would have the effect of changing the contractual arrangements of the authorizing documents and would be costly and labor intensive.

Comment. SIFMA said that, even if the authorizing documents and the disclosure documents expressly permitted bond owner consents to be provided by underwriters, the proposed rule now bars this type of consent and suggested that such change would be overreaching beyond the bounds of investor protection. SIFMA suggested that certain provisions in the Draft G–17 Notice be re-introduced, namely the provision that allowed an underwriter

[16] Squire Sanders suggested the following language:

It would not be a violation of Rule G–17 for an underwriter to consent to amendments to an authorizing document that would reduce the security for existing bondholders if the underwriter is giving consent as to newly issued bonds it is purchasing and the offering document for the new bonds (1) clearly describes the proposed amendments in the manner required by the authorizing document, and (2) conspicuously indicates that, by their purchase of the new bonds, the buyers are deemed to have given their consent to the amendments and to have directed and authorized the underwriter to execute, on their behalf, any written consent to the amendments that is required by the authorizing documents.

[17] Comment letters to the first request for comment concerning the G–11 amendments were received from: Investment Company Institute (''ICI''); Municipal Electric Authority of Georgia (''MEAG''); National Association of Independent Public Finance Advisors (''NAIPFA''); National Federation of Municipal Analysts (''NFMA''); New York City Municipal Water Finance Authority (''NY Water''); Nuveen Asset Management (''Nuveen''); Rhode Island Health and Educational Building Corporation (''RI''); Securities Industry and Financial Markets Association (''SIFMA''); and Standish Mellon Asset Management (''Standish Mellon''). NAIPFA and MEAG also submitted comments to the second request for comment concerning the G–11 Amendments.

[18] ICI, NAIPFA, NFMA, Nuveen, RI, and Standish Mellon.

[19] MEAG, NY Water and SIFMA.

to provide consent if the authorizing documents explicitly allowed such consent.

MSRB Response. The MSRB notes that subparagraph (l)(i)(E) of the proposed rule change reflects the original intent of both the Draft G–17 Notice and the G–11 Amendments, specifically, that existing bond owners be allowed a voice in the amendment process and not be overridden by the vote of a temporary owner such as an underwriter. MEAG's proposal is not consistent with the proposed rule change because it would allow an underwriter to vote the principal amount of bonds underwritten in lieu of the purchasing bond owners and have such vote ''count'' towards achieving the overall requisite number of consents required for the amendment. The MSRB notes that, if an issuer wishes to have the consents of the new purchasers counted immediately, it can request the underwriter implement subparagraph (l)(i)(D) of the proposed rule change and obtain individual consents from each new purchaser. The MSRB agrees to a certain extent with SIFMA's comment and notes that subparagraph (l)(i)(A) of the proposed rule change now excepts consents provided by underwriters if the practice is authorized in the authorizing documents and disclosed in the related offering documents. As noted above, the underwriter would be required to consider the request in light of its fair dealing obligations under Rule G–17.

Include Dealers Acting in Other Capacities

Comment. NFMA and RI supported the proposed exception included in the G–11 Amendments for remarketing agents, and stated that the exceptions were appropriate and sufficient. MEAG said that auction agents should be included because their function was ministerial, similar to that of a remarketing agent. Standish Mellon disagreed with the proposed exceptions for a dealer as an owner and as a remarketing agent, stating that it would allow the dealer too much discretion for self definition.

MSRB Response. The MSRB believes that the exceptions to the particular prohibition in the G–11 Amendments for dealers serving as underwriters and remarketing agents is sufficient and that creating exceptions for dealers in other functional capacities will create unnecessary complications and will not contribute to effectively protecting existing bond owners.

Positive and Negative Benefits of the Proposed Rule Change

Comment. ICI, NAIPFA, NFMA, Nuveen, Standish Mellon and RI generally supported the proposal, saying that the G–11 amendments would protect investors.

Comment. MEAG said that the G–11 Amendments would not benefit investors because they could preclude investors from realizing the benefits that could be derived from certain types of amendments. MEAG also said the G–11 Amendments might have a negative effect on issuers and investors because they would require issuers to undertake a costly process because there was no reasonable or cost-effective alternative, or might cause an issuer to delay the effectiveness of amendments until it had acquired sufficient consents and thereby delay or preclude investors from realizing the benefits of the amendments.

Comment. RI said that the G–11 Amendments would protect investors and would also require that consent provisions be more detailed and clear, and that issuers and investors would benefit from more certainty in the market. RI said it may be more complex for issuers to modify older documents, but it believed it could be done and suggested that trustees could provide consent with a legal opinion, and that older issues could be refunded.

Comment. NY Water and SIFMA suggested that the proposed rule change provide for an exception where the authorizing documents and official statement expressly provide for and disclose that an underwriter would be able to provide bond owner consent. NY Water noted that provisions specifically allowing underwriters to consent were designed to address the inability under an authorizing document to permit a deemed consent. Further, NY Water noted that where authorizing documents now include these provisions, failure to include this exception would have the effect of amending the issuer's existing authorizing documents without the issuer's consent. SIFMA noted that altering such express authority substantively changes the contractual rights and expectations of the parties.

Comment. NFMA said that the G–11 Amendments did not present a burden and called for additional disclosure.

MSRB Response. The MSRB recognizes the benefits to be gained by issuers and existing bond owners by timely amendments to authorizing documents and believes that the proposed rule change offers issuers a sufficient range of potential options to effect desired amendments in an efficient manner.

The MSRB also recognizes that certain issuers' authorizing and offering documents expressly authorized and disclosed the ability of underwriters to provide bond owner consents, and that following the publication of the Draft G–17 Notice, some issuers amended their documents to provide such authorization and disclosure. As a result, the MSRB, in its second request for comment on the G–11 Amendments, added a subparagraph (now subparagraph (l)(i)(A)) to except consents provided by an underwriter where the authorizing documents and the offering documents include such authorization and disclosure. MEAG agreed with this approach in its comments.

Comment. NAIPFA requested that the G–11 Amendments be revised to require that the obligation of obtaining consents be placed on the party to the transaction requesting the amendments to the authorizing documents, unless the parties agreed otherwise. The commenter said that the underwriter is typically the party that recommends the amendments and that the underwriter is often in the best position to obtain the bond owner consents. This commenter believed that such provision would improve market efficiency and lessen the financial and administrative impact that may otherwise be felt by issuers.

MSRB Response. The MSRB believes that the parties to the transaction are in the best position, at the time the necessity for consent is ascertained, to determine the appropriate party to bear the financial and administrative burden of obtaining the consents. In some cases, an issuer may choose to have its trustee or financial advisor manage the process; in other cases, the issuer may determine that the underwriter or other party is the appropriate party to assume all or part of the burden of obtaining consents. Including a provision placing the obligation on the underwriter ''unless otherwise agreed to by the parties'' may imply that the MSRB believes that such responsibilities belong with the underwriter and may adversely affect an issuer's negotiating position. Accordingly, the MSRB believes that this matter is best left to negotiation by the parties and has not included such a provision in the G–11 Amendments.

Comment. NFMA said that the G–11 Amendments should differentiate between amendments that merely modernize authorizing documents (with no adverse impact) and those that dilute security, which were not desirable.

MSRB Response. As the MSRB noted in response to similar comments by

NFMA relating to the Draft G–17 Notice, the MSRB believes that the proposed rule change will address a number of these issues. Unlike the Draft G–17 Notice, the proposed rule change does not list specific factors that a dealer must consider prior to providing a consent to changes to authorizing documents. The proposed rule change prohibits dealers from providing consent to any proposed amendment to an authorizing document, except in limited instances and in the context of a dealer's fair dealing obligations. The MSRB believes that the exceptions in the proposed rule change, and the overarching application of a dealer's fair dealing obligations, will address the difficulty of determining a ''reduction in security'' and achieve protection for existing bond owners.

Ability of Issuers To Obtain Consents Through Existing Mechanisms and Alternative Methods

Comment. MEAG and RI said the process of using DTC to obtain bond owner consents was costly and difficult. MEAG said the G–11 Amendments would preclude issuers from using a long standing practice of obtaining consents to amendments and would require issuers to undertake a more costly process. NFMA said that locating bond owners was not the issue, and that even if bond owners were located, they would consent only in limited circumstances. RI suggested that market participants, using technology and the web-based Electronic Municipal Market Access (''EMMA®'') system,[20] could develop a system of notification and request for consents to amendments.

MSRB Response. As discussed above, the MSRB believes that the proposed rule change will provide a sufficient range of potential options to allow issuers to obtain bond owner consents in a cost-sensitive and efficient manner.

Alternative Methods To Providing the Protections Sought Under the Rule G–11 Amendments That Would Be More Effective and/or Less Burdensome

Comment. MEAG said it was unaware of more effective/less burdensome alternatives. MEAG also said that the rule should be prospective and that underwriters should be able to provide consents only if bond documents provided for bond owner consent and the offering documents disclosed such practice. MEAG did not believe that relying on ''deemed consents'' would be more effective, because in its case, the bond indentures did not recognize the concept of a ''deemed consent.'' NFMA said that standards addressing a material dilution could be developed. RI said industry participants could develop a system (via technology) of notification and requests for consents from beneficial owners, which process would be especially helpful when amending older documents when no new financing was involved.

MSRB Response. As noted above, the proposed rule change will address MEAG's comment by allowing underwriters to provide such consents if the authorizing and offering documents provide for and disclose such practice, assuming the underwriter has determined that providing such consent would be consistent with its fair dealing obligations. With respect to the other comments, the MSRB encourages other market participants to develop alternatives to allow issuers to conduct direct solicitations of bond owners, if desired.

Other Comments

Other comments received, while not in direct response to the questions posed, are included here.

Comment. NFMA said that there should be better disclosure to existing bond owners if there was the ability to change the security for bonds with the consent of less than 100% of such owners, or when a material change was made to the authorizing documents, and that the MSRB should require conspicuous notice in a material event notice posted on EMMA.

MSRB Response. The MSRB notes that it does not have the statutory authority to amend SEC Rule 15c2–12 to include other event notices, but it has introduced facilities on EMMA to allow voluntary disclosure by various market participants, particularly in connection with the introduction of additional voluntary disclosure options for issuers and obligated persons [21] and invitations to issuers to submit information about bank loan and other financings.[22]

Comment. NFMA and Nuveen noted that amendments to authorizing documents, as well as the practice of underwriters banking consents, should be disclosed. These commenters also stated that where a material change in a security has resulted from a deemed consent, such event should be included in a material event notice on EMMA.

Comment. MEAG and SIFMA said that the exception for cases where 100% of existing owners had also consented should be revised to permit underwriters to consent in cases where consents were obtained from the requisite percentage of bond owners, as permitted by the authorizing documents. MEAG said that this exception, allowing an underwriter to consent if 100% of bond owners affected by the amendment (other than those on behalf of whom the dealer was consenting) had also consented, was too restrictive and would change the terms of a document that required less than 100% consent to effect amendments. This commenter also suggested that this provision be revised to make the effectiveness of the provision be conditioned upon the receipt of consents, rather than the ability of the underwriter to execute the consent.

MSRB Response. The MSRB notes that this requirement of 100% consent is applicable only under circumstances where an issuer requests an underwriter to consent in lieu of bond owners of newly issued bonds instead of obtaining the consent from the underlying purchasers, which scenario is addressed in subparagraph (l)(i)(D).[23] The MSRB agrees with the comment relating to the effectiveness of the underwriter's consent and has amended subparagraph (l)(i)(E) of the proposed rule change to reflect this comment.

Comment. MEAG also requested a clarification concerning paragraph (k)(iii) (now proposed subparagraph (l)(i)(C)) of the proposed rule change that allows a remarketing agent to consent to changes to an authorizing document provided that all bonds affected by the consent are held by the remarketing agent as a result of a mandatory tender. It suggested that this subparagraph be revised to clarify that the remarketing agent was not required to ''hold'' bonds tendered to it as a result of a mandatory tender if it obtained the specific consent to the proposed amendment from the bond owner electing to ''hold in lieu'' of tendering.

MSRB Response. The MSRB agrees with the suggestion and has incorporated this change in subparagraph (l)(i)(C) of the proposed rule change.

[20] EMMA is a registered trademark of the MSRB.

[21] MSRB Notice 2011–27 (May 23, 2011). Issuers and their designated agents have the ability to make available, on a voluntary basis, through EMMA preliminary official statements and other related pre-sale documents as well as official statements, advance refunding documents and related information.

[22] MSRB Notice 2012–18 (April 3, 2012).

[23] This provision does not change the ability of an issuer, without seeking the consent of an underwriter, to effect changes to its authorizing documents with consents that meet the requisite threshold in compliance with the terms of the authorizing documents. This provision only applies when the issuer is seeking the consent of an underwriter in lieu of new purchasers of bonds.

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 of 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–MSRB–2013–08 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–MSRB–2013–08. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet 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 MSRB. 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–MSRB–2013–08 and should be submitted on or before November 12, 2013.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[24]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2013–24558 Filed 10–21–13; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–70637; File No. SR–NYSEArca–2013–92]

Self-Regulatory Organizations; NYSE Arca, Inc.; Notice of Filing of Proposed Rule Change To Amend NYSE Arca Equities Rules 7.31, 7.32, 7.37, and 7.38 in Order To Comprehensively Update Rules Related to the Exchange's Order Types and Modifiers

October 9, 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 September 30, 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 NYSE Arca Equities Rules 7.31, 7.32, 7.37, and 7.38 in order to comprehensively update rules related to the Exchange's order types and modifiers. 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 Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend NYSE Arca Equities Rules 7.31, 7.32, 7.37, and 7.38[4] in order to update its rules related to the Exchange's order types and modifiers. Given the ever complex nature of equities trading, the Exchange has undertaken a comprehensive review of its rules related to order functionality to assure that its various order types, which have been adopted and amended over the years, accurately describe the functionality associated with those order types, and more specifically, how different order types may interact.[5] Accordingly, the Exchange proposes these rule changes in order to provide additional specificity and transparency to NYSE Arca Equities ETP Holders regarding the operation of NYSE Arca Equities order types and modifiers, to better align its rules with currently available functionality, and to organize and define order types and modifiers in a more intuitive manner.

The Exchange proposes to make specific rule changes as follows:

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[24] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 15 U.S.C. 78a.

[3] 17 CFR 240.19b–4.

[4] All references to rules in this filing are to the rules of NYSE Arca Equities.

[5] Commission staff has noted the increased complexity of the equities markets. *See* Gregg E. Berman, Senior Advisor to the Director of the Division of Trading and Markets, Market Structure: What we Know, and What we Need to Know (Sept. 21, 2011) (''This is because our present market structure is itself the product of evolutionary advancements in regulations, technologies, products, venues, news, investor sentiment, and probably even twitter. It is not a simple mosaic of different actors operating in isolation. The interdependencies of every participant and every system has led to an exponential growth in complexity.'')

Rule 7.31(a)—Market Order

The Exchange proposes to amend Rule 7.31(a) to expressly provide that Market Orders will not trade through the NBBO and that Market Orders shall be rejected if there is no bid or offer. A Market Order is an order to buy or sell a stated amount of a security that is to be executed at the National Best Bid or Offer (''NBBO''). Therefore, Market Orders will not trade through the NBBO, and the Exchange believes expressly stating as such in its Rules will provide additional specificity to Users. Additionally, Market Orders will be rejected if there is no bid or offer because a Market Order cannot be executed pursuant to the Users expectations—at the NBBO. The Exchange believes it is appropriate to reject a Market Order when there is no bid or offer because it assures that an unexecutable order will not be entered into the Exchange's book.

Rule 7.31(c)—Time in Force Modifiers

The Exchange proposes to make the following changes with respect to the description of Time in Force Modifiers:

- The Exchange proposes to describe the functionality found in Rule 7.31(c) as ''Modifiers,'' and as such, revise the title of Rule 7.31(c) to read ''Time in Force Modifiers.'' Similarly, the Exchange proposes to revise the names and descriptions of the functionality described in Rule 7.31(c) to reflect the usage of the term ''Modifiers'' rather than ''Orders.'' The Exchange believes that these proposed rule changes more clearly describe the function of the time-in-force instructions, *i.e.,* that they are modifiers that can be used with order types as opposed to distinct order types.
- The Exchange proposes to amend Rule 7.31(c)(1) to clarify that the Day Modifier cannot be combined with any other Time in Force Modifier. As is the case today, an order type that is required to include a Day Modifier cannot also have a Good Till Cancelled (''GTC''), Good Till Date (''GTD''), Timed, Immediate-or-Cancel (''IOC''), or Fill-or-Kill (''FOK'') Time in Force Modifier.
- The Exchange proposes to move the description of the Timed Modifier from its current location in Rule 7.31(q) to become new Rule 7.31(c)(2)(C). The Timed Modifier is used in conjunction with the GTD Modifier in order to specify an exact time until which a limit order will remain in effect, after which such order or the portion thereof not executed is to be treated as cancelled. As such, the Exchange believes it is appropriate to relocate the Timed Modifier to Rule 7.31(c) as a Time in Force Modifier.
- The Exchange proposes to move the description of the IOC Modifier from its current location in Rule 7.31(e) to become new Rule 7.31(c)(3). The Exchange also proposes to expand the description of the IOC Modifier in Rule 7.31(c)(3) to provide that the IOC Modifier will override any posting or routing instructions of orders that include the IOC Modifier. This rule change makes clear to ETP Holders that Exchange systems give priority to the IOC Modifier and ignore any other posting and routing instructions submitted with the order. Additionally, the Exchange proposes to specify that orders designated with an IOC Modifier never route. Further, the Exchange proposes to delete the subparagraphs under old Rule 7.31(e) as redundant. The determination as to what away quotes will not be traded through is based on the order type and not the IOC designation. Therefore, the Exchange believes it is appropriate for Users to review the applicable order type descriptions to determine which away quotes will be respected.
- The Exchange proposes to move the description of the FOK Modifier from its current location in current Rule 7.31(ll) to become new Rule 7.31(c)(4). The Exchange believes that the FOK instructions on an order are a time-in-force condition, and therefore it is more intuitive to include this modifier with other time in force descriptions.
- Because the Exchange proposes to define the term ''IOC,'' the Exchange proposes to replace references to the term ''immediate or cancel'' with the term ''IOC'' in Rules 7.31 and 7.37.[6]

Rule 7.31(d)—Inside Limit Order

The Exchange proposes to amend Rule 7.31(d) to specify that an Inside Limit Order may not be designated as a Discretionary Order and will not trade through either the NBBO or Protected Quotations.[7]

An Inside Limit Order is a limit order routed to the market participant with the best displayed price, and any unfilled portion will not be routed to the next best price level until all quotes at the current best bid or offer are exhausted. Once each current best bid or offer is exhausted, Exchange systems reevaluate the next best displayed price and route to that single price point and continue such assessment at each new best displayed price level until the Inside Limit Order is filled or no longer marketable. An Inside Limit Order is marketable when priced to buy (sell) at or above (below) the NBBO for the security. Therefore, the Inside Limit Order's functionality relies on a single-price to determine when it is no longer marketable. A Discretionary Order, however, is an order with two prices: a specified, undisplayed price and a specified, displayed price. The Exchange believes that it could cause confusion if Discretionary Orders were combined with Inside Limit Orders because Users might not know whether it is the limit price or the discretionary price which determines when the Inside Limit Order is no longer marketable. Therefore, the Exchange believes it is appropriate to reject Discretionary Orders when combined with Inside Limit Orders to reduce confusion, thus prohibiting an order combination which could result in an execution at odds with the expectations of a User.

Additionally, the Exchange believes that it is appropriate to specify that Inside Limit Orders will not trade through either the NBBO or Protected Quotations. Inside Limit Orders are designed to execute against the best displayed price level, whether or not quotes at such level are automatic or manual. As such, Inside Limit Orders will respect the NBBO and Protected Quotations, routing to away markets as necessary.

Rule 7.31(h)(2)—Discretionary Order

The Exchange proposes to amend Rule 7.31(h)(2) to specify that Discretionary Orders designated IOC and sell short Discretionary Orders shall be rejected.

Similar to why a Discretionary Order and an Inside Limit Order cannot be combined, the Exchange believes it is appropriate to reject a Discretionary Order designated IOC in order to reduce confusion regarding whether the order's functionality is based on the limit price or the discretionary price. A limit order designated IOC will execute in whole or in part as soon as such order is received at prices better than its limit price; adding a discretionary price only serves to add confusion as to whether the IOC will execute at prices better than its limit price or at prices better than its discretionary price. As such, the Exchange believes it is appropriate to reject Discretionary Orders designated IOC, thus prohibiting an order combination which could result in an execution at odds with the expectations of a User.

Additionally, Exchange systems currently do not accept sell short

[6] *See* proposed changes to Rules 7.31(h)(6), (h)(7), (s)(6), (aa), and 7.37(d)(1) and (2).

[7] The NBBO includes quotes from a market that may not be automated and therefore would not be a Protected Quotation pursuant to Regulation NMS Rule 600(b)(57).

Discretionary Orders because of the complexity of offering such functionality, and the Exchange believes that it will provide transparency in its rules to specify that such orders will be rejected.

Rule 7.31(h)(2)(A)—Passive Discretionary Order

A previous rule change filed with the Commission inadvertently deleted portions of the definition of a Passive Discretionary Order.[8] The Exchange proposes to amend Rule 7.31(h)(2)(A) to correct the inadvertent deletion and to provide that a Passive Discretionary Order will route to an away market if marketable upon entry. Additionally, the Exchange proposes to delete Rule 7.31(h)(2)(A)(i) as there no longer is a distinction in how Passive Discretionary Orders are treated between Exchange-listed and non-Exchange-listed securities.

Rule 7.31(h)(2)(B)—Discretion Limit Order

The Exchange proposes to amend Rule 7.31(h)(2)(B) to insert language that was inadvertently deleted by a filing previously made with the Commission to provide that a Discretionary Order may be designated as a Discretion Limit Order.[9] The inserted language conforms the first sentence of Rule 7.31(h)(2)(B) with the first sentence of Rule 7.31(h)(2)(A), which describes a Passive Discretionary Order.

Rule 7.31(h)(3)—Reserve Order

The Exchange proposes to amend Rule 7.31(h)(3) to specify that Reserve Orders cannot be combined with an order type that could never be displayed on the Corporation and must be in round lots. A Reserve Order is a limit order with a portion of the size displayed and with a reserve portion of the size (''reserve size'') that is not displayed on the Corporation. Therefore, the description of a Reserve Order contemplates a displayed portion. If an order type is never displayed on the Corporation, then it will not have the displayed portion required by the Reserve Order description. As a result, such order types are incompatible with a Reserve Order, and their combination with a Reserve Order is rejected. Additionally, because of its original design, Exchange systems currently do not accept Reserve Orders not entered in round lots, and the Exchange believes that it will provide transparency in its rules to specify that Reserve Orders not entered in round lots would be rejected.

Rule 7.31(h)(4)—Passive Liquidity Order

The Exchange proposes to amend Rule 7.31(h)(4) to specify that Passive Liquidity (''PL'') Orders must be designated as Inside Limit Orders. Exchange systems require that a PL Order must be designated as an Inside Limit Order or it will be rejected. A PL Order is entered by ETP Holders into Exchange systems by using two order tags, one for the order type and one for an execution instruction. The order type tag for PL Orders is the same as that for an Inside Limit Order. The execution instruction tag is one specifically for PL Orders. If the execution instruction tag specifically for PL Orders is not combined with an Inside Limit Order, then Exchange systems reject such an order. Thus, the combination is required to ensure proper entry of a PL Order, and the rule change is meant to add transparency to the order entry process. With the order entry for PL Orders designed in this manner, the combination of PL Orders with Inside Limit Orders permits PL Orders to respect not only protected quotations, but also manual quotations in its functionality.[10] A PL Order is designed to permit passive interaction with incoming orders; thus, the Exchange believes that respecting manual quotations, in addition to protected quotations, is consistent with the passive nature of a PL Order.

Additionally, the Exchange proposes to amend Rule 7.31(h)(4) to specify that PL Orders designated IOC shall be rejected. The Exchange believes it is appropriate to reject a PL Order designated IOC because an IOC designation would be inconsistent with the nature of a PL Order. A PL Order is designed to permit passive interaction with incoming orders; however, an IOC designation is seeking immediately available liquidity and then cancelling. As a result, the combination is incompatible and the Exchange believes it is appropriate to reject a PL Order designated IOC.

Rule 7.31(h)(5)—Mid-Point Passive Liquidity Order (''MPL Order'')

The Exchange proposes to amend Rule 7.31(h)(5) to clarify that MPL Orders entered without a limit price shall be rejected. MPL Orders are limit orders and therefore must be entered with a limit price. If a User fails to include a limit price with its MPL Order, the MPL Order will be rejected.

Additionally, in order to use consistent language in its rules, the Exchange proposes to change language referring to a ''No Midpoint Execution'' designator in the MPL Order description to a ''No Midpoint Execution'' Modifier.

Rule 7.31(i)—Directed Order; Rule 7.31(j)—Directed Fill

The Exchange proposes to delete Rules 7.31(i) and (j), as the Directed Order and Directed Fill are order types no longer available to Users on Exchange systems and thus should be removed from the rule. The Exchange also proposes to eliminate references in other rules to Directed Orders and Directed Fills.[11]

Rule 7.31(k)—Q Orders

The Exchange proposes to amend Rule 7.31(k)(4) to clarify that, in addition to being rejected when designated as an Intermarket Sweep Order, a Q Order will be rejected if it is marketable or is an odd lot. Both of these rejections reflect the fact that Q Orders are designed to be used by Market Makers to satisfy their obligation to maintain continuous, two-sided interest in securities in which they are registered to trade. As such, Q Orders are meant to act as a means to post quotes, and trades are to occur against them. Therefore, the Exchange believes it is appropriate to reject Q Orders that are marketable upon entry since such orders would be taking liquidity rather than providing liquidity. Additionally, a Market Maker's obligation to maintain continuous, two-sided interest requires that the interest ''shall have a displayed size of at least one normal unit of trading (or a larger multiple thereof).'' [12] In order to satisfy this requirement, the Exchange believes it is appropriate to reject Q Orders that do not have a displayed size of at least one round lot.

Rule 7.31(n)—Do Not Reduce; Rule 7.31(o)—Do Not Increase

For consistency, the Exchange proposes to describe the ''Do Not Reduce'' and ''Do Not Increase'' functionality as ''Modifiers'' rather than ''orders.'' The Exchange believes that the use of the term ''Modifier'' more accurately describes the functionality, since these modifiers can be added to any order type.

[8] *See* Securities Exchange Act Release No. 63584 (Dec. 21, 2010), 75 FR 81685 (Dec. 28, 2010).

[9] *See id.*

[10] An Inside Limit Order is defined as ''[a] Limit Order, if routed away pursuant to Rule 7.37(d), will be routed to the market participant with the *best displayed price.*'' *See* Rule 7.31(d) (emphasis added).

[11] *See* NYSE Arca Equities Rules 7.31(h)(4), (v), (w); 7.38(a)(1).

[12] *See* NYSE Arca Equities Rule 7.23(a)(1)(A).

Rule 7.31(p)—Fill-or-Return; Rule 7.31(r)—Fill-or-Return Plus

The Exchange proposes to delete Rules 7.31 (p) and (r), as the Fill-or-Return Order and Fill-or-Return Plus Order are order types not available to Users on Exchange systems and thus should be removed from the rule. The Exchange also proposes to eliminate references in other rules to the Fill-or-Return or Fill-or-Return Plus functionality.[13]

Rule 7.31(t)—Auction-Only Order

The Exchange proposes to amend Rule 7.31(t) to specify that, in addition to being incompatible with a GTC designation, an Auction-Only order cannot be designated as a discretionary order. A Discretionary Order is an order with a specified, undisplayed price, in addition to a specified, displayed price. Thus, a Discretionary Order contains two different prices. The Exchange believes permitting a Discretionary Order to combine with an Auction-Only order may cause confusion regarding the price at which the order would participate in the auction process. Therefore, the Exchange believes it is appropriate to reject such a combination, thus prohibiting an order combination which could result in an execution at odds with the expectations of a User.

The Exchange also proposes to move the descriptions of a Market-on-Close Order (''MOC'') and a Limit-on-Close Order (''LOC'') from their current locations in Rules 7.31(dd) and (ee), respectively, to new subparagraphs (3) and (4), respectively, of Rule 7.31(t). The Exchange believes that because MOC and LOC Orders are a form of Auction-only Orders, it is more logical to include these order types with other Auction-only order types. The Exchange also proposes to amend the descriptions of MOC and LOC Orders to conform them to the descriptions of Limit-on-Open and Market-on-Open Orders.

Rule 7.31(u)—Cleanup Order

The Exchange proposes to delete Rule 7.31(u), as Cleanup Orders are not available to Users on Exchange systems and thus should be removed from the rule.

Rule 7.31(v)—NOW Order

The Exchange proposes to amend Rule 7.31(v) to specify that combining a NOW Order with another order type will override the posting or routing instructions of the order with which it is combined. This rule change makes clear to ETP Holders that Exchange systems give priority to the NOW Order and ignore any other posting and routing instructions submitted with the order.

In order to conform its rule set, the Exchange also proposes to amend the description of a NOW Order such that it is described as a ''Limit Order'' rather than a ''Limited Price Order.''

Rule 7.31(x)—Primary Only (''PO'') Order

The Exchange proposes to amend Rule 7.31(x) to specify that, in addition to being incompatible with a GTC designation, a PO Order cannot be designated as a Reserve Order. A Reserve Order is a limit order with a portion of the size displayed, and with a reserve portion of the size that is not displayed, on the Exchange. Therefore, the Reserve Order's functionality is dependent on being on the Exchange. A PO Order, however, is a market or limit order that is routed to the primary market and will never have a size displayed on the Exchange. As a result, the Exchange believes it is appropriate to specify that a PO Order may not be combined with a Reserve Order because the two orders are incompatible.

Rule 7.31(z)—Midpoint Directed Fill

The Exchange proposes to delete Rule 7.31(z), as Midpoint Directed Fills are not available to Users on Exchange systems and thus should be removed from the rule.

Rule 7.31(cc)—Pegged Orders

The Exchange proposes to amend Rule 7.31(cc) to specify that Pegged Orders may be entered only during the Core Trading Session. Additionally, the Exchange is clarifying that Pegged Orders will be rejected where an NBBO does not exist at time of entry or where the Pegged Order is to sell short during a Short Sale Period.[14]

The Exchange believes it is appropriate to reject a Pegged Order where an NBBO does not exist because Pegged Orders are limit orders to buy or sell at a displayed price set to track the current bid or ask of the NBBO. If no NBBO exists, then a Pegged Order cannot function properly. Further, because a Pegged Order is rejected where an NBBO does not exist, Exchange systems will reject a Pegged Order entered outside of the Core Trading Session. Additionally, Exchange systems reject a sell short Pegged Order during a Short Sale Period because of the complexity of offering such functionality, and the Exchange believes it will provide clarity to ETP Holders to specify that such orders are rejected.

The Exchange also proposes to add subparagraphs (1) and (2) to Rule 7.31(cc) to specifically describe the two variations of Pegged Orders available to Users: Market Pegged and Primary Pegged. A Market Pegged Order is a buy order that is pegged to the National Best Offer or a sell order that is pegged to the National Best Bid. Because a Market Pegged Order is tracking the contra-side NBB or NBO, an offset value is required to avoid locking the market. A Primary Pegged Order is a buy order that is pegged to the NBB or a sell order that is pegged to the NBO. An offset value is permitted, but not required, on a Primary Pegged Order. Additionally, the Exchange is proposing to amend Rule 7.31(cc) to clarify that the offset value for Pegged Orders may be specified up to two decimals. The Exchange notes that the Primary and Market Pegged Orders are not new or novel, and the proposed revisions to the Exchange rule are consistent with the operation of pegging functionality at other markets.[15]

Rule 7.31(gg)—Don't Arb Me Modifier

The Exchange proposes to delete Rule 7.31(gg), as the Don't Arb Me Modifier is not available to Users on Exchange systems and thus should be removed from the rule.

Rule 7.31(hh)—Proactive if Locked Modifier

The Exchange proposes to amend Rule 7.31(hh) to clarify that the Proactive if Locked Modifier may be used in conjunction with order types other than Reserve Orders. Under current Rule 7.31(hh), the Proactive if Locked Modifier is described as a Proactive if Locked Reserve Order, and its description is tailored to the modifier's combination with a Reserve Order. The Exchange proposes to amend the description to make clear that the Proactive if Locked Modifier is not limited to use with only a Reserve Order, and may be combined with a limit order to cause the limit order to be routed to another market center in instances where the other market center has locked the order and the locking market has not resolved the locked market situation in a timely manner.

[13] *See* NYSE Arca Equities Rules 7.32; 7.37(d)(1)–(2).

[14] Rule 7.16(f)(ii) provides that Exchange systems ''shall not execute or display a short sale order with respect to a covered security at a price that is less than or equal to the current national best bid if the price of that security decreases by 10% or more . . . .'' Once triggered, this Short Sale Price Test, pursuant to Rule 7.16(f)(iv), will remain in effect until the close of trading on the next trading day (the ''Short Sale Period'').

[15] *See* Nasdaq Rule 4751(f)(4); BATS Rule 11.9(c)(8); NYSE Rule 13.

Rule 7.31(jj)—Intermarket Sweep Order (''ISO'')

The Exchange proposes to amend Rule 7.31(jj) to clarify that an ISO is never routed to an away market and may trade through a Protected Quotation. Although the Exchange's reference to the requirements of Regulation NMS provides Users with sufficient information to understand the ISO functionality, the Exchange believes that the amended language will provide additional clarity to Users.

Additionally, the Exchange proposes to amend Rule 7.31(jj) to clarify that when designated ISO, an order will not be rejected or cancelled even though it would lock, cross, or be marketable against an away market. Several Exchange order types will be rejected or cancelled if they were to lock, cross, or be marketable against an away market; however, marking such orders as ISOs will cause the combination to be accepted by Exchange systems. The restriction against locking, crossing, or being marketable against away markets, and thus rejecting the order, generally relates to the fact that such orders would be violating the restrictions found in Regulation NMS as locking, crossing, or trading through Protected Quotations. Because the ISO designation signifies that the User is complying with SEC Rule 611 of Regulation NMS with respect to ISOs—routing ISOs to better-priced Protected Quotations for the full displayed size—the concerns are no longer applicable, and therefore, the Exchange will not cancel or reject such orders when designated ISO.

Rule 7.31(kk)—Primary Sweep Order (''PSO'')

The Exchange proposes to amend Rule 7.31(kk) to update the description of PSOs. Currently, Rule 7.31(kk)(1) describes the process by which PSOs are routed to NYSE; however, such process is also applicable to PSOs routed to NYSE MKT. As such, the Exchange proposes to amend Rule 7.31(kk)(1) to include NYSE MKT.

Rule 7.31(mm)—Post No Preference Blind (''PNPB'')

The Exchange proposes to amend Rule 7.31(mm) to clarify that a PNPB Order is an PNP Order that is placed undisplayed on the NYSE Arca book at the price of the contra-quote of the PBBO if the order would lock or cross a protected quotation. The current rule text references the term ''displayed,'' however, that term is intended to modify the Protected Best Bid or Protected Best Offer. The Exchange proposes to amend the rule text to make clear that a PNPB order is undisplayed if it is priced at or through the PBBO. The proposed rule change does not change the functionality of the PNPB Order.

The Exchange proposes to further amend Rule 7.31(mm) to clarify that a PNPB Order combined with an Add Liquidity Only (''ALO'') Order will not be cancelled if it is marketable against the PBBO. Currently, Rule 7.31(nn)(1) states that an ALO Order will be rejected where, at time of entry, the ALO Order is marketable. This restriction is designed to prevent (1) the order from locking or crossing an away quote and (2) the order from taking liquidity rather than being a provider of liquidity. However, an ALO Order, when combined with a PNPB Order will not be rejected when it is marketable against the NBBO. An ALO Order that is combined with a PNPB Order may be marketable against the NBBO upon arrival. However, pursuant to the order instructions associated with a PNPB Order, if the PNPB ALO Order is marketable against the PBBO, it is placed undisplayed in the NYSE Arca book and therefore would not lock or cross an away quote. Additionally, because the order is undisplayed, it can rest in Exchange systems as a liquidity provider, despite being marketable against away quotes. A PNPB ALO Order would still be rejected if it would be marketable against liquidity resting in Exchange systems.

Rule 7.31(nn)—ALO Order

The Exchange proposes to amend Rule 7.31(nn) to clarify that an ALO Order must be designated as either a PNP or MPL Order. The Exchange notes that the reference to PNP Orders includes all types of PNP Orders, including PNPB Orders. An ALO Order is a limit order that is accepted and placed in the NYSE Arca book only where the order adds liquidity. ALO Orders do not route to away market centers. Such functionality is accomplished by designating the ALO Order as a PNP Order. As described in Rule 7.31(w), a PNP Order is a limit order to buy or sell that is to be executed in whole or part on the Corporation, without routing any portion of the order to another market center. An ALO Order can also be designated as an MPL Order, an order type combination whose functionality has previously been described by the Exchange.[16] The Exchange also proposes to delete the rule language stating that an ALO Order may not be designated as GTC. Because an ALO Order must be designated with a Day Modifier and no other Time in Force Modifiers may be combined with the Day Modifier, the Exchange believes that it is unnecessary to also state that an ALO may not be designated as GTC.

The Exchange also proposes to amend Rule 7.31(nn)(3) to explicitly provide that an MPL–ALO Order may lock another MPL or MPL–ALO Order and not be rejected. Currently, Rule 7.31(nn)(3) states that ''ALO Orders will ignore MPL Orders and proceed to be placed in the NYSE Arca Book . . . .'' For clarity, the Exchange is amending this provision to state that an ALO Order, designated as MPL and therefore undisplayed, will be accepted even if it is at the same price level as a contra-side MPL or MPL–ALO Order.[17]

Supplementary Material .01—Order Type and Modifier Combination

The Exchange proposes to add Supplementary Material .01 to Rule 7.31 in order to provide guidance to Users as to the possible order type combinations available and how to interpret Rule 7.31 to aid in determining what order type combinations will be accepted. Specifically, Supplementary Material .01 will provide the general proposition that, unless the terms of a proposed combination are inconsistent, Users are generally able to combine order types and modifiers. Additionally, the explicit rules that the Exchange has developed to aid Users are meant to provide guidance, but not provide an exhaustive list, of the permissible and impermissible order type and modifier combinations.

Given the number of order types and modifiers, the number of potential order type and modifier combinations is too numerous to effectively describe every possible combination without producing an unwieldy rule. The revisions appearing in this proposed rule change are meant to provide additional clarity as to combinations NYSE Arca reasonably believes that Users, in practice, enter. In addition, Supplementary Material .01 is designed to provide Users with the general rule for deciding when order types and modifiers may be combined.

Supplementary Material .02—Incoming/Resting Functionality

The Exchange proposes to add Supplementary Material .02 to Rule 7.31

[16] *See* Securities Exchange Act Release No. 67652 (Aug. 14, 2012), 77 FR 50189 (Aug. 20, 2012).

[17] A User may designate an MPL or MPL–ALO Order as eligible to interact with an arriving marketable MPL–ALO Order. If so designated, the two orders will execute and the arriving marketable MPL–ALO will be designated as the liquidity provider.

to provide additional guidance to Users as to certain order type combinations. Specifically, Supplementary Material .02 will provide that if two order types are combined that include instructions for operation on arrival and for how the order operates while resting on the Exchange's book, the instructions governing functionality while incoming will be operative upon arrival. Further, functionality governing how the order operates while resting on the Exchange's book will govern any remaining balance of the order that is not executed upon arrival. While such functionality may be intuitive, the Exchange believes it is appropriate to explicitly state such functionality in order to ensure that its rules are clear and properly interpreted by Users.

Rule 7.32—Order Entry

The Exchange proposes to amend Rule 7.32 to specify that orders with a size greater than one million shares shall be rejected. Exchange systems currently do not accept orders with a size greater than one million shares, and the Exchange believes that it will provide transparency in its rules to specify that orders with a size greater than one million shares would be rejected.

Rule 7.38—Odd and Mixed Lots

The Exchange proposes to amend Rule 7.38(a)(2) to clarify that specific language in the descriptions of individual order types override the general rule that mixed lot orders may be any order type supported by the Exchange. Rule 7.38(a)(2) currently provides that mixed lot orders submitted by Users to the NYSE Arca Marketplace may be any order type supported by the NYSE Arca Marketplace. The Exchange believes explicitly stating that specific language in the individual order types is controlling will provide guidance to those Users who may be confused by the broad language in Rule 7.38(a)(2).

Technical Amendments

The Exchange proposes to make technical amendments to various provisions in Rules 7.31 and 7.37. Specifically, the Exchange proposes to conform its usage of abbreviations such that common abbreviations for order types and modifiers will be inserted throughout Rules 7.31 and 7.37 where appropriate.

2. Statutory Basis

The proposed rule change is consistent with Section 6(b) [18] of the Act, in general, and furthers the objectives of Section 6(b)(5),[19] in particular, in that it is designed to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and national market system, and in general, to protect investors and the public interest, and not designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

The Exchange believes that the proposed rule change will foster cooperation and coordination with persons engaged in regulating transactions in securities because the specificity, transparency, and more intuitive descriptions and organization will assist regulators to understand how the affected order types and modifiers are being used by market participants. As such, the proposed rule change will help regulators in the identification of any potential misuse by market participants.

The Exchange believes that the proposed rule change will remove impediments to and perfect the mechanism of a free and open market and national market system because, by providing specificity and transparency, the proposed rule change will provide greater clarity with respect to the use and potential use of the functionality. With greater clarity regarding what a specific order type or modifier does and its proper use, greater competitive forces can be brought to bear on, and help to foster the proper functioning of, the market.

The Exchange believes that the proposed rule change will protect investors and the public interest. The increased transparency and specificity resulting from the proposed rule change will enable investors and the public to understand the tools available to the agents handling their orders as well as those available to professional market participants who may be competing with their orders.

Finally, the Exchange believes that the proposed rule change is not designed to permit unfair discrimination between customers, issuers, brokers, or dealers. By enhancing transparency, specificity, and clarity, the proposed rule change will reduce any potentially discriminatory or unfair use of Exchange functionality. By providing the functionality, making it available to the public, and providing clear explanations to help facilitate a complete understanding of the functionality, the proposed rule change will reduce any discriminatory or unfair use by a subset of the market.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change imposes any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. In fact, the Exchange believes that the proposed rule change will increase competition between market participants by providing greater transparency and specificity to market participants who may wish to take advantage of the functionality offered by the Exchange. The greater transparency and specificity will allow market participants to utilize the tools made available by the Exchange to accomplish their trading strategies and investment goals in an efficient manner. An increase in the knowledge of market participants regarding the functionality offered by the Exchange can only serve to improve the competition in the marketplace by creating a more transparent trading 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

Within 45 days of the date of publication of this notice in the **Federal Register** or within such longer period (i) as the Commission may designate up to 90 days of such date 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 the 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:

[18] 15 U.S.C. 78f(b).

[19] 15 U.S.C. 78f(b)(5).

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–2013–92* 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–2013–92. 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–2013–92 and should be submitted on or before November 12, 2013.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[20]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2013–24642 Filed 10–21–13; 8:45 am]

BILLING CODE 8011–01–P

[20] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–70624; File No. SR–NYSEArca–2013–101]

Self-Regulatory Organizations; NYSE Arca, Inc.; Notice of Filing of Proposed Rule Change To List and Trade Shares of the WisdomTree Bloomberg U.S. Dollar Bullish Fund, WisdomTree Bloomberg U.S. Dollar Bearish Fund, and the WisdomTree Commodity Currency Bearish Fund Under NYSE Arca Equities Rule 8.600

October 8, 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 September 26, 2013, NYSE Arca, Inc. (''Exchange'' or ''NYSE Arca'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to list and trade the shares of the following funds of the WisdomTree Trust (''Trust'') under NYSE Arca Equities Rule 8.600 (''Managed Fund Shares''): WisdomTree Bloomberg U.S. Dollar Bullish Fund (''DI Bull Fund''); the WisdomTree Bloomberg U.S. Dollar Bearish Fund (''DI Bear Fund,'' and with the DI Bull Fund, ''DI Funds''); and the WisdomTree Commodity Currency Bearish Fund (''CC Bear Fund,'' and collectively with the DI Funds, ''Funds''). The shares of the Funds are collectively referred to herein as the ''Shares.'' 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 list and trade the Shares of the Funds under NYSE Arca Equities Rule 8.600, which governs the listing and trading of Managed Fund Shares on the Exchange.[3] The Funds will be actively-managed exchange traded funds (''ETFs'').[4] The Shares will be offered by the Trust, which was established as a Delaware statutory trust on December 15, 2005. The Trust is registered with the Commission as an investment company and has filed a registration statement on Form N–1A (''Registration Statement'') with the Commission on behalf of each of the Funds.[5]

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] A Managed Fund Share is a security that represents an interest in an investment company registered under the Investment Company Act of 1940 (15 U.S.C. 80a–1) (''1940 Act'') organized as an open-end investment company or similar entity that invests in a portfolio of securities selected by its investment adviser consistent with its investment objectives and policies. In contrast, an open-end investment company that issues Investment Company Units, listed and traded on the Exchange under NYSE Arca Equities Rule 5.2(j)(3), seeks to provide investment results that correspond generally to the price and yield performance of specific foreign or domestic stock index, fixed income securities index, or combination thereof.

[4] The Commission previously approved listing and trading on the Exchange of a number of actively managed funds under NYSE Arca Equities Rule 8.600. *See, e.g.,* Securities Exchange Act Release Nos. 57801 (May 8, 2008), 73 FR 27878 (May 14, 2008) (SR–NYSEArca–2008–31) (order approving Exchange listing and trading of twelve actively-managed funds of the WisdomTree Trust); 58564 (September 17, 2008), 73 FR 55194 (September 24, 2008) (SR–NYSEArca–2008–86) (order approving Exchange listing and trading of WisdomTree Dreyfus Emerging Currency Fund); 62604 (July 30, 2010), 75 FR 47323 (August 5, 2010) (SR–NYSEArca–2010–49) (order approving listing and trading of WisdomTree Emerging Markets Local Debt Fund); 62623 (August 2, 2010), 75 FR 47652 (August 6, 2010) (SR–NYSEArca–2010–51) (order approving listing and trading of WisdomTree Dreyfus Commodity Currency Fund); 63598 (December 22, 2010), 75 FR 82106 (December 29, 2010) (SR–NYSEArca–2010–98) (order approving listing and trading of WisdomTree Managed Futures Strategy Fund); and 63919 (February 16, 2011), 76 FR 10073 (February 23, 2011) (SR–NYSEArca–2010–116) (order approving listing and trading of WisdomTree Asia Local Debt Fund).

[5] *See* Post-Effective Amendment No. 216 (DI Bull Fund), No. 217 (DI Bear Fund) and No. 218 (CC Bear Fund) to the Registration Statement on Form N–1A for the Trust, each dated September 6, 2013 under the Securities Act of 1933 (15 U.S.C. 77a) (''Securities Act'') and the 1940 Act. (File Nos. 333–

Continued

Description of the Shares and the Funds

WisdomTree Asset Management, Inc. (''WisdomTree Asset Management'') will be the investment adviser (''Adviser'') to each of the Funds.[6] Mellon Capital Management (''Mellon'') will serve as sub-adviser for each of the Funds (''Sub-Adviser'').[7] The Bank of New York Mellon is the administrator, custodian, and transfer agent for the Trust (''Custodian'' or ''Transfer Agent''). ALPS Distributors, Inc. serves as the distributor for the Trust (''Principal Underwriter''). Bloomberg Finance L.P. (''Index Sponsor'') is the sponsor of the Bloomberg US Dollar Total Return Index (''Bloomberg USD TR Index'') and the Bloomberg Inverse US Dollar Total Return Index (''Bloomberg Inverse USD TR Index,'' each an ''Index'' and together with the Bloomberg USD TR Index, the ''Indexes''). Each Index is described more fully below.[8]

Commentary .06 to Rule 8.600 provides that, if the investment adviser to the investment company issuing Managed Fund Shares is affiliated with a broker-dealer, such investment adviser shall erect a ''fire wall'' between the investment adviser and the broker-dealer with respect to access to information concerning the composition and/or changes to such investment company portfolio.[9] In addition, Commentary .06 further requires that personnel who make decisions on the open-end fund's portfolio composition must be subject to procedures designed to prevent the use and dissemination of material, non-public information regarding the open-end fund's portfolio. Commentary .06 to Rule 8.600 is similar to Commentary .03(a)(i) and (iii) to NYSE Arca Equities Rule 5.2(j)(3); however, Commentary .06 in connection with the establishment of a ''fire wall'' between the investment adviser and the broker-dealer reflects the applicable open-end fund's portfolio, not an underlying benchmark index, as is the case with index-based funds. The Adviser is not registered as a broker-dealer or affiliated with a broker-dealer. The Sub-Adviser is not a broker-dealer but is affiliated with one or more broker-dealers and has implemented a ''fire wall'' with respect to such broker-dealers regarding access to information concerning the composition and/or changes to a Fund's portfolio. In addition, Mellon personnel who make decisions regarding a Fund's portfolio will be subject to procedures designed to prevent the use and dissemination of material, non-public information regarding such Fund's portfolio. In the event (a) the Adviser or Sub-Adviser becomes registered as a broker-dealer or becomes newly affiliated with a broker-dealer, or (b) any new adviser or sub-adviser is a registered broker-dealer or becomes affiliated with a broker-dealer, it will implement a fire wall with respect to its relevant personnel or its broker-dealer affiliate regarding access to information concerning the composition and/or changes to the applicable Fund's portfolio, and will be subject to procedures designed to prevent the use and dissemination of material, non-public information regarding such portfolio.

WisdomTree Bloomberg U.S. Dollar Bullish Fund, WisdomTree Bloomberg U.S. Dollar Bearish Fund, and WisdomTree Commodity Currency Bearish Fund

DI Bull Fund—Index Information

The DI Bull Fund will be an actively managed fund that seeks to provide total returns, before expenses, that exceed the performance of the Bloomberg USD TR Index. The Bloomberg USD TR Index is based on the Bloomberg US Dollar Index (BDXY), which tracks changes in the value of the U.S. Dollar against a basket of developed and emerging market currencies which are deemed to have the highest liquidity in the currency markets and represent countries that make the largest contribution to trade flows with the United States.[10] The Bloomberg USD TR Index additionally incorporates the impact of short-term interest rate differences inherent in achieving such exposure by incorporating the net interest rate differential between the short-term interest rates in the U.S. and in the countries of those leading currencies

132380 and 811–21864). The descriptions of the Funds and the Shares contained herein are based on information in the Registration Statement. In addition, the Commission has issued an order granting certain exemptive relief to the Trust under the 1940 Act. *See* Investment Company Act Release No. 28171 (October 27, 2008) (File No. 812–13458 (''Exemptive Order'')). In compliance with Commentary .05 to NYSE Arca Equities Rule 8.600, which applies to Managed Fund Shares based on an international or global portfolio, the Trust's application for exemptive relief under the 1940 Act states that the Funds will comply with the federal securities laws in accepting securities for deposits and satisfying redemptions with redemption securities, including that the securities accepted for deposits and the securities used to satisfy redemption requests are sold in transactions that would be exempt from registration under the Securities Act.

[6] WisdomTree Investments, Inc. (''WisdomTree Investments'') is the parent company of WisdomTree Asset Management.

[7] The Sub-Adviser will be responsible for day-to-day management of the Funds and, as such, typically makes all decisions with respect to portfolio holdings. The Adviser will have ongoing oversight responsibility.

[8] Information regarding the Indexes and other indexes provided by the Index Sponsor can be found at *www.bloombergindexes.com.* The Index Sponsor is not a broker-dealer but is affiliated with one or more broker-dealers. The Index Sponsor 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 regard to its affiliated broker-dealers regarding the Indexes.

[9] An investment adviser to an open-end fund is required to be registered under the Investment Advisers Act of 1940 (''Advisers Act''). As a result, the Adviser and the Sub-Adviser and their related personnel are subject to the provisions of Rule 204A–1 under the Advisers Act relating to codes of ethics. This Rule requires investment advisers to adopt a code of ethics that reflects the fiduciary nature of the relationship to clients as well as compliance with other applicable securities laws. Accordingly, procedures designed to prevent the communication and misuse of non-public information by an investment adviser must be consistent with Rule 204A–1 under the Advisers Act. In addition, Rule 206(4)–7 under the Advisers Act makes it unlawful for an investment adviser to provide investment advice to clients unless such investment adviser has (i) adopted and implemented written policies and procedures reasonably designed to prevent violation, by the investment adviser and its supervised persons, of the Advisers Act and the Commission rules adopted thereunder; (ii) implemented, at a minimum, an annual review regarding the adequacy of the policies and procedures established pursuant to subparagraph (i) above and the effectiveness of their implementation; and (iii) designated an individual (who is a supervised person) responsible for administering the policies and procedures adopted under subparagraph (i) above.

[10] Data for the global currencies is derived, in part, from the Bank for International Settlements Triennial Central Bank Survey, December 2010 (''BIS Survey''). The global currencies included in the Indexes are limited to the top twenty currencies in terms of transaction volume, listed in the BIS Survey, under Table 3: ''Currency distribution of foreign exchange turnover,'' reflecting the percentage share of average daily turnover for the applicable month and year (''Table 3''). *See http://www.bis.org/publ/rpfxf10t.htm.* Trade volume data for the currencies selected is derived from the Board of Governors of the Federal Reserve System, Foreign Exchange Rates—H.10 Release. *See http://www.federalreserve.gov/Releases/H10/Summary/* (''Federal Reserve Release''). The global currencies selected for the Indexes are limited to the top twenty currencies by trade volume included in the most recent Federal Reserve Release.

The Index Sponsor selects for both Indexes the top ten currencies included in both the most recent BIS Survey and Federal Reserve Release, giving equal weighting to both liquidity and trade volume. The currencies selected are given weights in each Index based equally on relative trade volume and relative liquidity as compared with the other included currencies. The Indexes each exclude any currency that is tied directly to the U.S. Dollar (*e.g.,* Hong Kong Dollar) and limit the percentage weighting of the Chinese Yuan Renminbi (''CNY'') to three percent of the total weight of each Index, because the CNY is heavily managed by the Chinese government. The Indexes also exclude any currency that would receive a weighting of less than two percent of the Indexes, based on the relative weighting formula described above.

As of December 31, 2012 (the date of the most recent rebalancing of the Indexes), the components of each index were the following: Euro (34.3%); Japanese Yen (16.2%); Canadian Dollar (12.0%); British Pound (9.9%); Mexican Peso (8.5%); Australian Dollar (5.5%); Swiss Franc (4.9%); Korean Won (3.6%); Chinese Yuan Renminbi (3.0%); and Singapore Dollar (2.2%).

and the daily federal funds rate. The Bloomberg USD TR Index is structured to potentially benefit from a general rise in the level of the U.S. Dollar relative to the basket of global currencies.

To be considered for the Bloomberg US Dollar Index (and, accordingly, the Bloomberg USD TR Index and the Bloomberg Inverse USD TR Index), currencies must rank high in terms of their countries' or regions' contribution to overall trade in the U.S. or have high standing in terms of rank in foreign exchange trading volume, although they must have influence in both categories. The basket of currencies will be selected and weighted using the U.S. trade volume reported by the Federal Reserve [11] as a proxy for contribution to trade flows and foreign exchange turnover as reported in the BIS Survey as a proxy for foreign exchange liquidity.[12] Countries and their respective currencies relative to the U.S. Dollar are ranked in terms of their contribution to overall U.S. trade and the percentage of overall transaction volume for their currencies. Exposure to individual currencies whose movement has been largely regulated by their government will be capped at three percent and currencies with preliminary weights of less than two percent are removed. The final weights are then derived by distributing the weight to the remaining currencies in proportion to the preliminary weights. Currencies that are strictly tied to the U.S. Dollar will be excluded.

The Bloomberg USD TR Index's annual rebalance is done in December every year with a reference date of the third Friday of the month and a rebalance date after the close of the last U.S. trading date of the month.

The Bloomberg US Dollar Index value is published real time under the ticker BBDXY on Bloomberg. The Bloomberg USD TR Index (BBDXT) value is generated once a day.

DI Bear Fund—Index Information

The DI Bear Fund will be an actively managed fund that seeks to provide total returns, before expenses, that exceed the performance of the Bloomberg Inverse USD TR Index. The Bloomberg Inverse USD TR Index is based on the Bloomberg US Dollar Index (as described above), which tracks changes in the value of the U.S. Dollar against a basket of developed and emerging market currencies that have the highest liquidity in the currency markets and the biggest trade flows with the U.S. The Bloomberg Inverse USD TR Index additionally incorporates the impact of short-term interest rates in the global currencies. The Bloomberg Inverse USD TR Index is structured to potentially rise as global currencies appreciate relative to the U.S. Dollar.

The Bloomberg Inverse USD TR Index's annual rebalance is done in December every year with a reference date of the third Friday of the month and a rebalance date after the close of the last U.S. trading date of the month.

The Bloomberg Inverse USD TR Index (BBDXI) value is generated once a day.

The Indexes seek contrasting positions in the same currencies and the same weightings. The Bloomberg USD TR Index seeks to potentially benefit from a rise in the U.S. Dollar against a basket of currencies, while the Bloomberg Inverse USD TR Index seeks to potentially benefit from a fall in the U.S. Dollar against the same basket of currencies. The eligibility criteria for each of the Indexes and the method of weighting the Indexes are the same.

The Funds' Investment Methodologies

DI Bull Fund

According to the Registration Statement, under normal circumstances,[13] the DI Bull Fund will invest at least 80% of its net assets in U.S.-issued and non-U.S.-issued money market securities,[14] other U.S. government and investment grade non-U.S. government securities (*i.e.,* that are longer term than money market securities) and short-term investment grade corporate debt securities,[15] as well as positions in currency forward contracts,[16] listed currency options and listed currency futures,[17] currency swap

[11] The data used by the Index Sponsor to determine trading volumes in each currency will derive from the Federal Reserve Release, note 10, *supra.*

[12] The transactional volume will be derived from the BIS Survey, note 10, *supra.*

[13] The term ''under normal circumstances'' as used herein includes, but is not limited to, the absence of extreme volatility or trading halts in the fixed income markets or the financial markets generally; operational issues causing dissemination of inaccurate market information; or force majeure type events such as systems failure, natural or man-made disaster, act of God, armed conflict, act of terrorism, riot or labor disruption or any similar intervening circumstance.

[14] As used herein, the term ''money market securities'' includes: short-term, high quality obligations issued or guaranteed by the U.S. Treasury or the agencies or instrumentalities of the U.S. government; short-term, high quality securities issued or guaranteed by non-U.S. governments, agencies, and instrumentalities; repurchase agreements backed by U.S. government and non-U.S. government securities; money market mutual funds; and deposit and other obligations of U.S. and non-U.S. banks and financial institutions. All money market securities acquired by a Fund will be rated investment grade, except that a Fund may invest in unrated money market securities that are deemed by the Adviser or Sub-Adviser to be of comparable quality to money market securities rated investment grade. The determination by the Adviser or the Sub-Adviser that an unrated security is of comparable quality to another security rated investment grade will be based on, among other factors, a comparison between the unrated security and securities issued by similarly situated companies to determine where in the spectrum of credit quality the unrated security would fall. The Adviser or Sub-Adviser would also perform an analysis of the unrated security and its issuer similar, to the extent possible, to that performed by a nationally recognized statistical rating organization (''NRSRO'') in rating similar securities and issuers. *See Credit Analysis of Portfolio Securities,* Commission No-Action Letter (May 8, 1990).

The term ''investment grade,'' for purposes of money market securities only, is intended to mean securities rated A1 or A2 by one or more NRSROs. As used herein, the term ''U.S.-issued money market securities'' means money market securities issued or guaranteed by the U.S. government, repurchase agreements backed by the U.S. government securities, and U.S.-based money market mutual funds and deposits and other obligations of financial institutions organized or having their principal place of business in the U.S. ''Non-U.S.-issued money market securities'' means money market securities issued or guaranteed by a non-U.S. government, repurchase agreements backed by non-U.S. government securities, non-U.S.-based money market mutual funds, and deposits and other obligations of financial institutions organized or having their principal place of business outside the U.S.

[15] According to the Adviser, ''investment grade'' means securities (other than money market securities) rated in the Baa/BBB categories or above by one or more NRSROs. If a security is rated by multiple NRSROs and receives different ratings, the Fund will treat the security as being rated in the highest rating category received from an NRSRO. Rating categories may include sub-categories or gradations indicating relative standing.

[16] A currency forward contract is an agreement to buy or sell a specific currency on a future date at a price set at the time of the contract. Each of the Funds will invest only in currencies, and instruments that provide exposure to such currencies, that have significant foreign exchange turnover and are included in the BIS Survey. To the extent a Fund invests in currencies, each Fund will invest in currencies, and instruments that provide exposure to such currencies, explicitly listed on Table 3 in the BIS Survey.

[17] The exchange-listed currency options in which each of the Funds may invest will be listed on exchanges in the U.S. or the United Kingdom. The exchange-listed futures contracts in which each of the Funds may invest will be listed on exchanges in the U.S., the United Kingdom, Hong Kong, or Singapore. Each of the United Kingdom's primary financial markets regulator, the Financial Conduct Authority, Hong Kong's primary financial markets regulator, the Securities and Futures Commission, and Singapore's primary financial markets regulator, the Monetary Authority of Singapore, are signatories to the International Organization of Securities Commissions (''IOSCO'') Multilateral Memorandum of Understanding (''MMOU''), which is a multi-party information sharing arrangement among financial regulators. Both the Commission and the Commodity Futures Trading Commission are signatories to the IOSCO MMOU.

Each of the exchange-listed currency options and exchange-listed futures contracts in which a Fund may invest will be listed on exchanges that are members of the Intermarket Surveillance Group (''ISG'') or on an exchange with which the Exchange has entered into a comprehensive surveillance sharing agreement.

agreements,[18] and spot currencies to provide a long exposure, which is similar to price movements in the Bloomberg USD TR Index with the incorporation of relative interest rates in the United States and instruments in other representative countries.[19] The DI Bull Fund will seek this exposure through investments in money market securities combined with a similar size notional position in currency forwards and currency futures in the individual component currencies of the Bloomberg USD TR Index. If a sufficiently liquid futures contract on the Bloomberg USD TR Index or a related index is later developed, the Fund may invest in such futures contract as a substitute for, or as a complement to, futures contracts or forward contracts on the individual currencies in the Bloomberg USD TR Index. Although the Fund may invest in spot currencies, listed currency options, and currency swaps, investments in such instruments are expected to be limited, in each case to not more than 20% of Fund net assets. If, subsequent to an investment, the 80% requirement is no longer met, the DI Bull Fund's future investments will be made in a manner that will bring the Fund into compliance with this policy. The Fund's investments in forward contracts, listed options and listed futures contracts, and swap agreements will be backed by investments in U.S. issued money market securities, longer-term U.S. government securities, or other liquid assets (*e.g.,* commercial paper) in an amount equal to the exposure of such contracts.

Positioning for a stronger U.S. Dollar through a mixture of these securities and financial instruments is intended to provide a return reflective of the changes in the U.S. Dollar against the specified currencies, the U.S. cash rate, and the spread of U.S. interest rates against foreign interest rates.

The Fund may invest directly in foreign currencies in the form of bank and financial institution deposits, certificates of deposit, and bankers acceptances denominated in a specified non-U.S. currency, and may enter into foreign currency exchange transactions. As stated above, the Fund may also conduct its foreign currency exchange transactions on a spot (*i.e.,* cash) basis at the spot rate prevailing in the foreign currency exchange market.

In order to reduce interest rate risk, the Fund will generally maintain a weighted average portfolio maturity with respect to money market securities of 180 days or less on average (not to exceed 18 months) and will not purchase any money market securities with a remaining maturity of more than 397 calendar days. The ''average portfolio maturity'' of the Fund will be the average of all current maturities of the individual securities in the Fund's portfolio. The Fund's actual portfolio duration may be longer or shorter depending on market conditions.

The Exchange notes that the Fund's fixed income investment portfolio will meet the listing criteria for index-based, fixed income ETFs contained in NYSE Arca Equities Rule 5.2(j)(3), Commentary .02.[20]

DI Bear Fund

According to the Registration Statement, under normal circumstances,[21] the DI Bear Fund will invest at least 80% of its net assets in money market securities, other U.S. government and investment grade non-U.S. government securities (*i.e.,* that are longer term than money market securities) and short-term investment grade corporate debt securities[22] and positions in currency forward contracts,[23] listed currency options and currency futures,[24] currency swap agreements,[25] and spot currencies to provide a short exposure, which is similar to price movements in the Bloomberg Inverse USD TR Index with the incorporation of relative interest rates in the United States and instruments in other representative countries.[26] The DI Bear Fund will seek this exposure through investments in money market securities combined with a similar size notional position in currency forwards and currency futures in the individual component currencies of the Bloomberg Inverse USD TR Index. If a sufficiently liquid futures contract on the Bloomberg Inverse USD TR Index or a related index is later developed, the Fund may invest in such futures contract as a substitute for, or in [sic] complement to futures contracts or forward contracts on, the individual component currencies of the Bloomberg Inverse USD TR Index. Although the Fund may invest in spot currencies, currency options, and currency swaps, investments in such instruments are expected to be limited, in each case to not more than 20% of Fund net assets. If, subsequent to an investment, the 80% requirement is no longer met, the DI Bear Fund's future investments will be made in a manner that will bring the Fund into compliance with this policy. The Fund's investments in forward contracts, listed options contracts, listed futures contracts, and swap agreements will be backed by investments in U.S. issued money market securities, longer-term U.S. government securities, or

[18] A currency swap agreement is a foreign exchange agreement between two institutions to exchange aspects (*i.e.,* the principal and interest payments) of a loan in one currency for equivalent aspects of an equal in net present value loan in another currency. The market for currency swaps in which each of the DI Funds and the CC Bear Fund will invest is highly liquid. *See* BIS Survey, note 10, *supra,* for daily turnover in currency swaps.

[19] To the extent practicable, the DI Funds and the CC Bear Fund will invest in swaps cleared through the facilities of a centralized clearing house. The Funds may also invest in money market securities that may serve as collateral for the futures contracts, currency options, forward contracts, and currency swap agreements.

The Adviser or Sub-Adviser will also attempt to mitigate each Fund's credit risk by transacting only with large, well-capitalized institutions using measures designed to determine the creditworthiness of the counterparty. The Adviser or Sub-Adviser will take various steps to limit counterparty credit risk which will be described in the Registration Statement. Each Fund will enter into forward contracts and swap agreements only with financial institutions that meet certain credit quality standards and monitoring policies. Each Fund may also use various techniques to minimize credit risk, including early termination or reset and payment, using different counterparties, and limiting the net amount due from any individual counterparty. The Funds generally will collateralize forward contracts and swap agreements with cash and/or certain securities. Such collateral will generally be held for the benefit of the counterparty in a segregated tri-party account at the custodian to protect the counterparty against non-payment by the Fund. In the event of a default by the counterparty, and a Fund is owed money in the forward contract or swap transaction, the applicable Fund will seek withdrawal of the collateral from the segregated account and may incur certain costs exercising its right with respect to the collateral.

[20] *See* NYSE Arca Equities Rule 5.2(j)(3), Commentary .02 governing fixed income based Investment Company Units. The requirements of Rule 5.2(j)(3), Commentary .02(a) include the following: (i) The index or portfolio must consist of Fixed Income Securities (as defined generally to include the Fund's holdings in money market and other fixed income securities) (Rule 5.2(j)(3), Commentary.02(a)(1)); (ii) components that in the aggregate account for at least 75% of the weight of the index or portfolio must each have a minimum original principal amount outstanding of $100 million or more (Rule 5.2(j)(3), Commentary.02(a)(2)); (iii) a component may be a convertible security, however, once the convertible security converts to an underlying equity security, the component is removed from the index or portfolio (Rule 5.2(j)(3), Commentary.02(a)(3)); (iv) no component fixed-income security (excluding Treasury Securities) will represent more than 30% of the weight of the index or portfolio, and the five highest weighted component fixed-income securities do not in the aggregate account for more than 65% of the weight of the index or portfolio (Rule 5.2(j)(3), Commentary.02(a)(4)); and (v) an underlying index or portfolio (excluding exempted securities) must include securities from a minimum of 13 non-affiliated issuers (Rule 5.2(j)(3), Commentary.02(a)(5)).

[21] *See* note 13, *supra.*

[22] *See* note 15, *supra,* regarding the definition of ''investment grade.''

[23] *See* note 16, *supra,* regarding currency forward contracts.

[24] *See* note 17, *supra,* regarding listed currency options and listed futures contracts in which the Fund may invest.

[25] *See* note 18, *supra,* regarding currency swap agreements.

[26] *See* note 19, *supra.*

other liquid assets (*e.g.,* commercial paper) in an amount equal to the exposure of such contracts.

Positioning for a weaker U.S. Dollar through a mixture of these securities and financial instruments is intended to provide a return reflective of the change in the basket of currencies relative to the U.S. Dollar, the rate of U.S.-issued money market securities, and the spread of foreign interest rates over the U.S. Dollar.

The Fund may invest directly in foreign currencies in the form of bank and financial institution deposits, certificates of deposit, and bankers acceptances denominated in a specified non-U.S. currency, and may enter into foreign currency exchange transactions. As stated above, the Fund may also conduct its foreign currency exchange transactions on a spot (*i.e.,* cash) basis at the spot rate prevailing in the foreign currency exchange market.

In order to reduce interest rate risk, the Fund will generally maintain a weighted average portfolio maturity with respect to money market securities of 180 days or less on average (not to exceed 18 months) and will not purchase any money market securities with a remaining maturity of more than 397 calendar days. The ''average portfolio maturity'' of the Fund will be the average of all current maturities of the individual securities in the Fund's portfolio. The Fund's actual portfolio duration may be longer or shorter depending on market conditions.

The Exchange notes that the Fund's investment portfolio in fixed income securities will meet the listing criteria for index-based, fixed income ETFs contained in NYSE Arca Equities Rule 5.2(j)(3), Commentary .02.[27]

CC Bear Fund

The CC Bear Fund will be an actively-managed fund that seeks to provide total returns reflective of changes in the value of the U.S. Dollar relative to the currencies of selected commodity exporters and the difference between the relative short-term interest rates in the United States and comparable interest rates available for the investments in the currencies of those selected commodity exporters. The CC Bear Fund will seek to potentially benefit from appreciation in the U.S. Dollar relative to the selected commodity currencies. As used herein, the term ''commodity currency'' generally means the currency of a country whose economic success is commonly identified with the production and export of commodities (such as precious metals, oil, agricultural products, or other raw materials) and whose value is closely linked to the value of such commodities. These countries currently include Australia, Brazil, Canada, Chile, Indonesia, Mexico, New Zealand, Norway, Russia, and South Africa.

According to the Registration Statement, under normal circumstances,[28] the CC Bear Fund will invest at least 80% of its net assets, plus the amount of any borrowings for investment purposes, in investments that are tied economically to selected commodity producing countries available to U.S investors that make a significant contribution to the global export of commodities. Such investments may include a combination of positions in money market securities, other U.S. government and investment grade non-U.S. government securities (*i.e.,* that are longer term than money market securities) and short-term investment grade corporate debt securities,[29] with investments in currency forwards,[30] listed currency options and listed currency futures,[31] currency swaps,[32] and spot currencies to provide exposure to the change in value of the U.S. dollar relative to selected commodity currencies.[33] The CC Bear Fund will seek this exposure through investments in money market securities combined with a similar size notional position in currency forwards and currency futures in the individual selected currencies. Although the Fund may invest in spot currencies, listed currency options, and currency swaps, investments in such instruments are expected to be limited, in each case to not more than 20% of Fund net assets. If, subsequent to an investment, the 80% requirement is no longer met, the CC Bear Fund's future investments will be made in a manner that will bring the Fund into compliance with this policy.

The Fund's investments in forward contracts, listed options contracts, listed futures contracts, and currency swap agreements will be backed by investments in U.S. issued money market securities, longer-term U.S. government securities, or other liquid assets (*e.g.,* commercial paper) in an amount equal to the exposure of such contracts.

In addition to seeking broad exposure to the movements in the U.S. Dollar relative to the commodity currencies, the Fund intends to seek exposure across currencies correlated to each of their key commodity groups: Industrial metals; precious metals; energy; agriculture; and livestock. The CC Bear Fund generally will invest only in currencies that ''float'' relative to other currencies.[34] The Fund will invest only in currencies that it deems sufficiently liquid and accessible.

The Fund may invest directly in foreign currencies in the form of bank and financial institution deposits, certificates of deposit, and bankers acceptances denominated in a specified non-U.S. currency, and may enter into foreign currency exchange transactions. As stated above, the Fund may also conduct its foreign currency exchange transactions on a spot (*i.e.,* cash) basis at the spot rate prevailing in the foreign currency exchange market.

Positioning for a stronger U.S. Dollar through a mixture of these securities and financial instruments is intended to provide a return reflective of the changes in the U.S. Dollar against the specified currencies, the U.S. cash rate, and the spread of foreign interest rates against U.S. interest rates.

In order to reduce interest rate risk, the Fund will generally maintain a weighted average portfolio maturity with respect to money market securities of 90 days or less. The ''average portfolio maturity'' of the Fund will be the average of all current maturities of the individual securities in the Fund's portfolio. The Fund's actual portfolio duration may be longer or shorter depending on market conditions.

The CC Bear Fund is actively-managed and is not tied to an index. The Exchange notes, however, that the Fund's investment portfolio in fixed income securities will meet the listing criteria for index-based, fixed income ETFs contained in NYSE Arca Equities Rule 5.2(j)(3).[35]

Other Investments of the Funds

Each Fund reserves the right to invest in fixed income securities and cash, without limitation, as determined by the

[27] *See* note 20, *supra.*

[28] *See* note 13, *supra.*

[29] *See* note 15, *supra,* regarding definition of ''investment grade.''

[30] *See* note 16, *supra,* regarding currency forward contracts.

[31] *See* note 17, *supra,* regarding listed currency option and listed futures contracts in which the Fund may invest.

[32] *See* note 18, *supra,* regarding currency swap agreements.

[33] *See* note 19, *supra.*

[34] The value of a floating currency is largely determined by supply and demand and prevailing market rates. In contrast, the value of a ''fixed'' currency is generally set by a government or central bank at an official exchange rate. The Fund therefore generally does not intend to invest in the currency of certain major commodity producers, such as China, Saudi Arabia, and the United Arab Emirates, since their respective currencies are fixed or otherwise closely linked to the U.S. dollar.

[35] *See* note 20, *supra.*

Adviser or Sub-Adviser in response to adverse market, economic, political, or other conditions. Each Fund may also ''hedge'' or minimize its respective exposures to one or more foreign currencies in response to such conditions.

While each Fund, under normal circumstances, will invest at least 80% of its net assets in securities and other financial instruments as described above, each Fund may invest its remaining assets in other securities and financial instruments, as generally described below.

Each Fund may invest in the securities of other investment companies and exchange-traded products,'' including other ETFs registered under the 1940 Act (''ETPs'').[36]

Each Fund may hold up to an aggregate of 15% of its net assets in illiquid securities (calculated at the time of investment), including Rule 144A securities deemed illiquid by the Adviser or Sub-Adviser in accordance with Commission guidance.[37] Each Fund will monitor its portfolio liquidity on an ongoing basis to determine whether, in light of current circumstances, an adequate level of liquidity is being maintained, and will consider taking appropriate steps in order to maintain adequate liquidity if through a change in values, net assets, or other circumstances, more than 15% of a Fund's net assets are held in illiquid securities. Illiquid securities include securities subject to contractual or other restrictions on resale and other instruments that lack readily available markets as determined in accordance with Commission staff guidance.[38]

According to the Registration Statement, with respect to each of the Funds, the Funds each intend to qualify each year as a regulated investment company (''RIC'') under Subchapter M of the Internal Revenue Code of 1986, as amended.[39]

None of the Funds will concentrate 25% or more of the value of its respective total assets (taken at market value at the time of each investment) in any one industry, as that term is used in the 1940 Act (except that this restriction does not apply to obligations issued by the U.S. government or its agencies and instrumentalities).[40]

None of the Funds will invest in any non-U.S. equity securities. Each Fund's investments will be consistent with the Fund's respective investment objective and will not be used to enhance leverage.

The Shares

The Funds will issue and redeem Shares on a continuous basis at net asset value (''NAV'')[41] only in large blocks of Shares (''Creation Units'') in transactions with Authorized Participants (as defined below). Creation Units generally will consist of 100,000 Shares, though this may change from time to time. Creation Units are not expected to consist of less than 50,000 Shares. The Funds will each issue and redeem Creation Units in exchange for a portfolio of money market securities and other instruments closely approximating the holdings of such Fund or a combination of money market securities, other instruments (''Deposit Securities''), and/or an amount of U.S. cash representing one or more Deposit Securities (''Deposit Cash''). Once created, Shares of the Funds will trade on the secondary market in amounts less than a Creation Unit.

Together, the Deposit Securities and/or Deposit Cash and the Cash Component will constitute the ''Fund Deposit,'' which represents the minimum initial and subsequent investment amount for a Creation Unit of the applicable Fund. The ''Cash Component'' will be an amount equal to the difference between the NAV of the Shares (per Creation Unit) and the market value of the Deposit Securities (*e.g.,* if the NAV per Creation Unit is less than the market value of the Deposit Securities, the Cash Component will be a corresponding negative amount and the creator will be entitled to receive cash in an amount equal to the Cash Component). The Cash Component will serve the function of compensating for any differences between the NAV per Creation Unit and the market value of the Deposit Securities and/or Deposit Cash, as applicable.

According to the Registration Statement, to be eligible to place orders with respect to creations and redemptions of Creation Units, an entity must be (i) a ''Participating Party,'' *i.e.,* a broker-dealer or other participant in the clearing process through the Continuous Net Settlement System of the National Securities Clearing Corporation (''NSCC''), or (ii) a Depository Trust Company (''DTC'') participant. In addition, each Participating Party or DTC participant (each, an ''Authorized Participant'') must execute an agreement that has been agreed to by the Principal Underwriter and the Transfer Agent, and that has been accepted by the Trust, with respect to purchases and redemptions of Creation Units.

[36] When used herein, ETPs may include, without limitation, Investment Company Units (as described in NYSE Arca Equities Rule 5.2(j)(3)); Index-Linked Securities (as described in NYSE Arca Equities Rule 5.2.(j)(6)); Portfolio Depositary Receipts (as described in NYSE Arca Equities Rule 8.100); Trust-Issued Receipts (as described in NYSE Arca Equities Rule 8.200); Commodity-Based Trust Shares (as described in NYSE Arca Equities Rule 8.201); Currency Trust Shares (as described in NYSE Arca Equities Rule 8.202); Commodity Index Trust Shares (as described in NYSE Arca Equities Rule 8.203); Trust Units (as described in NYSE Arca Equities Rule 8.500); and Managed Fund Shares (as described in NYSE Arca Equities Rule 8.600). The ETPs in which the Funds may invest all will be listed and traded on U.S. registered exchanges. The Funds will invest in the securities of ETPs registered under the 1940 Act consistent with the requirements of Section 12(d)(1) of the 1940 Act or any rule, regulation or order of the Commission or interpretation thereof. The Funds will only make such investments in conformity with the requirements of Section 817 of the Internal Revenue Code of 1986. The ETPs in which the Funds may invest will primarily be indexed-based ETFs that hold substantially all of their assets in securities representing a specific index. While the Funds may invest in inverse ETPs, the Funds will not invest in leveraged (*e.g.,* 2X, –2X, 3X, or –3X) ETPs.

[37] A Fund's Sub-Adviser will be responsible for complying with the Fund's restrictions on investing in illiquid securities. In doing that, the Sub-Adviser makes ongoing determinations about the liquidity of Rule 144A securities that the respective Fund may invest in. In reaching liquidity decisions, the Sub-Adviser may consider the following factors: the frequency of trades and quotes for the security; the number of dealers wishing to purchase or sell the security and the number of other potential purchasers and dealer undertakings to make a market in the security; and the nature of the security and the nature of the marketplace trades (*e.g.,* the time needed to dispose of the security, the method of soliciting offers, and the mechanics of transfer).

[38] The Commission has stated that long-standing Commission guidelines have required open-end funds to hold no more than 15% of their net assets in illiquid securities and other illiquid assets. *See* Investment Company Act Release No. 28193 (March 11, 2008), 73 FR 14618 (March 18, 2008), footnote 34. *See also* Investment Company Act Release No. 5847 (October 21, 1969), 35 FR 19989 (December 31, 1970) (Statement Regarding ''Restricted Securities''); Investment Company Act Release No. 18612 (March 12, 1992), 57 FR 9828 (March 20, 1992) (Revisions of Guidelines to Form N–1A). A fund's portfolio security is illiquid if it cannot be disposed of in the ordinary course of business within seven days at approximately the value ascribed to it by the fund. *See* Investment Company Act Release No. 14983 (March 12, 1986), 51 FR 9773 (March 21, 1986) (adopting amendments to Rule 2a-7 under the 1940 Act); Investment Company Act Release No. 17452 (April 23, 1990), 55 FR 17933 (April 30, 1990) (adopting Rule 144A under the Securities Act).

[39] 26 U.S.C. 851.

[40] *See* Form N–1A, Item 9. The Commission has taken the position that a fund is concentrated if it invests more than 25% of the value of its total assets in any one industry. *See, e.g.,* Investment Company Act Release No. 9011 (Oct. 30, 1975), 40 FR 54241 (November 21, 1975).

[41] The NAV of each Fund's Shares generally is calculated once daily Monday through Friday as of the close of regular trading on the New York Stock Exchange, generally 4:00 p.m. Eastern time or ''E.T.'' (''NAV Calculation Time''). NAV per Share is calculated by dividing a Fund's net assets by the number of Fund Shares outstanding. For more information regarding the valuation of Fund investments in calculating a Fund's NAV, see the Registration Statement for such Fund.

The Custodian, through the NSCC, will make available on each business day, immediately prior to the opening of business on the Exchange's Core Trading Session (currently 9:30 a.m. E.T.), the list of names and the required number of each Deposit Security and/or Deposit Cash, as applicable, to be included in the current Fund Deposit (based on information at the end of the previous business day) for the applicable Fund. Such Fund Deposit is subject to any applicable adjustments, in order to effect purchases of Creation Units of the Fund until such time as the next-announced composition of the Deposit Securities and/or Deposit Cash, as applicable, is made available.

Shares may be redeemed only in Creation Units at their NAV next determined after receipt of a redemption request in proper form by the applicable Fund through the Transfer Agent and only on a business day.

With respect to the Fund, the Custodian, through the NSCC, will make available immediately prior to the opening of business on the Exchange (9:30 a.m. E.T.) on each business day, the list of the names and quantities of the applicable Fund's portfolio securities (''Fund Securities'') that will be applicable (subject to possible amendment or correction) to redemption requests received in proper form on that day. Fund Securities on redemption may not be identical to Deposit Securities.

Redemption proceeds for a Creation Unit will be paid either in-kind or in cash or a combination thereof, as determined by the Trust. With respect to in-kind redemptions of the Fund, redemption proceeds will consist of Fund Securities as announced by the Custodian on the business day of the request for redemption received in proper form plus cash in an amount equal to the difference between the NAV of the Shares being redeemed, as next determined after receipt of a request in proper form, and the value of the Fund Securities (''Cash Redemption Amount''), less a fixed redemption transaction fee and any applicable variable charge as set forth in the Registration Statement. In the event the Fund Securities have a value greater than the NAV of the Shares, a compensating cash payment equal to the differential will be required to be made by or through an Authorized Participant by the redeeming shareholder. Notwithstanding the foregoing, at the Trust's discretion, an Authorized Participant may receive the corresponding cash value of the securities in lieu of the in-kind securities value representing one of more Fund Securities.

The creation/redemption order cut-off time for the Funds is expected to be 4:00 p.m. E.T. for purchases/redemptions of Shares. On days when the Exchange closes earlier than normal, the applicable Fund may require orders for Creation Units to be placed earlier in the day.

Additional information regarding the Shares and the Funds, including investment strategies, risks, creation and redemption procedures, fees, portfolio holdings disclosure policies, distributions, and taxes is included in the Registration Statement.

Net Asset Value

The NAV per Share for each of the Funds will be computed by dividing the value of the net assets of each Fund (*i.e.,* the value of its total assets less total liabilities) by the total number of Shares outstanding, rounded to the nearest cent. Expenses and fees, including the management fees, are accrued daily and taken into account for purposes of determining NAV.[42] The NAV of each Fund will be calculated by the Custodian and determined at the close of regular trading session on the Exchange (ordinarily 4:00 p.m. E.T.) on each day that the Exchange is open, provided that fixed-income assets may be valued as of the announced closing time for trading in fixed-income instruments on any day that the Securities Industry and Financial Markets Association (or the applicable exchange or market on which the applicable Fund's investments are traded) announces an early closing time. Creation/redemption order cut-off times may also be earlier on such days.

In calculating a Fund's NAV per Share, the Fund's investment will generally be valued using market valuations. A market valuation generally means a valuation (i) obtained from an exchange, a pricing service, or a major market maker (or dealer), (ii) based on a price quotation or other equivalent indication of value supplied by an exchange, a pricing service, or a major market maker or dealer, or (iii) based on amortized cost, for securities with remaining maturities of 60 days or less. The Adviser may use various pricing services or discontinue the use of any pricing service, as approved by the applicable Fund's board of trustees (''Board'') from time to time. A price obtained from a pricing service based on such pricing service's valuation matrix may be considered a market valuation. Any assets or liabilities denominated in currencies other than the U.S. dollar will be converted into U.S. dollars at the current market rates on the date of valuation as quoted by one or more sources.

In the event that current market valuations are not readily available or such valuations do not reflect current market value, the Trust's procedures require the Trust's Valuation Committee to determine a security's or other asset's fair value in accordance with the 1940 Act if a market price is not readily available.[43] In determining such value, the Trust's Valuation Committee may consider, among other things, (i) price comparisons among multiple sources, (ii) a review of corporate actions and news events, and (iii) a review of relevant financial indicators (*e.g.,* movement in interest rates and market indices). In these cases a Fund's NAV may reflect certain portfolio securities' or other assets' fair values rather than their market prices. Fair value pricing involves subjective judgments and it is possible that the fair value determination for a security or other asset is materially different than the value that could be realized upon the sale of the security.

Availability of Information

The Funds' Web site (*www.wisdomtree.com*), which will be publicly available prior to the public offering of Shares, will include a form of the prospectus for the Funds that may be downloaded. The Web site will include additional quantitative information updated on a daily basis, including, for each Fund: (1) The prior business day's reported NAV, mid-point of the bid/ask spread at the time of calculation of such NAV (''Bid/Ask

[42] International Data Corporation (''IDC'') is expected to be the primary price source for each Fund's assets. Each Fund may also rely, however, on other recognized third-party pricing sources, including without limitation, Bloomberg, WM Reuters, JP Morgan, Markit, and JJ Kenney, to provide prices for certain asset categories including, among others, currency swaps, currency forward contracts, spot currencies, and corporate securities, in each case as approved or ratified, from time to time, by the applicable Fund's board of trustees. Exchange listed instruments will be valued, based on the end of day exchange prices of those instruments.

[43] The Trust's Board has established a Valuation Committee that is composed of officers of the Trust, investment management personnel of the Adviser and senior operations and administrative personnel of the applicable Sub-Adviser. The Valuation Committee is responsible for the valuation and revaluation of any portfolio investments for which market quotations are not readily available. The Valuation Committee has implemented procedures designed to prevent the use and dissemination of material, non-public information regarding valuation and revaluation of any portfolio investment.

Price''),[44] and a calculation of the premium and discount of the Bid/Ask Price against the NAV; and (2) data in chart format displaying the frequency distribution of discounts and premiums of the daily Bid/Ask Price against the NAV, within appropriate ranges, for each of the four previous calendar quarters. On each business day, before commencement of trading in Shares in the Core Trading Session[45] on the Exchange, the Trust will disclose on its Web site the identities and quantities of the portfolio of securities and other assets (''Disclosed Portfolio'') held by each Fund that will form the basis for each Fund's calculation of NAV at the end of the business day.[46] The Disclosed Portfolio will include, as applicable, the names, quantity, percentage weighting, and market value of money market securities and other assets held by the Fund and the characteristics of such assets. The Web site and information will be publicly available at no charge.

In addition, for each Fund, an estimated value, defined in Rule 8.600 as the ''Portfolio Indicative Value,'' that reflects an estimated intraday value of the Fund's portfolio, will be widely disseminated.[47] The Portfolio Indicative Value will be based upon the current value for the components of the Disclosed Portfolio and will be updated and disseminated by one or more major market data vendors at least every 15 seconds during the Core Trading Session on the Exchange. In addition, during hours when the markets for money market securities in a Fund's portfolio are closed, the Portfolio Indicative Value will be updated at least every 15 seconds during the Core Trading Session to reflect currency exchange fluctuations.

The dissemination of the Portfolio Indicative Value, together with the Disclosed Portfolio, will allow investors to determine the value of the underlying portfolio of each Fund on a daily basis and to provide a close estimate of that value throughout the trading day.

Intra-day executable price quotations on money market securities and other Fund fixed income securities, currency forwards, currency options, currency futures, currency swaps, and foreign exchange are available from major broker-dealer firms. Price information for listed currency options, listed currency futures, and ETPs is available from the exchange on which they trade. Intra-day price information is available through subscription services, such as Bloomberg and Thomson Reuters, which can be accessed by Authorized Participants and other investors. Information regarding market price and volume of the Shares will be continually available on a real-time basis throughout the day on brokers' computer screens and other electronic services. The previous day's closing price and trading volume information will be published daily in the financial section of newspapers. Quotation and last-sale information for the Shares will be available via the CTA high-speed line.

Initial and Continued Listing

The Shares will be subject to Rule 8.600, which sets forth the initial and continued listing criteria applicable to Managed Fund Shares. The Exchange represents that, for initial and/or continued listing, the Funds must be in compliance with Rule 10A–3 under the Act,[48] as provided by NYSE Arca Equities Rule 5.3. A minimum of 100,000 Shares for each Fund will be outstanding at the commencement of trading on the Exchange. The Exchange will obtain a representation from the issuer of the Shares that the NAV per Share will be calculated daily and that the NAV and the Disclosed Portfolio will be made available to all market participants at the same time.

Trading Halts

With respect to trading halts, the Exchange may consider all relevant factors in exercising its discretion to halt or suspend trading in the Shares of a Fund. Shares of each Fund will be halted if the ''circuit breaker'' parameters in NYSE Arca Equities Rule 7.12 are reached. These may include: (1) The extent to which trading is not occurring in the securities or the financial instruments comprising the Disclosed Portfolio of a Fund; or (2) whether other unusual conditions or circumstances detrimental to the maintenance of a fair and orderly market are present. Trading in the Shares will be subject to NYSE Arca Equities Rule 8.600(d)(2)(D), which sets forth circumstances under which Shares of a Fund may be halted.

Trading Rules

The Exchange deems the Shares to be equity securities, thus rendering trading in the Shares subject to the Exchange's existing rules governing the trading of equity securities. Shares will trade on the NYSE Arca Marketplace from 4:00 a.m. to 8:00 p.m. E.T. in accordance with NYSE Arca Equities Rule 7.34 (Opening, Core, and Late Trading Sessions). The Exchange has appropriate rules to facilitate transactions in the Shares during all trading sessions. As provided in NYSE Arca Equities Rule 7.6, Commentary .03, the minimum price variation (''MPV'') for quoting and entry of orders in equity securities traded on the NYSE Arca Marketplace is $0.01, with the exception of securities that are priced less than $1.00 for which the MPV for order entry is $0.0001.

Surveillance

The Exchange represents that trading in the Shares will be subject to the existing trading surveillances, administered by the Financial Industry Regulatory Authority (''FINRA'') on behalf of the Exchange, which are designed to detect violations of Exchange rules and applicable federal securities laws.[49] The Exchange represents that these procedures are adequate to properly monitor Exchange trading of the Shares in all trading sessions and to deter and detect violations of Exchange rules and applicable federal securities laws.

The surveillances referred to above generally focus on detecting securities trading outside their normal patterns, which could be indicative of manipulative or other violative activity. When such situations are detected, surveillance analysis follows and investigations are opened, where appropriate, to review the behavior of all relevant parties for all relevant trading violations.

FINRA, on behalf of the Exchange, will communicate as needed regarding trading in the Shares, ETPs, futures contracts, and options contracts with other markets and other entities that are members of the ISG, and FINRA, on behalf of the Exchange, may obtain trading information regarding trading in the Shares, ETPs, futures contracts, and

[44] The Bid/Ask Price of a Fund will be determined using the mid-point of the highest bid and the lowest offer on the Exchange as of the time of calculation of such Fund's NAV. The records relating to Bid/Ask Prices will be retained by each Fund and its service providers.

[45] The Core Trading Session is 9:30 a.m. to 4:00 p.m. E.T.

[46] Under accounting procedures to be followed by the Funds, trades made on the prior business day (''T'') will be booked and reflected in NAV on the current business day (''T+1''). Notwithstanding the foregoing, portfolio trades that are executed prior to the opening of the Exchange on any business day may be booked and reflected in NAV on such business day. Accordingly, each Fund will be able to disclose at the beginning of the business day the portfolio that will form the basis for the NAV calculation at the end of the business day.

[47] Currently, it is the Exchange's understanding that several major market data vendors display and/or make widely available Portfolio Indicative Values taken from the Consolidated Tape Association (''CTA'') or other data feeds.

[48] *See* 17 CFR 240.10A–3.

[49] 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.

options contracts from such markets and other entities. In addition, the Exchange may obtain information regarding trading in the Shares, ETPs, futures contracts, and options contracts from markets and other entities that are members of ISG or with which the Exchange has in place a comprehensive surveillance sharing agreement.[50] The ETPs, currency options, and currency futures held by the Funds all will be traded on registered exchanges that are ISG members or with which the Exchange has in place a comprehensive surveillance sharing agreement.

In addition, the Exchange also has a general policy prohibiting the distribution of material, non-public information by its employees.

Information Bulletin

Prior to the commencement of trading of Shares in a Fund, the Exchange will inform its Equity Trading Permit Holders in an Information Bulletin (''Bulletin'') of the special characteristics and risks associated with trading the Shares. Specifically, the Bulletin will discuss the following: (1) The procedures for purchases and redemptions of Shares in Creation Unit aggregations (and that Shares are not individually redeemable); (2) NYSE Arca Equities Rule 9.2(a), which imposes a duty of due diligence on its Equity Trading Permit Holders to learn the essential facts relating to every customer prior to trading the Shares; (3) the risks involved in trading the Shares during the Opening and Late Trading Sessions when an updated Portfolio Indicative Value will not be calculated or publicly disseminated; (4) how information regarding the Portfolio Indicative Value is disseminated; (5) the requirement that Equity Trading Permit Holders deliver a prospectus to investors purchasing newly issued Shares prior to or concurrently with the confirmation of a transaction; and (6) trading information.

In addition, the Bulletin will reference that a Fund is subject to various fees and expenses described in the Registration Statement. The Bulletin will discuss any exemptive, no-action, and interpretive relief granted by the Commission from any rules under the Act. The Bulletin will also disclose that the NAV for the Shares will be calculated after 4:00 p.m. E.T. each trading day.

[50] For a list of the current members of ISG, see *www.isgportal.org.* The Exchange notes that not all components of the Disclosed Portfolio for a Fund may trade on markets that are members of ISG or with which the Exchange has in place a comprehensive surveillance sharing agreement.

2. Statutory Basis

The basis under the Act for this proposed rule change is the requirement under Section 6(b)(5)[51] that an exchange have rules that are designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to remove impediments to, and perfect the mechanism of a free and open market, and, in general, to protect investors and the public interest.

The Exchange believes that the propose rule change is designed to prevent fraudulent and manipulative acts and practices in that the Shares will be listed on the Exchange pursuant to the initial and continued listing criteria in NYSE Arca Equities Rule 8.600. The Exchange has in place surveillance procedures that are adequate to properly monitor trading in the Shares in all trading sessions and to deter and detect violations of Exchange rules and applicable federal securities laws. The Adviser is not registered as, or affiliated, with a broker-dealer. Mellon is not a broker-dealer, but it is affiliated with multiple broker-dealers and has implemented a ''fire wall'' with respect to such broker-dealers regarding access to information concerning the composition and/or changes to a Fund's portfolio. In the event (a) the Adviser or Sub-Adviser becomes registered as, or the Adviser becomes newly affiliated with, a broker-dealer, or (b) any new adviser or sub-adviser is registered as or is affiliated with a broker-dealer, they will implement a fire wall with respect to such broker-dealer regarding access to information concerning the composition and/or changes to the applicable Fund's portfolio, and will be subject to procedures designed to prevent the use and dissemination of material, non-public information regarding such portfolio. In addition, Sub-Adviser personnel who make decisions regarding each Fund's portfolio are subject to procedures designed to prevent the use and dissemination of material, non-public information regarding the Fund's portfolio. The Index Sponsor is not a broker-dealer but is affiliated with one or more broker-dealers. The Index Sponsor 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 such broker-dealers regarding the Indexes. FINRA, on behalf of the Exchange, will communicate as needed regarding trading in the Shares, ETPs, futures contracts, and options contracts with other markets and other entities that are members of the ISG and FINRA, and on behalf of the Exchange, may obtain trading information regarding trading in the Shares, ETPs, futures contracts, and options contracts from such markets and other entities. In addition, the Exchange may obtain information regarding trading in the Shares, ETPs, futures contracts, and options contracts from markets and other entities that are members of ISG or with which the Exchange has in place a comprehensive surveillance sharing agreement. The ETPs, currency options, and currency futures held by the Funds all will be traded on registered exchanges that are ISG members or with which the Exchange has in place a comprehensive surveillance sharing agreement. The holdings of the Funds will be comprised primarily of money market securities and related investments in derivative instrument such as forward contracts, listed futures contracts, currency options, and swap agreements, as well as spot currencies. Each Fund's fixed income investment portfolio will meet the listing criteria for index-based, fixed income ETFs contained in NYSE Arca Equities Rule 5.2(j)(3), Commentary .02.[52] Each of the Funds will invest only in currencies, and instruments that provide exposure to such currencies, that have significant foreign exchange turnover and are included in the BIS Survey. To the extent practicable, each Fund will invest in swaps cleared through the facilities of a centralized clearinghouse. The Funds' investments in currency forward contracts, listed futures contracts, listed options contracts, and swap agreements will be backed by investments in U.S. issued money market securities, longer-term U.S. government securities, or other liquid assets (*e.g.,* commercial paper) in an amount equal to the exposure of such contracts. The Funds therefore will not use derivative instruments to enhance leverage. The listed currency options contracts and listed futures contracts in which the Funds will invest will be listed on U.S. exchanges regulated by the Commission or the CFTC, as applicable, or on specified foreign exchanges that are members of ISG and whose regulators are signatories to the IOSCO MMOU. The Funds will limit investments in illiquid securities, including Rule 144A securities deemed illiquid by the Sub-Adviser, to 15% of net assets in conformance with Commission guidance, and they will not invest in non-U.S. equity securities.

[51] 15 U.S.C. 78f(b)(5).

[52] *See* note 20, *supra.*

Each Fund's investments will be consistent with that Fund's investment objective and will not be used to enhance leverage. While the Fund may invest in inverse ETPs, the Fund will not invest in leveraged (*e.g.,* 2X, –2X, 3X, or –3X) ETPs.

The proposed rule change is designed to promote just and equitable principles of trade and to protect investors and the public interest in that the Exchange will obtain a representation from the issuer of the Shares that the NAV per Share of each Fund will be calculated daily every day the NYSE is open, and that the applicable NAV and Disclosed Portfolio will be made available to all market participants at the same time. In addition, a large amount of publicly available information will be publicly available regarding the Funds and the Shares, thereby promoting market transparency.

The Exchange believes that the proposed rule change will facilitate the listing and trading of additional types of exchange-traded products that will enhance competition among market participants, to the benefit of investors and the marketplace. In addition, the listing and trading criteria set forth in Rule 8.600 are intended to protect investors and the public interest. Each Fund's portfolio holdings that will form the basis for the Fund's calculation of NAV will be disclosed on its Web site daily after the close of trading on the Exchange and prior to the opening of trading of Shares in the Core Trading Session on the Exchange the following day. In addition, the Portfolio Indicative Value, as defined in NYSE Arca Equities Rule 8.600(c)(3), will be disseminated by the CTA or by one or more major market data vendors at least every 15 seconds during the Core Trading Session. Information regarding market price and trading volume of the Shares will be continually available on a real-time basis throughout the day on brokers' computer screens and other electronic services, and quotation and last-sale information will be available via the CTA high speed line. In addition, the Exchange has in place surveillance procedures that are adequate to properly monitor trading in the Shares. The Web site for the Funds will include a form of the applicable prospectuses for the Funds and additional data relating to the NAV and other applicable quantitative information. Moreover, 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. Trading in Shares of the Funds will be halted if the circuit breaker parameters in NYSE Arca Rule 7.12 have been reached in the applicable Fund or because of market condition or for reasons that, in the view of the Exchange, make trading in the Shares inadvisable, and trading in the Shares will be subject to NYSE Arca Rule 8.600(d)(2)(D), which sets forth circumstances under which trading in Shares of the Funds may be halted. In addition, as noted above, investors will have ready access to information regarding the Funds' holdings, the Portfolio Indicative Values, the Disclosed Portfolios, and quotation and last-sale information for the Shares of the Funds.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purpose of the Act. The Exchange notes that the proposed rule change will facilitate the listing and trading of additional actively-managed exchange-traded products that will enhance competition among market participants, to the benefit of investors and the marketplace.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were solicited or received with respect to the proposed rule change.

III. 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 after publication (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 the 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–NYSEArca–2013–101 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–2013–101. 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–2013–101 and should be submitted on or before November 12, 2013.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[53]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2013–24633 Filed 10–21–13; 8:45 am]

BILLING CODE 8011–01–P

[53] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–70693; File No. SR–NASDAQ–2013–131]

Self-Regulatory Organizations; The NASDAQ Stock Market LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Delay Implementation of the Dedicated OUCH Port Infrastructure Service

October 16, 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 October 4, 2013 The NASDAQ Stock Market LLC (''NASDAQ'' or ''Exchange''), filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of the Substance of the Proposed Rule Change

The Exchange proposes to delay implementation of the Dedicated OUCH Port Infrastructure service under Rule 7015(g). NASDAQ will begin offering the service in mid-first quarter of 2014, and will provide public notice thereof at least five days prior to the implementation date.

The text of the proposed rule change is available from NASDAQ's Web site at *http://nasdaq.cchwallstreet.com,* at NASDAQ's principal office, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in Sections A, B, and C below, of the most significant aspects of such statements.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

On July 23, 2013, the Exchange filed a proposal with the Commission to adopt a new Dedicated OUCH Port Infrastructure connectivity option and related fee.[3] At the time of filing, the Exchange anticipated offering the service in October 2013, concurrent with certain hardware upgrades occurring at NASDAQ, including upgrades to the OUCH port infrastructure. NASDAQ is delaying implementation of the updates to the OUCH port infrastructure, which consequently affects the rollout of the Dedicated OUCH Port Infrastructure service making it impossible to implement the service in October 2013.[4] Accordingly, NASDAQ is proposing to postpone the roll out of the service until mid-first quarter 2014, by which time the Exchange believes the upgrades to the OUCH port infrastructure will be completed. NASDAQ will not begin assessing the subscription fee until the date the service is offered, which NASDAQ will announce at least five days prior to the implementation date. NASDAQ will continue to assess the installation fee for any subscriptions to the service upon installation of the dedicated hardware.[5]

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6(b)(5) of the Act,[6] which requires the rules of an exchange 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. The Exchange believes that delay of service promotes just and equitable principals of trade in that it postpones implementation of the service until such a time that all users of OUCH port infrastructure would have the same, upgraded hardware. The proposed delay in offering the service is based on a delay to an underlying technical upgrade to certain systems of the Exchange. As a consequence, delaying implementation of the service until a time that such upgraded hardware is available will further the goal of perfecting fair and orderly markets, protecting investors and the public interest.

[3] Securities Exchange Act Release No. 70036 (July 25, 2013), 78 FR 45993 (July 30, 2013) (SR–NASDAQ–2013–097).

[4] *See http://www.nasdaqtrader.com/TraderNews.aspx?id=ETU2013-29.*

[5] NASDAQ has not received any subscription to the service outside the expired installation fee waiver period.

[6] 15 U.S.C. 78f(b)(5).

B. Self-Regulatory Organization's Statement on Burden on Competition

NASDAQ does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act, as amended. NASDAQ believes that the delay will not impact competition whatsoever as it will maintain the status quo until such time that the OUCH port infrastructure is upgraded, at which time the new service and associated monthly fee will be implemented. In this regard, existing subscribers to shared OUCH port infrastructure will continue to receive the same service, unaffected by the delay in upgrading the OUCH port infrastructure. Once upgraded, both subscribers to the shared infrastructure and Dedicated OUCH Port Infrastructure subscribers will operate on the same type of underlying hardware.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

Written comments were neither solicited nor received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing proposed rule change does not: (i) Significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, it has become effective pursuant to Section 19(b)(3)(A) of the Act[7] and subparagraph (f)(6) of Rule 19b–4 thereunder.[8]

A proposed rule change filed under Rule 19b–4(f)(6)[9] normally does not become operative prior to 30 days after the date of the filing. However, pursuant to Rule 19b–4(f)(6)(iii),[10] the Commission may designate a shorter time if such action is consistent with the protection of investors and the public interest. The Exchange has asked the Commission to waive the 30-day operative delay so that the proposal may

[7] 15 U.S.C. 78s(b)(3)(A).

[8] 17 CFR 240.19b–4(f)(6).

[9] 17 CFR 240.19b–4(f)(6).

[10] 17 CFR 240.19b–4(f)(6)(iii).

become operative immediately upon filing.

The Commission believes that waiving the 30-day operative delay is consistent with the protection of investors and the public interest. If the 30-day operative delay were not to be waived, then the Dedicated OUCH Port Infrastructure service would go live and require payments of fees even though the underlying hardware to support such a system would not be operational. Without a waiver, fees would be collected from subscribers of the Dedicated OUCH Port Infrastructure service before the service would actually be useable. Thus, waiver of the operative delay provides benefits to NASDAQ and to member firms subscribing to the service. Therefore, the Commission hereby waives the 30-day operative delay and designates the proposal operative upon filing.[11]

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule 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–NASDAQ–2013–131 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–NASDAQ–2013–131. 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 on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of such filing also will be available for inspection and copying at the principal offices 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–NASDAQ–2013–131, and should be submitted on or before November 12, 2013.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[12]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2013–24683 Filed 10–21–13; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–70606; File No. SR–ICC–2013–06]

Self-Regulatory Organizations; ICE Clear Credit LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Correct Minor Grammatical Errors, Remove Obsolete References and Comply With a Commission Recommendation

October 3, 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 September 24, 2013, ICE Clear Credit LLC (''ICC'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared primarily by ICC. ICC filed the proposal pursuant to Section 19(b)(3)(A) of the Act,[3] and Rule 19b–4(f)(3) thereunder,[4] so that the proposal was effective upon filing with the Commission. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The purpose of proposed rule change is to amend the ICC Clearing Rules (the ''Rules'') in order to correct minor grammatical errors, remove obsolete references and comply with a Commission recommendation to provide for consistent language within the Rules and Section 19(d)(1) of the Act.[5]

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, ICC 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. ICC has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of these statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

The proposed revisions are intended to correct minor grammatical errors, remove obsolete references, and comply with a Commission recommendation to provide for consistent language within the Rules and Section 19(d)(1) of the Act. ICC believes such changes will facilitate the prompt and accurate clearance and settlement of securities transactions and derivative agreements, contracts, and transactions for which it is responsible. The proposed Rule revisions are described in detail as follows.

In Rule 402(b), the term ''the Clearing House'' was removed and replaced with ''ICE Clear Credit'' in order to remain consistent with the Rules. In Rules

[11] For purposes only of waiving the 30-day operative delay, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[12] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 15 U.S.C. 78s(b)(3)(A).

[4] 17 CFR 240.19b–4(f)(3).

[5] 15 U.S.C. 78s(d)(1).

502(d)–(h), several erroneous placements of ''and'' were corrected.

In Rules 201(b)(i) and 206(a)(iii), references to the ''U.K. Financial Services Authority'' were removed and replaced with references to the ''U.K. Prudential Regulatory Authority.'' In Rule 201(b)(i), ''the European Securities and Markets Authority'' was added to the sample list of competent authorities for capital adequacy regulation listed in the membership qualification rules. Further, in Rule 206(a)(iii), ''the European Securities and Markets Authority'' was added to the list of regulatory agencies from which the receipt of specific notices requires Participant notification to ICC.

In Rule 503(a)(v) the specifically listed original nine Participant Appointees were removed from the Rules as the Participant Appointees are determined annually according to the procedure in Rule 503(a)(vi). Rule 503(a)(vi) was updated to change the word ''anniversary'' to the word ''date'' for clarification. Rule 503(a)(viii) was deleted and replaced with ''Intentionally omitted.'' because Rule 503(a)(viii) dealt with contingencies for an interim period that has since passed. Correspondingly, the definition of ''DCO/SCA Conversion Date'' was removed from Rule 102, as the term is no longer referred to in the Rules. In Rule 503(a)(x), language referring to an interim period that has since passed was removed. In Rules 801(b) and 802(b) obsolete references to deadlines for actions required of ICC that have since been completed were removed.

Per Commission recommendation, the word ''promptly'' was added to Rule 712(c) in order to provide for consistency of language within the Rules and Section 19(d)(1) of the Act.

The proposed rule changes do not require any changes to the ICC risk management framework including the ICC margin methodology, guaranty fund methodology, pricing parameters and pricing model.

Section 17A(b)(3)(F) of the Act[6] requires, among other things, that the rules of a clearing agency be designed to promote the prompt and accurate clearance and settlement of securities transactions and, to the extent applicable, derivative agreements, contracts, and transactions and to comply with the provisions of the Act and the rules and regulations thereunder. ICC believes that the proposed rule changes are consistent with the requirements of the Act and the rules and regulations thereunder applicable to ICC, in particular, to Section 17(A)(b)(3)(F), because ICC believes that the proposed rule changes will facilitate the prompt and accurate settlement of swaps and contribute to the safeguarding of securities and funds associated with swap transactions which are in the custody or control of ICC or for which it is responsible.

B. Self-Regulatory Organization's Statement on Burden on Competition

The correction of minor grammatical errors, removal of obsolete references and compliance with a Commission recommendation to provide for consistent language within the Rules and Section 19(d)(1) of the Act apply consistently across all market participants. Therefore, ICC does not believe the proposed rule change would have any impact, or impose any burden, on competition.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

Written comments relating to the proposed rule change have not been solicited or received. ICC will notify the Commission of any written comments received by ICC.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective upon filing pursuant to Section 19(b)(3)(A)[7] of the Act and Rule 19b–4(f)(3)[8] thereunder because correcting minor grammatical errors, removing obsolete references and complying with a Commission recommendation to provide for consistent language within the Rules and Section 19(d)(1) are concerned solely with the administration of ICC. 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–ICC–2013–06 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–ICC–2013–06. 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 such filings also will be available for inspection and copying at the principal office of ICE Clear Credit and on ICE Clear Credit's Web site at *https://www.theice.com/notices/Notices.shtml?regulatoryFilings.*

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–ICC–2013–06 and should be submitted on or before November 12, 2013.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[9]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2013–24557 Filed 10–21–13; 8:45 am]

BILLING CODE 8011–01–P

[6] 15 U.S.C. 78q–1(b)(3)(F).

[7] 15 U.S.C. 78s(b)(3)(A).

[8] 17 CFR 240.19b–4(f)(3).

[9] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–70643; File No. SR–Topaz–2013–07]

Self-Regulatory Organizations; Topaz Exchange, LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Amend the Schedule of Fees

October 9, 2013.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the ''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on September 30, 2013, the Topaz Exchange, LLC (d/b/a ISE Gemini) (the ''Exchange'' or ''Topaz'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I, II and III below, which Items have been prepared by the 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 the Substance of the Proposed Rule Change

Topaz is proposing to amend its Schedule of Fees to establish a surcharge fee for non-Priority Customer orders in options on 1/10 the value of the Nasdaq-100 Stock Index. The text of the proposed rule change is available on the Exchange's Internet Web site at *http://www.ise.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 the Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The self-regulatory organization has prepared summaries, set forth in Sections A, B and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and the Statutory Basis for, the Proposed Rule Change

1. Purpose

On August 26, 2013 the Exchange filed a proposed rule change to adopt a surcharge fee for options on the full value of the Nasdaq-100 Stock Index (''NDX''),[3] in connection with the listing of NDX options on the Exchange. As the Exchange now intends to list options on the Mini-NDX (''MNX''), which represents 1/10 the value of the NDX index, the Exchange is proposing to adopt the same $0.22 per contract surcharge fee for MNX options.

The Exchange has entered into a license agreement with The NASDAQ OMX Group, Inc. in connection with the listing and trading of MNX options, and is proposing to adopt a surcharge fee applicable to non-Priority Customer orders in these options to defray the licensing costs. Absent this license agreement, market participants would be unable to trade MNX options on the Exchange. This surcharge fee reflects the pass-through charges associated with the licensing of this product, and the Exchange believes that charging the participants that trade these instruments is the most equitable means of recovering the costs of the license. The Exchange notes that the proposed surcharge fee does not apply to Priority Customer orders in this product.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with the provisions of Section 6 of the Act,[4] in general, and Section 6(b)(4) of the Act,[5] in particular, in that it is designed to provide for the equitable allocation of reasonable dues, fees, and other charges among its members and other persons using its facilities.

The proposed surcharge fee is reasonable because it is a direct result of the licensing fees charged to the Exchange by the index provider that owns the intellectual property associated with the index, and reflect the pass-through charges associated with obtaining the license to trade MNX options, which the Exchange believes is the most equitable means of recovering the costs of the license. The proposed fee is equitable and not unfairly discriminatory in that it applies uniformly to all similarly situated Exchange participants, and is assessed only on those non-Priority Customer participants who choose to transact in MNX options. The Exchange believes it is equitable and not unfairly discriminatory to assess this surcharge fee on all participants except Priority Customers because the Exchange seeks to encourage Priority Customer order flow and the liquidity such order flow brings to the marketplace, which in turn benefits all market participants.

B. Self-Regulatory Organization's Statement on Burden on Competition

In accordance with Section 6(b)(8) of the Act,[6] 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. By providing all participants on the Exchange with the ability to hedge via MNX options, the Exchange is not placing any burden on competition among its various participants. The Exchange further notes that the licensing agreement it has secured is not an exclusive agreement as many other option exchanges currently trade MNX options and charge fees related to such license.[7] As such, there is no burden on competition among exchanges for the trading of these products.

Finally, the Exchange notes that it operates in a highly competitive market in which market participants can readily favor competing venues if they deem fee levels at a particular venue to be excessive. In such an environment, the Exchange must continually review, and consider adjusting, its 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

The Exchange has not solicited, and does not intend to solicit, comments on this proposed rule change. The Exchange has not received any unsolicited written comments from members or other interested parties.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A)(ii) of the Act,[8] and subparagraph (f)(2) of Rule 19b–4

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 34–70296 (Aug. 30, 2013), 78 FR 54942 (Sept. 6, 2013) (SR–Topaz–2013–03).

[4] 15 U.S.C. 78f.

[5] 15 U.S.C. 78f(b)(4).

[6] 15 U.S.C. 78f(b)(8).

[7] For example, NYSE Amex Options (''Amex''), NYSE Arca Options (''Arca''), and the International Securities Exchange, LLC (''ISE'') each charge a surcharge fee of $0.22 for trades in MNX options. *See* Amex Fee Schedule, Royalty Fees; Arca Fees and Charges, Royalty Fees; and ISE Schedule of Fees, Section VI, Other Options Fees and Rebates, Non-Priority Customer License Surcharge for Index Options.

[8] 15 U.S.C. 78s(b)(3)(A)(ii).

thereunder,[9] because it establishes a due, fee, or other charge imposed by Topaz.

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 to determine whether the proposed rule should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File No. SR–Topaz–2013–07 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 No. SR–Topaz–2013–07. 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 such filing also will be available for inspection and copying at the principal offices 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 No. SR–Topaz–2013–07, and should be submitted on or before November 12, 2013.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[10]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2013–24644 Filed 10–21–13; 8:45 am]

BILLING CODE 8011–01–P

[9] 17 CFR 240.19b–4(f)(2).

[10] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–70671; File No. SR–BOX–2013–46]

Self-Regulatory Organizations; BOX Options Exchange LLC; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Amend BOX Rule 3130 (Exemptions From Position Limits)

October 11, 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 October 2, 2013, BOX Options Exchange LLC (the ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I and II below, which Items have been prepared by the 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 BOX Rule 3130 (Exemptions from Position Limits) to simplify the position limit exemptions available to Options Participants. The text of the proposed rule change is available from the principal office of the Exchange, at the Commission's Public Reference Room and also on the Exchange's Internet Web site at *http://boxexchange.com.*

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The self-regulatory organization has prepared summaries, set forth in Sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend BOX Rule 3130 (Exemptions from Position Limits) to simplify the position limit exemptions available to Options Participants. This is a competitive filing based on the rules of BX and BATS.[3]

Specifically, the Exchange proposes to remove sections (b) through (e) of BOX Rule 3130. Once removed, section (a), ''Exemption Granted by Other Exchanges,'' will be the sole position limit exemption remaining. The Exchange believes that this exemption, which allows Participants to rely on applicable position limit exemptions granted by other exchanges, will result in increased uniformity among the exchanges and cause less confusion among all market participants. Furthermore the proposed change will have no impact on the position limit exemptions currently used by Participants on BOX. The Exchange has reviewed the position limit exemptions available at the other option exchanges and believes these represent all position limit exemptions that the Exchange is seeking to remove. The Exchange notes that this proposed change mimics the position limit exemption language used by BX and BATS.[4] In addition, the Exchange believes that the proposed rule change will help ensure that the Exchange's rules regarding Exemptions from Position Limits will always be in alignment with FINRA's exemption rules,[5] even if these change from time to time.

2. Statutory Basis

The Exchange believes that the proposal is consistent with the

[3] *See* BX Chapter XIV, Section 8 and BATS Rule 18.8.

[4] *Id.*

[5] *See* FINRA Rule 2360(b)(3)(A)(vii).

requirements of Section 6(b) of the Securities Exchange Act of 1934 (the ''Act''),[6] in general, and Section 6(b)(4) of the Act,[7] in particular, 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, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general to protect investors and the public interest.

In particular, the Exchange believes the proposed rule change will provide greater clarity to market participants regarding the Exchange's rules. In addition, the Exchange believes that the proposed rule change will help ensure that the Exchange's rules regarding Exemptions from Position Limits will always be in alignment with FINRA's rules. Accordingly, this proposal is designed to harmonize the exemptions from position limits rules across exchanges and will help protect investors.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act. In this regard and as indicated above, the Exchange notes that the rule change being proposed is substantially similar to BX's and BATS's rules regarding Exemptions from Position Limits.[8]

The Exchange believes this proposed rule change is necessary to establish uniform rules regarding Exemptions from Position Limits. Specifically, the proposed rule change will bring clarity and consistency to Exchange Rules by harmonizing the exemptions from position limits rules across exchanges and will therefore help protect investors. The Exchange does not believe the proposed rule change will impose any burden on any intramarket competition as it applies to all Participants. In addition, the Exchange does not believe the proposed rule filing will bring any unnecessary burden on intermarket competition as it is consistent with the ''Exemption from Position Limits'' rules of BX and BATS.[9]

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

The Exchange has neither solicited nor received comments on the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the proposed rule change does not (i) significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate if consistent with the protection of investors and the public interest, the proposed rule change has become effective pursuant to Section 19(b)(3)(A) of the Act [10] and Rule 19b–4(f)(6) thereunder.[11] 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.

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–BOX–2013–46 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–BOX–2013–46. 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–BOX–2013–46 and should be submitted on or before November 12, 2013.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[12]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2013–24663 Filed 10–21–13; 8:45 am]

BILLING CODE 8011–01–P

[6] 15 U.S.C. 78f(b).

[7] 15 U.S.C. 78f(b)(4).

[8] *See supra,* note 3.

[9] *See supra,* note 3.

[10] 15 U.S.C. 78s(b)(3)(A).

[11] 17 CFR 240.19b–4(f)(6). As required under Rule 19b–4(f)(6)(iii), the Exchange provided the Commission with written notice of its intent to file the proposed rule change, along with a brief description and the 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.

[12] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–70588; File No. SR–NYSEMKT–2013–59]

Self-Regulatory Organizations; NYSE MKT LLC; Order Instituting Proceedings To Determine Whether To Approve or Disapprove a Proposed Rule Change Relating to NDX and RUT Combination Orders

October 1, 2013.

I. Introduction

On June 21, 2013, NYSE MKT LLC (''NYSE MKT'') 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

[1] 15 U.S.C. 78s(b)(1).

thereunder,[2] a proposed rule change to amend NYSE MKT Rule 965NY to revise the procedures governing the trading of NDX and RUT combination orders. The proposed rule change was published for comment in the **Federal Register** on July 9, 2013.[3] The Commission received two comments regarding the proposal.[4] NYSE MKT responded to the comments on August 19, 2013.[5] On August 20, 2013, the Commission extended to October 7, 2013, the time within which the Commission must approve the proposed rule change, disapprove the proposed rule change, or institute proceedings to determine whether to disapprove the proposed rule change.[6] This order institutes proceedings under Section 19(b)(2)(B) of the Act[7] to determine whether to approve or disapprove the proposed rule change.

II. Description of the Proposal

NYSE MKT Rule 965NY(b) provides procedures for trading Nasdaq 100 Index (''NDX'') and Russell 2000 Index (''RUT'') combination orders.[8] Currently, NYSE MKT Rule 965NY(b) allows an ATP Holder holding an NDX or RUT combination order to execute the order at the best net debit or credit so long as (A) no leg of the order would trade at a price outside the currently displayed bids or offers in the trading crowd or bids or offers in the NDX or RUT Consolidated Book; and (B) at least one leg of the order would trade at a price that is better than the corresponding bid or offer in the NDX or RUT Consolidated Book.[9] An NDX or RUT combination order that is not executed immediately may be executed and printed at the prices originally quoted for each of the component option series within two hours after the time of the original quotes, provided that, at the time of execution, no individual leg of the NDX or RUT combination order may trade ahead of the corresponding bid or offer in the NDX or RUT Consolidated Book.[10]

NYSE MKT proposes to amend NYSE MKT Rule 965NY(b) to implement a one-year pilot program that would revise the procedures for trading NDX and RUT combination orders. NYSE MKT believes that the pilot program's revised trading procedures would make the trading of NDX and RUT combination orders more competitive with the trading of combinations in Nasdaq 100 Index futures and Russell 2000 Index futures on the Chicago Mercantile Exchange (''CME'') and the Intercontinental Exchange (''ICE''), respectively.[11]

NYSE MKT notes that its rules currently preclude trading the legs of an NDX or RUT combination order outside of the prevailing market quotes in the individual component series legs.[12] Further, NYSE MKT states that an NDX or RUT combination order must be executed at the prices originally quoted, with no window to find liquidity.[13] According to NYSE MKT, the rules of the CME and ICE allow spread and combination executions to take place without regard to market prices, and these executions are bound only by the daily price limit.[14] Although NYSE MKT believes that traders prefer to use NDX or RUT combinations, rather than futures, to hedge positions in NDX or RUT options to avoid the execution risk and increased costs involved in trading in the futures markets, NYSE MKT believes that the constraints in NYSE MKT's rules can make it more difficult for an NYSE Amex Options market participant to execute a complex NDX or RUT option trading strategy than it is for a CME or ICE market participant to execute substantially the same strategy using Nasdaq 100 Index futures or Russell 2000 Index futures.[15] NYSE MKT believes that the additional burden associated with trading on the Exchange may discourage trading on NYSE MKT in favor of trading on the CME and ICE.[16] NYSE MKT believes, further, that it may be at a competitive disadvantage because market participants who frequently trade spreads or combinations, or who trade spreads or combinations as a strategy for hedging risk, would tend to utilize a market venue where they can more consistently depend on achieving a net price execution.[17]

To further level the field of competition between market participants trading on NYSE Amex Options and on the CME and ICE, NYSE MKT proposes to revise its NDX and RUT combination order trading procedures.[18] Specifically, NYSE MKT proposes to amend NYSE MKT Rule 965NY(b)(4) to implement a one-year pilot program that would allow an ATP Holder to execute an NDX or RUT combination order at the best net debit or credit price, which may be outside the current derived net market,[19] so long as: (a) The best net debit or credit price would have been at or within the derived net market over the preceding two hours of trading that day; (b) no leg of the order would trade at a price outside the displayed bids or offers in the trading crowd or customer interest in the NDX or RUT Consolidated Book at a point in time over the preceding two-hour period; and (c) at least one leg of the order would trade at a price that is better than the corresponding customer bid or offer in the NDX or RUT Consolidated Book at the same point in time over the preceding two-hour period.[20] The ''derived net market'' is NYSE MKT's best bids and offers displayed in the individual option series for the strategy at any one point in time over the previous two hours, not at separate points in time for each of the series.[21] For example, an ATP Holder could not use the price of the April 2790 puts at 10:20 a.m. and the price of the April 2810 calls and puts at 10:30 a.m. to calculate a derived net market.[22]

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 69919 (July 2, 2013), 78 FR 41168 (''Notice'').

[4] *See* letters to Elizabeth M. Murphy, Secretary, Commission, from Darren Story, CFA, Student Options, LLC, dated July 12, 2013 (''Story Letter''); and from David Spack, Chief Compliance Officer, Casey Securities, LLC, dated August 2, 2013 (''Casey Letter'').

[5] *See* letter from Janet McGinness, Executive Vice President and Corporate Secretary, NYSE Euronext, to Elizabeth M. Murphy, Secretary, Commission, dated August 19, 2013 (''NYSE MKT Response'').

[6] *See* Securities Exchange Act Release No. 70235 (August 20, 2013), 78 FR 52818 (August 26, 2013).

[7] 15 U.S.C. 78s(b)(2)(B).

[8] *See* NYSE MKT Rule 965NY(b)(4)(iii). A ''NDX combination order'' is an order to purchase or sell NDX options and the offsetting number of NDX combinations defined by the delta. An ''NDX Combination'' is a long (short) NDX call and a short (long) NDX put having the same expiration date and strike price. A ''RUT combination order'' is an order to purchase or sell RUT options and the offsetting number of RUT combinations defined by the delta. An ''RUT Combination'' is a long (short) RUT call and a short (long) RUT put having the same expiration date and strike price. A ''delta'' is the positive (negative) number of NDX or RUT combinations that must be sold (bought) to establish a market neutral hedge with the corresponding NDX or RUT option position. *See* NYSE MKT Rule 965NY(b)(1)–(3).

[9] The ATP Holder holding the NDX or RUT combination order must be bidding or offering in a multiple of the minimum price variation on the basis of a total debit or credit for the order, and must determine that the combination order may not be executed by a combination of transactions with the bids and offers displayed in the NDX or RUT Consolidated Book before executing the order at the best net debit or credit. *See* NYSE MKT Rule 965NY(b)(4)(i).

[10] *See* NYSE MKT Rule 965NY(b)(4)(ii).

[11] *See* Notice, 78 FR at 41169.

[12] *See id.* at 41170.

[13] *See id.*

[14] *See id.*

[15] *See id.*

[16] *See id.*

[17] *See id.*

[18] *See* Notice, 78 FR at 41171.

[19] The proposal defines the ''derived net market'' as NYSE MKT's best bids and offers displayed in the individual option series for the strategy at any one point in time. *See* NYSE MKT Rule 965NY(b)(4)(iii).

[20] *See* NYSE MKT Rule 965NY(b)(4)(iii).

[21] *See* NYSE MKT Rule 965NY(b)(4)(iii) and Notice, 78 FR at 41171.

[22] *See* Notice, 78 FR at 41171.

NYSE MKT states that the proposed procedure is generally modeled after CME Rule 542 and ICE Rule 27.11(a)(v), in that it would allow an NDX or RUT combination order to be executed out-of-range from the current market prices in the individual component option series legs, provided that the reported net price and related component series prices were in range within the preceding two hours.[23] According to NYSE MKT, the rules of the CME and ICE require only that the reported price of each component futures contract leg be within the daily price limit, a number that the Exchange believes is generally much wider than the two-hour derived net market range proposed by the Exchange.[24]

Each component leg of an NDX or RUT combination order would continue to be reported to the trading floor and the Options Price Reporting Authority (''OPRA'') with a special indicator identifying the reported price as part of a combination order trade.[25]

NYSE MKT states its belief that the proposed procedure would not lessen the obligation of ATP Holders to obtain best execution of options orders for their customers.[26] If the Commission approves the proposal, NYSE MKT will issue a regulatory bulletin to ATP Holders explaining the operation of Rule 965NY, as amended, and reminding ATP Holders that the new procedure does not lessen the obligation of ATP Holders to obtain best execution of option orders for their customers.[27]

NYSE MKT characterizes the proposed pilot program as a narrowly tailored trading process that does not go as far as existing CME and ICE rules.[28] NYSE MKT believes that its proposed procedure would provide market participants with additional flexibility in achieving desired combination order strategies in NDX and RUT and in determining whether to execute their strategies using options traded on NYSE MKT or with comparable products traded on CME or ICE, respectively.[29]

NYSE MKT believes that the proposed pilot program would facilitate the orderly execution of combination orders in NDX and RUT at all times, including during volatile markets, in a manner that is more competitive with the existing CME and ICE trading procedures.[30] In addition, NYSE MKT believes that the proposal will address customers' desire to show an order to other market participants to seek price improvement or additional liquidity.[31] NYSE MKT believes, further, that the proposal would continue to provide an incentive for market makers to reduce the width of their quotes for an options position that is ''tied'' to a combination because, under the proposed procedure, a market maker would know that its hedge price has been established and that he or she would not have to trade in another market, which would result in tighter and more liquid markets for customers who trade options tied to combinations.[32]

If NYSE MKT were to propose to extend the pilot program or to make it permanent, NYSE MKT would provide the Commission with a pilot report analyzing the pilot program.[33] The pilot report, which NYSE MKT would submit to the Commission on a confidential basis at least two months prior to the expiration of the pilot program, would include information on the number of combination trades in NDX and RUT and best bid or offer trade through/trade at analysis of those trades.[34] The pilot report also would include information on the NDX and RUT options classes and other broad-based index option products, including information on average contract value, average daily volume, open interest, average order size, percentage of complex orders, percentage of volume from complex orders, and average daily notional value traded.[35]

III. Summary of Comments and NYSE MKT's Response

The Commission received two comments regarding the proposal,[36] and NYSE MKT responded to the comments.[37] One commenter opposes the proposal, stating its belief that it would cause ''irreparable harm'' to customers and prohibit competition that might provide improved prices for marketable orders.[38] The commenter believes that the prohibition in the current rule against trading any leg of an NDX or RUT combination order through a contemporaneous resting order for that series does not impede the trading of NDX or RUT combination orders because, in some circumstances, it would be possible to adjust the component legs of an NDX or RUT combination order in response to a change in the markets so that the combination order would achieve its desired net price and each leg of the order would trade within the range of the current quoted market for the series.[39] The commenter states that traders frequently make such adjustments, and that trades should continue to be executed at or within current market prices because current prices reflect available information and represent the best estimate of the true value of an option at a given time.[40] In addition, the commenter states its view that executing a leg of a combination order outside of the current market would result in a worse price for the customer.[41] The commenter also does

[23] *See id.* To be ''in range,'' the net price of the NDX or RUT combination order must have been at or within the derived net market over the preceding two-hour period, each leg of the order must trade at a price that would have been at or inside the best bids and offers displayed in the individual option series legs at a single point in time over the preceding two hours, and a least one leg of the order must trade at a price that would have been better than the corresponding customer orders in the NDX or RUT Consolidated Book at the same point in time. *See id.*

[24] *See id.*

[25] *See id.*

[26] *See id.*

[27] *See id.*

[28] *See* Notice, 78 FR at 41172.

[29] *See id.*

[30] *See id.*

[31] *See id.*

[32] *See id.* As explained more fully in footnote 5 in the Notice, a customer may request a market for the NDX puts that the customer wishes to purchase based on a specified level of the Nasdaq 100 Index. Specifying the index level allows market participants to determine the delta and a theoretical value of the puts. A market participant will then give his or her market for the puts and for the component NDX call and put options that would comprise the combination portion of the order. The combination portion of the order is equivalent to an order to trade futures at the underlying value of the Nasdaq 100 Index that has been specified by the parties. The prices quoted for the combination establish the hedge price for the transaction. When this occurs, market participants say that the puts have been ''tied'' to the combination. *See* Notice, 78 FR at 41169 at footnote 5 and accompanying text. (The Commission notes that footnote 5 in the Notice refers to the position being hedged by the offsetting NDX combination first as NDX calls, then as NDX puts. Example 3 in the Notice, on which footnote 5 is based, refers to a customer that wishes to trade the 35 delta NDX April 2790 puts tied to a combination. Accordingly, the Commission believes that NYSE MKT intends to refer to NDX puts as the position being hedged in footnote 5.)

[33] *See* Notice, 78 FR at 41171–72.

[34] *See* Notice, 78 FR at 41172.

[35] *See id.*

[36] *See* Story Letter and Casey Letter.

[37] *See* NYSE MKT Response.

[38] *See* Story Letter at 1.

[39] *See id.* For example, the commenter states that if a customer seeks to sell 100 RUT April 950 puts at 30.00 tied to a combination based on a Russell 2000 Index level of 975 with a 20 delta, and the market moves so that the combination must be printed at an index level of 980, rather than 975, the price of the April 950 puts can be lowered by a corresponding equivalent amount to account for the increase in the index level. The 5.00-point change in the index level would require a corresponding reduction of 1.00 for the April puts ($5.00 \times .20$ (20 delta) = 1.00). Reducing the April puts to 29.00 to account for the 5.00-point increase in the index level results in a $10,000 reduction for the April puts ($30.00 - 29.00 = 1.00 \times 100 \times 100$ = $10,000) and a corresponding $10,000 increase for the hedging combination ($975 - 980 = - 5.00 \times 20 \times 100$ = $10,000), so that, after the adjustments, the net price for the combination order remains the same. *See id.*

[40] *See* Story Letter at 1–2.

[41] *See id.*

not believe that the two-hour look back window would mitigate the potential impact of trade-throughs on market participants that provide liquidity in the underlying leg options.[42]

Another commenter supports implementing the proposal on a pilot basis.[43] The commenter states that its customers consider NDX and RUT spreads and combination orders to be equivalent to Nasdaq 100 Index and Russell 2000 Index futures, respectively, and that its customers find futures contracts to be more attractive than combination orders due to ease of execution.[44] The commenter believes that the restriction in the current rule that prohibits the execution of NDX and RUT combination orders at a price that would result in any underlying option leg trading through a contemporaneous resting order for that option impedes the trading of combinations. In particular, the commenter noted that there are instances when, by the time a customer has been found and both parties are ready to trade, the market has moved in such a way that consummating the trade would create a trade-through of a protected quote, requiring the trade to either be cancelled, adjusted, or moved to the futures market.[45] The commenter believes that the proposed two-hour look back would mitigate an impediment to trading combination orders by permitting an NDX or RUT combination order to trade through resting interest in instances where the combination order was at or within the quoted market at the time of the initial quote, even though quotes for one of the legs may move such that the leg is outside of the market by the time both parties are able to consummate the transaction.[46] Noting that options prices may move quickly and that combination orders in active index derivatives are difficult to complete, the commenter emphasizes that the ''important aspect to consider is that these kinds of combination orders, if they could be executable immediately (when the initial quote was received) *would* be in line with all quotes, and no trade-through issues would exist.''[47]

The commenter believes, further, that because NDX and RUT combination orders are difficult to complete, they require different rules from options transactions that can be executed almost immediately with the current quotes.[48] In addition, the commenter believes that the trade-throughs that would be permitted under the proposed rule would have a negligible impact on market participants that provide liquidity in the individual leg markets because there are comparable trade-through exceptions in the equity markets for block and contingent trades that do not have a negative impact on liquidity in the equity market.[49] Finally, the commenter believes that the proposed pilot program could tighten spreads because it would lock in hedge prices and eliminate the need for market participants to find their hedge in a different market.[50]

As discussed above, the commenter that opposes the proposal believes that market participants would be able, in some cases, to adjust the prices of the individual legs of a combination order to achieve the order's desired net price so that the order may be executed within the range of the current markets.[51] In addition, the commenter expresses concern that the proposal potentially could result in harm to customers.[52] In its response, NYSE MKT disagrees with the assertion that market participants could adjust the prices of the individual legs of a combination order to achieve the order's desired net price because, in some circumstances, such adjustments would not be feasible or desirable.[53] NYSE MKT also disagrees strongly with the assertion that the proposal would result in harm to customers, and notes that the commenter fails to specify whether the proposal would result in harm to customer orders on the book or to a customer participating in the combination order.[54] NYSE MKT notes that both the proposal and the adjustment process the commenter describes are designed to facilitate the execution of a complex order as a clean cross, to the extent consistent with market conditions and applicable priority rules.[55] NYSE MKT states that, as a complex negotiated trade, participants to combination orders agree on a net debit or credit for a transaction based on current market conditions.[56] In addition, NYSE MKT states that similar practices exist in the equity market, and that its proposed two-hour window is more restrictive than that of marketplaces offering competing products, such as ICE and CME.[57]

NYSE MKT believes that the proposal would provide for additional flexibility in achieving desired combinations and hedging strategies, and would create a transparent and more efficient process.[58] NYSE MKT believes, further, that its proposed two-hour window will enable the completion of combination orders in a manner that provides a reasonable degree of execution certainty, to the benefit of market participants and customers participating in the combination order.[59] NYSE MKT notes that market participants would not be required to use the two-hour look back window and that members may continue to use the current ''adjustment'' approach.[60]

IV. Proceedings To Determine Whether To Approve or Disapprove SR–NYSEMKT–2013–59 and Grounds for Disapproval Under Consideration

The Commission is instituting proceedings pursuant to Section 19(b)(2)(B) of the Act[61] to determine whether the proposed rule change should be approved or disapproved. Institution of such proceedings is appropriate at this time in view of the significant legal and policy issues raised by the proposed rule change, as discussed below. Institution of proceedings does not indicate that the Commission has reached any conclusions with respect to any of the issues involved. Rather, as described in greater detail below, the Commission seeks and encourages interested persons to provide additional comment on the proposed rule change.

Pursuant to Section 19(b)(2)(B) of the Act, the Commission is providing notice of the grounds for disapproval under consideration. The sections of the Act and the rules thereunder that are applicable to the proposed rule change include Sections 3(a)(1), 6(b)(5), and

[42] *See* Story Letter at 2.

[43] This commenter recommends collecting data concerning the volume of NDX and RUT combination order trades before and after the implementation of the pilot, as well as data regarding the available liquidity and spread sizes in the individual legs of the combinations. *See* Casey Letter at 2.

[44] *See* Casey Letter at 3.

[45] *See* Casey Letter at 1.

[46] *See id.*

[47] *Id.* at 2.

[48] *See id.*

[49] According to the commenter, market participants ''generally understand that these trade-throughs are not indicative of the real market, and thus they do not have an adverse impact on quote size or spread width.'' *See* Casey Letter at 2. The commenter believed, further, that equity market participants have absorbed the alternative rules for large and complex orders and continue to interact in meaningful ways without disruption to the overall market. *See* Casey Letter at 4.

[50] *See* Casey Letter at 4.

[51] *See* Story Letter at 1.

[52] *See id.* at 3.

[53] *See* NYSE MKT Response at 1.

[54] *See* NYSE MKT Response at 1–2.

[55] *See* NYSE MKT Response at 2.

[56] *See id.*

[57] *See* NYSE MKT Response at 1.

[58] *See* NYSE MKT Response at 2.

[59] *See* NYSE MKT Response at 1.

[60] *See* NYSE MKT Response at 2.

[61] 15 U.S.C. 78s(b)(2)(B).

11A(a) of the Act.[62] Section 3(a)(1) of the Act defines an exchange, in part, as any organization, association, or group of persons which constitutes, maintains, or provides a market place or facilities for bringing together purchasers and sellers of securities. Section 6(b)(5) of the Act requires, among other things, that the rules of a national securities exchange be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system and, in general, to protect investors and the public interest. In Section 11A(a) of the Act, Congress found, in part, 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 economically efficient execution of securities transactions.[63]

The Commission believes that NYSE MKT's proposal raises questions as to whether the proposed rule change is consistent with these standards. As discussed above, NYSE MKT's proposed pilot program would allow an ATP Holder to execute an NDX or RUT combination order outside the current derived net market so long as: (a) The best net debit or credit price would have been at or within the derived net market over the preceding two hours of trading that day; (b) no leg of the order would trade at a price outside the displayed bids or offers in the trading crowd or customer interest in the NDX or RUT Consolidated Book at a point in time over the preceding two-hour period; and (c) at least one leg of the order would trade at a price that is better than the corresponding customer bid or offer in the NDX or RUT Consolidated Book at the same point in time over the preceding two-hour period.[64] By allowing NDX and RUT combination orders to be executed outside of the current derived net market, the proposed rule change raises concerns about the potential effect of the proposal on the markets for NDX and RUT options, and, in particular, whether or how the potential for trade-throughs of prices on NYSE MKT would impact the incentives of market participants to provide liquidity in the individual series comprising the legs of an NDX or RUT combination order.

NYSE MKT states that practices similar to the trade-throughs that would be permitted under the proposal already exist in the equity markets.[65] The Commission notes that the Qualified Contingent Trade exemption (''QCT Exemption'') to Rule 611(a) of Regulation NMS,[66] permits inter-market trade-throughs of quotations in NMS stocks for qualified contingent trades, but does not provide for the intramarket trade-throughs that the proposal would permit.[67] Thus, the QCT Exemption does not establish a precedent for an exchange seeking to trade through its own market.[68] NYSE MKT does not provide an analysis of the potential impact of trade-throughs on the NYSE MKT NDX and RUT limit order books, nor does it provide a detailed discussion of how it would study the impact on the individual leg markets if the proposed pilot were approved.

In light of these issues and concerns, the Commission believes that questions arise regarding whether the proposal is consistent with the requirements of Sections 3(a)(1), 6(b)(5), and 11A(a) of the Act. As the Commission continues to evaluate the issues presented by the proposal, the Commission solicits comment on whether the proposal is consistent with the Act and whether the Exchange has met its burden in presenting a statutory analysis of how its proposal is consistent with the Act. In particular, the grounds for disapproval under consideration include whether the Exchange's proposal is consistent with Section 6(b)(5) of the Act, which requires, among other things, that the rules of a national securities exchange be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, and to protect investors and the public interest. In addition, under the Commission's rules of procedure, a self-regulatory organization that proposes to amend its rules bears the burden of demonstrating that its proposal is consistent with the Act.[69] In this regard:

> the description of the proposed rule change, its purpose and operation, its effect, and a legal analysis of its consistency with applicable requirements must all be sufficiently detailed and specific to support an affirmative Commission finding. Any failure of the self-regulatory organization to provide the information elicited by Form 19b–4 may result in the Commission not having a sufficient basis to make an affirmative finding that a proposed rule change is consistent with the Exchange Act and the rules and regulations thereunder that are applicable to the self-regulatory organization.[70]

V. Procedure: Request for Written Comments

The Commission requests that interested persons provide written submissions of their views, data, and arguments with respect to the concerns identified above, as well as any other concerns they may have with the proposal. In particular, the Commission invites the written views of interested persons concerning whether the proposal is consistent with Sections 3(a)(1), 6(b)(5), 11A(a), or any other provision of the Act, or the rules and regulations thereunder. Although there do not appear to be any issues relevant to approval or disapproval which would be facilitated by an oral presentation of views, data, and arguments, the Commission will consider, pursuant to Rule 19b–4, any request for an opportunity to make an oral presentation.[71]

Interested persons are invited to submit written data, views, and arguments regarding whether the proposal should be approved or disapproved by November 12, 2013. Any person who wishes to file a rebuttal to any other person's submission must file that rebuttal by November 26, 2013.

The Commission asks that commenters address the sufficiency and merit of the Exchange's statements in support of the proposal, in addition to any other comments they may wish to submit about the proposed rule change. In particular, the Commission seeks comment on the following:

[62] 15 U.S.C. 78c(a)(1), 15 U.S.C. 78f(b)(5), and 15 U.S.C. 78k–1(a)(1)(C).

[63] 15 U.S.C. 78k–1(a)(1)(C)(i).

[64] *See* NYSE MKT Rule 965NY(b)(4)(iii).

[65] *See* NYSE MKT Response at 2. As discussed above, one commenter believed that the trade-throughs permitted in the equity market have not had a negative impact on liquidity or disrupted the overall market. *See* Casey Letter at 2 and 4. *See also* note 49, *supra,* and accompanying text.

[66] 17 CFR 242.611(a).

[67] *See* Securities Exchange Act Release No. 57620 (April 4, 2008), 73 FR 19271 (April 9, 2008), 73 FR 19271 (order modifying the QCT Exemption); and 54389 (August 31, 2006), 71 FR 52829 (September 7, 2006) (order granting the QCT Exemption).

[68] The Commission also notes that under the Options Order Protection and Locked/Crossed Market Plan, only an NDX or RUT combination order that qualifies as a Complex Trade would be permitted to trade through the quotes in the leg markets of another exchange that trades NDX or RUT options. *See* Securities Exchange Act Release No. 60405 (July 30, 2009), 74 FR 39632 (August 6, 2009). The proposal does not address how NYSE MKT would treat an NDX or RUT combination order that is not a Complex Trade and therefore not permitted to trade through the NDX or RUT quotes of another options exchange.

[69] Rule 700(b)(3), 17 CFR 201.700(b)(3).

[70] *See id.*

[71] Section 19(b)(2) of the Act, as amended by the Securities Act Amendments of 1975, Public Law 94–29 (June 4, 1975), grants the Commission flexibility to determine what type of proceeding —either oral or notice and opportunity for written comments—is appropriate for consideration of a particular proposal by a self-regulatory organization. *See* Securities Act Amendments of 1975, Senate Comm. on Banking, Housing & Urban Affairs, S. Rep. No. 75, 94th Cong., 1st Sess. 30 (1975).

1. What, if any, effect do commenters believe the proposal may have on the incentives of market participants to provide liquidity in the series comprising an NDX or RUT combination order? Do commenters believe that permitting NDX and RUT combination orders to trade through interest in the leg market potentially could discourage market participants from placing limit orders in the individual series on the NDX and RUT limit order books? Why or why not?

2. Do commenters believe that NYSE MKT has adequately analyzed the potential effects of the proposal on the markets for NDX and RUT options, including the potential impact on market participants providing liquidity in the series comprising the legs of an NDX or RUT combination order? Why or why not?

3. As noted above, one commenter expresses concern that the flexibility to trade outside of the current derived net market could result in harm to customers.[72] NYSE MKT disagrees, stating in its response that participants to complex negotiated trades agree on a net price for a transaction based on current market conditions.[73] In addition, NYSE MKT notes that market participants would not be required to use the two-hour look back window.[74] What, if any, impact do commenters believe the ability to trade outside of the current derived net market would have on the quality of executions for customers trading NDX and RUT combination orders?

4. NYSE MKT believes that its current combination order rule ''does not come close to leveling the field with the CME and ICE rules for spread and combination trading,'' and that the rules of the CME and ICE require only that the reported price of each component futures contract be within the daily limit price.[75] Do commenters believe that NYSE MKT has fully identified the multi-legged futures strateg(ies) with which it believes NDX and RUT combination orders compete?

5. Do commenters believe that there are characteristics associated with the trading of NDX and RUT options that potentially could help the Commission assess the concerns discussed above regarding the potential to impact the quality of executions or the incentives of liquidity providers in the individual series? If so, please explain. Do commenters believe that these characteristics, if any, are unique to NDX and RUT options, or are they also shared by other broad-based index options? If so, the Commission is interested in statistics or other data concerning the trading of NDX and RUT options that would help the Commission to assess these characteristics.

6. As discussed more fully above, one commenter believes that the proposal is unnecessary because market participants would be able to adjust the prices of the legs of an NDX or RUT combination order so that they are at or within the current market. Another commenter states that the proposal would remove an impediment to the trading of NDX and RUT combination orders by allowing the orders to trade through the current market, provided that the conditions in the rule are satisfied. Do commenters agree or disagree with these views and why?

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–2013–59 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–NYSEMKT–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–NYSEMKT–2013–59 and should be submitted on or before November 12, 2013. Rebuttal comments should be submitted by November 26, 2013.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[76]

Kevin M. O'Neill,

Deputy Secretary.

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[72] *See* Story Letter at 3.

[73] *See* NYSE MKT Response at 2.

[74] *See id.*

[75] *See* Notice, 78 FR at 441170 and 41171.

[76] 17 CFR 200.30–3(a)(57).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–70668; File No. SR–BOX–2013–48]

Self-Regulatory Organizations; BOX Options Exchange LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Amend Interpretive Material to Rule 5050 and Rule 6090

October 11, 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 October 4, 2013, BOX Options Exchange LLC (''BOX'' or ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') a proposed rule change as described in Items I and II, below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend interpretive material to Rule 5050 (Series of Options Contracts Open for Trading) and Rule 6090 (Terms of Index Options Contracts) to give the Exchange the ability to initiate strike prices in more granular intervals for Short Term Options (''STOs'') in the same manner as on other options exchanges. The text of the proposed rule change is available from the principal office of the Exchange, at the Commission's Public

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

Reference Room and also on the Exchange's Internet Web site at *http://boxexchange.com.*

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The self-regulatory organization has prepared summaries, set forth in Sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend IM–5050–6 to Rule 5050 (Series of Options Contracts Open for Trading) and IM–6090–2 to Rule 6090 (Terms of Index Options Contracts) to give the Exchange the ability to initiate strike prices in more granular intervals for Short Term Options (''STOs''). This is a competitive filing being proposed as a response to immediately effective fillings recently submitted by the Chicago Board Options Exchange, Inc. (''CBOE''), NASDAQ OMX PHLX, LLC (''Phlx''), NYSE Arca, Inc. (''Arca''), NYSE MKT LLC (''MKT''), MIAX Options Exchange (''MIAX'') and the International Securities Exchange, LLC (''ISE'').[3]

The Commission recently approved filings submitted by ISE and Phlx that amended the strike price interval setting parameters for their Short Term Option Series (''STOS'') Programs, but the revisions to their respective rules differ.[4] Specifically, the ISE filing permits $0.50 strike price intervals for STOs for option classes that trade in one dollar increments in Related non-short Term Options and are in the STOS Program. The Phlx filing permits $0.50 strike price intervals when the strike price is below $75, and $1 strike price intervals when the strike price is between $75 and $150. Subsequent to the approval of these two competing methodologies, CBOE, Phlx, Arca, MKT, MIAX, and ISE filed immediately effective rule changes that integrated the two prior methodologies for establishing strike price intervals for STOs.[5]

The Exchange recently amended the strike price interval setting parameters for its STOS Program, however, the Exchange did not adopt a consolidated methodology and instead elected to adopt changes based on the Phlx filing.[6] In order to remain competitive, the Exchange is now proposing to adopt a consolidated methodology for strike price interval setting parameters for the STOS Program similar to the other exchanges. Specifically, the Exchange is proposing that the strike price interval for STOs may be $0.50 for option classes that trade in one dollar increments in Related non-short Term Options and are in the STOS Program.

The STOS Program is codified in the BOX Rules 5050 and 6090. These rules state that after an option class has been approved for listing and trading on the Exchange, the Exchange may open for trading on any Thursday or Friday that is a business day, series of options on no more than thirty option classes that expire on each of the next five consecutive Fridays that are business days. In addition to the thirty option class limitation, there is also a limitation that no more than twenty series for each expiration date in those classes may be opened for trading.[7] Furthermore, the strike price of each STO series has to be fixed with approximately the same number of strike prices being opened above and below the value of the underlying security at about the time that the STOs are initially opened for trading on the Exchange, and with strike prices being within thirty percent (30%) above or below the closing price of the underlying security from the preceding day. The Exchange does not propose any changes to the current program limitations. The Exchange only proposes to amend IM–5050–6 and IM-6090–2 to specify that the strike price interval for STOs may be $0.50 for option classes that trade in one dollar increments in Related non-short Term Options and are in the STOS Program.[8] Like the other options exchanges, the Exchanges rules will continue to permit strike price intervals to be $0.50 or greater where the strike price is less than $75, and $1 or greater where the strike price is between $75 and $150.

The Exchange notes that while it believes that there is substantial overlap between the two strike price interval setting parameters, the Exchange believes there are gaps that would enable one of the options exchanges listed above to initiate a series that the Exchange would not be able to initiate.[9] Since strict inter-exchange rule uniformity is not required for the STOS

[3] *See* Securities Exchange Act Release Nos. 68074 (October 19, 2012), 77 FR 65241 (October 25, 2012) (SR–CBOE–2012–92); 69633 (May 23, 2013), 78 FR 32498 (May 30, 2013) (SR–Phlx–2013–55); 68194 (November 8, 2012), 77 FR 68172 (November 15, 2012) (SR–NYSEArca–2012–114); 68193 (November 8, 2012), 77 FR 68177 (November 15, 2012) (NYSEMKT–2012–53); 69809 (June 20, 2013), 78 FR 38416 (June 26, 2013) (SR–MIAX–2013–30); 70335 (September 6, 2013), 78 FR 56253 (September 12, 2013) (SR–ISE–2013–47).

[4] *See* Securities Exchange Act Release Nos. 67754 (August 29, 2012), 77 FR 54629 (September 5, 20120 [sic]) (order approving SR–ISE–2012–33) (''ISE filing'') and 67753 (August 29, 2012) 77 FR 54635 (September 5, 2012) (order approving SR–Phlx–2012–78) (''Phlx filing'').

[5] *See supra,* note 3.

[6] *See* Securities Exchange Act Release No. 67870 (September 17, 2012), 77 FR 58600 (September 21, 2012) (Notice of Filing and Immediate Effectiveness of SR–BOX–2012–012).

[7] However, the Exchange may open up to 10 additional series for each option class that participates in the Short Term Option Series Program when deemed necessary to maintain an orderly market, to meet customer demand or when the market price of the underlying security moves substantially from the exercise price or prices of the series already opened. Any additional strike prices listed by the Exchange shall be within thirty percent (30%) above or below the current price of the underlying security. The Exchange may also open additional strike prices of Short Term Option Series that are more than 30% above or below the current price of the underlying security provided that demonstrated customer interest exists for such series, as expressed by institutional, corporate or individual customers or their brokers. Market Makers trading for their own account shall not be considered when determining customer interest under this provision. In the event that the underlying security has moved such that there are no series that are at least 10% above or below the current price of the underlying security, the Exchange will delist any series with no open interest in both the call and the put series having a: (i) Strike higher than the highest strike price with open interest in the put and/or call series for a given expiration month; and (ii) strike lower than the lowest strike price with open interest in the put and/or the call series for a given expiration month, so as to list series that are at least 10% but not more than 30% above or below the current price of the underlying security. In the event that the underlying security has moved such that there are no series that are at least 10% above or below the current price of the underlying security and all existing series have open interest, the Exchange may list additional series, in excess of the 30 allowed under IM–5050–6(b), that are between 10% and 30% above or below the price of the underlying security. The opening of the new Short Term Option Series shall not affect the series of options of the same class previously opened. IM–5050–6(b)(4) and IM–6090–2(b)(4).

[8] The Exchange also proposes to add the word ''index'' to the last sentence of IM–6060–2(b)(5) to clarify that the provision is referring to the expiration week of the index option class.

[9] The Exchange is making a distinction between initiating series and cloning series. The Exchange and the majority, if not all, of the other options exchanges that have adopted a STOS Program have a rule similar to the Exchange's that permits the listing of series that are opened by other exchanges. *See* IM–5050–6(b)(1) and IM–6090–2(b)(1). This filing is concerned with the ability to initiate series. For example, the strike price interval for ETF options is generally $1 or greater where the strike price is $200 or less. If an ETF class is selected to participate in the Short Term Option Program, the Exchange believes that the other exchanges would be permitted to initiate $0.50 strike price intervals where the strike price is between $151 and $200, but the Exchange would not be.

Programs that have been adopted by the various options exchanges, the Exchange proposes to revise its strike price intervals setting parameters so that it has the ability to initiate strike prices in the same manner (i.e., intervals) as CBOE, PHLX, Arca, MKT, MIAX, and ISE. Accordingly, the Exchange proposes to adopt rule text language substantially similar in all material respects to that adopted by the other exchanges, and in this way consolidate the two different approaches regarding strike price intervals for STOs.

In support of this proposal, the Exchange states that the principal reason for the proposed expansion is in response to market and customer demand to list actively traded products in more granular strike price intervals and to provide Participants [10] and their customers increased trading opportunities in the STOS Program, which is one of the most popular and quickly-expanding options expiration programs. The Exchange has observed increased demand for STO classes and/or series, particularly when market moving events such as significant market volatility, corporate events, or large market, sector, or individual issue price swings have occurred. There are substantial benefits to market participants in the ability to trade eligible option classes at more granular strike price intervals. The Exchange notes that the STOS Program has been well-received by market participants, in particular by retail investors. The Exchange believes that the current proposed revisions to the STOS Program will permit the Exchange to meet increased customer demand for more granular strike prices.

With regard to the impact of this proposal on system capacity, the Exchange has analyzed its capacity and represents that it and the Options Price Reporting Authority (''OPRA'') have the necessary systems capacity to handle any potential additional traffic associated with this current amendment to the STOS Program. The Exchange believes that its Participants will not have a capacity issue as a result of this proposal. The Exchange represents that it will monitor the trading volume associated with the additional options series listed as a result of this proposal and the effect (if any) of these additional series on market fragmentation and on the capacity of the Exchange's automated systems.

2. Statutory Basis

The Exchange believes that the proposal is consistent with the requirements of Section 6(b) of the Securities Exchange Act of 1934 (the ''Act''),[11] in general, and Section 6(b)(5) of the Act,[12] in particular, 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, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general to protect investors and the public interest. In particular, the Exchange believes that giving it the ability to initiate strike prices in $0.50 intervals for option classes that trade in one dollar increments in Related non-short Term Options and are in the STOS Program, as provided in the proposed rule text, is reasonable because it will benefit investors by providing them with the flexibility to more closely tailor their investment and hedging decisions. While the proposed rule change may generate additional quote traffic, the Exchange does not believe that any increased traffic will become unmanageable since the proposal remains limited to a fixed number of classes. The Exchange also believes that the proposed rule change will ensure competition because it will allow the Exchange to initiate series in the same strike intervals as other options exchanges, including CBOE, PHLX, Arca, MKT, MIAX and ISE.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act. The Exchangebelieves that the proposed rule change will in fact relieve any burden on, or otherwise promote, competition. In this regard and as indicated above, the Exchange notes that the rule change is being proposed as a competitive response to immediately effective filings recently submitted by CBOE, PHLX, Arca, MKT, MIAX and ISE.[13] The Exchange believes this proposed rule change is necessary to permit fair competition among the options exchanges with respect to STOS Programs.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

The Exchange has neither solicited nor received comments on the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing proposed rule change does not significantly affect the protection of investors or the public interest, does not impose any significant burden on competition, and, by its terms, does not become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, it has become effective pursuant to Section 19(b)(3)(A) of the Act [14] and Rule 19b–4(f)(6) thereunder.[15]

The Exchange has requested that the Commission waive the 30-day operative delay. The Commission believes that waiver of the 30-day operative delay will allow BOX to initiate strikes prices in more granular intervals for STOs in the same manner as other options exchanges. In sum, the proposed rule change presents no novel issues, and waiver will allow the Exchange to remain competitive with other exchanges. Therefore, the Commission designates the proposal operative upon filing.[16]

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule

[10] *See* Rule 100(40).

[11] 15 U.S.C. 78f(b).

[12] 15 U.S.C. 78f(b)(5).

[13] *See supra,* note 3.

[14] 15 U.S.C. 78s(b)(3)(A).

[15] 17 CFR 240.19b–4(f)(6). In addition, Rule 19b–4(f)(6)(iii) requires the Exchange to give the Commission written notice of the Exchange's intent to file the proposed rule change, along with a brief description and text of the proposed rule change, at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has satisfied this requirement.

[16] For purposes only of waiving the 30-day operative delay, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

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–BOX–2013–48 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–BOX–2013–48. 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–BOX–2013–48 and should be submitted on or before November 12, 2013.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[17]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2013–24660 Filed 10–21–13; 8:45 am]

BILLING CODE 8011–01–P

[17] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–70630; File No. SR–Phlx–2013–96]

Self-Regulatory Organizations; NASDAQ OMX PHLX LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Amend the Table of Contents of the Pricing Schedule

October 8, 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 September 27, 2013, NASDAQ OMX PHLX LLC (''Phlx'' or ''Exchange'') filed with the Securities and Exchange Commission (''SEC'' or ''Commission'') the proposed rule change as described in Items I, II, and III, below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of the Substance of the Proposed Rule Change

The Exchange proposes to amend the Table of Contents to its Pricing Schedule to refer to FLEX[3] transaction fees which were inadvertently not added to the Table of Contents at the time the fees were adopted.

The text of the proposed rule change is available on the Exchange's Web site at *http://nasdaqomxphlx.cchwallstreet.com/,* at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The purpose of the proposed rule change is to amend the Table of Contents to include a reference to FLEX transaction fees within the Pricing Schedule. The Exchange adopted new FLEX transaction fee pricing in Section IV, entitled ''Other Transaction Fees,'' Part B of the Pricing Schedule in a previous rule change and inadvertently did not amend the Table of Contents to reflect the addition of that pricing to Section IV.[4] The Exchange proposes to amend the Table of Contents to add the words ''FLEX Transaction Fees'' and also reletter Section IV, Part B, entitled ''Cancellation Fees,'' and Part C, entitled ''Options Regulatory Fee,'' as Parts C and D, respectively.

The Table of Contents allows members to readily locate pricing within the Pricing Schedule. The Pricing Schedule is located on the Exchange's Web page.[5] The Table of Contents contains hyperlinks which allow users to readily access the various portions of the Pricing Schedule with ease. By adding the words ''FLEX Transaction Fees'' to the Table of Contents, users will be able to click on this topic in the Table of Contents and be taken to that portion of the Pricing Schedule. The Exchange is not proposing any substantive amendments, but rather proposes to merely amend the contents of the Table of Contents.

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act[6] in general, and furthers the objectives of Section 6(b)(5) of the Act[7] in particular, in that it is 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, by providing market participants an easy format to readily locate FLEX transaction fees, which may be applicable to them. The Exchange believes that correcting the Table of Contents provides greater clarity to the

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b-4.

[3] The term ''FLEX option'' means a FLEX option contract that is traded subject to this Rule. Although FLEX options are generally subject to the rules in this section, to the extent that the provisions of this Rule are inconsistent with other applicable Exchange rules, this Rule takes precedence with respect to FLEX options. *See* Exchange Rule 1079.

[4] *See* Securities Exchange Release Act No. 69548 (May 9, 2013), 78 FR 28681 (May 15, 2013) (SR–Phlx–2013–49).

[5] *See http://nasdaqomxphlx.cchwallstreet.com.*

[6] 15 U.S.C. 78f(b).

[7] 15 U.S.C. 78f(b)(5).

Pricing Schedule as well as any easy means to access the FLEX transaction fees.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act as the amendment is non-substantive and merely serves to add a reference to the Table of Contents which was inadvertently not amended in a prior rule change.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were either solicited or received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Pursuant to Section 19(b)(3)(A) of the Act [8] and Rule 19b–4(f)(3) [9] thereunder, the Exchange has designated this proposal as one that is concerned solely with the administration of the self-regulatory organization, and therefore has become effective.

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–Phlx–2013–96 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–Phlx–2013–96. 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 such filing also will be available for inspection and copying at the principal offices 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–Phlx–2013–96, and should be submitted on or before November 12, 2013.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[10]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2013–24640 Filed 10–21–13; 8:45 am]

BILLING CODE 8011–01–P

[8] 15 U.S.C. 78s(b)(3)(A).

[9] 17 CFR 240.19b–4(f)(3).

[10] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–70590; File No. SR–CBOE–2013–092]

Self-Regulatory Organizations; Chicago Board Options Exchange, Incorporated; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change Relating to CBSX Appendix A

October 1, 2013.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the ''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on September 23, 2013, Chicago Board Options Exchange, Incorporated (''Exchange'' or ''CBOE'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend Appendix A in the CBOE Stock Exchange, LLC's (''CBSX'') Rules. The text of the proposed rule change is available on the Exchange's Web site (*http://www.cboe.com/AboutCBOE/CBOELegalRegulatoryHome.aspx*), at the Exchange's Office of the Secretary, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

By way of background, CBSX (CBOE's facility for trading non-option securities) rules are generally contained within Chapters 50 through 54 of the CBOE rulebook. Trading of non-option securities on CBSX is also subject to the rules in Chapters 1 through 29 to the same extent such rules apply to the trading of the products to which those rules apply, in some cases supplemented by the rules in Chapters 50 through 54, except for rules that have been replaced by rules in Chapters 50 through 54 and except where the context otherwise requires. Appendix A to Chapters 50 through 54 lists the rules in Chapters 1 through 29 that are applicable to trading on CBSX. Where appropriate, Appendix A also indicates that a rule in Chapter 1 through 29 has been supplemented by a rule in Chapter 50 through 54.[3]

In that regard, Appendix A of the CBSX rules currently references CBOE Rule 3.9, as supplemented by CBSX Rule 50.4. CBOE Rule 3.9(g) currently states, in relevant part, that any person applying pursuant to paragraph (a) of the rule to ''have an authorized trading function is required to have completed the Exchange's Trading Permit Holder Orientation Program and to have passed an Exchange Trading Permit Holder Qualification Exam.'' Because Appendix A of the CBSX rules contains a cross-reference to CBOE Rule 3.9 (as supplemented by CBSX Rule 50.4)[4], Rule 3.9 is applicable to CBSX Trading Permit Holder (''TPH'') applicants as well. The CBOE Registration Services Department historically, however, has not required this orientation or examination for CBSX TPH applicants that will not be engaging in options trading as both the orientation program and the examination referenced in paragraph (g) of Rule 3.9 are focused upon options trading on CBOE (not non-option securities).

As such, the Exchange is proposing to add text to the CBSX Appendix A to make clear that CBOE Rule 3.9(g) is not applicable to CBSX TPH applicants that will not engage in options trading on the Exchange. Specifically, the Exchange is proposing to add text to CBSX Appendix A to explicitly state the applicable subparagraphs of 3.9(g) that are applicable to CBSX TPH applicants. The Exchange believes this proposal is appropriate as the orientation program and examination referenced in CBOE 3.9(g) is focused on options trading. Thus, the Exchange believes it is appropriate to continue to administer the orientation and examination to CBOE TPH applicants but not to CBSX TPH applicants.

2. Statutory Basis

The Exchange believes the proposed rule change is consistent with the Securities Exchange Act of 1934 (the ''Act'') and the rules and regulations thereunder applicable to the Exchange and, in particular, the requirements of Section 6(b) of the Act.[5] Specifically, the Exchange believes the proposed rule change is consistent with the Section 6(b)(5)[6] requirements that the rules of an exchange be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest. Additionally, the Exchange believes the proposed rule change is consistent with the Section 6(b)(5)[7] requirement that the rules of an exchange not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

In particular, the Exchange believes that the proposed rule filing will more specifically state the requirements for CBSX applicants along with codify existing Exchange practices. The Exchange believes the proposed change is consistent with the Act in that it continues to require the options focused TPH Qualification Examination and associated orientation program for CBOE applicants applying to engage in options trading but not for CBSX applicants applying to the Exchange to engage in trading of non-option securities. In addition, the proposed filing is not unfairly discriminating because it will be applied to all similarly situated TPH applicants who are solely trading on CBSX.

B. Self-Regulatory Organization's Statement on Burden on Competition

CBOE 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. In particular, the Exchange does not believe that the proposed rule filing will place any burden on intramarket competition because it will be applied equally to similarly situated applicants that are applying to only engage in non-options trading on CBSX. The Exchange does not believe the proposed rule filing will place any burden on intermarket competition because it is merely codifying a current Exchange practice.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

The Exchange neither solicited nor received comments on the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing proposed rule does not: (i) Significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, the proposed rule change has become effective pursuant to Section 19(b)(3)(A) of the Act[8] and Rule 19b–4(f)(6) thereunder.

The Exchange has requested that the Commission waive the 30-day operative delay because the rule change would codify an existing Exchange practice and reduce confusion for associated persons of TPHs and regulators. The Commission designates the proposal operative upon filing because it will align CBSX's rules with its existing practice of not requiring CBSX TPH applicants to complete either the TPH orientation program or the TPH exam.[9]

At any time within 60 days of the filing of this proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the

[3] *See* Introduction to CBSX Rules, Chapters 50 through 54.

[4] CBSX Rule 50.4 relates to Trading Access to the CBSX System, and, thus, does not supplement the requirements specifically related to CBOE Rule 3.9(g).

[5] 15 U.S.C. 78f(b).

[6] 15 U.S.C. 78f(b)(5).

[7] *Id.*

[8] 15 U.S.C. 78s(b)(3)(A).

[9] For purposes only of waiving the 30-day operative delay, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

Commission takes such action, the Commission will institute proceedings to determine whether the proposed rule change should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–CBOE–2013–092 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–CBOE–2013–092. 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 such filing also will be available for inspection and copying at the principal office of the CBOE. 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–CBOE–2013–092 and should be submitted on or before November 12, 2013.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[10]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2013–24548 Filed 10–21–13; 8:45 am]

BILLING CODE 8011–01–P

[10] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–70623; File No. SR–BYX–2013–037]

Self-Regulatory Organizations; BATS Y-Exchange, Inc.; Notice of Filing and Immediate Effectiveness of a Rule Change To Add a Reference to Rule 10C–1 Under the Exchange Act in the Exchange's Rules Concerning Unlisted Trading Privileges

October 8, 2013.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the ''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on October 3, 2013, BATS Y-Exchange, Inc. (the ''Exchange'' or ''BYX'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of the Substance of the Proposed Rule Change

The Exchange filed a proposal add language to Rule 14.1, entitled ''Unlisted Trading Privileges,'' that will make clear that the Exchange will not list equity securities without first ensuring that its rules comply with Rule 10C–1 under the Act (''Rule 10C–1'').[3]

The text of the proposed rule change is available at the Exchange's Web site at *http://www.batstrading.com,* at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in Sections A, B, and C below, of the most significant parts of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange is proposing to add language to Rule 14.1, which will clarify the fact that the Exchange will not list equity securities without first ensuring that Exchange Rules comply with Rule 10C–1, as described below.[4]

On March 30, 2011, to implement Section 10C of the Act,[5] as added by Section 952 of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (''Dodd-Frank Act''),[6] the Commission proposed Rule 10C–1 under the Act,[7] which directs each national securities exchange to prohibit the listing of any equity security of any issuer, with certain exceptions, that does not comply with the rule's requirements regarding compensation committees of listed issuers and related requirements regarding compensation advisers. On June 20, 2012, the Commission adopted Rule 10C–1.[8] Rule 10C–1 obligates the Exchange to establish listing standards that require each member of a listed issuer's compensation committee to be a member of the issuer's board and to be independent, as well as establish certain factors that an issuer must consider when evaluating the independence of a director.[9] Rule 10C–1 also requires the Exchange to establish standards for evaluating the independence of a compensation consultant, legal counsel, or other adviser (''Compensation Consultant'') and requires a Company to provide funding to a compensation committee to retain such Compensation Consultant.[10]

The Exchange does not currently list any securities as a primary listing market. Consistent with this fact, Exchange Rule 14.1 currently states that

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 17 CFR 240.10C–1.

[4] 17 CFR 240.10C–1.

[5] 15 U.S.C. 78j–3.

[6] Public Law 111–203, 124 Stat. 1900 (2010).

[7] *See* Securities Act Release No. 9199, Securities Exchange Act Release No. 64149 (March 30, 2011), 76 FR 18966 (April 6, 2011) (''Rule 10C–1 Proposing Release'').

[8] *See* Securities Act Release No. 9330, Securities Exchange Act Release No. 67220 (June 20, 2012), 77 FR 38422 (June 27, 2012) (''Rule 10C–1 Adopting Release'').

[9] 17 CFR 240.10C–1.

[10] *Id.*

all securities traded on the Exchange are traded pursuant to unlisted trading privileges and that the Exchange will not list any securities before first filing and obtaining Commission approval of rules that incorporate qualitative listing criteria and comply with Rule 10A–3 under the Act.[11] To make clear the Exchange's intention to comply with the requirements of Rule 10C–1, the Exchange proposes to amend Rule 14.1 to state that no equity securities will be listed on the Exchange until Exchange Rules have been amended to also comply with Rule 10C–1. Because the Exchange does not presently list any equity securities, the Exchange does not believe it is necessary to make any further amendments in response Section 952 of the Dodd-Frank Act at this time.

2. Statutory Basis

The Exchange believes that its proposal is consistent with the requirements of the Act and the rules and regulations thereunder that are applicable to a national securities exchange, and, in particular, with the requirements of Section 6(b) of the Act.[12] Specifically, the proposal is consistent with Section 6(b)(5) of the Act,[13] which requires exchange rules to promote just and equitable principles of trade, remove impediments to, and perfect the mechanism of, a free and open market and a national market system, and, in general, protect investors and the public interest. The Exchange believes the proposed rule change fulfills these requirements because it will add language to Rule 14.1 that clarifies the fact that the Exchange will not list equity securities without first ensuring that its rules comply with Rule 10C–1, which implements Section 10C of the Act.[14]

B. Self-Regulatory Organization's Statement on Burden on Competition

BYX believes the proposal is consistent with Section 6(b)(8) of the Act[15] in that it does not impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. The Exchange notes that the proposed rule change will merely clarify the fact that Exchange Rules must comply with Rule 10C–1 under the Act before any listing of equity securities on the Exchange becomes effective. Thus, the rule change will not impose any burden on intermarket or intramarket competition.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

The Exchange has neither solicited nor received written comments on the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing proposed rule change does not: (i) Significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, it has become effective pursuant to Section 19(b)(3)(A) of the Act[16] and Rule 19b–4(f)(6)(iii) thereunder.[17]

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–BYX–2013–037 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–BYX–2013–037. 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 20549–1090, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of such 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–BYX–2013–037, and should be submitted on or before November 12, 2013

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[18]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2013–24632 Filed 10–21–13; 8:45 am]

BILLING CODE 8011–01–P

[11] 17 CFR 240.10A–3.

[12] 15 U.S.C. 78f(b).

[13] 15 U.S.C. 78f(b)(5).

[14] 15 U.S.C. 78j–3.

[15] 15 U.S.C. 78f(b)(8).

[16] 15 U.S.C. 78s(b)(3)(A).

[17] 17 CFR 240.19b–4(f)(6).

[18] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–70669; File No. SR–EDGX–2013–38]

Self-Regulatory Organizations; EDGX Exchange, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Relating to Amendments to the EDGX Exchange, Inc. Fee Schedule

October 11, 2013.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the ''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on October 2, 2013, EDGX Exchange, Inc. (the ''Exchange'' or ''EDGX'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

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 its fees and rebates applicable to Members [3] of the Exchange pursuant to EDGX Rule 15.1(a) and (c) (''Fee Schedule'') to add orders yielding Flag AA to the calculation of the average daily trading (''ADV'') threshold required to meet the MidPoint Match Volume Tier. The text of the proposed rule change is available on the Exchange's Internet Web site at *www.directedge.com,* at the Exchange's principal office, and at the Public Reference Room of the Commission.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The self-regulatory organization has prepared summaries, set forth in sections A, B and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and the Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend its Fee Schedule to add orders yielding Flag AA to the calculation of the ADV threshold required to meet the MidPoint Match Volume Tier. Footnote 3 of the Fee Schedule currently provides that Members may qualify for the MidPoint Match Volume Tier and not be charged a fee for orders that yield Flag MM on EDGX if they add and/or remove an ADV of at least 2,500,000 shares on a daily basis, measured monthly, on EDGX, yielding flags MM (adds liquidity to MidPoint Match using the Midpoint Match order type [4]) and/or MT (removes liquidity from MidPoint Match using MidPoint Match order type). The Exchange proposes to add orders yielding Flag AA (MidPoint Match Cross (same MPID)) to the calculation of the ADV threshold required to meet the MidPoint Match Volume Tier. The Exchange appends Flag AA to buy and sell MidPoint Match Orders that inadvertently match against each other and share the same MPID (Member shares both sides of the trade). MidPoint Match Orders yielding Flag AA would continue to be charged a rate of $0.0012 per share. The remainder of the criteria required to meet the tier as well as the rate offered by the tier would remain unchanged.

The Exchange proposes to implement these amendments to its Fee Schedule on October 2, 2013.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with the objectives of Section 6 of the Act,[5] in general, and furthers the objectives of Section 6(b)(4),[6] in particular, as it is designed to provide for the equitable allocation of reasonable dues, fees and other charges among its Members and other persons using its facilities.

The Exchange believes that adding orders yielding Flag AA to the calculation of the ADV threshold required to meet the MidPoint Match Volume Tier represents an equitable allocation of reasonable dues, fees, and other charges because adding orders yielding Flag AA, like Flags MM and MT, are designed to encourage Members to add liquidity at the midpoint of the national best bid or offer (''NBBO'') to the EDGX Book [7] each month. The Exchange appends Flag AA to buy and sell MidPoint Match Orders that inadvertently match against each other and share the same MPID (Member shares both sides of the trade). MidPoint Match Orders yielding Flag AA would continue to be charged a rate of $0.0012 per share and only the liquidity added at the midpoint of the NBBO (Flag MM) in this tier is not charged a fee. Both added and removed liquidity in Flags AA, MM and MT would be counted towards achieving the tier's ADV threshold. The Exchange believes that Members utilizing MidPoint Match Orders that add liquidity at the midpoint of the NBBO may receive the benefit of price improvement, and including orders that yield Flag AA to the calculation of the ADV threshold of the MidPoint Match Volume Tier would be a reasonable means by which to further encourage the use of such orders. In addition, the Exchange believes that by encouraging the use of MidPoint Match Orders, Members seeking price improvement would be more motivated to direct their orders to EDGX because they would have a heightened expectation of the availability of liquidity at the midpoint of the NBBO. In addition, the Exchange also believes that the proposed amendment to the MidPoint Match Volume Tier is non-discriminatory because it applies uniformly to all Members.

B. Self-Regulatory Organization's Statement on Burden on Competition

These proposed rule changes do not impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. The Exchange does not believe that any of these changes represent a significant departure from previous pricing offered by the Exchange or pricing offered by the Exchange's competitors. Additionally, Members may opt to disfavor EDGX's pricing if they believe that alternatives offer them better value. Accordingly, the Exchange does not believe that the proposed changes will impair the ability of Members or competing venues to maintain their competitive standing in the financial markets.

The Exchange believes that adding orders yielding Flag AA to the calculation of the ADV threshold required to meet the MidPoint Match Volume Tier would increase intermarket competition because it would lead to more competition for orders that seek liquidity at the midpoint of the NBBO. The Exchange believes that its proposal would neither increase nor decrease intramarket competition because the MidPoint Match Volume Tier would continue to apply uniformly to all Members and the ability of some Members to meet the tier would only benefit other Members by contributing to increased liquidity at the midpoint of the NBBO and better market quality at the Exchange.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

The Exchange has not solicited, and does not intend to solicit, comments on this proposed rule change. The

[3] The term ''Member'' is defined as ''any registered broker or dealer, or any person associated with a registered broker or dealer, that has been admitted to membership in the Exchange. A Member will have the status of a ''member'' of the Exchange as that term is defined in Section 3(a)(3) of the Act.'' *See* Exchange Rule 1.5(n).

[4] As defined in Exchange Rule 11.5(c)(7), the Midpoint Match Order is an order with an instruction to execute it at the midpoint of the NBBO.

[5] 15 U.S.C. 78f.

[6] 15 U.S.C. 78f(b)(4).

[7] The ''EDGX Book'' is defined as ''the System's electronic file of orders.'' *See* Exchange Rule 1.5(d).

Exchange has not received any unsolicited written comments from Members or other interested parties.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A) of the Act [8] and Rule 19b–4(f)(2) [9] thereunder. 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.

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–EDGX–2013–38 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–EDGX–2013–38. 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–EDGX–2013–38 and should be submitted on or before November 12, 2013.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[10]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2013–24661 Filed 10–21–13; 8:45 am]

BILLING CODE 8011–01–P

[8] 15 U.S.C. 78s(b)(3)(A).

[9] 17 CFR 240.19b–4 (f)(2).

[10] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–70617; File No. SR–MSRB–2013–06]

Self-Regulatory Organizations; Municipal Securities Rulemaking Board; Notice of Withdrawal of Proposed Rule Change to Amend MSRB Rule A–3, on Membership on the Board, To Modify the Standard of Independence for Public Board Members

October 7, 2013.

On July 3, 2013, the Municipal Securities Rulemaking Board (''MSRB'') 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 consisting of amendments to MSRB Rule A–3 to modify the standard of independence for public Board members. The proposed rule change was published for comment in the **Federal Register** on July 24, 2013.[3] The Commission received nine comment letters on the proposal.[4] On September 6, 2013, pursuant to Section 19(b)(2) of the Act,[5] the MSRB granted an extension of time for the Commission to act on the filing until October 22, 2013. The MSRB submitted a response to comments on September 6, 2013.[6] On October 4, 2013, the Exchange withdrew the proposed rule change (SR–MSRB–2013–06).

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[7]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2013–24629 Filed 10–21–13; 8:45 am]

BILLING CODE 8011–01–P

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] Securities Exchange Act Release No. 70004 (July 18, 2013), 78 FR 44607.

[4] *See* letters to Elizabeth M. Murphy, Secretary, Commission, from Jeanine Rodgers Caruso, CIPFA, President, National Association of Independent Public Finance Advisors, dated August 14, 2013; Barbara Roper, Director of Investor Protection, Consumer Federation of America, dated August 14, 2013; Kerry Korpi, Director of Research and Collective Bargaining, American Federation of State, County and Municipal Employees, dated August 14, 2013; Dustin T. McDonald, Director, Federal Liaison Center, Government Finance Officers Association, dated August 14, 2013; Americans for Financial Reform, dated August 14, 2013; Lisa S. Good, Executive Director, National Federation of Municipal Analysts, dated August 26, 2013; Gerald Gold, dated September 4, 2013; Jeanine Rodgers Caruso, CIPFA, President, National Association of Independent Public Finance Advisors, dated September 12, 2013; and Dorothy Donohue, Deputy General Counsel—Securities Regulation, Investment Company Institute, dated September 18, 2013.

[5] 15 U.S.C. 78s(b)(2).

[6] *See* letter to Elizabeth M. Murphy, Secretary, Commission, from Gary L. Goldsholle, General Counsel, MSRB, dated September 6, 2013.

[7] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–70673; File No. SR–Phlx–2013–99]

Self-Regulatory Organizations; NASDAQ OMX PHLX LLC; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change Clarifying Rule 1014 Regarding Daily Quoting Obligations

October 11, 2013.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] and Rule 19b–4 [2] thereunder, notice is hereby given that on October 2, 2013, NASDAQ OMX PHLX LLC (''Phlx'' or ''Exchange'') filed with the Securities and Exchange Commission (''SEC'' or ''Commission'') the proposed rule change as described in Items I, II, and III, below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange is filing with the Commission a proposal to clarify that Rule 1014 (Obligations and Restrictions

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

Applicable to Specialists and Registered Options Traders) quoting obligations remain in effect on a daily basis even though compliance with such obligations may be determined on a monthly basis.

The text of the proposed rule change is available on the Exchange's Web site at *http://nasdaqomxphlx.cchwallstreet.com,* at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The purpose of this proposed rule change is to clarify that Rule 1014 quoting obligations remain in effect on a daily basis even though compliance with such obligations may be determined on a monthly basis.

Background

Market makers on the Exchange include Registered Options Traders (''ROTs''),[3] Streaming Quote Traders (''SQTs''),[4] Remote Streaming Quote Traders (''RSQTs''),[5] specialists,[6] and Remote Specialists.[7] As set forth in Rule 1014, market makers have an obligation to make two-sided markets in options products listed on the Exchange. This rule change proposal does not negate, or attempt to change, any of the existing daily market making obligations established in Rule 1014. These Rule 1014 market making obligations continue in force. This proposal only clarifies that Rule 1014 quoting obligations remain in effect on a daily basis. This has been the case prior to the recent Exchange proposal establishing that compliance with quoting obligations may be determined on a monthly basis,[8] and remains so without change.

The daily market making obligations of market makers on the Exchange are set forth in Rule 1014. In particular, subsection (b)(ii)(D)(1) of Rule 1014 states that SQTs and RSQTs (when they do not function as Remote Specialists) shall be responsible to quote two-sided markets in not less than 60% of the series in which such SQTs or RSQTs are assigned; provided that, on any given day, a DRSQT or DSQT shall be responsible to quote two-sided markets in the lesser of 99% of the series listed on the Exchange or 100% of the series listed on the Exchange minus one call-put pair. The sub-section states also that whenever a DSQT or DRSQT enters a quotation in an option in which such DSQT or DRSQT is assigned, such DSQT or DRSQT must maintain until the close of that trading day quotations for the lesser of 99% of the series of the option listed on the Exchange or 100% of the series of the option listed on the Exchange minus one call-put pair. To satisfy the applicable requirements of this subparagraph (D)(1) with respect to quoting a series, an SQT, RSQT, DSQT, or DRSQT must quote such series 90% of the trading day (as a percentage of the total number of minutes in such trading day) or such higher percentage as the Exchange may announce in advance. Subsection (b)(ii)(D)(2) of Rule 1014 states that a specialist (including the RSQT functioning as a Remote Specialist in particular options) shall be responsible to quote two-sided markets in the lesser of 99% of the series or 100% of the series minus one call-put pair in each option in which such specialist is assigned. To satisfy the requirement of subsection (b)(ii)(D)(2) with respect to quoting a series, the specialist must quote such series 90% of the trading day (as a percentage of the total number of minutes in such trading day) or such higher percentage as the Exchange may announce in advance.[9]

As discussed, subsections (b)(ii)(D)(1) and (b)(ii)(D)(2) of Rule 1014 currently state that compliance with quoting obligations may be determined on a monthly basis. To make it clear that daily quoting obligations remain, however, the Exchange is adding language to these subsections to state that determining compliance with the continuous quoting requirement on a monthly basis does not relieve market makers of their obligation to provide continuous two-sided quotes on a daily basis, nor will it prohibit the Exchange from taking disciplinary action against market makers for failing to meet the continuous quoting obligation each trading day. Compliance on a monthly basis allows the Exchange to review the market makers' daily compliance in the aggregate and determine the appropriate disciplinary action for single or multiple failures to comply with the continuous quoting requirement during the month period.

This proposal clarifies that daily quoting requirements for market makers per Rule 1014 as specified remain the same and are not changed.

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b)

[3] An ROT is a regular member or a foreign currency options participant of the Exchange located on the trading floor who has received permission from the Exchange to trade in options for his own account. *See* Rule 1014(b)(i).

[4] An SQT is an ROT who has received permission from the Exchange to generate and submit option quotations electronically in options to which such SQT is assigned. An SQT may only submit such quotations while such SQT is physically present on the floor of the Exchange. *See* Rule 1014(b)(ii)(A).

[5] An RSQT is an ROT that is a member or member organization with no physical trading floor presence who has received permission from the Exchange to generate and submit option quotations electronically in options to which such RSQT has been assigned. An RSQT may only submit such quotations electronically from off the floor of the Exchange. *See* Rule 1014(b)(ii)(B).

Rule 1014 also discusses other market makers including Directed SQTs and Directed RSQTs, which receive Directed Orders as defined in Rule 1080(l)(i)(A). Specialists may likewise receive Directed Orders.

[6] A member may not act as an options specialist (to include a Remote Specialist as defined in Rule 1020(a)(ii)) in any option unless such member is registered as an options specialist in such option by the Exchange pursuant to Rule 501 and such registration may be revoked or suspended at any time by the Exchange. *See* Rule 1020(a)(i).

[7] A Remote Specialist is an options specialist in one or more classes that does not have a physical presence on an Exchange floor and is approved by the Exchange pursuant to Rule 501. *See* Rule 1020(a)(ii).

[8] *See* Securities Exchange Act Release No. 67700 (August 21, 2012) 77 FR 51835 (August 27, 2012) (SR–Phlx–2012–108) (notice of filing and immediate effectiveness) (the ''monthly compliance review proposal''). In the monthly compliance review proposal, the Exchange proposed in sub-sections (b)(ii)(D)(1) and (b)(ii)(D)(2) of Rule 1014 that compliance with the quoting obligation will be determined on a monthly basis. This puts the Exchange and its members on an equal footing with other options markets such as NYSE Arca (Rule 6.37B) and NYSE MKT (Rule 925.1NY) in terms of monthly compliance with the noted quoting obligations.

[9] For all market making obligations, *see* Rule 1014(b)(ii)(D).

of the Act [10] in general, and furthers the objectives of Section 6(b)(5) of the Act [11] in particular, in that it is 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. The Exchange would do this though a proposed rule change clarifying that daily quoting requirements pursuant to Rule 1014 are not changed by the monthly compliance review proposal, and remain the same, to the benefit of market participants.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act. The Exchange does not believe that this proposal should have any competitive impact because the Exchange's rules as noted are similar to those of other options exchanges.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were either solicited or received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The Exchange believes that the foregoing proposed rule change may take effect upon filing with the Commission pursuant to Section 19(b)(3)(A) [12] of the Act and Rule 19b–4(f)(6)(iii) thereunder [13] because the foregoing proposed rule change does not: (i) Significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate.

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is: (i) Necessary or appropriate in the public interest; (ii) for the protection of investors; or (iii) otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–Phlx–2013–99 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–Phlx–2013–99. 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 inspection and copying 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–Phlx–2013–99 and should be submitted on or before November 12, 2013.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[14]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2013–24664 Filed 10–21–13; 8:45 am]

BILLING CODE 8011–01–P

[10] 15 U.S.C. 78f(b).

[11] 15 U.S.C. 78f(b)(5).

[12] 15 U.S.C. 78s(b)(3)(A).

[13] 17 CFR 240.19b–4(f)(6)(iii). In addition, Rule 19b–4(f)(6) requires a self-regulatory organization to give the Commission written notice of its intent to file the proposed rule change at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has satisfied this requirement.

[14] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–70589; File No. SR–NSX–2013–19]

Self-Regulatory Organizations; National Stock Exchange, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Amend Rule 11.19 To Extend Pilot Program Regarding Clearly Erroneous Executions

October 1, 2013.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the ''Act'') [1] and Rule 19b–4 thereunder,[2] notice is hereby given that on September 30, 2013, National Stock Exchange, Inc. (''NSX®'' or the ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change, as described in Items I and II below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comment 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 extend a pilot program related to Rule 11.19, entitled ''Clearly Erroneous Executions.'' The Exchange also proposes to remove certain references to individual stock trading pauses contained in Rule 11.19(c)(4) and to amend to Rule 11.19 to make technical and non-substantive changes in the rule text. The Exchange has designated this proposal as non-controversial and provided the Commission with the notice required by Rule 19b-4(f)(6)(iii) under the Act.[3]

The text of the proposed rule change is available on the Exchange's Web site at *http://www.nsx.com,* at the principal office of the Exchange, and at the Commission's Public Reference Room.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 17 CFR 240.19b–4(f)(6)(iii).

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The purpose of this filing is to extend the effectiveness of the Exchange's current rule applicable to Clearly Erroneous Executions and to remove references to individual stock trading pauses described in Rule 11.19(c)(4). Portions of Rule 11.19, explained in further detail below, are currently operating as a pilot program set to expire on September 30, 2013.[4] The Exchange proposes to extend the pilot program to April 8, 2014.

On September 10, 2010, the Commission approved, on a pilot basis, changes to NSX Rule 11.19 to provide for uniform treatment: (1) Of clearly erroneous execution reviews in multi-stock events involving twenty or more securities; and (2) in the event transactions occur that result in the issuance of an individual stock trading pause by the primary listing market and subsequent transactions that occur before the trading pause is in effect on the Exchange.[5] The Exchange also adopted changes to Rule 11.19 that reduced the ability of the Exchange to deviate from the objective standards set forth in Rule 11.19[6] and, in 2013, adopted a provision designed to address the operation of the Plan to Address Extraordinary Market Volatility Pursuant to Rule 608 of Regulation NMS under the Act (the ''Limit Up-Limit Down Plan'' or the ''Plan'').[7] The Exchange believes the benefits to market participants from the more objective clearly erroneous executions rule should continue on a pilot basis through April 8, 2014, which is one year following the commencement of operations of the Plan. The Exchange believes that continuing the pilot during this time will protect against any unanticipated consequences. Thus, the Exchange believes that the protections of the Clearly Erroneous Rule should continue while the industry gains further experience operating the Limit Up-Limit Down Plan.

The Exchange also proposes to eliminate all references in Rule 11.19 to individual stock trading pauses issued by a primary listing market. Specifically, Rule 11.19(c)(4) provides specific rules to follow with respect to review of an execution as potentially clearly erroneous when there was an individual stock trading pause issued for that security and the security is included in the S&P 500® Index, the Russell 1000® Index, or a pilot list of Exchange Traded Products (''Circuit Breaker Securities''). The stock trading pauses described in Rule 11.19(c)(4) are being phased out as securities become subject to the Plan pursuant to a phased implementation schedule. The Plan is already operational with respect to all Circuit Breaker Securities and thus the Exchange believes that all references to individual stock trading pauses should be removed, including all cross-references to Rule 11.19(c)(4) contained in other portions of Rule 11.19.[8]

Finally, the Exchange is proposing amendments to Rule 11.19 to make technical and non-substantive changes in the rule text. These changes include removing incorrect references in the first paragraph of the rule to paragraph (i) when the correct reference should be to paragraph (j), and correcting certain other language and punctuation issues.

2. Statutory Basis

The Exchange believes that its proposal is consistent with the requirements of the Act and the rules and regulations thereunder that are applicable to a national securities exchange and, in particular, with the requirements of Section 6(b) of the Act.[9] In particular, the proposal is consistent with Section 6(b)(5) of the Act,[10] because it would promote just and equitable principles of trade and remove impediments to, and perfect the mechanism of, a free and open market and a national market system. The Exchange believes that the pilot program promotes just and equitable principles of trade in that it promotes transparency and uniformity across markets concerning review of transactions as clearly erroneous. More specifically, the Exchange believes that the extension of the pilot would help assure that the determination of whether a clearly erroneous trade has occurred will be based on clear and objective criteria, and that the resolution of the incident will occur promptly through a transparent process. The proposed rule change would also help assure consistent results in handling erroneous trades across the U.S. markets, thus furthering fair and orderly markets, the protection of investors and the public interest. Although the Plan will become fully operational during the same time period as the proposed extended pilot, the Exchange believes that maintaining the pilot will help to protect against unanticipated consequences. To that end, the extension will allow the Exchange to determine whether Rule 11.19 is necessary once the Plan is fully operational and, if so, whether improvements can be made. The elimination of references to individual stock trading pauses will help to avoid confusion among market participants, which is consistent with the protection of investors and the public interest and therefore consistent with the Act. As described above, individual stock trading pauses have been replaced by the Plan with respect to all Circuit Breaker Securities.

With respect to the technical, non-substantive changes to the text of Rule 11.19, the Exchange believes that these are consistent with Section 6(b)(5) of the Act in that they correct certain incorrect references to other section of the rule text and other language and punctuation items, thereby enhancing the clarity of Exchange rules, which is consistent with promoting just and equitable principles of trade and the protection of investors and the public interest.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change implicates any competitive issues. To the contrary, the

[4] *See* Securities Exchange Act Release No. 68803 (February 1, 2013); 78 FR 9078 (February 7, 2013); SR–NSX–2013–06.

[5] *See* Securities Exchange Act Release No. 62886 (September 10, 2010); 75 FR 56613 (September 16, 2010); SR–NSX–2010–06 [sic].

[6] *Id.*

[7] *See* Securities Exchange Act Release No. 69087 (March 14, 2013), 78 FR 16325 (March 14, 2013) [sic]; SR–NSX–2013–09 [sic]; Securities Exchange Act Release No. 67091 (May 31, 2012), 77 FR 33498 (June 6, 2012); SR–NSX–2011–11 [sic] (May 31, 2012) [sic]; *see also* NSX Rule 11.19(j).

[8] The Exchange notes that certain Exchange Traded Products (''ETPs'') are not yet subject to the Plan. Because such ETPs are not on the pilot list of securities, such ETPs are not subject to Rule 11.19(c)(4). *See* Securities Exchange Act Release No. 65114 (August 11, 2011); 76 FR 51439 (August 18, 2011); SR–NSX–2011–10. The proposed rule change does not change the status quo with respect to such ETPs. As amended, all securities, including ETPs not subject to the Plan, will continue to be subject to Rule 11.19(c)(1) through (3).

[9] 15 U.S.C. 78f(b).

[10] 15 U.S.C. 78f(b)(5).

Exchange believes that the Financial Industry Regulatory Authority, Inc. (''FINRA'') and other national securities exchanges are also filing similar proposals, and thus, that the proposal will help to ensure consistent rules across market centers.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

Written comments on the proposed rule change were neither solicited nor received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the proposed rule change does not (i) significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate if consistent with the protection of investors and the public interest, the proposed rule change has become effective pursuant to Section 19(b)(3)(A) of the Act [11] and Rule 19b–4(f)(6)(iii) thereunder.[12]

The Exchange has asked the Commission to waive the 30-day operative delay so that the proposal may become operative immediately upon filing. The Commission believes that waiving the 30-day operative delay is consistent with the protection of investors and the public interest, as it will allow the pilot program to continue uninterrupted, thereby avoiding investor confusion that could result from a temporary interruption in the pilot program. For this reason, the Commission designates the proposed rule change to be operative upon filing.[13]

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 No. SR–NSX–2013–19 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 No. SR–NSX–2013–19. 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 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 such 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 No. SR–NSX–2013–19 and should be submitted on or before November 12, 2013.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[14]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2013–24547 Filed 10–21–13; 8:45 am]

BILLING CODE 8011–01–P

[11] 15 U.S.C. 78s(b)(3)(A).

[12] 17 CFR 240.19b–4(f)(6)(iii). As required under Rule 19b-4(f)(6)(iii), the Exchange provided the Commission with written notice of its intent to file the proposed rule change, along with a brief description and the 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.

[13] 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).

[14] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–70613; File No. SR–FINRA–2013–036]

Self-Regulatory Organizations; Financial Industry Regulatory Authority, Inc.; Notice of Designation of a Longer Period for Commission Action on a Proposed Rule Change Relating to Wash Sale Transactions and FINRA Rule 5210 (Publication of Transactions and Quotations)

October 4, 2013.

I. Introduction

On August 15, 2013, Financial Industry Regulatory Authority, Inc. (''FINRA'') filed with the Securities and Exchange Commission (''Commission''), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'') [1] and Rule 19b–4 thereunder,[2] a proposed rule change to amend FINRA Rule 5210. The proposed rule change was published for comment in the **Federal Register** on September 4, 2013.[3] The Commission received five comments on the proposal.[4]

Section 19(b)(2) of the Act [5] provides that within 45 days of the publication of notice of the filing of a proposed rule change, or within such longer period up to 90 days as the Commission may designate if it finds such longer period to be appropriate and publishes its reasons for so finding or as to which the self-regulatory organization consents,

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 70276 (August 28, 2013), 78 FR 54502 (''Notice'').

[4] *See* letter from Anonymous to Elizabeth M. Murphy, Secretary, Commission, dated September 9, 2013; letter from William A. Jacobson, Clinical Professor of Law, and Director, Cornell Securities Law Clinic, and Jimin Lee, Cornell University Law School, to Elizabeth M. Murphy, Secretary, Commission, dated September 25, 2013; letter from Stuart J. Kaswell, Executive Vice President, Managing Director and General Counsel, Managed Funds Association, to Elizabeth M. Murphy, Secretary, Commission, dated September 25, 2013; letter from Manisha Kimmel, Executive Director, Financial Industry Forum, to Elizabeth M. Murphy, Secretary, Commission, dated September 25, 2013; and letter from Theodore R. Lazo, Managing Director and Associate General Counsel, SIFMA, to Elizabeth M. Murphy, Secretary, Commission, dated October 4, 2013.

[5] 15 U.S.C. 78s(b)(2).

the Commission shall either approve the proposed rule change, disapprove the proposed rule change, or institute proceedings to determine whether the proposed rule change should be disapproved. The 45th day for this filing is October 19, 2013.

The Commission is hereby extending the 45-day period for Commission action on the proposed rule change. The Commission has determined that it is appropriate to designate a longer period within which to take action on the proposed rule change. In particular, the extension of time will ensure that the Commission has sufficient time to consider and take action on FINRA's proposal in light of, among other things, the comments received on the proposal.

Accordingly, pursuant to Section 19(b)(2)(A)(ii)(I) of the Act [6] and for the reasons stated above, the Commission designates December 3, 2013, as the date by which the Commission should either approve or disapprove, or institute proceedings to determine whether to disapprove, the proposed rule change File No. SR–FINRA–2013–036.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[7]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2013–24569 Filed 10–21–13; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–70644; File No. SR–Topaz–2013–06]

Self-Regulatory Organizations; Topaz Exchange, LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Related to Market Maker Risk Parameters

October 9, 2013.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the ''Act''),[1] and Rule 19b-4 thereunder,[2] notice is hereby given that on September 30, 2013, the Topaz Exchange, LLC (d/b/a ISE Gemini) (the ''Exchange'' or ''Topaz'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I and II below, which items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes changes to mitigate market maker risk by requiring market makers to enter values in the Exchange-provided risk parameters.

The text of the proposed rule change is available on the Exchange's Internet Web site at *http://www.ise.com,* at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The self-regulatory organization has prepared summaries, set forth in Sections A, B and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, Proposed Rule Change

1. Purpose

Pursuant to Topaz Rule 804, the Exchange currently provides functionality that will automatically remove a market maker's quotes in all series of an options class when certain parameter settings are triggered. Specifically, there are four parameters that can be set by market makers on a class-by-class basis. These parameters are available for market maker quotes in single options series. Market makers establish a time frame during which the system calculates: (1) the number of contracts executed by the market maker in an options class; (2) the percentage of the total size of the market maker's quotes in the class that has been executed; (3) the absolute value of the net between contracts bought and contracts sold in an options class; and (4) the absolute value of the net between (a) calls purchased plus puts sold, and (b) calls sold plus puts purchased. The market maker establishes limits for each of these four parameters, and when the limits are exceeded within the prescribed time frame, the market makers quotes are removed.[3]

The purpose of this functionality is to allow market makers to provide liquidity across potentially hundreds of options series without being at risk of executing the full cumulative size of all such quotes before being given adequate opportunity to adjust their quotes. For example, if a market maker can enter quotes with a size of 20 contracts in 150 series of an options class, its total potential exposure is 3000 contracts in the options class. To mitigate the risk of executing all 3000 contracts without evaluating its positions, the market maker risk functionality will automatically remove its quotes in all series of the options class after it has executed a specified number of contracts (*e.g.,* 100) in series of that options class during a specified time period (*e.g.,* 5 seconds).

To assure that all quotations are firm for their full size, the parameter calculations occur after an execution against a market maker's quote takes place. For example, if a market maker has set a parameter of 100 contracts during a 5 second interval for an options class, and has executed a total of 95 contracts in the options class within the previous 3 seconds, a quote in a series of that class with a size of 20 contracts continues to be firm for all 20 contracts. In this example, an incoming order could execute all 20 contracts of the quote, and following the execution, the total size parameter would add 20 contracts to the running total of 95. Since the total size executed within the 5 second time frame exceeds the 100 contracts established by the market maker for the options class, all of the market maker's quotes in the options class would be removed. The market maker would then enter new quotes in the class.

Use of these risk management tools is voluntary under the rules. Similarly, from a technical perspective, market makers currently do not need to enter

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[6] 15 U.S.C. 78s(b)(2)(A)(ii)(I).

[7] 17 CFR 200.30–3(a)(31).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b-4.

[3] The Exchange is proposing certain non-substantive changes to the text of Rule 804 for clarity. The changes shorten the first sentence in Rule 804 by deleting ''if the market maker trades, in the aggregate across all series of an options class during a specified time period'' and to delete ''(established by the market maker), within a time frame specified by the market maker'' as the text might be confusing in its current form and is redundant with other text within the Rule. To assure clarity, the Exchange also proposes to specify that the first parameter is a number of ''total'' contracts ''in the class,'' and to specify that the fourth parameter is a net value based on puts and calls purchased and sold ''in the class.'' Finally, the Exchange proposes to use a uniform construction of ''the specified . . .'' for each of the four parameters. The Exchange is not proposing to alter the operation of the functionality, other than to make use of the parameters mandatory.

any values into the applicable fields, and thus effectively can choose not to use these tools. The Exchange proposes to amend the rule to make it mandatory for market makers to enter values into all four of the quotation risk management parameters for all options classes in which it enters quotes. The purpose of the rule change is to prevent market makers from inadvertently entering quotes without risk-management parameters. In this respect, the Exchange notes that all Topaz market makers currently use the parameters when entering quotes.[4] However, it is possible that a market maker could inadvertently enter quotes without populating one or more of the risk parameters, resulting in the member being exposed to much more risk than it intended. Accordingly, at the request of Topaz market makers, the Exchange proposes to modify the trading system to reject quotes if there are any missing risk management values for the options class.

While entering values into the quotation risk parameters will be mandatory to prevent an inadvertent exposure to risk, the Exchange notes that market makers who prefer to use their own risk-management systems can enter values that assure the Exchange-provided parameters will not be triggered.[5] Accordingly, the proposal does not require members to manage their risk using the Exchange-provided tools.

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Securities Exchange Act of 1934 (the ''Act'')[6] in general, and furthers the objectives of Section 6(b)(5) of the Act[7] in particular, in that it is designed to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism for a free and open market and a national market system, and, in general, to protect investors and the public interest.

The Exchange believes that requiring market makers to enter values into the risk parameters provided by the Exchange will not be unreasonably burdensome, as all Topaz market makers currently utilize the functionality. Moreover, the Exchange is proposing this rule change at the request of its market makers to reduce their risk of inadvertently entering quotes without populating the risk parameters. As discussed above, the Exchange will be modifying the trading system to automatically reject quotations unless the parameters are populated with values, which will protect market makers from inadvertent exposure to excessive risk. Reducing such risk will enable market makers to enter quotations with larger size, which in turn will benefit investor through increased liquidity for the execution of their orders. Such increased liquidity benefits investors because they receive better prices and because it lowers volatility in the options market.

B. Self-Regulatory Organization's Statement on Burden on Competition

The proposed rule change does not impose any burden on competition. This proposal is based on a recently approved rule change by the International Securities Exchange, LLC (''ISE'') and is identical to the ISE proposal.[8] The proposed rule change to make it mandatory for market makers to populate the quotation risk management parameters is being made at the request of Topaz market makers to prevent the inadvertent entry of quotes without risk-management parameters. Market makers who prefer to use their own risk-management systems can enter out-of-range values so that the Exchange-provided parameters will not be triggered. Accordingly, the proposal does not require members to manage their risk using an Exchange-provided tool.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

The Exchange has not solicited, and does not intend to solicit, comments on this proposed rule change. The Exchange has not received any unsolicited written comments from members or other interested parties.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The Exchange believes that the foregoing proposed rule change may take effect upon filing with the Commission pursuant to Section19(b)(3)(A)[9] of the Act and Rule 19b–4(f)(6) thereunder[10] because the foregoing proposed rule change does not (i) significantly affect the protection of investors or the public interest, (ii) impose any significant burden on competition, and (iii) become operative for 30 days after its filing date, or such shorter time as the Commission may designate.

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is: (i) necessary or appropriate in the public interest; (ii) for the protection of investors; or (iii) otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–Topaz–2013–06 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–Topaz–2013–06. This file number should be included on the subject line if email is used. To help the Commission process and review your

[4] The Exchange notes that with the exception of one market maker, all Topaz market makers are currently also market makers on the International Securities Exchange (''ISE'') and ISE recently amended its rules to make it mandatory for market makers to enter values into all four risk management parameters for classes in which ISE market makers enter quotes. Topaz market makers are therefore accustomed to using these risk parameters because they are required to use them when trading on ISE. The Exchange therefore does not believe the proposed rule change will have any impact on the way members currently trade on the Exchange. Additionally, the Exchange will provide notice to members before making use of the parameters mandatory.

[5] For example, a market maker could set the value for the total number of contracts executed in a class at a level that exceeds the total number of contracts the market maker actually quotes in an options class.

[6] 15 U.S.C. 78f(b).

[7] 15 U.S.C. 78f(b)(5).

[8] *See* Securities Exchange Act Release No. 70132 (August 7, 2013), 78 FR 49311 (August 13, 2013) (SR–ISE–2013–38).

[9] 15 U.S.C. 78s(b)(3)(A).

[10] 17 CFR 240.19b–4(f)(6). In addition, Rule 19b–4(f)(6) requires a self-regulatory organization to give the Commission written notice of its intent to file the proposed rule change at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has satisfied this requirement.

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 such filing also will be available for inspection and copying at the principal office of the ISE. 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–Topaz–2013–06 and should be submitted on or before November 12, 2013.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[11]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2013–24645 Filed 10–21–13; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–70605; File No. SR–CME–2013–21]

Self-Regulatory Organizations; Chicago Mercantile Exchange Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Related to Its IRS Margin Methodology

October 3, 2013.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'' or ''Exchange Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on September 30, 2013, Chicago Mercantile Exchange Inc. (''CME'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change described in Items I and II below, which Items have been prepared primarily by CME. CME filed the proposal pursuant to Section 19(b)(3)(A) of the Act,[3] and Rule 19b–4(f)(4)(ii) thereunder,[4] so that the proposal was effective upon filing with the Commission. The Commission is publishing this notice to solicit comments on the proposed rule change for interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

CME proposes to make an adjustment to one particular component of its current IRS margin model. The proposed change is reflected in an Advisory Notice issued to market participants (included below). Italicized text indicates additions; bracketed text indicates deletions.

* * * * *

To: Clearing Member Firms; Chief Financial Officers; Back Office Managers; Margin Managers

From: CME Clearing

Notice: #13–444

Notice Date: September 26, 2013

Effective Date: October 01, 2013

Please note CME Clearing will deploy SGD denominated swaps to the Production environment Tuesday, October 1st. This deployment will include:

- *SGD margin data files and VWAP index support*
- *To account for negative zero rates that Singapore dollar Swap Offer Rate (SOR) has experienced, CME will shift the data by 4% before computing the returns.*

CME has concurrently filed a change with the CFTC which will be effective in accordance with the CFTC Regulation 40.6 timeframes.

Please contact the CME Client Services Team at onboarding@cmegroup.com or 312.338.7712 with any questions/concerns.

* * * * *

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, CME included statements concerning the purpose 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. CME has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

CME currently offers clearing for a variety of swaps products under the exclusive jurisdiction of the Commodity Futures Trading Commission (''CFTC''), including, specifically, clearing for over-the-counter (''OTC'') interest rate swaps (''IRS''). CME proposes to make certain changes to its current IRS margin model in relation to Singapore Dollar (''SGD'') IRS.

The current CME IRS margin model utilizes historical inputs. In August 2011, the Singapore Dollar Swap Offer Rate (''SOR'') turned negative due to inflows into the Singapore dollar. Inputs into the IRS margin model are undefined for negative rate environments. The proposed change will solve for the negative SOR inputs from the August 2011 timeframe. The changes are being communicated to market participants via advisory notices. The text of the most recent advisory notice, which announces the intended October 1, 2013 production date for the change, is the subject of this filing. Prior advisory notices also discussed this change in the context of providing market participants with notice of the change for the purpose of announcing a testing environment.

There are no CME rulebook changes associated with the changes. The changes do not materially affect the CME IRS margin model. The changes only affect CME's interest rate swap clearing offering and do not materially impact CME's security-based swap clearing business. CME also notes that it has also submitted the proposed rule changes that are the subject of this filing to its primary regulator, the CFTC, in a separate filing. The changes became effective with the CFTC as of September 23, 2013. The changes are effective on filing but will become operational on October 1, 2013.

CME believes the proposed rule changes are consistent with the requirements of the Exchange Act including Section 17A of the Exchange Act.[5] The proposed rule changes involve enhancements to CME's current IRS margin methodology and are therefore designed to promote the prompt and accurate clearance and settlement of securities transactions and, to the extent applicable, derivatives agreements, contracts, and transactions, to assure the safeguarding of securities

[11] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 15 U.S.C. 78s(b)(3)(A).

[4] 17 CFR 240.19b–4(f)(4)(ii).

[5] 15 U.S.C. 78q–1.

and funds which are in the custody or control of the clearing agency or for which it is responsible, and, in general, to protect investors and the public interest consistent with Section 17A(b)(3)(F) of the Exchange Act.[6] The proposed rule changes accomplish these objectives because the proposed rule changes help to adjust CME's IRS margin methodology to address the fact that the Singapore Dollar Swap Offer Rate (''SOR'') turned negative due to inflows into the Singapore dollar and as such the changes contribute to the safeguarding of securities and funds in CME's custody or control or for which CME is responsible and the protection of investors.

Furthermore, the proposed changes are limited in their effect to swaps products offered under CME's authority to act as a derivatives clearing organization. These products are under the exclusive jurisdiction of the CFTC. As such, the proposed CME changes are limited to CME's activities as a derivatives clearing organization clearing swaps that are not security-based swaps; CME notes that the policies of the CFTC with respect to administering the Commodity Exchange Act are comparable to a number of the policies underlying the Exchange Act, such as promoting market transparency for over-the-counter derivatives markets, promoting the prompt and accurate clearance of transactions and protecting investors and the public interest.

Because the proposed changes are limited in their effect to swaps products offered under CME's authority to act as a derivatives clearing organization, the proposed changes are properly classified as effecting a change in an existing service of CME that:

(a) primarily affects the clearing operations of CME with respect to products that are not securities, including futures that are not security futures, and swaps that are not security-based swaps or mixed swaps; and

(b) does not significantly affect any securities clearing operations of CME or any rights or obligations of CME with respect to securities clearing or persons using such securities-clearing service.

As such, the changes are therefore consistent with the requirements of Section 17A of the Exchange Act[7] and are properly filed under Section 19(b)(3)(A)[8] and Rule 19b–4(f)(4)(ii)[9] thereunder.

B. Self-Regulatory Organization's Statement on Burden on Competition

CME does not believe that the proposed rule change will have any impact, or impose any burden, on competition. The proposed rule changes simply involve enhancements to CME's current IRS margin methodology.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

CME has not solicited comments regarding this proposed rule change. CME has not received any unsolicited written comments from interested parties.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective upon filing pursuant to Section 19(b)(3)(A)(iii) of the Act[10] and Rule 19b–4(f)(4)(ii)[11] thereunder. At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov*. Please include File Number SR–CME–2013–21 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–CME–2013–21. 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 or 10:00 a.m. and 3:00 p.m. Copies of such filing also will be available for inspection and copying at the principal office of CME and on CME's Web site (*http://www.cmegroup.com/market-regulation/rule-filings.html*).

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–CME–2013–21 and should be submitted on or before November 12, 2013.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[12]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2013–24556 Filed 10–21–13; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–70691; File No. SR–FINRA–2013–043]

Self-Regulatory Organizations; Financial Industry Regulatory Authority, Inc.; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change Relating to TRACE Fees for Securities Act Rule 144A Transaction Data

October 16, 2013.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the ''Act'')[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on October 2, 2013, Financial Industry Regulatory Authority, Inc. (''FINRA'') filed with the Securities and Exchange Commission

[6] 15 U.S.C. 78q–1(b)(3)(F).

[7] 15 U.S.C. 78q–1.

[8] 15 U.S.C. 78s(b)(3)(A).

[9] 17 CFR 240.19b–4(f)(4)(ii).

[10] 15 U.S.C. 78s(b)(3)(A)(iii).

[11] 17 CFR 240.19b–4(f)(4)(ii).

[12] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

(the ''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by FINRA. FINRA has designated the proposed rule change as ''establishing or changing a due, fee or other charge'' under Section 19(b)(3)(A)(ii) of the Act [3] and Rule 19b–4(f)(2) thereunder,[4] which renders the proposal effective upon receipt of this filing by the Commission. 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

FINRA is proposing to amend FINRA Rule 7730 to: (1) Provide for Trade Reporting and Compliance Engine (''TRACE'') data fees for real-time and historic data sets of transactions in TRACE-Eligible Securities [5] that are effected pursuant to Rule 144A [6] under the Securities Act of 1933 [7] (''Rule 144A transactions''); [8] (2) clarify Level II Full Service Web Browser fee rates in light of the availability of additional data sets; and (3) make other technical amendments.

The text of the proposed rule change is available on FINRA's Web site at *http://www.finra.org,* at the principal office of FINRA and at the Commission's Public Reference Room.[9]

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, FINRA 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. FINRA has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

Recently, FINRA amended FINRA Rule 6750, FINRA Rule 7730 and TRACE dissemination protocols to provide greater transparency in Rule 144A transactions in TRACE-Eligible Securities.[10] In the Rule 144A Dissemination Rule Change, FINRA included amendments to FINRA Rule 7730 to establish data sets for real-time and historic Rule 144A transaction data.

In this proposed rule change, FINRA proposes to establish fees for the real-time disseminated Rule 144A transaction data and the Historic TRACE Data for Rule 144A transactions, clarify Level II Full Service Web Browser fee rates in light of the availability of additional data sets, and incorporate other technical amendments in FINRA Rule 7730.

Rule 144A Data Sets

In the Rule 144A Dissemination Rule Change, FINRA amended FINRA Rule 7730(c) to establish the Rule 144A transaction data set (''Rule 144A Data Set''), which is similar to the data sets established for corporate bonds (''Corporate Bond Data Set''), Agency Debt Securities (''Agency Data Set'') and Asset-Backed Securities (''ABS Data Set'').[11] The Rule 144A Data Set will consist of information disseminated immediately upon receipt of a transaction report for a Rule 144A transaction. FINRA proposes to extend the market data fees currently in effect for similar real-time TRACE market data sets (i.e., the Corporate Bond Data Set, the Agency Data Set and the ABS Data Set) to the Rule 144A Data Set. The proposed rule change would amend FINRA Rule 7730(c)(1), FINRA Rule 7730(c)(2) and the preceding table to provide that each data set is available at the same rate and eliminate redundant text.[12]

In addition, in the Rule 144A Dissemination Rule Change, FINRA amended FINRA Rule 7730(d) to establish a historic data set for Rule 144A transactions (''Historic Rule 144A Data Set''), which is similar to the data sets established for corporate bonds (''Historic Corporate Bond Data Set''), Agency Debt Securities (''Historic Agency Data Set'') and Asset-Backed Securities (''Historic ABS Data Set'') referenced in the rule.[13] FINRA proposes to establish fees for the Historic Rule 144A Data Set at the same rates currently in effect in FINRA Rule 7730(d) for the existing historic data sets. The proposed rule change would amend FINRA Rule 7730(d)(1), FINRA Rule 7730(d)(2) and the preceding table to provide that each data set is available at the same rate and eliminate redundant text.[14] In connection with the fees for the Historic Rule 144A Data Set, FINRA proposes to clarify in FINRA Rule 7730(d)(1)(A)(ii) and FINRA Rule 7730(d)(1)(B)(ii) that the 2003 Historic Rule 144A Data Set includes the 2002 Historic Rule 144A Data Set, and in FINRA Rules 7730(d)(1)(A)(i) and 7730(d)(1)(B)(i) that the set-up fee to receive Historic TRACE data is paid only one time, instead of per data set.[15]

FINRA also proposes two clarifying amendments to other provisions of Rule 7730 as discussed below.

Level II Full Service Web Browser Fee

FINRA proposes to clarify in FINRA Rule 7730(a)(1) applicable fees when a firm uses a TRACE web browser that includes access to real-time TRACE transaction data. The subscription rate

[3] 15 U.S.C. 78s(b)(3)(A)(ii).

[4] 17 CFR 240.19b–4(f)(2).

[5] The term TRACE-Eligible Security is defined in FINRA Rule 6710(a).

[6] 17 CFR 230.144A.

[7] 15 U.S.C. 77a *et seq.* (hereinafter ''Securities Act'').

[8] *See* Securities Exchange Act Release No. 70345 (September 6, 2013), 78 FR 56251 (September 12, 2013) (Order Granting Approval of Proposed Rule Change Relating to the Dissemination of Transactions in TRACE-Eligible Securities that are Effected Pursuant to Securities Act Rule 144A; File No. SR–FINRA–2013–029) (''Rule 144A Dissemination Rule Change''). The Rule 144A Dissemination Rule Change amends FINRA Rule 6750, FINRA Rule 7730 and the TRACE dissemination protocols to provide for the dissemination of Rule 144A transactions and to establish real-time and historic data sets for Rule 144A transactions. The effective date for the Rule 144A Dissemination Rule Change will be established in a Regulatory Notice.

[9] As part of the proposed rule change, FINRA submitted an Exhibit 4 and an Exhibit 5. The Exhibit 4 shows the text of the proposed rule change marked to show the proposed changes as compared to FINRA Rule 7730 including amendments approved by the SEC as if such amendments were effective. *See* note 8. The Exhibit 5 shows the text of the proposed rule change marked to show the proposed changes as compared to the current rule text of FINRA Rule 7730 in accordance with the requirements of Form 19b–4.

[10] *See* note 8. FINRA Rule 6750 will provide for the dissemination of Rule 144A transactions, provided the asset type (e.g., corporate bonds) currently is subject to dissemination under FINRA Rule 6750. The Rule 144A Dissemination Rule Change does not extend to equity transactions effected pursuant to Securities Act Rule 144A (17 CFR 230.144A).

[11] The terms Agency Debt Security and Asset-Backed Security are defined in FINRA Rule 6710(l) and FINRA Rule 6710(m), respectively.

[12] *See* Exhibit 4 to the Form 19b–4, which is available on FINRA's Web site.

[13] As noted in the Rule 144A Dissemination Rule Change, the Historic Rule 144A Data Set would include Rule 144A transactions in TRACE-Eligible Securities subject to dissemination, effected as of or after July 1, 2002, and, among other things, would include uncapped volume information. However, like all other Historic TRACE Data, Rule 144A transaction data included in the Historic Rule 144A Data Set would be released subject to a delay of approximately 18 months from the date of the transaction.

[14] *See* Exhibit 4 to the Form 19b–4 on FINRA's Web site.

[15] FINRA Rule 7730(d) specifies: ''Historic TRACE Data fees, except the Set-Up Fee, are charged for each Data Set.'' *See* Exhibit 4 to the Form 19b–4 on FINRA's Web site.

for the Level II Full Service Web Browser includes the fees for a subscription to one or two data sets, which were established when there were only two data sets. When the Rule 144A Dissemination Rule Change becomes effective, there will be four available real-time data sets: Corporate Bond Data Set, Agency Data Set, ABS Data Set and Rule 144A Data Set. FINRA would extend the subscription rates currently applicable to first and second data sets (i.e., a discounted rate of $30 per data set for a single user ID and $60 per data set for additional user IDs) to the third and fourth data sets in two similar provisions. Specifically, in FINRA Rule 7730(a)(1)(B)(i), for a Level II Full Service Web Browser subscription for a single user ID or the first user ID, the current fee is $50 per month [16] (including one data set), and $80 per month (including two data sets). As amended, the Level II Full Service Web Browser subscription fee would be $110 per month (for subscribers to three data sets), or $140 per month (for subscribers to four data sets). For Level II Full Service Web Browser subscriptions for additional user IDs, in FINRA Rule 7730(a)(1)(B)(ii), the current fee is $80 per month per user ID (including one data set) and $140 per month per user ID (including two data sets).[17] FINRA would extend the same fee rate per data set to the third and fourth data sets, so that the Level II Full Service Web Browser subscription fee (applicable to additional users IDs) would be $200 per month per user ID (for subscribers to three data sets), and $260 per month per user ID (for subscribers to four data sets).

TBA Transaction Reporting Fee

The trade reporting fees for transactions in TRACE-Eligible Securities are set forth in FINRA Rule 7730(b)(1). For Agency Pass-Through Mortgage-Backed Securities, as defined in FINRA Rule 6710(v), traded to be announced (''TBA''), as defined in FINRA Rule 6710(u), the trade reporting fee is $1.50 per transaction. At the time the TBA reporting fee was established, FINRA had not defined TBA transactions to include those involving SBA-Backed ABS; however, FINRA intended the TBA reporting fee to apply to all TBA transactions. Accordingly, FINRA proposes to clarify that SBA-Backed ABS, as defined in FINRA Rule 6710(bb), traded TBA are subject to the $1.50 per transaction trade reporting fee.

FINRA has filed the proposed rule change for immediate effectiveness. The implementation date of the proposed rule change will be the same as the effective date of the Rule 144A Dissemination Rule Change.

2. Statutory Basis

FINRA believes that the proposed rule change is consistent with the provisions of Section 15A(b)(5) of the Exchange Act,[18] which requires, among other things, that FINRA rules provide for the equitable allocation of reasonable dues, fees and other charges among members and issuers and other persons using any facility or system that FINRA operates or controls.

FINRA believes that the proposed fees for the Rule 144A Data Set and Historic Rule 144A Data Set that are an extension of the fee rates that are assessed currently for existing real-time and historic data sets are reasonable, equitably allocated and not unfairly discriminatory. FINRA believes that the proposed fees are reasonable in light of FINRA's regulatory and operational costs, including personnel, technology and storage costs to collect and provide real-time and historic Rule 144A transaction data and the increase in such costs incurred by FINRA over time. FINRA proposes fees at the rates that have been in effect for several years for similar data bases, and such fees are designed to defray a portion of such costs.

FINRA believes that the proposed rule change provides for the equitable allocation of the proposed fees among member firms and other market participants and data users, and is not unfairly discriminatory. The Rule 144A Data Set and Historic Rule 144A Data Set would be accessible by all member firms and other market participants and data users, subject to the same fee rates that are in effect for the real-time and historic Corporate Bond, Agency and ABS data sets. As with fees for other data sets (real-time and historic) provided by FINRA, the proposed fees would be charged only to those member firms and other market participants and data users that opt to receive a subscription to the applicable data set. FINRA proposes to charge qualifying Tax-Exempt Organizations [19] reduced fees for the Rule 144A Data Set and Historic Rule 144A Data Set, which are the same reduced fee rates that FINRA currently charges such organizations to access other data sets. The proposed reduced data fees for qualifying Tax-Exempt Organizations are an equitable allocation of fees in that the lower rate provides greater access to TRACE information to organizations that are formed exclusively for a charitable purpose. FINRA also believes that the Rule 144A Data Set and Historic Rule 144A Data Set fees are not unfairly discriminatory because the data sets would be available to all similarly situated members and other data users on an equal basis at the same rates, except for the proposed lower rates for qualifying Tax-Exempt Organizations.

FINRA believes that the proposed amendments regarding the Level II Full Service Web Browser subscription fees are reasonable in light of FINRA's regulatory and operational costs, including personnel, technology and storage costs to collect and provide real-time transaction data and the increase in such costs incurred by FINRA over time. FINRA proposes amendments to allow members to access additional data bases at the same fee rate that has been in effect for several years, and such fees are designed to defray a portion of such costs. FINRA also believes that such amendments provide for the equitable allocation of fees among member firms in that the combined service/market data product, which allows members to report and review the member's transactions and to access market data, is available to all firms that wish to subscribe at the same rate. In addition, FINRA believes that the additional proposed fees for access to additional data sets as part of the Level II Full Service Web Browser are not unfairly discriminatory because the Level II Full Service Web Browser service is available to all members.

Finally, FINRA believes that applying the TBA reporting fee that currently applies to almost all TBA transactions to an additional small number of TBA transactions is a reasonable and fair fee assessment, and results in a fee that is equitably allocated among members engaged in similar transactions. Also, the proposed fee is not unfairly discriminatory in that all members engaged in such TBA transactions will be subject to the same fee.

B. Self-Regulatory Organization's Statement on Burden on Competition

FINRA does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Exchange Act.

[16] Each fee includes the $20 per month fee per user ID for Level I Trade Report Only Web Browser Access as specified in FINRA Rule 7730(a)(1)(A).

[17] Again, each fee includes the $20 per month fee per user ID for Level I Trade Report Only Web Browser Access. *See* note 16.

[18] 15 U.S.C. 78*o*–3(b)(5).

[19] Tax-Exempt Organization is defined in FINRA Rule 7730(f)(2) and means an organization that is described in Section 501(c) of the Internal Revenue Code (26 U.S.C. § 501(c)) and has received recognition of the exemption from federal income taxes from the Internal Revenue Service.

The proposed fees for the Rule 144A Data Set and Historic Rule 144A Data Set, which are consistent with current rates for subscriptions to similar TRACE data sets, are reasonable, equitably allocated and not unfairly discriminatory, and will permit a broad spectrum of members, data vendors and other market participants, including qualifying Tax Exempt Organizations, to obtain and use the data in furtherance of market integrity and the protection of investors in such securities. Similarly, FINRA does not believe that the proposed amendments to the Level II Full Service Web Browser subscription, providing a member access to multiple data sets as part of such service, will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Exchange Act. Access to the Rule 144A Data Set and Historic Rule 144A Data Set as well as the Level II Full Service Browser subscription may facilitate competition in the market for such securities in that access to such data will assist members and customers in: (1) Determining the quality of their executions; (2) price discovery; and (3) assessing the accuracy and integrity of the valuation of positions.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

Written comments were neither solicited nor received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A) of the Act [20] and paragraph (f) of Rule 19b–4[21] thereunder. At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission will institute proceedings to determine whether the proposed rule change should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–FINRA–2013–043 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–FINRA–2013–043. 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 FINRA. 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–FINRA–2013–043 and should be submitted on or before November 12, 2013.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[22]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2013–24680 Filed 10–21–13; 8:45 am]

BILLING CODE 8011–01–P

[20] 15 U.S.C. 78s(b)(3)(A).

[21] 17 CFR 240.19b–4(f).

[22] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–70608; File No. SR–BATS–2013–051]

Self-Regulatory Organizations; BATS Exchange, Inc.; Notice of Filing of Proposed Rule Change To List and Trade Shares of the iShares Liquidity Income Fund

October 3, 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 September 19, 2013, BATS Exchange, Inc. (''Exchange'' or ''BATS'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange is proposing to list and trade shares of the iShares Liquidity Income Fund (''Fund'') of the iShares U.S. ETF Trust (''Trust'') under BATS Rule 14.11(i) (''Managed Fund Shares''). The shares of the Fund are collectively referred to herein as the ''Shares.''

The text of the proposed rule addition is available at the Exchange's Web site at *http://www.batstrading.com,* at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in Sections A, B, and C below, of the most significant parts of such statements.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to list and trade the Shares under BATS Rule 14.11(i), which governs the listing and trading of Managed Fund Shares on the Exchange.[3] The Fund will be an actively managed fund. The Shares will be offered by the Trust, which was established as a Delaware statutory trust on June 21, 2011. The Trust is registered with the Commission as an open-end investment company and has filed a registration statement on behalf of the Fund on Form N–1A (''Registration Statement'') with the Commission.[4]

Description of the Shares and the Fund

BlackRock Fund Advisors is the investment adviser (''BFA'' or ''Adviser'') to the Fund.[5] State Street Bank and Trust Company is the administrator, custodian, and transfer agent for the Trust. BlackRock Investments, LLC (''Distributor'') serves as the distributor for the Trust.

BATS Rule 14.11(i)(7) provides that, if the investment adviser to the investment company issuing Managed Fund Shares is affiliated with a broker-dealer, such investment adviser shall erect a ''fire wall'' between the investment adviser and the broker-dealer with respect to access to information concerning the composition and/or changes to such investment company portfolio.[6] In addition, Rule 14.11(i)(7) further requires that personnel who make decisions on the investment company's portfolio composition must be subject to procedures designed to prevent the use and dissemination of material non-public information regarding the applicable investment company portfolio. Rule 14.11(i)(7) is similar to BATS Rule 14.11(b)(5)(A)(i), however, Rule 14.11(i)(7) in connection with the establishment of a ''fire wall'' between the investment adviser and the broker-dealer reflects the applicable open-end fund's portfolio, not an underlying benchmark index, as is the case with index-based funds. The Adviser is not a registered broker-dealer, but is affiliated with multiple broker-dealers and has implemented ''fire walls'' with respect to such broker-dealers regarding access to information concerning the composition and/or changes to the Fund's portfolio. In addition, Adviser personnel who make decisions regarding the Fund's portfolio are subject to procedures designed to prevent the use and dissemination of material non-public information regarding the Fund's portfolio. In the event that (a) the Adviser becomes a broker-dealer or newly affiliated with a broker-dealer, or (b) any new adviser or sub-adviser is a broker-dealer or becomes affiliated with a broker-dealer, it will implement a fire wall with respect to its relevant personnel or such broker-dealer affiliate, as applicable, regarding access to information concerning the composition and/or changes to the portfolio, and will be subject to procedures designed to prevent the use and dissemination of material non-public information regarding such portfolio.

iShares Liquidity Income Fund

According to the Registration Statement, the Fund will seek to provide current income consistent with preservation of capital. To achieve its objective, the Fund will invest, under normal circumstances,[7] at least 80% of its net assets in a portfolio of U.S. dollar-denominated investment-grade fixed and floating-rate debt securities (''Fixed Income Securities''). The Fund will not be a money market fund and thus will not seek to maintain a stable net asset value of $1.00 per Share. In the absence of normal circumstances, the Fund may temporarily depart from its normal investment process, provided that such departure is, in the opinion of BFA, consistent with the Fund's investment objective and in the best interest of the Fund. For example, the Fund may hold a higher than normal proportion of its assets in cash in response to adverse market, economic, or political conditions.

The Fund will hold Fixed Income Securities of at least 13 non-affiliated issuers. The Fund will not purchase the securities of issuers conducting their principal business activity in the same industry if, immediately after the purchase and as a result thereof, the value of the Fund's investments in that industry would equal or exceed 25% of the current value of the Fund's total assets, provided that this restriction does not limit the Fund's: (i) Investments in securities of other investment companies; (ii) investments in securities issued or guaranteed by the U.S. government, its agencies or instrumentalities; or (iii) investments in repurchase agreements collateralized by U.S. government securities.[8] The Fund will not invest in non-U.S. equity securities.

The Fund intends to qualify each year as a regulated investment company (''RIC'') under Subchapter M of the Internal Revenue Code of 1986, as amended.[9] The Fund will invest its assets, and otherwise conduct its operations, in a manner that is intended to satisfy the qualifying income, diversification, and distribution requirements necessary to establish and maintain RIC qualification under Subchapter M.

Fixed Income Securities

The Fund intends to achieve its investment objective by investing, under normal circumstances, at least 80% of its net assets in a portfolio of U.S.

[3] The Commission approved BATS Rule 14.11(i) in Securities Exchange Act Release No. 65225 (August 30, 2011), 76 FR 55148 (September 6, 2011) (SR–BATS–2011–018).

[4] *See* Registration Statement on Form N–1A for the Trust, dated February 4, 2013 (File Nos. 333–179904 and 811–22649). The descriptions of the Fund and the Shares contained herein are based, in part, on information in the Registration Statement. The Commission has issued an order granting certain exemptive relief to the Company under the Investment Company Act of 1940 (15 U.S.C. 80a–1) (''1940 Act'') (''Exemptive Order''). *See* Investment Company Act Release No. 29571 (January 24, 2011) (File No. 812–13601).

[5] BlackRock Fund Advisors is an indirect wholly owned subsidiary of BlackRock, Inc.

[6] An investment adviser to an open-end fund is required to be registered under the Investment Advisers Act of 1940 (''Advisers Act''). As a result, the Adviser and its related personnel are subject to the provisions of Rule 204A–1 under the Advisers Act relating to codes of ethics. This Rule requires investment advisers to adopt a code of ethics that reflects the fiduciary nature of the relationship to clients as well as compliance with other applicable securities laws. Accordingly, procedures designed to prevent the communication and misuse of non-public information by an investment adviser must be consistent with Rule 204A–1 under the Advisers Act. In addition, Rule 206(4)–7 under the Advisers Act makes it unlawful for an investment adviser to provide investment advice to clients unless such investment adviser has (i) adopted and implemented written policies and procedures reasonably designed to prevent violation, by the investment adviser and its supervised persons, of the Advisers Act and the Commission rules adopted thereunder; (ii) implemented, at a minimum, an annual review regarding the adequacy of the policies and procedures established pursuant to subparagraph (i) above and the effectiveness of their implementation; and (iii) designated an individual (who is a supervised person) responsible for administering the policies and procedures adopted under subparagraph (i) above.

[7] The term ''under normal circumstances'' includes, but is not limited to, the absence of adverse market, economic, political, or other conditions, including extreme volatility or trading halts in the fixed income markets or the financial markets generally; operational issues causing dissemination of inaccurate market information; or force majeure type events such as systems failure, natural or man-made disaster, act of God, armed conflict, act of terrorism, riot, or labor disruption, or any similar intervening circumstance.

[8] *See* Form N–1A, Item 9. The Commission has taken the position that a fund is concentrated if it invests in more than 25% of the value of its total assets in any one industry. *See, e.g.,* Investment Company Act Release No. 9011 (October 30, 1975), 40 FR 54241 (November 21, 1975).

[9] 26 U.S.C. 851.

dollar-denominated investment-grade Fixed Income Securities, rated BBB- or higher by Standard & Poor's Financial Services LLC and/or Fitch Inc. (''Fitch''), or Baa3 or higher by Moody's Investors Service, Inc. (''Moody's''), or, if unrated, determined by BFA to be of equivalent quality.[10] Under normal circumstances, the Fund will invest primarily in Fixed Income Securities maturing in three years or less. Under normal circumstances, short-term investments (generally, securities with original maturities of one year or less) held by the Fund will carry a rating in the highest two-rating categories of at least one nationally recognized statistical ratings organization (*e.g.,* A–2, P–2, or F2 or better by Standard & Poor's Ratings Services, Moody's, or Fitch, respectively), or if such investments are unrated, determined to be of comparable quality by BFA, at the time of investment.

Fixed Income Securities will include fixed and floating rate debt securities, such as corporate [11] and government bonds, agency securities,[12] instruments of non-U.S. issuers, privately-issued securities,[13] structured securities,[14] municipal bonds, money market securities,[15] and investment companies (including investment companies advised by BFA or its affiliates) that invest in such Fixed Income Securities.[16] The Fund may invest up to 5% of its net assets in Fixed Income Securities and instruments of issuers that are domiciled in emerging market countries.

The Fund will invest in asset-backed and mortgage-backed Fixed Income Securities.[17] Asset-backed securities are fixed-income securities that are backed by a pool of assets, usually loans such as installment sale contracts or credit card receivables. Mortgage-backed securities are asset-backed securities based on a particular type of asset, a mortgage. There are a wide variety of mortgage-backed securities involving commercial or residential, fixed-rate or adjustable rate mortgages, and mortgages issued by banks or government agencies.[18]

The Fund's investments will be consistent with the Fund's investment objective and will not be used to enhance leverage. Under normal circumstances, the dollar-weighted average life of the Fund's portfolio is expected to be one year or less, as calculated by the Adviser.[19] The Fund will also seek to maintain a dollar-weighted average maturity that is less than 180 days.[20]

The Fund is an actively-managed fund that does not seek to replicate the performance of a specified index. The Exchange notes, however, that the Fund's portfolio will meet certain criteria for index-based, fixed income exchange-traded funds contained in Rule 14.11(c)(4)(B)(i).[21]

[10] According to the Adviser, BFA may determine that unrated Fixed Income Securities are of ''equivalent quality'' based on such credit quality factors that it deems appropriate, which may include among other things, performing an analysis similar, to the extent possible, to that performed by a nationally recognized statistical ratings organization when rating similar securities and issuers. In making such a determination, BFA may consider internal analyses and risk ratings, third party research and analysis, and other sources of information, as deemed appropriate by the Adviser.

[11] While the Fund is permitted to invest without restriction in corporate bonds, the Adviser expects that, under normal circumstances, the Fund will generally seek to invest in corporate bond issuances that have at least $100 million par amount outstanding in developed countries and at least $200 million par amount outstanding in emerging market countries.

[12] ''Agency securities'' for these purposes generally includes securities issued by the following entities: Government National Mortgage Association (Ginnie Mae); Federal National Mortgage Association (Fannie Mae); Federal Home Loan Banks (FHLBanks); Federal Home Loan Mortgage Corporation (Freddie Mac); Farm Credit System (FCS) Farm Credit Banks (FCBanks); Student Loan Marketing Association (Sallie Mae); Resolution Funding Corporation (REFCORP); Financing Corporation (FICO); and the Farm Credit System (FCS) Financial Assistance Corporation (FAC). Agency securities can include, but are not limited to, mortgage-backed securities.

[13] ''Privately-issued securities'' generally includes Rule 144A securities and, in this context, may include both mortgage-backed and non-mortgage 144A securities.

[14] ''Structured securities'' generally includes privately-issued and publicly-issued structured securities, including certain publicly-issued structured securities that are not agency securities. Examples include, but are not limited to: Asset-backed securities backed by assets such as consumer receivables, credit cards, student loans, and equipment leases; asset-backed commercial paper; credit linked notes; and secured funding notes.

[15] The Adviser expects that, under normal circumstances, the Fund intends to invest in money market securities (as described below) in a manner consistent with its investment objective in order to help manage cash flows in and out of the Fund, such as in connection with payment of dividends or expenses, and to satisfy margin requirements, to provide collateral or to otherwise back investments in derivative instruments. For these purposes, money market securities include: Short-term, high-quality obligations issued or guaranteed by the U.S. Treasury or the agencies or instrumentalities of the U.S. government; short-term, high-quality securities issued or guaranteed by non-U.S. governments, agencies and instrumentalities; repurchase agreements; money market mutual funds; commercial paper; and deposits and other obligations of U.S. and non-U.S. banks and financial institutions. All money market securities acquired by the Fund will be rated investment grade. The Fund does not intend to invest in any unrated money market securities. However, it may do so, to a limited extent, such as where a rated money market security becomes unrated, if such money market security is determined by the Adviser to be of comparable quality. BFA may determine that unrated securities are of comparable quality based on such credit quality factors that it deems appropriate, which may include, among other things, performing an analysis similar, to the extent possible, to that performed by a nationally recognized statistical rating organization rating similar securities and issuers.

[16] The Fund currently anticipates investing in only registered open-end investment companies, including mutual funds and the open-end investment company funds described in BATS Rule 14.11, but notes that the Exemptive Order allows the Fund to invest in ''shares of other ETFs, shares of money market mutual funds, or other investment companies.''

[17] The Fund has not established a fixed limit to the amount of asset-backed and/or mortgage-backed debt securities in which it will invest, which is consistent with analogous funds. *See, e.g.,* iShares Short Maturity Bond Fund as described in SR–BATS–2012–033 (July 27, 2012) and approved by Securities Exchange Act Release No. 67894 (September 20, 2012), 77 FR 59227 (September 26, 2012) and PIMCO Enhanced Short Maturity Strategy Fund (''MINT Fund'') as described in Amendment 1 to SR–NYSEArca–2009–79 (November 10, 2009) and approved by Securities Exchange Act Release No. 60981 (November 10, 2009), 74 FR 59594 (November 18, 2009) (SR–NYSEArca–2009–79). As noted above, at least 80% of the Fund's net assets will be, under normal circumstances, invested in U.S. dollar-denominated investment grade Fixed Income Securities, including asset-backed and/or mortgage-backed debt securities. Neither high-yield asset-backed securities nor high-yield mortgage-backed securities are included in the Fund's principal investment strategies. The liquidity of a security, especially in the case of asset-backed and mortgage-backed debt securities, is a substantial factor in the Fund's security selection process.

[18] *See* note 12, *supra.*

[19] Dollar-weighted average life is the weighted average of the times when principal is to be repaid.

[20] Dollar-weighted average maturity is calculated by taking the average length of time to maturity (fixed-rate) or the next interest rate reset (floating-rate) for each underlying instrument held by the Fund, weighted according to the relative holdings per instrument.

[21] *See* BATS Rule 14.11(c)(4)(B)(i) governing fixed income based Index Fund Shares. The Fund's portfolio will meet the following requirements of Rule 14.11(c)(4)(B)(i): (i) The index or portfolio must consist of Fixed Income Securities (Rule 14.11(c)(4)(B)(i)(a)); (ii) a component may be a convertible security, however, once the convertible security component converts to an underlying equity security, the component is removed from the index or portfolio (Rule 14.11(c)(4)(B)(i)(c)); (iii) no component fixed-income security (excluding Treasury Securities) will represent more than 30% of the weight of the index or portfolio, and the five highest weighted component fixed-income securities do not in the aggregate account for more than 65% of the weight of the index or portfolio (Rule 14.11(c)(4)(B)(i)(d)); (iv) an underlying index or portfolio (excluding exempted securities) must include securities from a minimum of 13 non-affiliated issuers (Rule 14.11(c)(4)(B)(i)(e)); and (v) component securities that in aggregate account for at least 90% of the weight of the index or portfolio must be either: (1) From issuers that are required to file reports pursuant to Sections 13 and 15(d) of the Act; (2) from issuers that have a worldwide market value of its outstanding common equity held by non-affiliates of $700 million or more; (3) from issuers that have outstanding securities that are notes, bonds, debentures, or evidence of indebtedness having a total remaining principal amount of at least $1 billion; (4) exempted securities as defined in Section 3(a)(12) of the Act; or (5) from issuers that are a government of a foreign country or a political subdivision of a foreign country (Rule 14.11(c)(4)(B)(i)(f)).

Other Portfolio Holdings

The Fund may, to a limited extent (under normal circumstances, less than 20% of the Fund's net assets), engage in transactions in futures contracts, options, and swaps.[22]

The Fund may hold up to an aggregate amount of 15% of its net assets in illiquid securities (calculated at the time of investment), including Rule 144A securities deemed illiquid by the Adviser[23] under the 1940 Act.[24] The Fund will monitor its portfolio liquidity on an ongoing basis to determine whether, in light of current circumstances, an adequate level of liquidity is being maintained, and will consider taking appropriate steps in order to maintain adequate liquidity if, through a change in values, net assets, or other circumstances, more than 15% of the Fund's net assets are held in illiquid securities. Illiquid securities include securities subject to contractual or other restrictions on resale and other instruments that lack readily available markets as determined in accordance with Commission staff guidance.

Net Asset Value

According to the Registration Statement, the net asset value (''NAV'') of the Fund's Shares generally will be calculated once daily Monday through Friday as of the close of regular trading on the New York Stock Exchange (''NYSE''), generally 4:00 p.m. Eastern Time (''NAV Calculation Time'') on each day that NYSE is open for trading, based on prices at the NAV Calculation Time. NAV per Share is calculated by dividing the Fund's net assets by the number of Fund Shares outstanding. The Fund's net assets are valued primarily on the basis of market quotations.

According to the Registration Statement, the Fund values Fixed Income Securities using prices provided directly from one or more broker-dealers, market makers, or independent third-party pricing services which may use matrix pricing and valuation models to derive values. Swap agreements and other derivatives are generally valued based upon quotations from market makers or by a pricing service in accordance with valuation procedures approved by the Fund's board of directors. Certain short-term debt securities may be valued on the basis of amortized cost. Intraday, executable price quotations on Fixed Income Securities and other assets are available from major broker-dealer firms and for exchange-traded assets, including investment companies, futures, and options, such intraday information is available directly from the applicable listing exchange.

According to the Registration Statement, generally, trading in certain Fixed Income Securities is substantially completed each day at various times prior to the close of business on NYSE. Generally, trading in certain derivatives is substantially completed each day at various times prior to the close of business on NYSE. The values of such securities and derivatives used in computing the NAV of the Fund are determined at such times.

According to the Registration Statement, when market quotations are not readily available or are believed by BFA to be unreliable, the Fund's investments are valued at fair value. Fair value determinations are made by BFA in accordance with policies and procedures approved by the Fund's board of directors and in accordance with the 1940 Act. BFA may conclude that a market quotation is not readily available or is unreliable if a security or other asset or liability is thinly traded, or where there is a significant event[25] subsequent to the most recent market quotation.

According to the Registration Statement, fair value represents a good faith approximation of the value of an asset or liability. The fair value of an asset or liability held by the Fund is the amount the Fund might reasonably expect to receive from the current sale of that asset or the cost to extinguish that liability in an arm's-length transaction. Valuing the Fund's investments using fair value pricing will result in prices that may differ from current valuations and that may not be the prices at which those investments could have been sold during the period in which the particular fair values were used. The value of assets or liabilities denominated in non-U.S. currencies will be converted into U.S. dollars using exchange rates deemed appropriate by BFA in its role as Adviser.

For more information regarding the valuation of Fund investments in calculating the Fund's NAV, see the Registration Statement.

The Shares

The Fund will issue and redeem Shares on a continuous basis at the NAV per Share only in large blocks of a specified number of Shares or multiples thereof (''Creation Units'') in transactions with authorized participants who have entered into agreements with the Distributor. The Fund currently anticipates that a Creation Unit will consist of 50,000 Shares, though this number may change from time to time, including prior to listing of the Fund. The exact number of Shares that will constitute a Creation Unit will be disclosed in the Registration Statement of the Fund. Once created, Shares of the Fund trade on the secondary market in amounts less than a Creation Unit.

The consideration for purchase of Creation Units of the Fund generally will consist of the in-kind deposit of a designated portfolio of securities (including any portion of such securities for which cash may be substituted) (*i.e.,* ''Deposit Securities'') and the ''Cash Component'' computed as described below. Together, the Deposit Securities and the Cash Component constitute the ''Fund Deposit,'' which represents the minimum initial and subsequent investment amount for a Creation Unit of the Fund.

The portfolio of securities required for purchase of a Creation Unit may not be

[22] Derivatives might be included in the Fund's investments to serve the investment objectives of the Fund. Examples include, but are not limited to, treasury futures to hedge against rising interest rates, currency futures to hedge against foreign exchange rates, interest rate swaps, credit default swaps, total return swaps, and equity index options. The derivatives will be exchange traded and/or centrally cleared, and they will be collateralized. Derivatives are not a principal investment strategy of the Fund.

[23] In reaching liquidity decisions, the Adviser may consider factors including: The frequency of trades and quotes for the security; the number of dealers wishing to purchase or sell the security and the number of other potential purchasers; dealer undertakings to make a market in the security; the nature of the security and the nature of the marketplace trades (*e.g.,* the time needed to dispose of the security, the method of soliciting offers, and the mechanics of transfer); any legal or contractual restrictions on the ability to transfer the security or asset; significant developments involving the issuer or counterparty specifically (*e.g.,* default, bankruptcy, etc.) or the securities markets generally; and settlement practices, registration procedures, limitations on currency conversion or repatriation, and transfer limitations (for foreign securities or other assets).

[24] The Commission has stated that long-standing Commission guidelines have required open-end funds to hold no more than 15% of their net assets in illiquid securities and other illiquid assets. *See* Investment Company Act Release No. 28193 (March 11, 2008), 73 FR 14618 (March 18, 2008), footnote 34. *See also* Investment Company Act Release No. 5847 (October 21, 1969), 35 FR 19989 (December 31, 1970) (Statement Regarding ''Restricted Securities''); Investment Company Act Release No. 18612 (March 12, 1992), 57 FR 9828 (March 20, 1992) (Revisions of Guidelines to Form N–1A). A fund's portfolio security is illiquid if it cannot be disposed of in the ordinary course of business within seven days at approximately the value ascribed to it by the fund. *See* Investment Company Act Release No. 14983 (March 12, 1986), 51 FR 9773 (March 21, 1986) (adopting amendments to Rule 2a–7 under the 1940 Act); Investment Company Act Release No. 17452 (April 23, 1990), 55 FR 17933 (April 30, 1990) (adopting Rule 144A under the Securities Act of 1933).

[25] A ''significant event'' is an event that, in the judgment of BFA, is likely to cause a material change to the closing market price of the asset or liability held by the Fund.

identical to the portfolio of securities the Fund will deliver upon redemption of Fund Shares. The Deposit Securities and Fund Securities (as defined below), as the case may be, in connection with a purchase or redemption of a Creation Unit, generally will correspond pro rata, to the extent practicable, to the securities held by the Fund.

The Cash Component will be an amount equal to the difference between the NAV of the Shares (per Creation Unit) and the ''Deposit Amount,'' which will be an amount equal to the market value of the Deposit Securities, and serve to compensate for any differences between the NAV per Creation Unit and the Deposit Amount. The Fund generally offers Creation Units partially for cash. BFA will make available through the National Securities Clearing Corporation (''NSCC'') on each business day, prior to the opening of business on the Exchange, the list of names and the required number or par value of each Deposit Security and the amount of the Cash Component to be included in the current Fund Deposit (based on information as of the end of the previous business day) for the Fund.

The identity and number or par value of the Deposit Securities may change pursuant to changes in the composition of the Fund's portfolio as rebalancing adjustments and corporate action events occur from time to time. The composition of the Deposit Securities may also change in response to adjustments to the weighting or composition of the holdings of the Fund.

The Fund reserves the right to permit or require the substitution of a ''cash in lieu'' amount to be added to the Cash Component to replace any Deposit Security that may not be available in sufficient quantity for delivery or that may not be eligible for transfer through the Depository Trust Company (''DTC'') or the clearing process through the NSCC.

Except as noted below, all creation orders must be placed for one or more Creation Units and must be received by the Distributor in proper form no later than 4:00 p.m. Eastern Time, in each case on the date such order is placed in order for creation of Creation Units to be effected based on the NAV of Shares of the Fund as next determined on such date after receipt of the order in proper form. Orders requesting substitution of a ''cash in lieu'' amount generally must be received by the Distributor no later than 2:00 p.m. Eastern Time on the Settlement Date. The ''Settlement Date'' is generally the third business day after the transmittal date. On days when the Exchange or the bond markets close earlier than normal, the Fund may require orders to create or to redeem Creation Units to be placed earlier in the day.

Fund Deposits must be delivered through the Federal Reserve System (for cash and government securities), through DTC (for corporate and municipal securities), or through a central depository account, such as with Euroclear or DTC, maintained by State Street or a sub-custodian (''Central Depository Account'') by an authorized participant. Any portion of a Fund Deposit that may not be delivered through the Federal Reserve System or DTC must be delivered through a Central Depository Account. The Fund Deposit transfer must be ordered by the authorized participant in a timely fashion so as to ensure the delivery of the requisite number of Deposit Securities to the account of the Fund by no later than 3:00 p.m. Eastern Time on the Settlement Date.

A standard creation transaction fee will be imposed to offset the transfer and other transaction costs associated with the issuance of Creation Units.

Shares of the Fund may be redeemed only in Creation Units at their NAV next determined after receipt of a redemption request in proper form by the Distributor and only on a business day. BFA will make available through the NSCC, prior to the opening of business on the Exchange on each business day, the designated portfolio of securities (including any portion of such securities for which cash may be substituted) that will be applicable (subject to possible amendment or correction) to redemption requests received in proper form on that day (''Fund Securities''). Fund Securities received on redemption may not be identical to Deposit Securities that are applicable to creations of Creation Units.

Unless cash redemptions are available or specified for the Fund, the redemption proceeds for a Creation Unit generally will consist of a specified amount of cash, Fund Securities, plus additional cash in an amount equal to the difference between the NAV of the Shares being redeemed, as next determined after the receipt of a request in proper form, and the value of the specified amount of cash and Fund Securities, less a redemption transaction fee. The Fund generally redeems Creation Units partially for cash.

A standard redemption transaction fee will be imposed to offset transfer and other transaction costs that may be incurred by the Fund.

Redemption requests for Creation Units of the Fund must be submitted to the Distributor by or through an authorized participant no later than 4:00 p.m. Eastern Time on any business day in order to receive that day's NAV. The authorized participant must transmit the request for redemption in the form required by the Fund to the Distributor in accordance with procedures set forth in the authorized participant agreement.

Additional information regarding the Shares and the Fund, including investment strategies, risks, creation and redemption procedures, fees and expenses, portfolio holdings disclosure policies, distributions, taxes, and reports to be distributed to beneficial owners of the Shares can be found in the Registration Statement or on the Web site for the Fund (*www.iShares.com*), as applicable.

Availability of Information

The Fund's Web site, which will be publicly available prior to the public offering of Shares, will include a form of the prospectus for the Fund that may be downloaded. The Web site will include additional quantitative information updated on a daily basis, including, for the Fund: (1) The prior business day's reported NAV, mid-point of the bid/ask spread at the time of calculation of such NAV (''Bid/Ask Price''),[26] daily trading volume, and a calculation of the premium and discount of the Bid/Ask Price against the NAV; and (2) data in chart format displaying the frequency distribution of discounts and premiums of the daily Bid/Ask Price against the NAV, within appropriate ranges, for each of the four previous calendar quarters. Daily trading volume information will be available in the financial section of newspapers, through subscription services such as Bloomberg, Thomson Reuters, and International Data Corporation, which can be accessed by authorized participants and other investors, as well as through other electronic services, including major public Web sites. On each business day, before commencement of trading in Shares during Regular Trading Hours[27] on the Exchange, the Fund will disclose on its Web site the identities and quantities of the portfolio of securities and other assets (''Disclosed Portfolio'') held by the Fund that will form the basis for the Fund's calculation of NAV

[26] The Bid/Ask Price of the Fund will be determined using the midpoint of the highest bid and the lowest offer on the Exchange as of the time of calculation of the Fund's NAV. The records relating to Bid/Ask Prices will be retained by the Fund and its service providers.

[27] Regular Trading Hours are 9:30 a.m. to 4:00 p.m. Eastern Time.

at the end of the business day.[28] The Disclosed Portfolio will include, as applicable, the names, quantity, percentage weighting and market value of Fixed Income Securities and other assets held by the Fund, and the characteristics of such assets. The Web site and information will be publicly available at no charge.

In addition, for the Fund, an estimated value, defined in BATS Rule 14.11(i)(3)(C) as the ''Intraday Indicative Value,'' that reflects an estimated intraday value of the Fund's portfolio, will be disseminated. Moreover, the Intraday Indicative Value will be based upon the current value for the components of the Disclosed Portfolio and will be updated and widely disseminated by one or more major market data vendors at least every 15 seconds during the Exchange's Regular Trading Hours.[29] In addition, the quotations of certain of the Fund's holdings may not be updated during U.S. trading hours if such holdings do not trade in the United States or if updated prices cannot be ascertained.

The dissemination of the Intraday Indicative Value, together with the Disclosed Portfolio, will allow investors to determine the value of the underlying portfolio of the Fund on a daily basis and provide a close estimate of that value throughout the trading day.

Intraday, executable price quotations on Fixed Income Securities and other assets are available from major broker-dealer firms and for exchange-traded assets, including investment companies, futures, and options, such intraday information is available directly from the applicable listing exchange. All such intraday price information is available through subscription services, such as Bloomberg, Thomson Reuters, and International Data Corporation, which can be accessed by authorized participants and other investors.

Information regarding market price and volume of the Shares will be continually available on a real-time basis throughout the day on brokers' computer screens and other electronic services. The previous day's closing price and trading volume information for the Shares will be published daily in the financial section of newspapers. Quotation and last-sale information for the Shares will be available on the facilities of the CTA.

Initial and Continued Listing

The Shares will be subject to BATS Rule 14.11(i), which sets forth the initial and continued listing criteria applicable to Managed Fund Shares. The Exchange represents that, for initial and/or continued listing, the Fund must be in compliance with Rule 10A–3 under the Act.[30] A minimum of 100,000 Shares will be outstanding at the commencement of trading on the Exchange. The Exchange will obtain a representation from the issuer of the Shares that the NAV per Share will be calculated daily and that the NAV and the Disclosed Portfolio will be made available to all market participants at the same time.

Trading Halts

With respect to trading halts, the Exchange may consider all relevant factors in exercising its discretion to halt or suspend trading in the Shares of the Fund. The Exchange will halt trading in the Shares under the conditions specified in BATS Rule 11.18. Trading may be halted because of market conditions or for reasons that, in the view of the Exchange, make trading in the Shares inadvisable. These may include: (1) The extent to which trading is not occurring in the securities and/or the financial instruments composing the Disclosed Portfolio of the Fund; or (2) whether other unusual conditions or circumstances detrimental to the maintenance of a fair and orderly market are present. Trading in the Shares also will be subject to Rule 14.11(i)(4)(B)(iv), which sets forth circumstances under which Shares of the Fund may be halted.

Trading Rules

The Exchange deems the Shares to be equity securities, thus rendering trading in the Shares subject to the Exchange's existing rules governing the trading of equity securities. BATS will allow trading in the Shares from 8:00 a.m. until 5:00 p.m. Eastern Time. The Exchange has appropriate rules to facilitate transactions in the Shares during all trading sessions. As provided in BATS Rule 11.11(a), the minimum price variation for quoting and entry of orders in Managed Fund Shares traded on the Exchange is $0.01, with the exception of securities that are priced less than $1.00, for which the minimum price variation for order entry is $0.0001.

Surveillance

The Exchange believes that its surveillance procedures are adequate to properly monitor the trading of the Shares on the Exchange during all trading sessions and to deter and detect violations of Exchange rules and the applicable federal securities laws. Trading of the Shares through the Exchange will be subject to the Exchange's surveillance procedures for derivative products, including Managed Fund Shares. The Exchange may obtain information regarding trading in the Shares and the underlying shares in investment companies, futures, and options via the Intermarket Surveillance Group (''ISG''), from other exchanges who are members or affiliates of the ISG, or with which the Exchange has entered into a comprehensive surveillance sharing agreement.[31] The Exchange prohibits the distribution of material non-public information by its employees.

Information Circular

Prior to the commencement of trading, the Exchange will inform its members in an Information Circular of the special characteristics and risks associated with trading the Shares. Specifically, the Information Circular will discuss the following: (1) The procedures for purchases and redemptions of Shares in Creation Units (and that Shares are not individually redeemable); (2) BATS Rule 3.7, which imposes suitability obligations on Exchange members with respect to recommending transactions in the Shares to customers; (3) how information regarding the Intraday Indicative Value is disseminated; (4) the risks involved in trading the Shares during the Pre-Opening[32] and After Hours Trading Sessions[33] when an updated Intraday Indicative Value will not be calculated or publicly disseminated; (5) the requirement that members deliver a prospectus to investors purchasing newly issued

[28] Under accounting procedures to be followed by the Fund, trades made on the prior business day (''T'') will be booked and reflected in NAV on the current business day (''T+1''). Accordingly, the Fund will be able to disclose at the beginning of the business day the portfolio that will form the basis for the NAV calculation at the end of the business day.

[29] Currently, it is the Exchange's understanding that several major market data vendors display and/or make widely available Intraday Indicative Values published via the Consolidated Tape Association (''CTA'') or other data feeds.

[30] *See* 17 CFR 240.10A–3.

[31] For a list of the current members and affiliate members of ISG, *see www.isgportal.com.* The Exchange notes that not all components of the Disclosed Portfolio for the Fund may trade on markets that are members of ISG or with which the Exchange has in place a comprehensive surveillance sharing agreement. The Exchange also notes that all of the investment company securities, futures, and options will trade on markets that are a member of ISG or with which the Exchange has in place a comprehensive surveillance sharing agreement.

[32] The Pre-Opening Session is from 8:00 a.m. to 9:30 a.m. Eastern Time.

[33] The After Hours Trading Session is from 4:00 p.m. to 5:00 p.m. Eastern Time.

Shares prior to or concurrently with the confirmation of a transaction; and (6) trading information.

In addition, the Information Circular will advise members, prior to the commencement of trading, of the prospectus delivery requirements applicable to the Fund. Members purchasing Shares from the Fund for resale to investors will deliver a prospectus to such investors. The Information Circular will also discuss any exemptive, no-action, and interpretive relief granted by the Commission from any rules under the Act.

In addition, the Information Circular will reference that the Fund is subject to various fees and expenses described in the Registration Statement. The Information Circular will also disclose the trading hours of the Shares of the Fund and the applicable NAV Calculation Time for the Shares. The Information Circular will disclose that information about the Shares of the Fund will be publicly available on the Fund's Web site. In addition, the Information Circular will reference that the Trust is subject to various fees and expenses described in the Fund's Registration Statement.

2. Statutory Basis

The Exchange believes that the proposal is consistent with Section 6(b) of the Act [34] in general and Section 6(b)(5) of the Act [35] in particular 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, 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 Exchange believes that the proposed rule change is designed to prevent fraudulent and manipulative acts and practices in that the Shares will be listed and traded on the Exchange pursuant to the initial and continued listing criteria in BATS Rule 14.11(i). The Exchange believes that its surveillance procedures are adequate to properly monitor the trading of the Shares on the Exchange during all trading sessions and to deter and detect violations of Exchange rules and the applicable federal securities laws. If the investment adviser to the investment company issuing Managed Fund Shares is affiliated with a broker-dealer, such investment adviser to the investment adviser shall erect a ''fire wall'' between the investment adviser and the broker-dealer with respect to access to information concerning the composition and/or changes to such investment company portfolio. The Adviser is not a registered broker-dealer, but is affiliated with multiple broker-dealers and has implemented ''fire walls'' with respect to such broker-dealers regarding access to information concerning the composition and/or changes to the Fund's portfolio. The Exchange may obtain information regarding trading in the Shares and the underlying shares in investment companies, futures, and options via the ISG, from other exchanges who are members or affiliates of the ISG, or with which the Exchange has entered into a comprehensive surveillance sharing agreement.[36]

According to the Registration Statement, the Fund expects that it will have at least 80% of its assets invested in U.S. dollar-denominated investment grade Fixed Income Securities. The Fund's exposure to any single industry will generally be limited to 25% of the Fund's assets. The Fund's investments will be consistent with the Fund's investment objective and will not be used to enhance leverage. The Fund also may invest its net assets in money market instruments at the discretion of the Adviser. The Fund may invest up to 5% of its net assets in Fixed Income Securities and instruments of issuers that are domiciled in emerging market countries. While the Fund is permitted to invest without restriction in corporate bonds, the Adviser expects that, under normal circumstances, the Fund will generally seek to invest in corporate bond issuances that have at least $100 million par amount outstanding in developed countries and at least $200 million par amount outstanding in emerging market countries. The Fund will not invest in non-U.S. equity securities.

Additionally, the Fund may hold up to an aggregate amount of 15% of its net assets in illiquid securities (calculated at the time of investment), including Rule 144A securities. The Fund will monitor its portfolio liquidity on an ongoing basis to determine whether, in light of current circumstances, an adequate level of liquidity is being maintained, and will consider taking appropriate steps in order to maintain adequate liquidity if, through a change in values, net assets, or other circumstances, more than 15% of the Fund's net assets are held in illiquid securities. Illiquid securities include securities subject to contractual or other restrictions on resale and other instruments that lack readily available markets as determined in accordance with Commission staff guidance. The Fund may engage in derivatives transactions, including transactions in futures contracts, options, and swaps, to a limited extent.[37] The Fund's portfolio will meet certain criteria for index-based, fixed income exchange-traded funds contained in Rule 14.11(c)(4)(B)(i).[38]

The proposed rule change is designed to promote just and equitable principles of trade and to protect investors and the public interest in that the Exchange will obtain a representation from the issuer of the Shares that the NAV per Share will be calculated daily and that the NAV and the Disclosed Portfolio will be made available to all market participants at the same time. In addition, a large amount of information is publicly available regarding the Fund and the Shares, thereby promoting market transparency. Moreover, the Intraday Indicative Value will be disseminated by one or more major market data vendors at least every 15 seconds during Regular Trading Hours. On each business day, before commencement of trading in Shares during Regular Trading Hours, the Fund will disclose on its Web site the Disclosed Portfolio that will form the basis for the Fund's calculation of NAV at the end of the business day. Pricing information will be available on the Fund's Web site including: (1) The prior business day's reported NAV, the Bid/Ask Price of the Fund, and a calculation of the premium and discount of the Bid/Ask Price against the NAV; and (2) data in chart format displaying the frequency distribution of discounts and premiums of the daily Bid/Ask Price against the NAV, within appropriate ranges, for each of the four previous calendar quarters. Additionally, information regarding market price and trading of the Shares will be continually available on a real-time basis throughout the day on brokers' computer screens and other electronic services, and quotation and last-sale information for the Shares will be available on the facilities of the CTA. The Web site for the Fund will include a form of the prospectus for the Fund

[34] 15 U.S.C. 78f.

[35] 15 U.S.C. 78f(b)(5).

[36] *See* note 31, *supra.*

[37] Derivatives might be included in the Fund's investments to serve the investment objectives of the Fund. Examples include, but are not limited to, treasury futures to hedge against rising interest rates, and currency futures to hedge against foreign exchange rates. The derivatives will be exchange traded and/or centrally cleared, and they will be collateralized. Derivatives are not a principal investment strategy of the Fund. *See* note 22, *supra.*

[38] *See* note 21, *supra.*

and additional data relating to NAV and other applicable quantitative information. Trading in Shares of the Fund will be halted under the conditions specified in BATS Rule 11.18. Trading may also be halted because of market conditions or for reasons that, in the view of the Exchange, make trading in the Shares inadvisable. Finally, trading in the Shares will be subject to BATS Rule 14.11(i)(4)(B)(iv), which sets forth circumstances under which Shares of the Fund may be halted. In addition, as noted above, investors will have ready access to information regarding the Fund's holdings, the Intraday Indicative Value, the Disclosed Portfolio, and quotation and last-sale information for the Shares.

Intraday, executable price quotations on Fixed Income Securities and other assets are available from major broker-dealer firms and for exchange-traded assets, including investment companies, futures, and options, such intraday information is available directly from the applicable listing exchange. Such intraday price information is available through subscription services, such as Bloomberg, Thomson Reuters, and International Data Corporation, which can be accessed by authorized participants and other investors.

The proposed rule change is designed to perfect the mechanism of a free and open market and, in general, to protect investors and the public interest in that it will facilitate the listing and trading of an additional type of actively-managed exchange-traded product that will enhance competition among market participants, to the benefit of investors and the marketplace. As noted above, the Exchange has in place surveillance procedures relating to trading in the Shares and may obtain information via ISG from other exchanges that are members of ISG or with which the Exchange has entered into a comprehensive surveillance sharing agreement. In addition, as noted above, investors will have ready access to information regarding the Fund's holdings, the Intraday Indicative Value, the Disclosed Portfolio, and quotation and last-sale information for the Shares.

For the above reasons, the Exchange believes that the proposed rule change is consistent with the requirements of Section 6(b)(5) of the Act.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purpose of the Act. The Exchange notes that the proposed rule change will facilitate the listing and trading of an additional actively-managed exchange-traded product that will enhance competition among market participants, to the benefit of investors and the marketplace.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

The Exchange has neither solicited nor received written comments on the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 45 days of the date of publication of this notice in the **Federal Register** or within such longer period up to 90 days of publication (i) as the Commission may designate if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the Exchange consents, the Commission will:

A. By order approve or disapprove such proposed rule change; or

B. institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–BATS–2013–051 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–BATS–2013–051. 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 Section, 100 F Street NE., Washington, DC 20549, on official business days between 10:00 a.m. and 3:00 p.m. Copies of the filing will also 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–BATS–2013–051 and should be submitted on or before November 12, 2013.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[39]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2013–24559 Filed 10–21–13; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–70683; File No. SR–CBOE–2013–087]

Self-Regulatory Organizations; Chicago Board Options Exchange, Incorporated; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change Relating to Fees for the Complex Order Book Data Feed for CBOE Listed Options

October 15, 2013.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the ''Act''),[1] and Rule 19b-4 thereunder,[2] notice is hereby given that on September 30, 2013, Chicago Board Options Exchange, Incorporated (the ''Exchange'' or ''CBOE'') filed with the Securities and Exchange Commission (the ''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. The Commission is publishing this notice to

[39] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

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

Chicago Board Options Exchange, Incorporated (the ''Exchange'' or ''CBOE'') proposes to amend the fee schedule of Market Data Express, LLC (''MDX''), an affiliate of CBOE, to establish fees for the Complex Order Book (''COB'') Data Feed for CBOE listed options (''COB Data Feed'' or ''Data''). The text of the proposed rule change is available on the Exchange's Web site (*http://www.cboe.com/AboutCBOE/CBOELegalRegulatoryHome.aspx*), at the Exchange's Office of the Secretary, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The COB Data Feed is a real-time feed that consists of data regarding the Exchange's Complex Order Book and related complex order information. The COB Data Feed includes ''best bid and offer'' or ''BBO'' quotes and identifying information for all CBOE-traded complex order strategies, as well as all executed CBOE complex order trades (and identifies whether the trade was a customer trade or whether a complex order in the COB is a customer order). The COB Data Feed is currently made available by MDX to all market participants free of charge.[3]

The Exchange proposes to establish fees for the COB Data Feed. MDX would charge Customers of the COB Data Feed $3,000 per month (''Data Fee''). A COB Data Feed ''Customer'' is any entity that receives the COB Data Feed, either directly from MDX's system or through a connection to MDX provided by an approved redistributor (*i.e.,* a market data vendor or an extranet service provider), and distributes it externally or uses it internally, except that an entity or person that receives the COB Data Feed from a Customer and only uses it internally is not a ''Customer'' if it receives the COB Data Feed from a Customer subject to a form of ''Subscriber Agreement'' that has been approved by MDX. The Data Fee for the COB Data Feed would be waived for Customers of the COB Data Feed who are also Customers of the BBO Data Feed.[4] Customers of the BBO Data Feed are currently charged $5,000 per month by MDX.[5] The proposed waiver of the Data Fee for the COB Data Feed would allow a Customer of the COB Data Feed who is also a Customer of the BBO Data Feed to redistribute the COB Data Feed for no additional charge.[6]

In addition, MDX would charge a Customer ''User Fees'' of $25 per month per Device[7] or user ID for receipt of the data by ''Professional Users''[8] and $1 per month for receipt of the data by ''Non-Professional Users''.[9] User Fees would be subject to a cap of $2,000 per month, *i.e.,* a Customer would pay no more than $2,000 in User Fees in a month.

The Exchange also proposes to make several formatting and clean up changes to the MDX fee schedule. The Exchange proposes to create three separate sections on the MDX fee schedule for the BBO Data Feed, COB Data Feed and FLEX Options Data Feed[10] and include the definitions applicable to each data feed within its respective section. The Exchange proposes to renumber the section on Systems Fees and move the definition of Port Fee within that section. Finally, the Exchange proposes to delete the Definitions section of the MDX fee schedule, including the provisions on invoicing and late payments which are included within MDX's written agreement for the data.

The proposed fees would be effective on October 1, 2013.

2. Statutory Basis

The Exchange believes the proposed rule change is consistent with the requirements of Section 6(b) of the Securities Exchange Act of 1934 (''Act'')[11] in general, and, in particular, with Section 6(b)(4) of the Act[12] in that it provides for the equitable allocation of reasonable dues, fees and other charges among users and recipients of the Data, and with Section 6(b)(5)[13] of the Act in that it is not designed to permit unfair discrimination between them. The Exchange believes the proposed Data Fee and User Fees are equitable and not unfairly discriminatory because they would apply equally to all Customers of the COB Data Feed except the Data Fee would be waived for Customers of the COB Data Feed who are also Customers of the BBO Data Feed. The Exchange notes that the fee structure of differentiated professional and nonprofessional fees has long been used by other exchanges for their products and by the Options Price Reporting Authority (''OPRA'') Plan in order to reduce the price of data to retail investors and make it more broadly available.[14]

[3] *See* Securities Exchange Act Release No. 70118 (August 5, 2013) (SR–CBOE–2013–070).

[4] The BBO Data Feed is a real-time, low latency data feed that includes CBOE BBO data, consisting of all outstanding quotes and standing orders at the best available price level on each side of the market, with aggregate size and last sale data. The BBO Data Feed includes the data included in the COB Data Feed, among other data. *See* Securities Exchange Act Release No. 69438 (April 23, 2013), 78 FR 25334 (April 30, 2013).

[5] *Id.*

[6] Such Customers would still be subject to User Fees as described below.

[7] A ''Device'' means any computer, workstation or other item of equipment, fixed or portable, that receives, accesses and/or displays data in visual, audible or other form.

[8] A ''Professional User'' is any natural person recipient of the COB Data Feed who is not a Non-Professional User. User Fees for Professional Users are payable for both ''internal'' Professional Users (Devices or user IDs of employees of a Customer) and ''external'' Professional Users (Devices or user IDs of Professional Users who receive the Data from a Customer and are not employed by the Customer). (Non-Professional Users must be external since a person who uses the COB Data Feed for a commercial purpose cannot be a Non-Professional User.)

[9] A ''Non-Professional User'' is a natural person who uses the COB Data Feed only for personal purposes and not for any commercial purpose and who, if he or she works in the United States, is not: (i) Registered or qualified in any capacity with the Securities and Exchange Commission, the Commodities Futures Trading Commission, any state securities agency, any securities exchange or association, or any commodities or futures contract market or association; (ii) engaged as an ''investment adviser'' as that term is defined in Section 201(11) of the Investment Advisors Act of 1940 (whether or not registered or qualified under that Act); or (iii) employed by a bank or other organization exempt from registration under federal or state securities laws to perform functions that would require registration or qualification if such functions were performed for an organization not so exempt; or, if he or she works outside of the United States, does not perform the same functions as someone who would qualify as a Non-Professional User if he or she worked in the United States.

[10] The FLEX Options Data Feed is currently made available to all market participants free of charge. *See* Securities Exchange Act Release No. 68696 (January 18, 2013), 78 FR 5527 (January 25, 2013).

[11] 15 U.S.C. 78f(b).

[12] 15 U.S.C. 78f(b)(4).

[13] 15 U.S.C. 78f(b)(5).

[14] *See, e.g.,* Securities Exchange Act Release No. 67589 (August 2, 2012), 77 FR 47459 (August 8,

Continued

The Exchange believes the proposed waiver of the Data Fee is equitable and not unfairly discriminatory because it would apply equally to all Customers of the COB Data Feed who are also Customers of the BBO Data Feed. Customers of the BBO Data Feed already pay MDX $5,000 for the right to use and redistribute the data in the BBO Data Feed. The BBO Data Feed includes the data in the COB Data Feed. The proposed waiver of the Data Fee would allow a Customer of the COB Data Feed who is also a Customer of the BBO Data Feed to redistribute the COB Data Feed for no additional charge, thereby incentivizing further redistribution of the data in the COB Data Feed. The Exchange notes other exchanges offer similar fee waivers.[15]

The Exchange also believes the proposed fees are equitable because the COB Data Feed is purely optional. Only those Customers that deem the product to be of sufficient overall value and usefulness would purchase it.

The Exchange believes the proposed fees are reasonable because they compare favorably to fees that other markets charge for similar products. For example, the Exchange believes The International Securities Exchange (''ISE'') offers a ''Spread Feed'', which like the COB Data Feed includes order and quote data for complex strategies. The Exchange believes ISE charges distributors of its Spread Feed $3,000 per month and a monthly controlled device fee of $25 per controlled device for Professionals.

The Exchange notes that the COB Data Feed also competes with products offered by NASDAQ OMX PHLX and NYSE. NASDAQ OMX PHLX offers a market data product entitled ''TOPO Plus Orders'', which like the COB Data Feed includes order and last sale information for complex strategies and other market data. NYSE offers market data products entitled ''NYSE ArcaBook for Amex Options'' and ''NYSE ArcaBook for Arca Options'' that include top-of-book and last sale data for complex strategies similar to the data in the COB Data Feed.

The Exchange believes that the proposed cap on User Fees is reasonable because it may encourage more vendors to choose to offer the COB Data Feed, thereby expanding the distribution of this market data for the benefit of investors.

The proposed formatting and clean-up changes to the MDX fee schedule will benefit Customers and users by making the fee schedule clearer and easier to understand.

For the reasons cited above, the Exchange believes the proposed fees for the COB Data Feed are equitable, reasonable and not unfairly discriminatory. In addition, the Exchange believes that no substantial countervailing basis exists to support a finding that the proposed fees for the COB Data Feed fails to meet the requirements of the Act.

B. Self-Regulatory Organization's Statement on Burden on Competition

In accordance with Section 6(b)(8) of the Act,[16] CBOE 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 existence of 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 Exchange believes competition provides an effective constraint on the market data fees that the Exchange, through MDX, has the ability and the incentive to charge. CBOE has a compelling need to attract order flow from market participants in order to maintain its share of trading volume. This compelling need to attract order flow imposes significant pressure on CBOE to act reasonably in setting its fees for market data, particularly given that the market participants that will pay such fees often will be the same market participants from whom CBOE must attract order flow. These market participants include broker-dealers that control the handling of a large volume of customer and proprietary order flow. Given the portability of order flow from one exchange to another, any exchange that sought to charge unreasonably high data fees would risk alienating many of the same customers on whose orders it depends for competitive survival. CBOE currently competes with eleven options exchanges (including CBOE's affiliate, C2 Options Exchange) for order flow.[17]

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, Customers will not offer the COB Data Feed unless this product will help them maintain current users or attract new ones. For example, a broker-dealer will not choose to offer the COB Data Feed 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 the COB Data Feed from Customers 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

2012) (revising OPRA's definition of the term ''Nonprofessional'').

[15] The Exchange believes the NASDAQ Options Market charges only one distributor fee to allow a subscriber access to its ''NASDAQ ITCH-to-Trade Options'' (ITTO) and ''Best of NASDAQ Options'' (BONO) products. The Exchange believes NASDAQ OMX BX charges only one distributor fee to allow a subscriber access to its ''BX Options Depth of Market'' (BX Depth) and ''BX Options Top of Market'' (BX Top) products.

[16] 15 U.S.C. 78f(b)(8).

[17] The Commission has previously made a finding that the options industry is subject to significant competitive forces. *See, e.g.,* Securities Exchange Act Release No. 59949 (May 20, 2009), 74 FR 25593 (May 28, 2009) (SR–ISE–2009–97) (order approving ISE's proposal to establish fees for a real-time depth of market data offering).

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.

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 options 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.

The Existence of Alternatives. CBOE is constrained in pricing the COB Data Feed by the availability to market participants of alternatives to purchasing the COB Data Feed. CBOE must consider the extent to which market participants would choose one or more alternatives instead of purchasing the exchange's data. Other options exchanges can and have produced their own complex strategies market data products, and thus are sources of potential competition for MDX. As noted above, ISE, NASDAQ OMX PHLX and NYSE offer market data products that compete with the COB Data Feed. 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.

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 trading decisions. The Exchange believes that the proposed waiver of the Data Fee and the cap on User Fees, which may permit wider distribution of the COB Data Feed at a lower cost to Customers with a large number of Professional and Non-professional Users, may encourage more users to demand and more Customers to choose to offer the COB Data Feed, thereby benefitting Professional and Non-professional Users, including public investors.

The existence of numerous alternatives to the Exchange's products, including 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.

The COB Data Feed is voluntary on the part of the Exchange, which is not required to offer such services, and voluntary on the part of prospective Customers that are not required to use it. The Exchange believes the COB Data Feed offered by MDX will help attract new users and new order flow to the Exchange, thereby improving the Exchange's ability to compete in the market for options order flow and executions.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

The Exchange neither solicited nor received comments on the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A) of the Act [18] and paragraph (f) of Rule 19b–4 [19] thereunder. At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission will institute proceedings to determine whether the proposed rule change should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–CBOE–2013–087 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–CBOE–2013–087. 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

[18] 15 U.S.C. 78s(b)(3)(A).

[19] 17 CFR 240.19b–4(f).

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–CBOE–2013–087 and should be submitted on or before November 12, 2013.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[20]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2013–24674 Filed 10–21–13; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–70696; File No. SR–NYSEMKT–2013–82]

Self-Regulatory Organizations; NYSE MKT LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change for a Temporary Suspension of Those Aspects of Rules 36.20—Equities and 36.21—Equities That Would Not Permit Floor Brokers To Use Personal Portable Phone Devices on the Trading Floor Due to the Unavailability of Exchange-Provided Cell Phones Beginning on October 10, 2013 Until the Earlier of When Cell Phone Service Is Restored or October 11, 2013

October 16, 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 October 10, 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 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 a temporary suspension of those aspects of Rules 36.20—Equities and 36.21—Equities that would not permit Floor brokers to use personal portable phone devices on the Trading Floor due to the unavailability of Exchange-provided cell phones beginning on October 10, 2013 until the earlier of when cell phone service is restored or October 11, 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 Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to temporarily suspend those aspects of Rules 36.20—Equities and 36.21—Equities that would not permit Floor brokers to use personal portable phone devices on the Trading Floor.[4] As proposed, all other aspects of Rule 36—Equities remain applicable and the temporary suspensions of the applicable Rule 36—Equities requirements are in effect beginning October 10, 2013 when the outage began, and remain in place until the earlier of when phone service is restored or close of business Friday, October 11, 2013.[5]

On October 10, 2013, the third-party carrier that provides service for the Exchange-provided cell phones experienced an issue that affected Exchange authorized and provided portable phones for Floor brokers. This outage only impacted the service for Exchange authorized and provided portable phones. As a result, all Exchange authorized and provided cell phones were non-operational before the opening of trading on October 10, 2013. The Exchange is working closely with the third-party carrier to restore such cell phone service.

Rules 36.20—Equities and 36.21—Equities govern the type of telephone communications that are approved for Floor brokers. Pursuant to Rule 36.20—Equities, Floor brokers may maintain a telephone line on the Trading Floor and use Exchange authorized and provided portable phones while on the Trading Floor. The use of such Exchange authorized and provided portable phones is governed by Rule 36.21—Equities. Because of the issues with the third-party carrier, all Exchange authorized and provided portable phones are not functional and therefore Floor brokers cannot use the Exchange authorized and provided portable phones. However, the personal cell phones of Floor brokers are operational on the Trading Floor. The Exchange believes that because communications with customers is a vital part of a Floor broker's role as agent and therefore contributes to maintaining a fair and orderly market, during the period when Exchange-provided cell phones are non-operational, Floor brokers should be permitted to use personal portable phone devices in lieu of the non-operational Exchange authorized and provided portable phones.

The Exchange therefore proposes to temporarily suspend the limitations in Rules 36.20—Equities and 36.21—Equities that permit Floor brokers to use only Exchange authorized and provided portable phones so that Floor brokers may also use personal portable phones on the Trading Floor. The Exchange proposes that pursuant to this temporary suspension, Floor brokers must provide the Exchange with the names of all Floor-based personnel who used personal portable phones during this temporary suspension period, together with the phone number and applicable carrier for each number.

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[20] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 15 U.S.C. 78a.

[3] 17 CFR 240.19b–4.

[4] Pursuant to Rule 6A—Equities, the Trading Floor is defined as the restricted-access physical areas designated by the Exchange for the trading of securities.

[5] The Exchange provided Floor brokers with notice of this rule filing, including the applicable recordkeeping and other requirements related to using personal cell phones during the temporary suspension of Rule 36—Equities.

Floor broker member organizations must maintain in their books and records all cell phone records that show both incoming and outgoing calls that were made during the period that a personal portable phone was used on the Trading Floor. To the extent the records are unavailable from the third-party carrier, the Floor brokers must maintain contemporaneous records of all calls made or received on a personal portable phone while on the Trading Floor. As with all member organization records, such cell phone records must be provided to Exchange regulatory staff, including without limitation staff of the Financial Industry Regulatory Authority (''FINRA''), on request.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6(b) of the Act,[6] in general, and furthers the objectives of Section 6(b)(5) of the Act,[7] in particular, 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 mechanism of a free and open market and a national market system.

In particular, because of issues experienced by a third-party cell phone carrier, Exchange authorized and provided cell phones are not functional. The Exchange believes that the proposed temporary suspensions from those aspects of Rule 36—Equities that restrict Floor broker's use of personal portable phones on the Trading Floor removes impediments to and perfects the mechanism of a free and open market and national market system because the proposed relief will enable Floor brokers to conduct their regular business, notwithstanding the ongoing issues with telephone service. The Exchange further believes that without the requested relief, Floor brokers would be compromised in their ability to conduct their regular course of business on the Trading Floor. In particular, for Floor brokers, because they operate as agents for customers, their inability to communicate with customers could compromise their ability to represent public orders on the Trading Floor.

[6] 15 U.S.C. 78f(b).

[7] 15 U.S.C. 78f(b)(5).

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. The Exchange does not believe that the proposed rule change will impose any burden on competition because the proposed change only impacts Floor brokers and has no change in operations for other market participants or other market centers. To the contrary, the Exchange believes that without the proposed relief, Floor brokers would be compromised in their ability to conduct their regular course of business on the Trading Floor, thereby placing a burden on the Floor brokers' ability to compete.

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 Exchange has filed the proposed rule change pursuant to Section 19(b)(3)(A)(iii) of the Act[8] and Rule 19b–4(f)(6) thereunder.[9] Because the proposed rule change does not: (i) Significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative prior to 30 days from the date on which it was filed, or such shorter time as the Commission may designate, if consistent with the protection of investors and the public interest, the proposed rule change has become effective pursuant to Section 19(b)(3)(A) of the Act[10] and Rule 19b–4(f)(6) thereunder.[11]

A proposed rule change filed under Rule 19b–4(f)(6)[12] normally does not become operative prior to 30 days after the date of the filing. However, pursuant to Rule 19b–4(f)(6)(iii),[13] the Commission may designate a shorter time if such action is consistent with the protection of investors and the public interest. The Exchange has asked the Commission to waive the 30-day operative delay so that the proposal may become operative immediately upon filing. The Commission believes that waiving the 30-day operative delay is consistent with the protection of investors and the public interest. Waiver of the operative delay allows the terms of the relief described herein to be available during the service outage for Exchange-provided cell phones. Therefore, the Commission hereby waives the 30-day operative delay and designates the proposal operative upon filing.[14]

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) of the Act[15] to determine whether the proposed rule change should be approved or disapproved.

[8] 15 U.S.C. 78s(b)(3)(A)(iii).

[9] 17 CFR 240.19b–4(f)(6).

[10] 15 U.S.C. 78s(b)(3)(A).

[11] 17 CFR 240.19b–4(f)(6). In addition, Rule 19b–4(f)(6) requires a self-regulatory organization to give the Commission written notice of its intent to file the proposed rule change, along with a brief description and text of the proposed rule change, at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has satisfied this requirement.

[12] 17 CFR 240.19b–4(f)(6).

[13] 17 CFR 240.19b–4(f)(6)(iii).

[14] For purposes only of waiving the 30-day operative delay, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[15] 15 U.S.C. 78s(b)(2)(B).

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–2013–82 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–NYSEMKT–2013–82. 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–2013–82 and should be submitted on or before November 12, 2013.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[16]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2013–24684 Filed 10–21–13; 8:45 am]

BILLING CODE 8011–01–P

[16] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–70664; File No. SR–BATS–2013–054]

Self-Regulatory Organizations; BATS Exchange, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Related to Fees for Use of BATS Exchange, Inc.

October 11, 2013.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the ''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on October 1, 2013, BATS Exchange, Inc. (the ''Exchange'' or ''BATS'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I, II and III below, which Items have been prepared by the Exchange. The Exchange has designated the proposed rule change as one establishing or changing a member due, fee, or other charge imposed by the Exchange under Section 19(b)(3)(A)(ii) of the Act[3] and Rule 19b–4(f)(2) thereunder,[4] which renders the proposed rule change effective upon filing with the Commission. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

I. Self-Regulatory Organization's Statement of the Terms of the Substance of the Proposed Rule Change

The Exchange filed a proposal to amend the fee schedule applicable to Members[5] and non-members of the Exchange pursuant to BATS Rules 15.1(a) and (c). Changes to the fee schedule pursuant to this proposal will be effective upon filing.

The text of the proposed rule change is available at the Exchange's Web site at *http://www.batstrading.com,* at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in Sections A, B, and C below, of the most significant parts of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to modify its fee schedule applicable to use of the Exchange effective October 1, 2013, in order to: (1) Increase the fee to remove liquidity from the Exchange's order book in all securities; (2) modify the tiered rebate structure applicable to adding liquidity to the Exchange's order book in securities priced $1.00 or above; (3) adopt an additional rebate incentive (subject to average daily volume requirements) for orders that join the national best bid or national best offer (the ''NBBO'') when the Exchange is not already at the NBBO (''NBBO Joiner'' orders); and (4) make various formatting changes to enhance and simplify the fee schedule.

[3] 15 U.S.C. 78s(b)(3)(A)(ii).

[4] 17 CFR 240.19b–4(f)(2).

[5] A Member is any registered broker or dealer that has been admitted to membership in the Exchange.

Increase to Fee To Remove Liquidity From the Exchange

The Exchange currently charges $0.0029 per share for all orders executed on the Exchange that remove liquidity from the Exchange in securities priced $1.00 per share or above. The Exchange proposes to increase this standard fee to remove liquidity from the Exchange to $0.0030 per share.

Consistent with the current fee to remove liquidity, the $0.0030 charge per share for executions that remove liquidity from the Exchange will not apply to executions that remove liquidity in securities priced under $1.00 per share. The Exchange proposes to increase the fee for such executions from 0.10% of the total dollar value of the execution to 0.30% of the total dollar value of the execution.

Modifications to Tiered Rebate Structure for Securities Priced $1.00 or Above

The Exchange currently operates a tiered pricing structure through which Members can realize higher rebates for adding displayed liquidity. Specifically, the Exchange provides a standard rebate of $0.0025 per share for orders that add displayed liquidity for Members that do not qualify for a higher rebate based on their volume. The Exchange then provides a rebate of $0.0027 per share for orders that add displayed liquidity to the Exchange's order book where the Member has an average daily volume (''ADV''), as defined below, equal to or greater than 0.5% but less than 1.0% of average of total consolidated volume (''TCV''), as also defined below. Finally, the Exchange provides a rebate of $0.0029 per share for orders that add displayed liquidity to the Exchange's order book for any Member that has an ADV equal to or greater than 1.0% of TCV. The Exchange proposes to expand the number of tiers available and to modify the rebates associated with such tiers, as well as the rebates provided to Members not qualifying for tiered pricing.

For purposes of the fee schedule, the definition of ADV is average daily volume calculated as the number of shares added or removed, combined, per day on a monthly basis (excluding routed volume).[6] Rather than basing its

[6] The Exchange allows affiliated entities to aggregate their order flow for purposes of the Exchange's determination of ADV with respect to

pricing structure on a static number of shares executed by a Member each day, the Exchange operates its tiered pricing structure such that it is based on total consolidated volume, or TCV, and is thus variable based on overall volumes in the securities industry. TCV is defined as total consolidated volume calculated as the volume reported by all exchanges and trade reporting facilities to a consolidated transaction reporting plan for the month for which the fees apply.[7]

In connection with the proposed changes described below, the Exchange proposes to add a definition of ''ADAV'' to the fee schedule, which term will mean average daily volume calculated as the number of shares added per day on a monthly basis (excluding routed volume). Accordingly, ADAV measures a Member's average daily added volume only, and Member's will be able to qualify for applicable tiers with a lower ADAV than ADV.[8]

The Exchange proposes to replace the two existing tiers with six tiers, each of which, in turn, can be reached through either a Member's ADAV (added liquidity only) or a Member's ADV (added and removed volume combined). In part to fund such expansion, the Exchange proposes to reduce its standard rebate for Members that do not qualify for a tiered rebate from $0.0025 per share to $0.0020 per share. Further, the Exchange proposes to adopt the following tiers and rebates.

Volume tier	Member's ADAV is equal to or greater than average TCV of:		Member's ADV is equal to or greater than average TCV of:	Rebate per share
Tier 1	0.10%	or	0.25%	($0.0025)
Tier 2	0.20	or	0.50	(0.0028)
Tier 3	0.30	or	0.75	(0.0029)
Tier 4	0.50	or	1.00	(0.0030)
Tier 5	0.75	or	1.40	(0.0031)
Tier 6	1.00	or	1.75	(0.0032)

Accordingly, the Exchange proposes to offer the current standard rebate of $0.0025 per share to all Members that can achieve Tier 1, which is available to Members with ADAV of 0.10% or more of average TCV or ADV of 0.25% or more of average TCV. Members that do not currently qualify for any tiered rebates today may be able to qualify either under this tier, Tier 1, or if their ADAV (added liquidity only) qualifies for one of the Tiers. With respect to Members that qualify for tiered pricing today, with ADV of at least 0.5% of average TCV, all such Members will receive higher rebates than they do under the current pricing structure. For instance, Members qualifying for Tier 2 with between 0.5% and 0.75% of ADV and 0.75% and 1% of ADV will receive rebates of $0.0028 per share and $0.0029 per share (as compared to $0.0027 for Members with between 0.5% and 1.0% of ADV under the current rebate structure). Members will also be able to qualify for these two tiers at lower levels of ADAV, namely 0.2% and 0.3%, respectively. Further, the Exchange proposes to offer three tiers at which a higher rebate is available than is currently available for reaching the Exchange's current highest tier. Specifically, Members reaching Tier 4 will receive a rebate of $0.0030 per share, Members reaching Tier 5 will receive a rebate of $0.0031 per share and Members reaching the highest tier, Tier 6, will receive a rebate of $0.0032 per share.

Adoption of NBBO Joiner Rebates

Consistent with programs offered by the Exchange for orders that set the NBBO when received by the Exchange (''NBBO Setter'' orders), the Exchange proposes to adopt a program to attract aggressively priced displayed liquidity by providing an additional rebate for orders that join the NBBO when the Exchange is not already at the NBBO. To the extent such an order is displayed and executed on the Exchange, a NBBO Joiner order will receive an additional rebate of $0.0001 per share. This rebate is in addition to the rebate a Member would otherwise receive under the tiered pricing structure, as described above. Consistent with the current NBBO Setter program, the Exchange proposes to limit the ability to qualify for NBBO Joiner rebates to Members that have ADV equal to or greater than 0.5% of TCV. Because the Exchange has expanded the tiered pricing structure such that Members can qualify for rebates at the same level as those with ADV equal to or greater than 0.5% of TCV if they achieve ADAV of 0.2% or higher, the Exchange proposes to use this tier level as the eligibility requirement. Accordingly, the Exchange proposes to provide NBBO Setter and NBBO Joiner rebates to all qualifying orders entered by Members qualifying for Tier 2 or higher.

Additional Formatting Changes

In order to adopt the new tiered pricing structure, the Exchange has proposed to add much of the new pricing as part of a chart format. The Exchange proposes to convert other portions of its ''Equities Pricing'' section to charts, even though the substance of such fees will not change. In this connection, the Exchange has also further differentiated between the liquidity rebates for displayed liquidity, as described above, and those for non-displayed liquidity, which the Exchange does not propose to substantively modify. The Exchange notes that it intends to further convert the remainder of the fee schedule to a chart format in the near future. In order to reduce text later in the fee schedule, the Exchange also proposes to make clear up-front that all references on the fee schedule to ''adding'' and ''removing'' liquidity mean adding liquidity or removing liquidity from the Exchange's order book.

pricing tiers if such entities provide prior notice to the Exchange. Specifically, to the extent two or more affiliated companies maintain separate memberships with the Exchange and can demonstrate their affiliation by showing they control, are controlled by, or are under common control with each other, the Exchange permits such Members to count overall volume of the affiliates in calculating ADV. The Exchange verifies such affiliation using a Member's Form BD, which lists control affiliates.

[7] The Exchange notes that it also excludes the last Friday of June from the calculation of ADV and average daily TCV. The last day of June is the day that Russell Investments reconstitutes its family of indexes (''Russell Reconstitution''), resulting in particularly high trading volumes, much of which the Exchange believes derives from market participants who are not generally as active entering the market to rebalance their holdings in-line with the Russell Reconstitution.

[8] The Exchange proposes to calculate ADAV in the same way that it calculates ADV, including permitting aggregation amongst affiliated entities and the exclusion of Russell Reconstitution day. *See supra* notes 6 and 7.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder that are applicable to a national securities exchange, and, in particular, with the requirements of Section 6 of the Act.[9] Specifically, the Exchange believes that the proposed rule change is consistent with Section 6(b)(4) of the Act,[10] in that it provides for the equitable allocation of reasonable dues, fees and other charges among members and other persons using any facility or system which the Exchange operates or controls. The Exchange notes that it operates in a highly competitive market in which market participants can readily direct order flow to competing venues if they deem fee levels at a particular venue to be excessive.

The changes to Exchange execution fees and rebates proposed by this filing are intended to attract order flow to the Exchange by continuing to offer competitive pricing while also creating additional incentives to providing aggressively priced displayed liquidity. While Members that remove liquidity from the Exchange will be paying higher fees due to the proposal, the increased revenue received by the Exchange will be used to fund programs that the Exchange believes will attract additional liquidity and thus improve the depth of liquidity available on the Exchange. Accordingly, the Exchange believes that the higher access fees for both securities priced $1.00 and above and securities priced below $1.00 will benefit Members' results in trading on the Exchange to the extent the tiered rebate structure maintained by the Exchange for adding displayed liquidity, the continued offering of the NBBO Setter rebate, and the adoption of the NBBO Joiner rebate incentivize liquidity providers to provide more aggressively priced liquidity. Thus, the Exchange believes that the slight increases to the fees to remove liquidity from the Exchange are reasonable and equitably allocated. Further, the Exchange does not believe that the proposed increases to the fees to remove liquidity from the Exchange are unfairly discriminatory as they will be uniformly applied to all Members.

The Exchange believes that continuing to base its tiered rebate structure on overall TCV, rather than a static number irrespective of overall volume in the securities industry, is a fair and equitable approach to pricing. Volume-based tiers such as the expanded liquidity rebate tiers proposed in this filing have been widely adopted in the equities markets, and are equitable and not unreasonably discriminatory because they are open to all members on an equal basis and provide rebates that are reasonably related to the value to an exchange's market quality associated with higher levels of market activity, such as higher levels of liquidity provision and introduction of higher volumes of orders into the price and volume discovery process. Accordingly, the Exchange believes that the proposal is not unreasonably discriminatory because it is consistent with the overall goals of enhancing market quality.

The proposed modification to the Exchange's rebate structure will have variable affects on Members of the Exchange, dependent on the volume of transaction activity they conduct on the Exchange. The Exchange notes that Members currently qualifying for tiered rebates will receive higher rebates in all cases. The Exchange also notes that additional Members will be able to qualify for tiered rebates based on a lower threshold of ADV (i.e., Tier 1 at ADV of 0.25% of TCV) or based on the new classification of ADAV, which measures added volume only but allows Members to qualify at lower percentages of TCV (e.g., ADAV of 0.1%, 0.2%, or 0.3% of TCV, respectively, for Tiers 1, 2, and 3). Those Members qualifying for volume Tier 1 will not be impacted by any decrease in rebates, but will continue to receive the same rebates that they do today. Despite the decrease in rebate for all Members that do not qualify for the lowest tier, the Exchange believes that its proposed fee structure is fair and equitable for the reasons described above related to market quality. The Exchange reiterates that the volume tiers are open to all Members on an equal basis, and are therefore equitable and not unreasonably discriminatory.

The proposed addition of the definition of ADAV and, in turn, the ability to qualify for volume-based enhanced rebate based on ADAV is reasonable as it is another method of measuring a Member's contribution to the overall market quality on the Exchange. While all order flow contributing to the Exchange is important, the Exchange has consistently offered programs to incentivize the addition of aggressively priced displayed liquidity to the Exchange due to the value of such liquidity. Accordingly, the Exchange believes that its proposed policy to measure ADAV and permit tier qualification at lower levels than ADV is fair and equitable, and not unreasonably discriminatory.

Additionally, the Exchange believes that the proposed NBBO Joiner rebate, similar to rebates offered by the Exchange under the NBBO Setter program, will incentivize the entry on the Exchange of more aggressive orders that will maintain tight spreads, benefitting both Members and public investors. The Exchange further believes that conditioning a Member's ability to receive the NBBO Joiner rebate on reaching a volume tier of Tier 2 or higher is consistent with the Act for the reasons described above with respect to volume-based tiers generally. The Exchange notes that by proposing qualification at Tier 2 or higher it is maintaining the same volume requirement to qualify for the NBBO Setter rebate (i.e., ADV 0.5% or more of TCV) as it previously required, though Members may potentially also qualify based on ADAV of 0.2%, and thus, additional Members may qualify for NBBO Setter rebates or the new NBBO Joiner rebates.

Finally, the Exchange believes that the proposed changes to further simplify the fee schedule and to move towards a fee schedule that is in a chart format are fair and reasonable, and non-discriminatory in that they are designed to be more easily understood by Members.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act, as amended. As noted above, the changes to Exchange execution fees and rebates proposed by this filing are intended to attract order flow to the Exchange by continuing to offer competitive pricing while also creating additional incentives to provide aggressively priced displayed liquidity. Thus, while the Exchange is slightly increasing the fees to remove liquidity from the Exchange, the Exchange is offsetting such increase with additional rebates designed to enhance the liquidity available on the Exchange. Similarly, while some Members will recognize a decrease rebate for liquidity added to the Exchange, the Exchange has offered a lower volume tier in order to maintain the current rebate level as well as additional ways to reach the various volume tiers (with lower volume levels) based on added liquidity only. The Exchange's proposed NBBO Joiner rebate will benefit competition by

[9] 15 U.S.C. 78f.

[10] 15 U.S.C. 78f(b)(4).

rewarding Members that help the Exchange to join other market centers at the NBBO. Promotion of displayed liquidity at the NBBO enhances market quality for all market participants and promotes competition amongst market centers. The Exchange believes that the proposed changes as a whole will contribute to additional displayed liquidity on the Exchange, which will, in turn, benefit competition due to the improvements to the overall market quality of the Exchange.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

The Exchange has neither solicited nor received written comments on the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A) of the Act [11] and paragraph (f) of Rule 19b–4 thereunder.[12] 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–BATS–2013–054 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–BATS–2013–054. 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 such 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–BATS–2013–054 and should be submitted on or before November 12, 2013.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[13]

Kevin M. O'Neill,

Deputy Secretary.

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[11] 15 U.S.C. 78s(b)(3)(A).

[12] 17 CFR 240.19b–4(f).

[13] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–70614; File No. SR–NASDAQ–2013–129]

Self-Regulatory Organizations; The NASDAQ Stock Market LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Amend Its Schedule of Fees and Credits Applicable to Execution and Routing of Orders in Securities Priced at $1 or More per Share Under Rule 7018

October 4, 2013.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] and Rule 19b–4 [2] thereunder, notice is hereby given that on September 27, 2013, The NASDAQ Stock Market LLC (''NASDAQ'' or ''Exchange'') filed with the Securities and Exchange Commission (''SEC'' or ''Commission'') the proposed rule change as described in Items I, II, and III, below, which Items have been prepared by NASDAQ. 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 the Substance of the Proposed Rule Change

NASDAQ is proposing amend its schedule of fees and credits applicable to execution and routing of orders in securities priced at $1 or more per share under Rule 7018. NASDAQ will implement the proposed rule change on October 1, 2013.

The text of the proposed rule change is available on the Exchange's Web site at *http://nasdaq.cchwallstreet.com,* at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

NASDAQ is proposing several changes to its schedule of fees and credits applicable to execution and routing of orders in securities priced at $1 or more per share under Rule 7018. First, NASDAQ currently offers a credit of $0.0020 per share executed for midpoint pegged and midpoint post-only orders (''midpoint orders'') that provide liquidity if a member provides an average daily volume of more than 5 million shares through midpoint orders during the month and the member's average daily volume of liquidity provided through midpoint orders during the month is at least 2 million shares more than in April 2013. NASDAQ is proposing to eliminate this pricing tier for midpoint orders, because no member has ever qualified for it. Accordingly, NASDAQ believes that the tier has been ineffective at encouraging

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

members to make greater use of midpoint orders, and may be eliminated without member impact. Under tiers that will remain in place, NASDAQ pays a credit of $0.0017 per share executed for midpoint orders if the member provides an average daily volume of 5 million or more shares through midpoint orders during the month (without any requirement for an increase above prior levels), and a credit of $0.0014 per share executed for midpoint orders if the member provides an average daily volume of less than 5 million shares through midpoint orders during the month.

Second, NASDAQ is modifying certain routing fees applicable to orders routed to NASDAQ OMX PSX (''PSX''), so that the applicable fees for routing to that venue will be generally consistent with fees for routing to other venues. Specifically, NASDAQ currently charges $0.0028 per share executed for orders using the SOLV or SAVE routing strategies [3] that execute at PSX, while charging $0.0030 per share executed when such orders execute at most other venues.[4] NASDAQ is increasing the fee for routing to PSX to match the $0.0030 per share executed fee for other most venues. Similarly, NASDAQ currently charges $0.0028 per share executed for order using the TFTY routing strategy [5] that execute at PSX, while charging $0.0030 per share executed when such orders execute at the New York Stock Exchange (''NYSE'').[6] NASDAQ is increasing the fee for routing to PSX to match this $0.0030 per share executed fee. The changes are designed to increase revenue in a period of persistent low trading volumes and to simplify the routing fee schedule. The changes are unlikely to have a significant impact on members that use NASDAQ's routing services, since relatively few routed orders are executed at PSX.

Third, NASDAQ is reducing the credit paid with respect to QCST and QDRK orders [7] that execute at BX from $0.0014 per share executed to $0.0011 per share executed. The change will make the credit paid with respect to orders routed to BX more consistent with the credits paid by BX itself, which have been modified in recent months.[8] In addition, the change will reduce costs in a period of persistent low trading volumes and is unlikely to have a significant impact on members that use NASDAQ's routing services, since relatively few routed orders are executed at BX.

2. Statutory Basis

NASDAQ believes that the proposed rule change is consistent with the provisions of Section 6 of the Act,[9] in general, and with Sections 6(b)(4) and 6(b)(5) of the Act,[10] in particular, in that it provides for the equitable allocation of reasonable dues, fees and other charges among members and issuers and other persons using any facility or system which NASDAQ operates or controls, and is not designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

The change to eliminate the rebate tier applicable to midpoint orders is reasonable because the tier has never applied to any members since its inception and therefore the change will not result in a fee increase. Similarly, the change is consistent with an equitable allocation of fees and is not unfairly discriminatory because members that use midpoint orders will continue to be eligible for the tiers for which they currently qualify (either $0.0017 or $0.0014 per share executed, depending on their volume levels). Accordingly, the change will not affect the allocation of fees and rebates among members and will not have a discriminatory impact on any members.

The change with respect to fees for routing to PSX is reasonable because it will make the applicable fees for routing to PSX consistent with the fees for routing to other venues. Moreover, the change will result in a modest increase of only $0.0002 per share executed for SAVE, SOLV, and TFTY orders when they access liquidity on PSX. The change is consistent with an equitable allocation of fees and not unfairly discriminatory because it will eliminate an existing disparity between the fees charged for routing to PSX and routing to certain other destinations, thereby making the applicable fees more consistent. In addition, the change is equitable and not unfairly discriminatory because it affects only those members that opt to use NASDAQ's optional routing services, and will in any event have a minimal impact because few orders using the strategies execute at PSX.

The change with respect to QCST and QDRK orders routed to BX is reasonable because it will make the credit paid by NASDAQ more consistent with the credit received by NASDAQ from BX with respect to such orders. Moreover, the change will result in a modest decrease of only $0.0003 per share executed with respect to the applicable

[3] SAVE is a routing option under which orders may either (i) route to BX and PSX, check the NASDAQ book for available shares, and then route to other destinations on the applicable routing table, or (ii) may check NASDAQ first and then route to destinations on the applicable routing table. If shares remain un-executed after routing, they are posted to the book. Once on the book, if the order is subsequently locked or crossed by another market center, NASDAQ will not route the order to the locking or crossing market center. SOLV is a routing option under which orders may either (i) route to BX and PSX, check NASDAQ, and then route to other destinations on the applicable routing table, or (ii) may check NASDAQ first and then route to destinations on the applicable routing table. If shares remain un-executed after routing, they are posted to the book. Once on the book, if the order is subsequently locked or crossed by another accessible market center, NASDAQ will route the order to the locking or crossing market center.

[4] The exception is NASDAQ OMX BX (''BX''). For SAVE and SOLV orders that execute at BX, NASDAQ charges no fee and pays no rebate, reflecting the fact that BX itself pays a small credit with respect to orders that access liquidity.

[5] TFTY is a routing option under which orders check NASDAQ for available shares only if so instructed by the entering firm and are thereafter routed to destinations on the applicable routing table. If shares remain un-executed after routing, they are posted to the book. Once on the book, if the order is subsequently locked or crossed by another market center, the System will not route the order to the locking or crossing market center.

[6] The routing table applicable to TFTY generally favors routing destinations that charge no or low execution fees, and would generally route to such destinations before routing to higher cost destinations such as NYSE and PSX. For TFTY orders that execute at BX (which pays a small credit for executions), NASDAQ charges no fee and pays no rebate. For TFTY orders that execute at destinations other than BX, PSX, and NYSE, NASDAQ charges $0.0005 per share executed, consistent with the lower cost of routing to such destinations.

[7] QDRK is a routing option under which orders check NASDAQ for available shares and simultaneously route the remaining shares to destinations on the applicable routing table that are not posting Protected Quotations within the meaning of Regulation NMS. If shares remain un-executed after routing, they are posted on the book. Once on the book, if the order is subsequently locked or crossed by another market center, NASDAQ will not route the order to the locking or crossing market center.

QCST is a routing option under which orders check NASDAQ for available shares and simultaneously route the remaining shares to destinations on the applicable routing table that are not posting Protected Quotations within the meaning of Regulation NMS and to certain, but not all, exchanges. If shares remain un-executed after routing, they are posted on the book. Once on the book, if the order is subsequently locked or crossed by another market center, NASDAQ will not route the order to the locking or crossing market center.

[8] SR–BX–2013–054 (September 27, 2013); Securities Exchange Act Release No. 70339 (September 6, 2013), 78 FR 56249 (September 12, 2013) (SR–BX–2013–051). Depending on volumes of orders routed to BX in a given month, NASDAQ may receive a credit of either $0.0013 or $0.0007 per share executed with respect to such orders. The reduction of the credit paid by NASDAQ thereby reduces the extent to which NASDAQ pays an extra credit to encourage the use of the QDRK and QCST strategies, which were introduced earlier in the year but which have seen a recent increase in use. Securities Exchange Act Release No. 68839 (February 6, 2013), 78 FR 9957 (February 12, 2013) (SR–NASDAQ–2013–014).

[9] 15 U.S.C. 78f.

[10] 15 U.S.C. 78f(b)(4) and (5).

credit. The change is consistent with an equitable allocation of fees and not unfairly discriminatory because it will reduce the extent to which NASDAQ pays an extra credit to encourage the use of the QDRK and QCST strategies, thereby making the credit paid to NASDAQ members more consistent with credits paid by BX. In addition, the change is equitable and not unfairly discriminatory because it affects only those members that opt to use NASDAQ's optional routing services, and will in any event have a minimal impact because few orders using the strategies execute at BX.

B. Self-Regulatory Organization's Statement on Burden on Competition

NASDAQ does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act, as amended.[11] NASDAQ notes that it operates in a highly competitive market in which market participants can readily favor competing venues if they deem fee levels at a particular venue to be excessive, or rebate opportunities available at other venues to be more favorable. In such an environment, NASDAQ must continually adjust its fees to remain competitive with other exchanges and with alternative trading systems that have been exempted from compliance with the statutory standards applicable to exchanges. Because competitors are free to modify their own fees in response, and because market participants may readily adjust their order routing practices, NASDAQ believes that the degree to which fee changes in this market may impose any burden on competition is extremely limited. In this instance, although the proposed change with respect to midpoint orders has the effect of eliminating a rebate tier, the tier had not been successful at encouraging greater use of midpoint orders, and so its elimination is unlikely to have an impact on the order routing decisions of NASDAQ members. Moreover, other incentive tiers with respect to midpoint orders remain in place. Similarly, the proposed changes with respect to routing fees are expected to have a minimal effect on members that opt to use NASDAQ's routing services, because few routed orders execute at PSX or BX; moreover, the amount of the fee increase (for PSX) or credit reduction (for BX) is small. In addition, numerous alternatives exist to the routing services offered by NASDAQ. Thus, if any of the changes are [sic] unattractive to market participants, it is likely that NASDAQ will lose market share as a result. As a result of these considerations, NASDAQ does not believe that the proposed changes will impair the ability of members or competing order execution venues to maintain their competitive standing in the financial markets.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were either solicited or received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A) of the Act [12] and paragraph (f) of Rule 19b–4 thereunder.[13] 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–NASDAQ–2013–129 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–NASDAQ–2013–129. 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 on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of such filing also will be available for inspection and copying at the principal offices 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–NASDAQ–2013–129, and should be submitted on or before November 12, 2013.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[14]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2013–24570 Filed 10–21–13; 8:45 am]

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[11] 15 U.S.C. 78f(b)(8).

[12] 15 U.S.C. 78s(b)(3)(A).

[13] 17 CFR 240.19b–4(f).

[14] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–70682; File No. SR–Phlx–2013–101]

Self-Regulatory Organizations; NASDAQ OMX PHLX LLC; Notice of Filing of Proposed Rule Change Regarding the Short Term Option Series Program

October 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 October 3, 2013, NASDAQ OMX PHLX LLC (''Phlx'' or ''Exchange'') filed with the Securities and Exchange Commission (''SEC'' or ''Commission'') the proposed rule change as described in Items I, II, and III, below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

I. Self-Regulatory Organization's Statement of the Terms of the Substance of the Proposed Rule Change

The Exchange is filing with the Commission a proposal to amend Rule 1012 (Series of Options Open for Trading) to expand the Short Term Option Program (''STO Program'' or ''Program'')[3] so that the Exchange may: Change the current thirty option class limitation to fifty option classes on which STOs may be opened; list or add STOs within fifty percent (50%) above or below the closing price of the underlying security from the preceding day if the price of the underlying security is greater than $20, or within one hundred percent (100%) above or below the closing price of the underlying security from the preceding day if the price of the underlying security is less than or equal to $20; open up to thirty STO series for each expiration date in an STO class; add an STO strike price interval of $2.50 or greater where the strike price is above $150; and in general harmonize the different parts of the Program.

The text of the proposed rule change is available on the Exchange's Web site at *http://nasdaqomxphlx.cchwallstreet.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 the Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and the Statutory Basis for, the Proposed Rule Change

1. Purpose

The purpose of this proposed rule change is to amend Rule 1012 to expand the STO Program for non-index options so that the Exchange may: Change the current thirty option class limitation to fifty option classes on which STOs may be opened; list or add STOs within fifty percent (50%) above or below the closing price of the underlying security from the preceding day if the price of the underlying security is greater than $20, or within one hundred percent (100%) above or below the closing price of the underlying security from the preceding day if the price of the underlying security is less than or equal to $20; open up to thirty STO series for each expiration date in an STO class; add an STO strike price interval of $2.50 or greater where the strike price is above $150; and in general harmonize the different parts of the Program.[4]

The STO Program, which was initiated in 2010,[5] is codified in Commentary .11 to Rule 1012 for non-index options including equity, currency, and exchange traded fund (''ETF'') options.[6] These sections currently state that after an option class has been approved for listing and trading on the Exchange, the Exchange may open for trading on any Thursday or Friday that is a business day series of options on no more than thirty option classes that expire on the Friday of the following business week that is a business day.[7] In addition to the thirty option class limitation, there is also a limitation that no more than twenty series for each expiration date in those classes may be opened for trading.[8] Furthermore, the strike price of each STO has to be fixed with approximately the same number of strike prices being opened above and below the value of the underlying security at about the time that the STOs are initially opened for trading on the Exchange, and with strike prices being within thirty percent (30%) above or below the closing price of the underlying security from the preceding day. The Exchange proposes in part to increase the number of STO classes that may be opened, match the opening of initial and additional STO strikes to what is permissible per the OLPP,[9] add new strike prices increments that may be used in the STO Program, and in general harmonize the different parts of the Program (e.g., initial listings and additional series).

In terms of the strike price intervals, the STO Program currently allows that the interval between strike prices on

[3] STOs, also known as ''weekly options'' as well as ''Short Term Options'', are series in an options class that are approved for listing and trading on the Exchange in which the series are opened for trading on any Thursday or Friday that is a business day and that expire on the Friday of the next business week. If a Thursday or Friday is not a business day, the series may be opened (or shall expire) on the first business day immediately prior to that Thursday or Friday, respectively. For STO Program rules regarding non-index options, *see* Rule 1000(b)(44) and Commentary .11 to Rule 1012. For STO Program rules regarding index options, which are not implicated by this proposal, *see* Rule 1000A(b)(16) and Rule 1101A(b)(vi).

[4] The price of the underlying security will be calculated commensurate with Commentary .10(a) to Rule 1012 as amended.

[5] *See* Securities Exchange Act Release No. 62296 (June 15, 2010), 75 FR 35115 (June 21, 2010) (SR–Phlx–2010–84) (notice of filing and immediate effectiveness permanently establishing STO Program on the Exchange).

[6] The Exchange does not by this filing propose any changes to Rule 1101A(b)(vi) related to the STO Program for index options.

[7] The increase in the number of option issues that could be opened pursuant to the STO Program was approved in 2011. *See* Securities Exchange Act Release No. 65776 (November 17, 2011), 76 FR 72482 (November 23, 2011) (SR–Phlx–2011–131) (approval order).

[8] However, if the Exchange opens less than twenty (20) Short Term Option Series for a Short Term Option Expiration Date, additional series may be opened for trading on the Exchange when the Exchange deems it necessary to maintain an orderly market, to meet customer demand or when the market price of the underlying security moves substantially from the exercise price or prices of the series already opened. Any additional strike prices listed by the Exchange shall be within thirty percent (30%) above or below the current price of the underlying security. The Exchange may also open additional strike prices of Short Term Option Series that are more than 30% above or below the current price of the underlying security provided that demonstrated customer interest exists for such series, as expressed by institutional, corporate or individual customers or their brokers. Market-makers trading for their own account shall not be considered when determining customer interest under this provision. The opening of the new Short Term Option Series shall not affect the series of options of the same class previously opened. Commentary .11(d) to Rule 1012. The Exchange proposes, as discussed below, to change twenty (20) Short Term Option Series to thirty (30) Short Term Option Series to achieve consistency with other proposed rule changes.

[9] The full name of the OLPP (which is applicable to all option exchanges) is Plan For The Purpose of Developing and Implementing Procedures Designed to Facilitate the Listing and Trading of Standardized Options Submitted Pursuant to Section 11A(a)(3)(B) of the Securities Exchange Act of 1934. With regard to the listing of new series on equity, ETF, or trust issued receipt (''TIRs'') option classes, subsection 3.(g)(i) of the OLPP states, in relevant part, that the exercise price of each option series listed by an exchange that chooses to list a series of options (known as the Series Selecting Exchange) shall be fixed at a price per share which is reasonably close to the price of the underlying equity security, ETF, or TIR at or about the time the Series Selecting Exchange determines to list such series. Except as provided in subparagraphs (ii) through (iv) of the OLPP, if the price of the underlying security is less than or equal to $20, the Series Selecting Exchange shall not list new option series with an exercise price more than 100% above or below the price of the underlying security. If the price of the underlying security is greater than $20, the Series Selecting Exchange shall not list new option series with an exercise price more than 50% above or below the price of the underlying security.

Subsection 3.(g)(i) of the OLPP indicates that an option series price has to be reasonably close to the price of the underlying security and must not exceed a maximum of 50% or 100%, depending on the price, from the underlying. The Exchange's proposal related to non-index options, while conforming to the current structure of the Exchange's STO rules, is similar in practical effect to the noted OLPP subsection.

STOs may be (i) $0.50 or greater where the strike price is less than $75, and $1 or greater where the strike price is between $75 and $150 for all classes that participate in the STO Program; or (ii) $0.50 for classes that trade in one dollar increments in Related non-STOs [10] and that participate in the STO Program. Related non-STO series shall be opened during the week prior to the week that such Related non-STO series expire in the same manner and in the same strike price intervals as permitted in Commentary .11 to Rule 1012.[11] This proposal retains many of the fundamental limitations of the STO Program while proposing specific changes as described below.

The Proposal

First, the Exchange proposes to increase the number of STO classes that may be opened after an option class has been approved for listing and trading on the Exchange. Specifically, the Exchange proposes in Commentary .11(a) of Rule 1012 that the Exchange may select up to fifty currently listed option classes on which Short Term Option Series may be opened. The Exchange proposes also that for each option class eligible for participation in the STO Program, the Exchange may open up to thirty STO Series for each expiration date in that class.[12] The Exchange believes that this proposed moderate increase is needed and advisable in light of the demonstrated acceptance and popularity of the STO Program among market participants, as discussed below.

Second, the Exchange proposes to indicate under what circumstances, subsequent to opening initial STO classes, additional STO strike prices may be added. Specifically, the Exchange proposes in Commentary .11(c) of Rule 1012 that any initial series listed by the Exchange shall be reasonably close to the price of the underlying equity security and within the following parameters: (i) If the price of the underlying security is less than or equal to $20, additional strike prices shall be not more than one hundred percent (100%) above or below the price of the underlying security; and (ii) if the price of the underlying security is greater than $20, additional strike prices shall be not more than fifty percent (50%) above or below the price of the underlying security. This proposal is in line with the process for adding new series of options found in subsection 3.(g)(i) of the OLPP, and harmonizes the Program internally. The Exchange believes that this proposal is a reasonable and desirable enhancement to the STO Program.

Third, the Exchange proposes changes to Commentary .11(d) of Rule 1012 to indicate that any additional strike prices listed by the Exchange shall be reasonably close to the price of the underlying equity security and within the following parameters: (i) If the price of the underlying security is less than or equal to $20, additional strike prices shall be not more than one hundred percent (100%) above or below the price of the underlying security; and (ii) if the price of the underlying security is greater than $20, additional strike prices shall be not more than fifty percent (50%) above or below the price of the underlying security. This is done so that the parameters for opening STOs and adding strike prices are in conformity. The Exchange proposes additional changes to Commentary .11(d) to indicate that if the Exchange has opened less than thirty (30) Short Term Option Series for a Short Term Option Expiration Date, the Exchange may also open additional strike prices of Short Term Option Series that are more than 50% above or below the current price of the underlying security (if the price is greater than $20); provided that demonstrated customer interest exists for such series, as expressed by institutional, corporate or individual customers or their brokers. Market Makers trading for their own account are not considered when determining customer interest.[13] This is done to conform the additional strike price methodology with the proposed 50% listing standard in the same subsections, and to ensure that the opening 30 Short Term Option Series language is consistent with other proposed changes,[14] while retaining the demonstrated interest language that may be useful in unforeseen circumstances.

Fourth, the Exchange also proposes to simplify the Delisting Language in Commentary .11(d) of Rule 1012, which currently contains a range methodology (at least 10% but not more than 30% above or below the current price of the underlying),[15] to indicate that the Exchange will delist any series with no open interest in both the call and the put series having a: (i) Strike higher than the highest price with open interest in the put and/or call series for a given expiration week; and (ii) strike lower than the lowest strike price with open interest in the put and/or the call series for a given expiration week. The Exchange believes that like its other proposals, the delisting proposal will add clarity and certainty to the STO process on the Exchange, as well as across other markets that may choose to implement similar changes (discussed below).

Fifth, the Exchange proposes to add $2.50 strike price intervals to the STO Program. Specifically, the Exchange proposes in Commentary .11(e) of Rule 1012 to indicate that the interval between strike prices on STOs may be $2.50 or greater where the strike price is above $150. This proposed change complements the current STO strike price intervals, which are $0.50 or greater where the strike price is less than $75, and $1 or greater where the strike price is between $75 and $150 for all classes that participate in the STO Program.[16] The proposed $2.50 strike price interval addresses the issue that above a $150 strike price STO strike

[10] Related non-STOs are non-STOs that have similar options with longer expiration cycles (e.g., monthly Apple (AAPL) options would be Related non-STOs to weekly AAPL options). Unlike monthly non-index options series such as AAPL, which may not be listed within two business days of expiration, because of the short STO expiration cycle these options may be listed up to expiration.

[11] Commentary .11(e) to Rule 1012.

[12] The current limitation is up to thirty currently listed option classes and up to twenty series for each expiration date in an STO class. Commentary .11(a) of Rule 1012.

[13] Commentary .10(a) to Rule 1012 currently states that if the price of the underlying security is greater than $20, the Exchange shall not list new option series with an exercise price more than 50% above or below the price of the underlying security. Immediately before this language, the Exchange proposes to also add a carve-out that states: ''Except as provided in Commentary .11(d) to Rule 1012 . . .''

[14] The Exchange believes that the 100% standard proposed for initial listings where the price of the underlying is below $20 is adequate and does not need to be repeated for additional series adds.

[15] Currently, the Delisting Language states: ''In the event that the underlying security has moved such that there are no series that are at least 10% above or below the current price of the underlying security, the Exchange will delist any series with no open interest in both the call and the put series having a: (i) Strike higher than the highest price with open interest in the put and/or call series for a given expiration week; and (ii) strike lower than the lowest strike price with open interest in the put and/or the call series for a given expiration week, so as to list series that are at least 10% but not more than 30% above or below the current price of the underlying security. In the event that the underlying security has moved such that there are no series that are at least 10% above or below the current price of the underlying security and all existing series have open interest, the Exchange may list additional series, in excess of the 30 allowed under Commentary .11, that are between 10% and 30% above or below the price of the underlying security.'' Commentary .11(d) of Rule 1012. *See* Securities Exchange Act Release No. 70116 (August 5, 2013), 78 FR 48754 (August 9, 2013) (SR–Phlx–2013–79) (notice of filing and immediate effectiveness regarding delisting series and opening up to five consecutive weekly expirations of STOs).

[16] STO strike price intervals may also be in $1 increments in Related non-STOs that participate in the STO Program. Commentary .11 of Rule 1012.

price intervals must currently be an exceedingly wide $5.00 or greater.[17]

All options exchanges that have weeklies programs have similar rules regarding their own programs, and tend to emulate STO changes that are initiated by other options exchanges. The Exchange recognizes that while this may result in a potentially increased combined capacity footprint of exchanges with weeklies programs, the specific beneficial changes proposed in this filing greatly outweigh any such potential impact.

The principal reason for the proposed expansion is market demand for additional STO classes and series and a desire to make the STO Program more effective. There is continuing strong customer demand for having the ability to execute hedging and trading strategies via STOs, particularly in the current fast and volatile multi-faceted trading and investing environment that extends across numerous markets and platforms[18] and includes market moving events such as significant market volatility, corporate events, or large market, sector, or individual issue price swings. The Exchange has been requested by traders and other market participants to expand the STO Program to allow additional STO offerings and increased efficiency.

In order that the Exchange not exceed the current thirty option class and twenty option series restriction, the Exchange has on occasion had to turn away STO customers (traders and investors) because it could not list, or had to delist, STOs or could not open adequate STO Series because of restrictions in the STO Program. This has negatively impacted investors and traders, particularly retail public customers, who have continued to request the Exchange not to remove STO classes or add STO classes, or have requested the Exchange to expand the STO Program so that additional STO classes and series could be opened that would allow the market participants to execute trading and hedging strategies.[19] There are, as discussed, substantial benefits to market participants having the ability to trade eligible option classes within the STO Program. Furthermore, the Exchange supports the objective of responding to customer need to enhance successful programs to make them more efficient for hedging and trading purposes.

The Exchange notes that the STO Program has been well-received by market participants, in particular by retail investors. The volume of STO trading has increased by 132% since the beginning of 2011[20] and continues to grow, such that currently STOs represent 20% of trading volume on the Exchange and 31% of trading volume across all option exchanges.[21] The Exchange believes that weekly expiration options will continue to grow in importance for all market participants, including institutional and retail investors.[22]

The proposed revisions to the STO Program will permit the Exchange to meet customer demand for better STO Program use and efficiency, harmonization of OLPP and STO Program rules, internal harmonization of the STO Program, and a reasonable expansion of strike price intervals in the Program.

By way of example, if an investor wants to gain exposure to a relatively higher priced security like AAPL, he may invest in AAPL stock and/or AAPL options. Currently, the investor must choose a strike price that might lack the precision he is looking for in order to gain or reduce exposure to AAPL. If the investor is looking to invest in a long position in AAPL, for example, he may choose to execute a covered call strategy by selling calls on AAPL. Assume AAPL is trading at $415. Under the current rules the nearest out of the money STO call would be the $420.00 strike, which would, with one week until expiration, trade at or about $2.15. If the $417.50 strike were available per this proposal, however, the investor could sell calls at approximately $3.15. This would allow the investor to still execute an out of the money covered call strategy, but would increase the potential return by $1, or approximately 46% ($1/$2.15), thus offering approximately 46% additional risk protection. To the investor writing covered calls on his AAPL equity position, this extra risk protection could be very significant on an annual basis, and costly if not available.

By way of a second example, if an investor wants to gain exposure to a lower priced security like Banc of America (BAC), he may invest in BAC stock and/or options. Assume BAC is trading at $14.60. The investor may have established a long position in a non-STO BAC option like, for example, the standard expiration BAC Aug 17th 1.00 calls. To offset some of the risk the investor possesses in the BAC Aug 17th 1.00 calls, the investor may wish to make a corresponding trade in the BAC Aug 10th (STO) 1.00 call. Currently, the investor does not have this risk reduction strategy available to him, as the current BAC STO does not have available strikes. The proposal would correct this shortcoming.

By way of further example, in a lower priced stock such as BAC there may be a need for tighter strike price intervals in case of a precipitous drop in price. Assume BAC is trading at $14.60. Assume BAC announces a large loss, and the stock price drops to $6. The Exchange believes that investors should have the ability to use calls or puts with a more targeted strike price to attain proper risk protection—one of the great advantages of options. Because current STO rules do not allow a strike price below $9.50 in the BAC STO, however, an investor looking to purchase out of the money put protection for a short period of time, and at a lower premium than a longer term option, is not able to do so. BAC $9.50 strike puts would trade at a premium of about $3.50 or more, and would require the investor to sell or exercise his puts by expiration if they remained in the money. An Aug 10th $5.00 out of the money STO option in BAC, on the other hand, would trade a much more affordable premium due to being out of the money, and would only require the investor to sell or exercise his put if the BAC stock price continued its precipitous drop. Clearly, the ability to make more targeted and efficient decisions regarding the protection of investments is of great importance to investments and market participants, and should be encouraged.

Following are illustrations of the STO listing process per the rules as proposed. Assume that the Alcoa Inc. (AA) STO closes at $7.92. Pursuant to the proposed rule, STOs may be added between $1 and $15.50 (half point strike

[17] *See, e.g.,* Commentary .05 to Rule 1012.

[18] These include, without limitation, options, equities, futures, derivatives, indexes, ETFs, exchange traded notes, currencies, and over the counter instruments.

[19] The Exchange noted, in its STO Program expansion proposal in 2011, that it was requested by a retail investor to reinstate an STO class that the Exchange had to remove from trading because of the class option limitation within the Program. The investor told the Exchange that he had used the removed class as a powerful tool for hedging a market sector, and that various strategies that the investor put into play were disrupted and eliminated when the class was removed. *See* Securities Exchange Act Release No. 65776 (November 17, 2011), 76 FR 72482 (November 23, 2011) (SR–Phlx–2011–131) (order approving opening STO series on 30 option classes).

[20] Since the STO Program was initiated in 2010 on the Exchange and other markets (some of which were established after the STO Program was initiated), STO Program volume has expanded by more than 3000%.

[21] During the same period of time, however, the volume of standard monthly options across all exchanges has, on the other hand, declined by 28%.

[22] The current STO Program, which is similar across all options markets that have weeklies programs, is in its current formulation one of the more challenging industry-wide listings program to administer. Recognizing the importance of the Program, the Exchange is seeking to improve the Program for non-index STOs by making it more uniform and logical.

intervals are currently permitted where the strike price is below $75). On day one, the maximum number of Short Term Option Series that may be listed are thirty. If the Exchange opens less than thirty Short Term Option Series, additional series may be added as the underlying price moves. If the AA price moves to $10, additional series can be added as high as $20 (100% above the underlying price). If the AA price moves to $5, additional lower strikes would not be added, since the initial strikes go as low as possible ($1). Or, assume that the McDonald's Corporation (MCD) STO closes at $96.26. Pursuant to the proposed rule, Short Term Options Series may be added between $49 and $144 (in $0.50 and $1 intervals). On day one, no more than thirty Short Term Option Series may be listed. If the Exchange opens less than thirty Short Term Option Series, additional series may be added as the underlying price moves. If the MCD price moves to $105, additional series can be added as high as $155 (50% above the underlying price). If the MCD price moves to $87, additional lower strikes can be added as low as $43.50. To list strikes above the 50% threshold, however, there must be demonstrated customer interest for such series, as expressed by institutional, corporate or individual customers or their brokers.

Following are illustrations of the STO delisting process per the rules as proposed. Series delisting would occur under the proposed rule if the stock price moves and there are no series at least 10% above/below the current price. Assume AA closed at $7.92 and strikes were listed between $1 and $15. If the AA price moved to $15, and there were no strikes at $16.50 or above (at least 10% above the current price), the delisting process would begin. For the delisting process, staff would simply need to check what, if any, strikes are higher than the highest strike with open interest, and lower than the lowest strike with open interest. Unlike the current delisting process, there would be no need to check whether strikes were within a listing band (e.g., 10% to 30%). Or, assume that MCD closed at $96.26 and strikes were listed between $82 and $110. If the MCD price moved to $104, and there were no strikes at $115 or above (at least 10% above the current price), the delisting process would begin. For the delisting process, staff would simply need to check what strikes are higher than the highest strike with open interest, and lower than the lowest strike with open interest.

With regard to the impact of this proposal on system capacity, the Exchange has analyzed its capacity and represents that it and the Options Price Reporting Authority (''OPRA'') have the necessary systems capacity to handle any potential additional traffic associated with this current amendment to the STO Program. The Exchange believes that its members will not have a capacity issue as a result of this proposal. The Exchange represents that it will monitor the trading volume associated with the additional options series listed as a result of this proposal and the effect (if any) of these additional series on market fragmentation and on the capacity of the Exchange's automated systems.[23]

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act [24] in general, and furthers the objectives of Section 6(b)(5) of the Act [25] in particular, in that it is 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. Expanding the classes and additional series that can be opened in the STO Program, simplifying the delisting process, and allowing $2.50 strike price intervals will result in a continuing benefit to investors by giving them more flexibility to closely tailor their investment and hedging decisions in greater number of securities.

The STO Program has been well-received by market participants, and in particular by retail investors, and has seen increasing trading volume. The Exchange believes that the current proposed revisions to the STO Program will permit the Exchange to meet customer demand for enhanced STO Program use and efficiency, harmonization of OLPP and STO Program rules, and a reasonable expansion of strike price intervals in the Program to the benefit of investors, market participants, and the marketplace.

With regard to the impact of this proposal on system capacity, the Exchange believes that it and OPRA have the necessary systems capacity to handle any potential additional traffic associated with this current amendment to the STO Program. The Exchange believes that its members will not have a capacity issue as a result of this proposal. All exchanges that have STO programs have largely similar STO rules and tend to emulate STO rule changes proposals initiated by other exchanges. While the Exchange recognizes that this proposal may be copied by other exchanges and impact their capacity, the Exchange believes that any such potential capacity impact will not outweigh (and does not outweigh for the Exchange) the significant benefits that this proposal will afford market participants and the market in general in terms of significantly greater flexibility and increases in efficient trading and hedging options.

The proposed revisions to the STO Program will permit the Exchange to meet customer demand for better STO Program use and efficiency, harmonization of OLPP and STO Program rules, internal harmonization of the STO Program, and a reasonable expansion of strike price intervals in the Program.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. To the contrary, the Exchange believes that the proposal is decidedly pro-competitive. The Exchange believes that the proposed rule change will result in additional investment options and opportunities to achieve the investment objectives of market participants seeking efficient trading and hedging vehicles, to the benefit of investors, market participants, and the marketplace in general.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were either solicited or received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 45 days of the date of publication of this notice in the **Federal Register** or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the Exchange consents, the Commission shall: (a) By order approve or disapprove such proposed rule change, or (b) institute proceedings

[23] As noted previously, because the STO Program is an industry-wide program, exchanges tend to emulate the rule filings of one another. The Exchange recognizes that while this may result in a potentially increased combined capacity footprint of exchanges with weeklies programs, the Exchange believes that the specific beneficial changes proposed in this filing greatly outweigh any such potential impact.

[24] 15 U.S.C. 78f(b).

[25] 15 U.S.C. 78f(b)(5).

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–Phlx–2013–101 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–Phlx–2013–101. 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 on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of such filing also will be available for inspection and copying at the principal offices 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–Phlx–2013–101, and should be submitted on or before November 12, 2013.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[26]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2013–24673 Filed 10–21–13; 8:45 am]

BILLING CODE 8011–01–P

[26] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–70569; File No. SR–NASDAQ–2013–102]

Self-Regulatory Organizations; The NASDAQ Stock Market LLC; Order Approving a Proposed Rule Change To Assume Operational Responsibility for Certain Surveillance Activity Currently Performed by FINRA Under the Exchange's Authority and Supervision

September 30, 2013.

On July 31, 2013, The NASDAQ Stock Market LLC (''NASDAQ'' or ''Exchange'') filed with the Securities and Exchange Commission (''Commission''), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'')[1] and Rule 19b–4 thereunder,[2] a proposed rule change to assume operational responsibility for certain surveillance activity currently performed by the Financial Industry Regulatory Authority (''FINRA'') under the Exchange's authority and supervision. The proposed rule change was published for comment in the **Federal Register** on August 16, 2013.[3] The Commission received no comments on the proposal.

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[4] and, in particular, the requirements of Section 6(b)(5) of the Act.[5] Since it became a national securities exchange, NASDAQ has contracted with FINRA through various regulatory services agreements to perform certain surveillance and other regulatory functions on its behalf.[6] NASDAQ Rule 0150 requires that, unless NASDAQ obtains prior Commission approval, the regulatory functions subject to the regulatory services agreement in effect at the time when NASDAQ became a national securities exchange must continue to be performed by FINRA or an affiliate thereof or by another independent self-regulatory organization. NASDAQ now proposes to reallocate operational responsibility from FINRA to NASDAQ Regulation for a limited number of equities surveillance patterns and related review functions focused on: (1) Manipulation patterns that monitor solely NASDAQ activity, including patterns that monitor the Exchange's opening and closing crosses and compliance with minimum bid listing requirements, and (2) monitoring of compliance by member firms with elements of the Commission's Regulation M[7] and NASDAQ Rule 4619 compliance.

In the Notice, the Exchange represents that it has the ability to conduct the surveillances and regulatory functions that it will assume. The Commission also notes that the Exchange represents that its expertise in its own market structure, along with its existing real-time monitoring of these activities, may enable the Exchange to better detect improper activities on its market. Moreover, these patterns, underlying rules, and analytical requirements are similar to patterns that NASDAQ regulatory personnel already operate for affiliated options markets. The Exchange represents that NASDAQ's MarketWatch group, which already handles other real-time surveillance of the NASDAQ market, should be able to adequately and effectively handle the surveillances related to the instant proposed rule change.

In the Notice, the Exchange further represents that it will continue to refer potentially violative conduct to FINRA for further review and that FINRA will continue to perform most of the surveillance activity for NASDAQ's equity markets. The Exchange also represents that FINRA will continue to perform examination and enforcement work, subject to NASDAQ's supervision and ultimate responsibility.

For the foregoing reasons, the Commission believes that the proposed rule change is consistent with the Act.

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,[8] that the proposed rule change (SR–NASDAQ–2013–102) be, and it hereby is, approved.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 70159 (August 12, 2013), 78 FR 50123 (August 16, 2013)(''Notice'').

[4] In approving this proposed rule change, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[5] 15 U.S.C. 78f(b)(5).

[6] *See* Securities Exchange Act Release No. 53128 (January 13, 2006), 71 FR 3550 (January 23, 2006).

[7] 17 CFR 242.100 et seq.

[8] 15 U.S.C. 78s(b)(2).

[9] 17 CFR 200.30–3(a)(12).

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[9]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2013–24543 Filed 10–21–13; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–70670; File No. SR–Topaz–2013–08]

Self-Regulatory Organizations; Topaz Exchange, LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Amend the Schedule of Fees

October 11, 2013.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the ''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on October 1, 2013, the Topaz Exchange, LLC (d/b/a ISE Gemini) (the ''Exchange'' or ''Topaz'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I, II and III below, which Items have been prepared by the 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 the Substance of the Proposed Rule Change

Topaz is proposing to amend its Schedule of Fees to increase Maker Rebates for Market Makers that achieve the Tier 4 ADV threshold, to permit Topaz to exclude from its ADV calculations any trading day on which the Exchange is closed for trading due to a market-wide trading halt, to adopt a definition of ''affiliate'' for the purpose of calculating affiliated Member ADV, and to make other related clarifying changes. The text of the proposed rule change is available on the Exchange's Internet Web site at *http://www.ise.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 the Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The self-regulatory organization has prepared summaries, set forth in Sections A, B and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and the Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to increase Maker Rebates for Market Makers[3] that achieve the Tier 4 average daily volume (''ADV'') threshold, to permit Topaz to exclude from its ADV calculations any trading day on which the Exchange is closed for trading due to a market-wide trading halt, to adopt a definition of ''affiliate'' for the purpose of calculating affiliated Member ADV, and to make other related clarifying changes to its Schedule of Fees.

On September 3, 2013 the Exchange filed with the Commission an immediately effective rule filing (the ''initial filing'')[4] that established volume-based tiered rebates for adding liquidity on the Exchange (''Maker Rebate''). The Exchange is now proposing to increase the Tier 4 Maker Rebate applicable to Market Makers. Currently, Market Makers that achieve Tier 4 receive a Maker Rebate for Regular Orders in Standard Options of $0.37 per contract for Penny Symbols, $0.39 per contract for SPY, and $0.46 per contract for Non-Penny Symbols. For Regular Orders in Mini Options, the Tier 4 Maker Rebate is $0.037 per contract for Penny Symbols, $0.039 per contract for SPY, and $0.046 per contract for Non-Penny Symbols. The Exchange is proposing to increase the Tier 4 Maker Rebate by $0.01 per contract in Standard Options and $0.001 per contract in Mini Options. As such, the new Tier 4 Maker Rebate for Market Makers in Standard Options will be $0.38 per contract for Penny Symbols, $0.40 per contract for SPY, and $0.47 per contract for Non-Penny Symbols. For Mini Options the new Tier 4 Maker Rebate for Market Makers will be $0.038 per contract for Penny Symbols, $0.040 per contract for SPY, and $0.047 per contract for Non-Penny Symbols. The Exchange believes that increasing the Maker Rebate applicable to Market Makers that achieve the ADV threshold for Tier 4 will incentivize Market Makers to increase order flow to the Exchange.

The Exchange is further proposing to modify its Schedule of Fees to permit the Exchange to exclude from its ADV calculation, when determining applicable rebate tiers, any day that the market is not open for the entire trading day. This would allow the Exchange to exclude days where the Exchange declares a trading halt in all securities or honors a market-wide trading halt declared by another market.[5] For example, this would have allowed the Exchange to exclude August 22, 2013 when trading was halted in Nasdaq-listed securities for three hours across all exchanges.[6] The Exchange will provide a notice, and post it on the Exchange's Web site, to inform Members of any day that is to be excluded from its ADV calculations in connection with this proposed rule change.

If the Exchange did not have the ability to exclude aberrant low volume days when calculating ADV for the month, as a result of the decreased trading volume, the numerator for the calculation (*e.g.,* trading volume) would be correspondingly lower, but the denominator for the threshold calculations (*e.g.,* the number of trading days) would not be decreased. This could result in an unintended cost increase. Absent the authority to exclude days that the market is not open for the entire trading day. Members will experience an effective decrease in rebates. The artificially low volumes of trading on such days could reduce the trading activity of Members both daily and monthly. Accordingly, excluding such days from the monthly calculation will diminish the likelihood of an effective increase in the cost of trading on the Exchange, a result that is unintended and undesirable to the Exchange and its Members.

As stated in the initial filing, the Exchange will aggregate the trading activity of affiliated members in determining ADV.[7] For example, a firm with market making and agency desks housed in different entities will be

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] The term Market Maker refers to ''Competitive Market Makers'' and ''Primary Market Makers'' collectively. Market Maker orders sent to the Exchange by an Electronic Access Member are assessed fees and rebates at the same level as Market Maker orders. *See* footnote 2, Schedule of Fees, Section I and II.

[4] *See* Securities Exchange Act Release No. 70426 (Sept. 17, 2013), 78 FR 58359 (Sept. 23, 2013) (SR–Topaz–2013–04).

[5] The Exchange will not be excluding days on which the Exchange closes early for holiday observance from its ADV calculation.

[6] Trading in Nasdaq-listed securities was halted across all markets on August 22, 2013 due to a systems issue experienced by the NASDAQ UTP SIP.

[7] Aggregation is necessary and appropriate because certain Members conduct customer and market maker trading activity through separate but related broker-dealers.

permitted to aggregate ADV across both entities in determining the applicable rebate tiers. To provide more clarity on what ''affiliated'' means in this context the Exchange is now adopting a definition for this term. In particular, the Exchange will aggregate the trading activity of separate Members in calculating ADV provided there is at least 75% common ownership between the firms as reflected on each firm's Form BD, Schedule A. The Exchange believes that aggregating volume across Members that share at least 75% common ownership will allow Members to continue to execute trades on the Exchange through separate broker-dealer entities for different types of volume, while receiving rebates based on the aggregate volume being executed across such entities.

The Exchange is also adopting clarifying text to its Schedule of Fees to reflect how Maker Rebates are currently provided on the Exchange. This clarifying text merely explains in the Schedule of Fees items already discussed in the initial filing, and does not make any substantive changes to the rebates being offered. In particular, the Exchange wants to clarify in the text of the Schedule of Fees that Total Affiliated Member ADV includes all volume in all symbols and order types, including both maker and taker volume, and that the highest tier threshold attained by a Member applies retroactively only in the given month. The Exchange is also changing a reference to ''client categories'' to instead refer to ''market participants'' as that term is used elsewhere in the Schedule of Fees and is therefore clearer. The Exchange believes that adopting this new text in the Schedule of Fees itself will decrease confusion among its Members.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with the provisions of Section 6 of the Act,[8] in general, and Section 6(b)(4) of the Act,[9] in particular, in that it is designed to provide for the equitable allocation of reasonable dues, fees, and other charges among its members and other persons using its facilities.

With respect to increasing the Tier 4 Maker Rebate for Market Makers, the Exchange believes that the price differentiation between Market Makers and other market participants is appropriate and not unfairly discriminatory because Market Makers have different requirements and obligations to the Exchange that other market participants do not (such as quoting requirements). The Exchange believes that increasing the Maker Rebate applicable to Market Makers that achieve Tier 4, which is the highest volume tier, will incentivize Market Makers to increase order flow to the Exchange.

The Exchange notes that it has determined to charge fees and provide rebates in Mini Options at a rate that is 1/10th the rate of fees and rebates the Exchange provides for trading in Standard Options. The Exchange believes it is reasonable and equitable and not unfairly discriminatory to assess lower fees and rebates to provide market participants an incentive to trade Mini Options on the Exchange. The Exchange believes the proposed rebates are reasonable and equitable in light of the fact that Mini Options have a smaller exercise and assignment value, specifically 1/10th that of a standard option contract, and, as such, is providing rebates that are 1/10th of those applicable to Standard Options.

The Exchange believes that it is equitable and reasonable to permit the Exchange to eliminate from the calculation days on which the market is not open the entire trading day because it preserves the Exchange's intent behind adopting volume-based pricing. The proposed change is non-discriminatory because it applies equally to all Members and to all volume tiers.

The language permitting aggregation of volume amongst corporate affiliates for purposes of the ADV calculation is intended to avoid disparate treatment of firms that have divided their various business activities between separate corporate entities as compared to firms that operate those business activities within a single corporate entity. By way of example, many firms that are Members of the Exchange operate several different business lines within the same corporate entity. In contrast, other firms may be part of a corporate structure that separates those business lines into different corporate affiliates, either for business, compliance or historical reasons. Those corporate affiliates, in turn, are required to maintain separate memberships with the Exchange in order to access the Exchange. The Exchange believes that corporate affiliates should continue to be aggregated and is adopting a definition of affiliate to clarify when Members will be considered affiliated. The Exchange notes that the proposed definition of ''affiliate'' to be used to aggregate affiliated Member ADV is consistent with definitions used by other options exchanges, including the Chicago Board Options Exchange, Inc. (''CBOE'') and the MIAX Options Exchange (''MIAX'').[10]

The Exchange further believes that it is appropriate to add the clarifying text to the Schedule of Fees in order to make it more transparent to Members and investors.

B. Self-Regulatory Organization's Statement on Burden on Competition

In accordance with Section 6(b)(8) of the Act,[11] the Exchange does not believe that the proposed rule change will impose any burden on intermarket or intramarket competition that is not necessary or appropriate in furtherance of the purposes of the Act.

With respect to Tier 4 Maker Rebates for Market Makers, the Exchange believes that the fee change will not impose any unnecessary burden on intramarket competition because, while it only applies to Market Maker orders, Market Makers take on a number of obligations and responsibilities that other market participants are not required to undertake. The proposed increase to the Tier 4 Maker Rebate applicable to Market Makers is intended to attract increased order flow to the Exchange from Market Makers, which will provide increased volume and greater trading opportunities for all market participants. The Exchange believes the proposed fee change does not impose a burden on inter-market competition because it is consistent with fees charged by other exchanges.[12] The proposed rebates, which the Exchange believes are comparable to those provided by its competitors for similar orders, will encourage competition and continue to attract additional order flow to the Exchange.

With respect to ADV calculations for rebates, the Exchange notes that there are very few instances where the rule will actually be invoked, and when invoked, the Exchange believes the rule will have little or no impact on trading decisions or execution quality. To the contrary, the Exchange believes that the proposed modification to its ADV calculation is pro-competitive and will result in lower total costs to end users, a positive outcome of competitive

[8] 15 U.S.C. 78f.

[9] 15 U.S.C. 78f(b)(4).

[10] *See* CBOE Fee Schedule, Volume Incentive Program (VIP); MIAX Fee Schedule, Transaction Fees, Exchange Fees, Priority Customer Rebate Program.

[11] 15 U.S.C. 78f(b)(8).

[12] For example, NYSE Arca Options (''Arca'') provides a rebate in Standard Options to market makers that achieve their ''Super Tier'' of $0.37 per contract for Penny Pilot Issues (except SPY), and $0.39 per contract in SPY. *See* Arca Fees and Charges, Trade Related Charges for Standard Options.

markets. Moreover, other options exchanges have adopted rules that are substantially similar to the change in ADV calculation being proposed by the Exchange.[13]

The Exchange also notes that other exchanges have substantially similar requirements for aggregating affiliated Member ADV in determining applicable tiered rebates. As provided in the initial filing, the Exchange currently aggregates affiliated Member ADV in calculating rebate tiers, and this proposed rule change merely explains the how affiliate status is determined for that purpose, which will have no competitive impact.

Furthermore, the Exchange believes that the clarifying text being added to the Schedule of Fees is non-substantive, and therefore does not impact the competition analysis.

The Exchange operates in a highly competitive market in which market participants can readily direct their order flow to competing venues. In such an environment, the Exchange must continually review, and consider adjusting, its fees and rebates to remain competitive with other exchanges. For the reasons described above, the Exchange believes that the proposed fee changes reflect this competitive environment.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

The Exchange has not solicited, and does not intend to solicit, comments on this proposed rule change. The Exchange has not received any unsolicited written comments from members or other interested parties.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A)(ii) of the Act,[14] and subparagraph (f)(2) of Rule 19b–4 thereunder,[15] because it establishes a due, fee, or other charge imposed by Topaz.

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 to determine whether the proposed rule should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File No. SR–Topaz–2013–08 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 No. SR–Topaz–2013–08. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method.

The Commission will post all comments on the Commission's Internet 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 such filing also will be available for inspection and copying at the principal offices 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 No. SR–Topaz–2013–08, and should be submitted on or before November 12, 2013.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[16]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2013–24662 Filed 10–21–13; 8:45 am]

BILLING CODE 8011–01–P

[13] *See, e.g.,* Securities Exchange Act Release Nos. 70472 (Sept. 23, 2013) (PHLX–2013–93); 70470 (Sept. 23, 2013) (NASDAQ–2013–117).

[14] 15 U.S.C. 78s(b)(3)(A)(ii).

[15] 17 CFR 240.19b–4(f)(2).

[16] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–70611; File No. SR–CFE–2013–005]

Self-Regulatory Organizations; CBOE Futures Exchange, LLC; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change Relating to the Notification and Reporting Provisions for Exchange of Contract for Related Position Transactions and Block Trades

October 4, 2013.

Pursuant to Section 19(b)(7) of the Securities Exchange Act of 1934 (''Act''),[1] notice is hereby given that on September 20, 2013, CBOE Futures Exchange, LLC (''CFE'' or ''Exchange'') filed with the Securities and Exchange Commission (''SEC'' or ''Commission'') the proposed rule change described in Items I, II, and III below, which Items have been prepared by CFE. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons. CFE also has filed this proposed rule change with the Commodity Futures Trading Commission (''CFTC''). CFE filed a written certification with the CFTC under Section 5c(c) of the Commodity Exchange Act (''CEA'')[2] on September 20, 2013.

I. Self-Regulatory Organization's Description of the Proposed Rule Change

CFE proposes to revise the notification and reporting provisions contained in CFE Rules 414 (Exchange of Contract for Related Position) (''ECRP'') and 415 (Block Trading).

The scope of this filing is limited solely to the application of the rule changes to security futures traded on CFE. The only security futures currently traded on CFE are traded under Chapter 16 of CFE's Rulebook which is applicable to Individual Stock Based and Exchange-Traded Fund Based Volatility Index (''Volatility Index'') security futures.

The text of the proposed rule change is attached as Exhibit 4 to the filing

[1] 15 U.S.C. 78s(b)(7).

[2] 7 U.S.C. 7a–2(c).

submitted by the Exchange but is not attached to the published notice of the filing.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, CFE 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. CFE has prepared summaries, set forth in Sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

CFE Rule 414 sets forth requirements relating to ECRP transactions, and CFE Rule 415 sets forth requirements relating to Block Trades. Each of these types of transactions occurs off-exchange, and CFE Rules 414(i) and 415(g) each set forth notification and reporting requirements, which are substantially the same. The current proposal seeks to amend these provisions. The impetus for these proposed changes is the planned expansion of extended trading hours for CBOE Volatility Index (VIX) futures, which is planned to occur in two phases with the first phase to begin in late September and the second phase to begin in the weeks that follow.[3]

Because CFE's Help Desk will be staffed during longer periods of time than previously, the Exchange is proposing to amend the notification and reporting provisions contained in CFE Rules 414 (Exchange of Contract for Related Position) and 415 (Block Trades), which apply to all products traded on the Exchange.

For purposes of efficiency, the Exchange will describe below the current notification and reporting provisions and the proposed changes to those provisions, which would apply equally to both CFE Rule 414 and CFE Rule 415.

The current notification and reporting provisions require that each party to the transaction have an Authorized Reporter call or email the CFE Help Desk after the transaction is agreed upon to notify CFE of the terms of the transaction.[4] These provisions are described in terms of when there is agreement to the transaction, which triggers the ten-minute time period during which the transaction must be reported to the CFE Help Desk.[5] Unless otherwise specified in the rules governing the relevant Contract:

- If the transaction is agreed upon between the time that Trading Hours commence in the relevant Contract and 3:15 p.m., the notification to the CFE Help Desk must be made without delay and by no later than ten minutes after the transaction is agreed upon (in which event the CFE Help Desk will report the transaction to CFE's trading system and provide a written transaction summary on that day);[6]
- if the transaction is agreed upon between 3:15 p.m. and 3:25 p.m., the notification to the CFE Help Desk must be made either
- on the day the transaction is agreed upon by no later than 3:25 p.m. (in which event the CFE Help Desk will report the transaction to CFE's trading system and provide a written transaction summary to the Authorized Reporters on that day) or
- on the following business day by no later than ten minutes from the time that Trading Hours commence in the relevant Contract (in which event the CFE Help Desk will report the transaction to CFE's trading system and provide and provide a written transaction summary to the Authorized Reporters on that business day); and
- if the transaction is agreed upon after 3:25 p.m. and prior to the time that Trading Hours commence in the relevant Contract on the following business day, the notification to the CFE Help Desk must be made on that following business day by no later than ten minutes from the time that Trading Hours commence in the relevant Contract (in which event the CFE Help Desk will report the transaction to CFE's trading system and provide a written transaction summary to the Authorized Reporters on that business day).

The current proposal would extend the time frames during which ECRP transactions and Block Trades may be reported. Also, the notification provisions would be described in terms of the time of notification to the Exchange (instead of when there is agreement to the transaction).[7]

Specifically, based upon the time of notification to the CFE Help Desk of an ECRP or Block Trade, these Rules would be amended to include charts that specify the manner in which the notification of an ECRP or Block Trade must be provided to the CFE Help Desk, the Business Day for which the ECRP Contract leg or Block Trade will be submitted for clearing, and when the Help Desk will report the ECRP Contract leg or Block Trade to CFE's trading system. The CFE Help Desk will provide a written transaction summary to each Authorized Reporter on the Business Day for which the ECRP Contract leg or Block Trade is submitted for clearing. The Exchange notes that between 7:00 a.m. and 4:00 p.m. on each business day, notification may be made by phone or email. The Exchange proposes to limit the method of notification to email only during all other times. The proposed rule charts[8] would be as follows:

Time of notification to the Exchange	Notification method	Business day for which contract Leg/Block Trade submitted for clearing	When Help Desk reports contract Leg/Block Trade
7:00 a.m.–3:15 p.m. Monday–Friday.	Phone or E-Mail	Business Day of transaction	As soon as practicable following required notifications to Help Desk.
		Next Business Day for Trade at Settlement (TAS) transactions reported after 3:12 p.m.	

[3] *See* CFE Information Circular *IC13–029* for additional information regarding the expansion of extended trading hours for VIX futures. This rule filing is intended to address how the notification and reporting provisions for ECRP transactions and Block Trades will operate when CFE introduces a new 45-minute extended trading hours period for VIX futures. This new trading period of extended trading hours in VIX futures will be from 3:30 p.m.–4:15 p.m. on Mondays through Thursdays.

[4] For this purpose, agreement to the transaction includes, without limitation, agreement to the actual price or premium of the Contract leg of the ECRP transaction or Block Trade (except in the case of a trade at settlement (''TAS'') transaction that is permitted by the rules governing the relevant Contract, in which case agreement to the transaction includes, without limitation, agreement upon whether the price or premium of the Contract leg of the ECRP transaction or Block Trade will be the daily settlement price or an agreed upon differential above or below the daily settlement price). The Exchange is also taking this opportunity to make further explicit that agreement to the terms of an ECRP transaction or Block Trade includes agreement to the quantity of the Contract leg of an ECRP transaction or the quantity of the Block Trade.

[5] All times included in this filing and in CFE's Rules are Chicago time.

[6] Additional details regarding the written transaction summary prepared by the CFE Help Desk are set forth in CFE Rules 414(k) and 415(i).

[7] The Exchange notes that Authorized Reporters would still be required to notify the CFE Help Desk without delay and by no later than ten minutes after the transaction is agreed upon.

[8] A separate chart would be set forth in both CFE Rule 414 and CFE Rule 415 and each chart would set forth the same reporting and notification provisions. For purposes of efficiency, the Exchange is setting forth one chart in the purpose section of this filing.

Time of notification to the Exchange	Notification method	Business day for which contract Leg/Block Trade submitted for clearing	When Help Desk reports contract Leg/Block Trade
3:15 p.m. to 3:30 p.m. Monday–Friday.	Phone or E-Mail	Calendar day of transaction or next Business Day, as designated by Authorized Reporters. Next Business Day for TAS transactions.	As soon as practicable after trading next commences following required notifications to Help Desk.
3:30 p.m. to 4:00 p.m. Monday–Thursday [9].	Phone or E-Mail	Calendar day of transaction or Business Day of transaction, as designated by Authorized Reporters. Business Day of transaction for TAS transactions.	As soon as practicable following required notifications to Help Desk.
3:30 p.m. Friday to 7:00 a.m. Monday.	E-Mail	Next Business Day	As soon as practicable after trading next commences following required notifications to Help Desk.
4:00 p.m. to 4:15 p.m. Monday–Thursday.	Phone or E-Mail	Business Day of transaction	As soon as practicable following required notifications to Help Desk (which may occur either during first period of extended trading hours or after trading next commences).
4:15 p.m. to 7:00 am (next calendar day) Monday–Thursday.	E-Mail	Business Day of transaction	As soon as practicable after trading next commences following required notifications to Help Desk.

CFE also proposes to amend CFE Rules 414(i) and 415(g) by providing that the Exchange may modify the days and times during which the notification, reporting, and clearance submission provisions set forth in the chart above would be applicable in the event that the Exchange is not be open for business or has shortened Trading Hours in connection with a holiday or a period of mourning.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6(b) of the Act,[10] in general, and furthers the objectives of Section 6(b)(5) [11] in particular in that it is designed 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 Exchange believes that the proposed rule change would benefit investors and market participants because it would enhance CFE's ECRP and Block Trade reporting provisions by extending the time frames during which ECRP transactions and Block Trades may be reported. The Exchange also believes that the proposed rule change is equitable and not unfairly discriminatory because amended CFE Rules 414 and 415 would apply to all TPHs and Authorized Reporters and do not discriminate between market participants.

B. Self-Regulatory Organization's Statement on Burden on Competition

CFE does not believe that the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act, in that the rule change makes enhancements to CFE's Block Trade and ECRP reporting process. In addition, the Exchange believes that the expansion of the ability to report Block Trades and ECRP transactions in security futures in conjunction with the expansion of trading hours in VIX futures will promote competition because it will provide for the reporting and dissemination of security futures Block Trades and ECRPs during additional time frames which will serve to promote additional transparency and thus potential further price competition.

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 proposed rule change will become operative on or after October 7, 2013.

At any time within 60 days of the date of effectiveness of the proposed rule change, the Commission, after consultation with the CFTC, may summarily abrogate the proposed rule change and require that the proposed rule change be refiled in accordance with the provisions of Section 19(b)(1) of the Act.[12]

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–CFE–2013–005 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–CFE–2013–005. This file number should be included on the subject line if email is used. To help the

[9] As described in footnote 4, the Exchange will be introducing a new trading period of extended trading hours in VIX futures that will be from 3:30 p.m.–4:15 p.m. on Mondays through Thursdays. Authorized Reporters are able between 3:30 p.m. and 4:00 p.m. to report the Contract leg of an ECRP transaction or a Block Trade for clearing on either the calendar day of the transaction or the next business day. However, after 4:00 p.m., Authorized Traders will only be able to report trades for clearing on the next Business Day. The Exchange is providing this detail as background as to why the chart does not line up directly with the new trading period of extended trading hours being introduced for VIX futures.

[10] 15 U.S.C. 78f(b).

[11] 15 U.S.C. 78f(b)(5).

[12] 15 U.S.C. 78s(b)(1).

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 such filing also will be available for inspection and copying at the principal offices 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–CFE–2013–005, and should be submitted on or before November 12, 2013.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[13]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2013–24567 Filed 10–21–13; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–70575; File No. SR–NASDAQ–2013–126]

Self-Regulatory Organizations; The NASDAQ Stock Market LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Extend Fee Pilot Program for NASDAQ Last Sale

September 30, 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 September 25, 2013, The NASDAQ Stock Market LLC (''NASDAQ'' or the ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') a proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of the Substance of the Proposed Rule Change

NASDAQ is proposing to extend for three months the fee pilot pursuant to which NASDAQ distributes the NASDAQ Last Sale (''NLS'') market data products. NLS allows data distributors to have access to real-time market data for a capped fee, enabling those distributors to provide free access to the data to millions of individual investors via the internet and television. Specifically, NASDAQ offers the ''NASDAQ Last Sale for NASDAQ'' and ''NASDAQ Last Sale for NYSE/NYSE MKT'' data feeds containing last sale activity in U.S. equities within the NASDAQ Market Center and reported to the FINRA/NASDAQ Trade Reporting Facility (''FINRA/NASDAQ TRF''), which is jointly operated by NASDAQ and the Financial Industry Regulatory Authority (''FINRA''). The purpose of this proposal is to extend the existing pilot program for three months, from October 1, 2013 to December 31, 2013.

This pilot program supports the aspiration of Regulation NMS to increase the availability of proprietary data by allowing market forces to determine the amount of proprietary market data information that is made available to the public and at what price. During the pilot period, the program has vastly increased the availability of NASDAQ proprietary market data to individual investors. Based upon data from NLS distributors, NASDAQ believes that since its launch in July 2008, the NLS data has been viewed by millions of investors on Web sites operated by Google, Interactive Data, and Dow Jones, among others.

The text of the proposed rule change is below. Proposed new language is in italics; proposed deletions are in brackets.

* * * * *

7039. NASDAQ Last Sale Data Feeds

(a) For a three month pilot period commencing on [July] *October* 1, 2013, NASDAQ shall offer two proprietary data feeds containing real-time last sale information for trades executed on NASDAQ or reported to the NASDAQ/FINRA Trade Reporting Facility.

(1)–(2) No change.

(b)–(c) No change.

* * * * *

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 Statutory Basis for, the Proposed Rule Change

1. Purpose

Prior to the launch of NLS, public investors that wished to view market data to monitor their portfolios generally had two choices: (1) pay for real-time market data or (2) use free data that is 15 to 20 minutes delayed. To increase consumer choice, NASDAQ proposed a pilot to offer access to real-time market data to data distributors for a capped fee, enabling those distributors to disseminate the data at no cost to millions of internet users and television viewers. NASDAQ now proposes a three-month extension of that pilot program, subject to the same fee structure as is applicable today.

NLS consists of two separate ''Level 1'' products containing last sale activity within the NASDAQ market and reported to the jointly-operated FINRA/NASDAQ TRF. First, the ''NASDAQ Last Sale for NASDAQ'' data product is a real-time data feed that provides real-time last sale information including execution price, volume, and time for executions occurring within the NASDAQ system as well as those reported to the FINRA/NASDAQ TRF. Second, the ''NASDAQ Last Sale for NYSE/NYSE MKT'' data product provides real-time last sale information including execution price, volume, and time for NYSE- and NYSE MKT-securities executions occurring within the NASDAQ system as well as those reported to the FINRA/NASDAQ TRF. By contrast, the securities information processors (''SIPs'') that provide ''core'' data consolidate last sale information from all exchanges and trade reporting facilities (''TRFs''). Thus, NLS replicates a subset of the information provided by the SIPs.

NASDAQ established two different pricing models, one for clients that are able to maintain username/password

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[13] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b-4.

entitlement systems and/or quote counting mechanisms to account for usage, and a second for those that are not. Firms with the ability to maintain username/password entitlement systems and/or quote counting mechanisms are eligible for a specified fee schedule for the NASDAQ Last Sale for NASDAQ Product and a separate fee schedule for the NASDAQ Last Sale for NYSE/NYSE MKT Product. Firms that are unable to maintain username/password entitlement systems and/or quote counting mechanisms also have multiple options for purchasing the NASDAQ Last Sale data. These firms choose between a ''Unique Visitor'' model for internet delivery or a ''Household'' model for television delivery. Unique Visitor and Household populations must be reported monthly and must be validated by a third-party vendor or ratings agency approved by NASDAQ at NASDAQ's sole discretion. In addition, to reflect the growing confluence between these media outlets, NASDAQ offered a reduction in fees when a single distributor distributes NASDAQ Last Sale Data Products via multiple distribution mechanisms.

NASDAQ also established a cap on the monthly fee, currently set at $50,000 per month, for all NASDAQ Last Sale products. The fee cap enables NASDAQ to compete effectively against other exchanges that also offer last sale data for purchase or at no charge.

As with the distribution of other NASDAQ proprietary products, all distributors of the NASDAQ Last Sale for NASDAQ and/or NASDAQ Last Sale for NYSE/NYSE MKT products pay a single $1,500/month NASDAQ Last Sale Distributor Fee in addition to any applicable usage fees. The $1,500 monthly fee applies to all distributors and does not vary based on whether the distributor distributes the data internally or externally or distributes the data via both the internet and television.

2. Statutory Basis

NASDAQ believes that the proposed rule change is consistent with the provisions of Section 6 of the Act,[3] in general, and with Section 6(b)(4) of the Act,[4] in particular, in that it provides an equitable allocation of reasonable fees among users and recipients of the data. In adopting Regulation NMS, the Commission granted self-regulatory organizations (''SROs'') and broker-dealers (''BDs'') increased authority and flexibility to offer new and unique market data to the public. It was believed that this authority would expand the amount of data available to consumers, and also spur innovation and competition for the provision of market data.

NASDAQ believes that its NASDAQ Last Sale market data products are precisely the sort of market data product that the Commission envisioned when it adopted Regulation NMS. The Commission concluded that Regulation NMS—by lessening regulation of the market in proprietary data—would itself further the Act's goals of facilitating efficiency and competition:

> [E]fficiency is promoted when broker-dealers who do not need the data beyond the prices, sizes, market center identifications of the NBBO and consolidated last sale information are not required to receive (and pay for) such data. The Commission also believes that efficiency is promoted when broker-dealers may choose to receive (and pay for) additional market data based on their own internal analysis of the need for such data.[5]

By removing unnecessary regulatory restrictions on the ability of exchanges to sell their own data, Regulation NMS advanced the goals of the Act and the principles reflected in its legislative history. If the free market should determine whether proprietary data is sold to BDs at all, it follows that the price at which such data is sold should be set by the market as well.

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) (''*NetCoalition I*''), upheld the Commission's reliance upon competitive markets to set reasonable and equitably allocated fees for 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.''' *NetCoalition I,* at 535 (quoting H.R. Rep. No. 94–229, at 92 (1975), *as reprinted in* 1975 U.S.C.C.A.N. 321, 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.' ''[6]

The court in *NetCoalition I,* while upholding the Commission's conclusion that competitive forces may be relied upon to establish the fairness of prices, nevertheless concluded that the record *in that case* did not adequately support the Commission's conclusions as to the competitive nature of the market for NYSE Arca's data product at issue in that case. As explained below in NASDAQ's Statement on Burden on Competition, however, NASDAQ believes that there is substantial evidence of competition in the marketplace for data that was not in the record in the *NetCoalition I* case, and that the Commission is entitled to rely upon such evidence in concluding that the fees established in this filing are the product of competition, and therefore in accordance with the relevant statutory standards.[7] Moreover, NASDAQ further notes that the product at issue in this filing—a NASDAQ last sale data product that replicates a subset of the information available through ''core'' data products whose fees have been reviewed and approved by the SEC—is quite different from the NYSE Arca depth-of-book data product at issue in *NetCoalition I.* Accordingly, any findings of the court with respect to that product may not be relevant to the product at issue in this filing.

B. Self-Regulatory Organization's Statement on Burden on Competition

NASDAQ does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act, as amended. NASDAQ's ability to price its Last Sale Data Products is constrained by (1) competition between exchanges and other trading platforms that compete with each other in a variety of dimensions; (2) the existence of inexpensive real-time consolidated data and market-specific data and free delayed consolidated data; and (3) the inherent contestability of the market for proprietary last sale data.

The market for proprietary last sale 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, trades, and market data itself, providing virtually

[3] 15 U.S.C. 78f.

[4] 15 U.S.C. 78f(b)(4).

[5] Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496 (June 29, 2005).

[6] *NetCoalition I,* at 535.

[7] It should also be noted that Section 916 of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (''Dodd-Frank Act'') has amended paragraph (A) of Section 19(b)(3) of the Act, 15 U.S.C. 78s(b)(3), to make it clear that all exchange fees, including fees for market data, may be filed by exchanges on an immediately effective basis.

limitless opportunities for entrepreneurs who wish to produce and distribute their own market data. This proprietary data is produced by each individual exchange, as well as other entities, in a vigorously competitive market.

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 execution 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 platform where the order can be posted, including the execution fees, data quality and price, and distribution of its data products. Without trade executions, exchange data products cannot exist. Moreover, data products are valuable to many end users only insofar as they provide information that end users expect will assist them or their customers in making trading decisions.

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, the operation of the exchange is characterized by high fixed costs and low marginal costs. This cost structure is common in content and content distribution industries such as software, where developing new software typically requires a large initial investment (and continuing large investments to upgrade the software), but once the software is developed, the incremental cost of providing that software to an additional user is typically small, or even zero (*e.g.,* if the software can be downloaded over the internet after being purchased).[8] In NASDAQ's case, it is costly to build and maintain a trading platform, but the incremental cost of trading each additional share on an existing platform, or distributing an additional instance of data, is very low. Market information and executions are each produced jointly (in the sense that the activities of trading and placing orders are *the* source of the information that is distributed) and are each subject to significant scale economies. In such cases, marginal cost pricing is not feasible because if all sales were priced at the margin, NASDAQ would be unable to defray its platform costs of providing the joint products.

An exchange's BD customers view the costs of transaction executions and of data as a unified cost of doing business with the exchange. A BD will direct orders to a particular exchange only if the expected revenues from executing trades on the exchange exceed net transaction execution costs and the cost of data that the BD chooses to buy to support its trading decisions (or those of its customers). The choice of data products is, in turn, a product of the value of the products in making profitable trading decisions. If the cost of the product exceeds its expected value, the BD will choose not to buy it. Moreover, as a BD chooses to direct fewer orders to a particular exchange, the value of the product to that BD decreases, for two reasons. First, the product will contain less information, because executions of the BD's trading activity will not be reflected in it. Second, and perhaps more important, the product will be less valuable to that BD because it does not provide information about the venue to which it is directing its orders. Data from the competing venue to which the BD is directing orders will become correspondingly more valuable.

Similarly, in the case of products such as NLS that are distributed through market data vendors, the vendors provide price discipline for proprietary data products because they control the primary means of access to end users. Vendors impose price restraints based upon their business models. For example, vendors such as Bloomberg and Reuters that assess a surcharge on data they sell may refuse to offer proprietary products that end users will not purchase in sufficient numbers. Internet portals, such as Google, impose a discipline by providing only data that will enable them to attract ''eyeballs'' that contribute to their advertising revenue. Retail BDs, such as Schwab and Fidelity, offer their customers proprietary data only if it promotes trading and generates sufficient commission revenue. Although the business models may differ, these vendors' pricing discipline is the same: they can simply refuse to purchase any proprietary data product that fails to provide sufficient value. NASDAQ and other producers of proprietary data products must understand and respond to these varying business models and pricing disciplines in order to market proprietary data products successfully. Moreover, NASDAQ believes that products such as NLS can enhance order flow to NASDAQ by providing more widespread distribution of information about transactions in real time, thereby encouraging wider participation in the market by investors with access to the internet or television. Conversely, the value of such products to distributors and investors decreases if order flow falls, because the products contain less content.

Analyzing the cost of market data distribution in isolation from the cost of all of the inputs supporting the creation of market data will inevitably underestimate the cost of the data. Thus, because it is impossible to create data without a fast, technologically robust, and well-regulated execution system, system costs and regulatory costs affect the price of market data. It would be equally misleading, however, to attribute all of the exchange's costs to the market data portion of an exchange's joint product. Rather, 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.

Competition among trading platforms can be expected to constrain the aggregate return 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. NASDAQ pays rebates to attract orders, charges relatively low prices for market information and charges relatively high prices for accessing posted liquidity. Other platforms may choose a strategy of paying lower liquidity rebates to attract orders, setting relatively low prices for accessing posted liquidity, and setting relatively high prices for market information. Still others may provide most data free of charge and rely exclusively on transaction fees to recover their costs. Finally, some platforms may incentivize use by providing opportunities for equity ownership, which may allow them to charge lower direct fees for executions and data.

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. Such regulation is unnecessary because an ''excessive'' price for one of the joint products will ultimately have to be reflected in lower

[8] *See* William J. Baumol and Daniel G. Swanson, ''The New Economy and Ubiquitous Competitive Price Discrimination: Identifying Defensible Criteria of Market Power,'' *Antitrust Law Journal,* Vol. 70, No. 3 (2003).

prices for other products sold by the firm, or otherwise the firm will experience a loss in the volume of its sales that will be adverse to its overall profitability. In other words, an increase in the price of data will ultimately have to be accompanied by a decrease in the cost of executions, or the volume of both data and executions will fall.

The level of competition and contestability in the market is evident in the numerous alternative venues that compete for order flow, including thirteen SRO markets, as well as internalizing BDs and various forms of alternative trading systems (''ATSs''), including dark pools and electronic communication networks (''ECNs''). Each SRO market competes to produce transaction reports via trade executions, and two FINRA-regulated TRFs compete to attract internalized transaction reports. It is common for BDs to further and exploit this competition by sending their order flow and transaction reports to multiple markets, rather than providing them all to a single market. Competitive markets for order flow, executions, and transaction reports provide pricing discipline for the inputs of proprietary data products.

The large number of SROs, TRFs, 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, TRF, ATS, and BD is currently permitted to produce proprietary data products, and many currently do or have announced plans to do so, including NASDAQ, NYSE, NYSE MKT, NYSE Arca, BATS, and Direct Edge.

Any ATS or BD can combine with any other ATS, BD, or multiple ATSs or BDs to produce joint proprietary data products. Additionally, order routers and market data vendors can facilitate single or multiple BDs' production of proprietary data products. The potential sources of proprietary products are virtually limitless.

The fact that proprietary data from ATSs, BDs, and vendors can by-pass SROs is significant in two respects. First, non-SROs can compete directly with SROs for the production and sale of proprietary data products, as BATS and Arca did before registering as exchanges by publishing proprietary book data on the internet. Second, because a single order or transaction report can appear in a core data product, an SRO proprietary product, and/or a non-SRO proprietary product, the data available in proprietary products is exponentially greater than the actual number of orders and transaction reports that exist in the marketplace. Indeed, in the case of NLS, the data provided through that product appears both in (i) real-time core data products offered by the SIPs for a fee, and (ii) free SIP data products with a 15-minute time delay, and finds a close substitute in last-sale products of competing venues.

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, inexpensive, and profitable. 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, TracECN, BATS Trading and Direct Edge. A proliferation of dark pools and other ATSs operate profitably with fragmentary shares of consolidated market volume.

Regulation NMS, by deregulating the market for proprietary data, has increased the contestability of that market. While BDs have previously published their proprietary data individually, Regulation NMS encourages market data vendors and BDs to produce proprietary products cooperatively in a manner never before possible. Multiple market data vendors already have the capability to aggregate data and disseminate it on a profitable scale, including Bloomberg and Thomson Reuters.

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 $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 (such as last sale data) that is simply a subset of the consolidated data. 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.

The competitive nature of the market for products such as NLS is borne out by the performance of the market. In May 2008, the internet portal Yahoo! began offering its Web site viewers real-time last sale data (as well as best quote data) provided by BATS. In response, in June 2008, NASDAQ launched NLS, which was initially subject to an ''enterprise cap'' of $100,000 for customers receiving only one of the NLS products, and $150,000 for customers receiving both products. The majority of NASDAQ's sales were at the capped level. In early 2009, BATS expanded its offering of free data to include depth-of-book data. Also in early 2009, NYSE Arca announced the launch of a competitive last sale product with an enterprise price of $30,000 per month. In response, NASDAQ combined the enterprise cap for the NLS products and reduced the cap to $50,000 (*i.e.,* a reduction of $100,000 per month). Although each of these products offers only a specific subset of data available from the SIPs, NASDAQ believes that the products are viewed as substitutes for each other and for core last-sale data, rather than as products that must be obtained in tandem. For example, while Yahoo! and Google now both disseminate NASDAQ's product, several other major content providers, including MSN and Morningstar, use the BATS product.

In this environment, a super-competitive increase in the fees charged for either transactions or data has the potential to impair revenues from both products. ''No one disputes that competition for order flow is 'fierce'.'' *NetCoalition I* at 24. The existence of fierce competition for order flow implies a high degree of price sensitivity on the part of BDs with order flow, since they may readily reduce costs by directing orders toward the lowest-cost trading venues. A BD that shifted its order flow from one platform to another in response to order execution price differentials would both reduce the value of that platform's market data and reduce its own need to consume data from the disfavored platform. If a platform increases its market data fees, the change will affect the overall cost of doing business with the platform, and affected BDs will assess whether they can lower their trading costs by directing orders elsewhere and thereby lessening the need for the more expensive data. Similarly, increases in the cost of NLS would impair the willingness of distributors to take a product for which there are numerous alternatives, impacting NLS data revenues, the value of NLS as a tool for attracting order flow, and ultimately, the volume of orders routed to NASDAQ and the value of its other data products.

In establishing the price for the NASDAQ Last Sale Products, NASDAQ considered the competitiveness of the market for last sale data and all of the implications of that competition. NASDAQ 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 NLS, including real-time consolidated data, free delayed consolidated data, and proprietary data from other sources ensures that NASDAQ cannot set unreasonable fees, or fees that are unreasonably discriminatory, without losing business to these alternatives. Accordingly, NASDAQ believes that the acceptance of the NLS product in the marketplace demonstrates the consistency of these fees with applicable statutory standards.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

Three comment letters were filed regarding the proposed rule change as originally published for comment. NASDAQ responded to these comments in a letter dated December 13, 2007. Both the comment letters and NASDAQ's response are available on the SEC Web site at *http://www.sec.gov/comments/sr-nasdaq-2006-060/nasdaq2006060.shtml.* In addition, in response to prior filings to extend the NLS pilot,[9] the Securities Industry and Financial Markets Association (''SIFMA'') and/or NetCoalition[10] filed comment letters contending that the SEC should suspend and institute disapproval proceedings with respect to the filing. SIFMA and NetCoalition had also filed petitions seeking review by the United States Court of Appeals for the District of Columbia Circuit with respect to the NLS pricing pilots in effect from July 1, 2011 through September 30, 2011, from October 1, 2011 through December 31, 2011, from July 1, 2012 through September 30, 2012, and from January 1, 2013 through March 31, 2013. These appeals were stayed pending resolution of the consolidated case *NetCoalition v. SEC,* Nos. 10–1421, 10–1422, 11–1001, and 11–1065 (''*NetCoalition II*''). On April 30, 2013, the court issued a decision dismissing *NetCoalition II,* concluding that it lacked jurisdiction to entertain the case. Subsequently, the court issued orders dismissing each of the pending petitions seeking review of prior extensions of the NLS pricing pilot. On May 30, 2013, SIFMA filed with the Commission an ''Application for an Order Setting Aside Rule Changes of Certain Self-Regulatory Organizations Limiting Access to their Services'' that purports to challenge prior filings under Section 19(d) and (f) of the Act.[11] Pursuant to a Commission procedural order, interested parties have recently completed submission of briefs to the Commission regarding appropriate procedures and other threshold questions.

It appears to NASDAQ that SIFMA's contentions in this new proceeding are similar to the contentions in its numerous prior comment letters, which have repeatedly argued that market data fees are improper unless established through public utility-style rate-making proceedings that are nowhere contemplated by the Act. In making its arguments, SIFMA has sought to rely upon *NetCoalition I,* while repeatedly mischaracterizing the import of that case. Specifically, the court made findings about the extent of the Commission's record in support of determinations about a depth-of-book product offered by NYSE Arca. In making this limited finding, the court nevertheless squarely rejected contentions that cost-based review of market data fees was required by the Act:

> The petitioners believe that the SEC's market-based approach is prohibited under the Exchange Act because the Congress intended ''fair and reasonable'' to be determined using a cost-based approach. The SEC counters that, because it has statutorily-granted flexibility in evaluating market data fees, its market-based approach is fully consistent with the Exchange Act. We agree with the SEC.[12]

While the court noted that cost data could sometimes be relevant in determining the reasonableness of fees, it acknowledged that submission of cost data may be inappropriate where there are ''difficulties in calculating the direct costs . . . of market data,'' *id.* at 539. That is the case here, due to the fact that the fixed costs of market data production are inseparable from the fixed costs of providing a trading platform, and the marginal costs of market data production are minimal.[13] Because the costs of providing execution services and market data are not unique to either of the provided services, there is no meaningful way to allocate these costs among the two ''joint products''—and any attempt to do so would result in inherently arbitrary cost allocations.[14]

SIFMA further contended that prior filings lacked evidence supporting a conclusion that the market for NLS is competitive, asserting that arguments about competition for order flow and substitutability were rejected in *NetCoalition I.* While the court did determine that the record before it was not sufficient to allow it to endorse those theories on the facts of that case, the court did not itself make any conclusive findings about the actual presence or absence of competition or the accuracy of these theories: rather, it simply made a finding about the state of the SEC's record. Moreover, analysis about competition in the market for depth-of-book data is only tangentially relevant to the market for last sale data. As discussed above and in prior filings, perfect and partial substitutes for NLS exist in the form of real-time core market data, free delayed core market data, and the last sale products of competing venues; additional competitive entry is possible; and evidence of competition is readily apparent in the pricing behavior of the venues offering last sale products and the consumption patterns of their customers. Thus, although NASDAQ believes that the competitive nature of the market for all market data, including depth-of-book data, will ultimately be established, SIFMA's submissions have not only mischaracterized the

[9] Securities Exchange Act Release Nos. 69245 (March 27, 2013), 78 FR 19772 (April 2, 2013) (SR–NASDAQ–2013–053); 68568 (January 3, 2013), 78 FR 1910 (January 9, 2013) (SR–NASDAQ–2012–145); 67376 (July 9, 2012), 77 FR 41467 (July 13, 2012) (SR–NASDAQ–2012–078); 65488 (October 5, 2011), 76 FR 63334 (October 21, 2011) (SR–NASDAQ–2011–132); 64856 (July 12, 2011), 76 FR 41845 (July 15, 2011) (SR–NASDAQ–2011–092); 64188 (April 5, 2011), 76 FR 20054 (April 11, 2011) (SR–NASDAQ–2011–044).

[10] It was recently reported that NetCoalition is terminating its operations. *See* Martinez, ''NetCoalition Winds Down Operations'' (available at *http://thehill.com/blogs/hillicon-valley/technology/263793-netcoalition-winds-down-operations*). Accordingly, NASDAQ notes that the most recent comment letter was filed solely by SIFMA. *See* Letter from Ira D. Hammerman, Senior Managing Director & General Counsel, SIFMA, to Elizabeth M. Murphy, Secretary, Commission (April 23, 2013).

[11] Admin. Proc. File No. 3–15351. *See also* Admin Proc. File No. 13–15350 (similar proceeding with respect to NYSEArca data product). As with prior SIFMA challenges, the pendency of SIFMA's new action should in no way affect the continuation of the pilot for NASDAQ Last Sale.

[12] *NetCoalition I,* 615 F.3d at 534.

[13] Because the fees charged for products must cover these fixed costs, pricing at marginal cost is impossible.

[14] The court also explicitly acknowledged that the ''joint product'' theory set forth by NASDAQ's economic experts in *NetCoalition I* (and also described in this filing) could explain the competitive dynamic of the market and explain why consideration of cost data would be unavailing. Indeed, the Commission relied on that theory before the D.C. Circuit, but the court declined to reach the question because the Commission raised it for the first time on appeal. *Id.* at 541 n.16. For the purpose of providing a complete explanation of the theory, NASDAQ is further submitting as Exhibit 3 to this filing a study that was submitted to the Commission in SR–NASDAQ–2011–010. *See* Statement of Janusz Ordover and Gustavo Bamberger at 2–17 (December 29, 2010).

NetCoalition I decision, but have also failed to address the characteristics of the product at issue and the evidence already presented.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A)(ii) of the Act.[15] 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–NASDAQ–2013–126 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–NASDAQ–2013–126. 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 such filing also will be available for inspection and copying at the principal office of NASDAQ. 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–NASDAQ–2013–126 and should be submitted on or before November 12, 2013.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[16]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2013–24545 Filed 10–21–13; 8:45 am]

BILLING CODE 8011–01–P

[15] 15 U.S.C. 78s(b)(3)(A)(ii).

[16] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–70697; File No. SR–NYSE–2013–69]

Self-Regulatory Organizations; New York Stock Exchange LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change for a Temporary Suspension of Those Aspects of Rules 36.20 and 36.21 That Would Not Permit Floor Brokers To Use Personal Portable Phone Devices on The Trading Floor Due to the Unavailability of Exchange-Provided Cell Phones Beginning on October 10, 2013 Until the Earlier of When Cell Phone Service Is Restored or October 11, 2013

October 16, 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 October 10, 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.

[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 a temporary suspension of those aspects of Rules 36.20 and 36.21 that would not permit Floor brokers to use personal portable phone devices on the Trading Floor due to the unavailability of Exchange-provided cell phones beginning on October 10, 2013 until the earlier of when cell phone service is restored or October 11, 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 Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to temporarily suspend those aspects of Rules 36.20 and 36.21 that would not permit Floor brokers to use personal portable phone devices on the Trading Floor.[4] As proposed, all other aspects of Rule 36 remain applicable and the temporary suspensions of the applicable Rule 36 requirements are in effect beginning October 10, 2013 when the outage began, and remain in place until the earlier of when phone service is restored or close of business Friday, October 11, 2013.[5]

On October 10, 2013, the third-party carrier that provides service for the Exchange-provided cell phones experienced an issue that affected Exchange authorized and provided

[4] Pursuant to Rule 6A, the Trading Floor is defined as the restricted-access physical areas designated by the Exchange for the trading of securities.

[5] The Exchange provided Floor brokers with notice of this rule filing, including the applicable recordkeeping and other requirements related to using personal cell phones during the temporary suspension of Rule 36.

portable phones for Floor brokers. This outage only impacted the service for Exchange authorized and provided portable phones. As a result, all Exchange authorized and provided cell phones were non-operational before the opening of trading on October 10, 2013. The Exchange is working closely with the third-party carrier to restore such cell phone service.

Rules 36.20 and 36.21 govern the type of telephone communications that are approved for Floor brokers. Pursuant to Rule 36.20, Floor brokers may maintain a telephone line on the Trading Floor and use Exchange authorized and provided portable phones while on the Trading Floor. The use of such Exchange authorized and provided portable phones is governed by Rule 36.21. Because of the issues with the third-party carrier, all Exchange authorized and provided portable phones are not functional and therefore Floor brokers cannot use the Exchange authorized and provided portable phones. However, the personal cell phones of Floor brokers are operational on the Trading Floor. The Exchange believes that because communications with customers is a vital part of a Floor broker's role as agent and therefore contributes to maintaining a fair and orderly market, during the period when Exchange-provided cell phones are non-operational, Floor brokers should be permitted to use personal portable phone devices in lieu of the non-operational Exchange authorized and provided portable phones.

The Exchange therefore proposes to temporarily suspend the limitations in Rules 36.20 and 36.21 that permit Floor brokers to use only Exchange authorized and provided portable phones so that Floor brokers may also use personal portable phones on the Trading Floor. The Exchange proposes that pursuant to this temporary suspension, Floor brokers must provide the Exchange with the names of all Floor-based personnel who used personal portable phones during this temporary suspension period, together with the phone number and applicable carrier for each number. Floor broker member organizations must maintain in their books and records all cell phone records that show both incoming and outgoing calls that were made during the period that a personal portable phone was used on the Trading Floor. To the extent the records are unavailable from the third-party carrier, the Floor brokers must maintain contemporaneous records of all calls made or received on a personal portable phone while on the Trading Floor. As with all member organization records, such cell phone records must be provided to Exchange regulatory staff, including without limitation staff of the Financial Industry Regulatory Authority (''FINRA''), on request.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6(b) of the Act,[6] in general, and furthers the objectives of Section 6(b)(5) of the Act,[7] in particular, 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 mechanism of a free and open market and a national market system.

In particular, because of issues experienced by a third-party cell phone carrier, Exchange authorized and provided cell phones are not functional. The Exchange believes that the proposed temporary suspensions from those aspects of Rule 36 that restrict Floor broker's use of personal portable phones on the Trading Floor removes impediments to and perfects the mechanism of a free and open market and national market system because the proposed relief will enable Floor brokers to conduct their regular business, notwithstanding the ongoing issues with telephone service. The Exchange further believes that without the requested relief, Floor brokers would be compromised in their ability to conduct their regular course of business on the Trading Floor. In particular, for Floor brokers, because they operate as agents for customers, their inability to communicate with customers could compromise their ability to represent public orders on the Trading Floor.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. The Exchange does not believe that the proposed rule change will impose any burden on competition because the proposed change only impacts Floor brokers and has no change in operations for other market participants or other market centers. To the contrary, the Exchange believes that without the proposed relief, Floor brokers would be compromised in their ability to conduct their regular course of business on the Trading Floor, thereby placing a burden on the Floor brokers' ability to compete.

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 Exchange has filed the proposed rule change pursuant to Section 19(b)(3)(A)(iii) of the Act[8] and Rule 19b–4(f)(6) thereunder.[9] Because the proposed rule change does not: (i) significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative prior to 30 days from the date on which it was filed, or such shorter time as the Commission may designate, if consistent with the protection of investors and the public interest, the proposed rule change has become effective pursuant to Section 19(b)(3)(A) of the Act[10] and Rule 19b–4(f)(6) thereunder.[11]

A proposed rule change filed under Rule 19b–4(f)(6)[12] normally does not become operative prior to 30 days after the date of the filing. However, pursuant to Rule 19b–4(f)(6)(iii),[13] the Commission may designate a shorter time if such action is consistent with the protection of investors and the public interest. The Exchange has asked the Commission to waive the 30-day operative delay so that the proposal may become operative immediately upon filing. The Commission believes that waiving the 30-day operative delay is consistent with the protection of investors and the public interest. Waiver of the operative delay allows the terms of the relief described herein to be available during the service outage for Exchange-provided cell phones. Therefore, the Commission hereby waives the 30-day operative delay and

[6] 15 U.S.C. 78f(b).

[7] 15 U.S.C. 78f(b)(5).

[8] 15 U.S.C. 78s(b)(3)(A)(iii).

[9] 17 CFR 240.19b–4(f)(6).

[10] 15 U.S.C. 78s(b)(3)(A).

[11] 17 CFR 240.19b–4(f)(6). In addition, Rule 19b–4(f)(6) requires a self-regulatory organization to give the Commission written notice of its intent to file the proposed rule change, along with a brief description and text of the proposed rule change, at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has satisfied this requirement.

[12] 17 CFR 240.19b–4(f)(6).

[13] 17 CFR 240.19b–4(f)(6)(iii).

designates the proposal operative upon filing.[14]

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) of the Act[15] 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–2013–69 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.

All submissions should refer to File Number SR–NYSE–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–NYSE–2013–69 and should be submitted on or before November 12, 2013.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[16]

Kevin M. O'Neill,

Deputy Secretary.

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[14] For purposes only of waiving the 30-day operative delay, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[15] 15 U.S.C. 78s(b)(2)(B).

[16] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–70675; File No. SR–DTC–2013–10]

Self-Regulatory Organizations; The Depository Trust Company; Order Approving Proposed Rule Change To Terminate the Sealed Envelope Service, Which Is Part of The Depository Trust Company's Custody Service

October 11, 2013.

I. Introduction

On August 22, 2013, The Depository Trust Company (''DTC'') filed with the Securities and Exchange Commission (''Commission'') proposed rule change SR–DTC–2013–10 (''Proposed Rule Change'') pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'')[1] and Rule 19b–4 thereunder.[2] The Proposed Rule Change was published in the **Federal Register** on September 5, 2013.[3] The Commission received one comment to the Proposed Rule Change.[4] This order approves the Proposed Rule Change.

II. Description

DTC filed the Proposed Rule Change to terminate its Sealed Envelope Service (''Service''), which is part of its Custody Service, as described below.

A. Sealed Envelope Service

In 2002, DTC launched the Service as an addition to its Custody Service in response to requests from DTC participants (''Participants'') to assist in fully outsourcing their vaults to DTC. The Service is designed to provide physical custody to Participants for documents or instruments that are not securities, such as loan agreements, wills, deeds, mortgages, contracts, and option agreements.[5]

DTC allows for the sealed envelopes containing instruments or documents that are not securities to be held in custody in one of DTC's vaults. DTC assigns each sealed envelope a user-CUSIP number for tracking and record keeping purposes. Participants balance their sealed envelopes daily with DTC in the same manner as for securities held in the Custody Service. The depositing Participant is required to list the contents of the envelope on the outside of the envelope, as DTC does not open any sealed envelopes or verify the contents therein other than an examination for dangerous contents.

Proposed Rule Change

DTC has determined to discontinue the Service for multiple reasons. First, the Service is not widely used, as only 15 Participants currently use the Service and one of those Participants represents approximately 85% of the total volume. Second, since DTC does not verify the content of the envelope submitted by a Participant under the Service, it cannot confirm that a sealed envelope contains instruments and document qualifying for the Service.

DTC has stated that all 15 Participants of the Service were notified of DTC's intention to discontinue the Service and none of the Participants objected. DTC will work with those Participants to develop a timeline to return sealed envelopes that it currently has in custody.

III. Comments Received

The Commission received one comment on the Proposed Rule Change.[6] The commenter supports the Proposed Rule Change and notes that terminating the Service would mitigate risk, promote transparency and integrity in the markets, provide seamless clearing and settlement services, mitigate existing conflicts of interest, and enhance know your customer and

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] Release No. 34–70291 (Aug. 30, 2013), 78 FR 54696 (Sept. 5, 2013).

[4] *See* Comment from Sheila Waddell dated September 2, 2013 (''Waddell Comment''), *http://www.sec.gov/comments/sr-dtc-2013-10/dtc201310-1.htm.*

[5] The deposit of securities certificates, as well as tangible assets such as currency, gold coins, or jewelry, is strictly prohibited by DTC.

[6] Waddell Comment, *supra* note 4.

customer identification programs.[7] Furthermore, the commenter states that the Service places an undue burden and risk on DTC because it has no way of verifying the contents of a sealed envelope.[8]

IV. Discussion

Section 19(b)(2)(C) of the Act directs the Commission to approve a proposed rule change of a self-regulatory organization if it finds that such proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to such organization.[9] Section 17A(b)(3)(F) of the Act requires that, among other things, ''[t]he rules of the clearing agency are designed to promote the prompt and accurate clearance and settlement of securities transactions and . . . to assure the safeguarding of securities and funds which are in the custody or control of the clearing agency or for which it is responsible.'' [10]

Here, as described above, DTC's proposed rule change to terminate the Service should help further safeguard the securities and settlement process as a whole, as required by Section 17A(b)(3)(F) of the Act,[11] by eliminating the risk presented by the fact that DTC does not verify the contents of sealed envelopes placed in its custody. Moreover, terminating the Service will allow DTC to reallocate resources towards promoting other clearing and settlement processes.

V. Conclusion

On the basis of the foregoing, the Commission finds the Proposed Rule Change is consistent with the requirements of the Act, particularly with the requirements of Section 17A of the Act,[12] and the rules and regulations thereunder.

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,[13] that the proposed rule change SR–DTC–2013–10 be, and herebyis, APPROVED. [14]

For the Commission by the Division of Trading and Markets, pursuant to delegated authority.[15]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2013–24667 Filed 10–21–13; 8:45 am]

BILLING CODE 8011–01–P

[7] *See id.*

[8] *See id.*

[9] 15 U.S.C. 78(s)(b)(2)(C).

[10] 15 U.S.C. 78q–1(b)(3)(F).

[11] 15 U.S.C. 78q–1(b)(3)(F).

[12] 15 U.S.C. 78q–1.

[13] 15 U.S.C. 78s(b)(2).

[14] In approving the Proposed Rule Change, the Commission considered the proposal's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

[15] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–70662; File No. SR– BATS–2013–056]

Self-Regulatory Organizations; BATS Exchange, Inc.; Notice of Filing of a Proposed Rule Change To Amend Rule 12.6 To Conform to FINRA Rule 5320 Relating to Trading Ahead of Customer Orders

October 11, 2013.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the ''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on October 3, 2013, BATS Exchange, Inc. (the ''Exchange'' or ''BATS'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange filed a proposal to amend Rule 12.6 to make it substantially the same as Financial Industry Regulatory Authority (''FINRA'') Rule 5320.

The text of the proposed rule change is available at the Exchange's Web site at *http://www.batstrading.com,* at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in Sections A, B, and C below, of the most significant parts of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend Rule 12.6, which limits trading ahead of customer orders by Members,[3] to make the rule substantially the same as FINRA Rule 5320.[4] As with FINRA Rule 5320, amended Rule 12.6 would prohibit Members from trading ahead of customer orders, subject to specified exceptions. The amended rule would include exceptions for large orders and institutional accounts, proprietary transactions effected by a trading unit of a Member with no knowledge of customer orders held by another trading unit of the Member, riskless principal transactions, intermarket sweep orders (''ISOs''), and odd lot and bona fide error transactions, discussed in detail below. Amended Rule 12.6 would also provide the same guidance as FINRA Rule 5320 on minimum price improvement standards, order handling procedures, and trading outside normal market hours.

Background

Current Rule 12.6, the customer order protection rule, generally prohibits Members from trading on a proprietary basis ahead of, or along with, customer orders that are executable at the same price as the proprietary order. The rule contains several exceptions that make it permissible for a Member to enter a proprietary order while representing a customer order that could be executed at the same price, including permitting transactions for the purposes of facilitating the execution, on a riskless principal basis, of one or more customer orders.

Proposal To Adopt Text of FINRA Rule 5320

To harmonize its rules with FINRA, the Exchange proposes to delete the current text of Rule 12.6 and its supplementary material and adopt the text and supplementary material of FINRA Rule 5320, with certain technical changes, as Rule 12.6. FINRA Rule 5320 generally provides that a FINRA member that accepts and holds an order in an equity security from its own

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] Members are registered brokers or dealers that have been admitted to membership at the Exchange. BATS Rule 1.5(n).

[4] *See* Securities Exchange Act Release No. 63895 (February 11, 2011), 76 FR 9386 (February 17, 2011) (SR–FINRA–2009–90).

customer, or a customer of another broker-dealer, without immediately executing the order is prohibited from trading that security on the same side of the market for its own account at a price that would satisfy the customer order, unless it immediately thereafter executes the customer order up to the size and at the same or better price at which it traded for its own account.

Exceptions

Amended Rule 12.6 would include exceptions to the prohibition against trading ahead of customer orders. That is, a Member that meets the conditions of an exception would be permitted to trade a security on the same side of the market for its own account at a price that would satisfy a customer order in certain circumstances. The exceptions are set out below.

Large Orders and Institutional Accounts

One exception would permit a Member to negotiate terms and conditions with respect to the acceptance of certain large-sized orders (orders of 10,000 shares or more unless such orders are less than $100,000 in value) or orders from institutional accounts. The term ''institutional account'' will be defined in accordance with FINRA Rule 4512(c). That is, an institutional account will be defined as the account of: (1) A bank savings and loan association, insurance company or registered investment company; (2) an investment adviser registered either with the SEC under Section 203 of the Investment Advisers Act or with a state securities commission (or any agency or office performing like functions); or (3) any other person (whether a natural person, corporation, partnership, trust or otherwise) with total assets of at least $50 million. This exception would require the Member to provide clear and comprehensive written disclosure to each customer at account opening and annually thereafter that: (a) states that the Member may trade proprietarily at prices that would satisfy the customer order, and (b) provides the customer with a meaningful opportunity to opt in to the Rule 12.6 protections with respect to all or any portion of its order. If a customer does not opt in to the protections with respect to all or any portion of its order, the Member may reasonably conclude that such customer has consented to the Member trading a security on the same side of the market for its own account at a price that would satisfy the customer's order.[5]

In lieu of providing written disclosure to customers at account opening and annually thereafter, the proposed rule would permit Members to provide clear and comprehensive oral disclosure to, and obtain consent from, a customer on an order-by-order basis. The Member would be required to document who provided such consent and that such consent evidences the customer's understanding of the terms and conditions of the order. If a customer opted in to the Rule 12.6 protections, a Member could still obtain consent on an order-by-order basis to trade ahead of or along with an order from that customer, provided that the Member documented who provided such consent and that such consent evidenced the customer's understanding of the terms and conditions of the order.

No-Knowledge Exception

The Exchange is also proposing to include in Interpretation and Policy .02 a ''no-knowledge'' exception to its customer order protection rule. The proposed exception would allow one trading unit of a Member to trade in a proprietary capacity and at prices that would satisfy customer orders held by another, separate trading unit of the Member. The No-Knowledge Exception would be applicable with respect to NMS stocks, as defined in Rule 600 of Regulation NMS under the Act.

To avail itself of the No-Knowledge Exception, a Member would be required to meet certain conditions. First, it would have to implement and utilize an effective system of internal controls (such as appropriate information barriers) that operate to prevent the proprietary trading unit from obtaining knowledge of the customer orders held by a separate trading unit. As proposed, Interpretation and Policy .02 will make clear that appropriate information barriers must, at a minimum, comply with the Exchange's existing requirements regarding the prevention of the misuse of material, non-public information, which are set forth in Exchange Rule 5.5. Second, the Member would have to provide, at account opening and annually thereafter, a written description of how it handles customer orders and the circumstances under which it may trade proprietarily, including in a market-making capacity, at prices that would satisfy the customer order. A Member must maintain records indicating which orders rely on the no-knowledge exception and produce these records to the Exchange upon request. The onus will be on the Member to produce sufficient documentation justifying reliance on the No-Knowledge exception for any given trade. To ensure clarity and transparency regarding this exception and others, the Exchange will be issuing a regulatory notice informing Members of these proposed rule changes. The Exchange will include in the regulatory notice the effective date for the rule as amended, which shall be at least 30 days after the approval of the amendments to Rule 12.6 in order to allow Members to make any necessary changes to their internal policies or processes.

Riskless Principal Exception

Amended Rule 12.6 would not apply to a proprietary trade made by the Member to facilitate the execution, on a riskless principal basis, of another order from a customer (whether its own customer or the customer of another broker-dealer). To take advantage of this exception, the Member would have to: (a) Submit a report, contemporaneously with the execution of the facilitated order, identifying the trade as riskless principal to the Exchange, and (b) have written policies and procedures to ensure that riskless principal transactions relied upon for this exception comply with applicable Exchange rules. At a minimum, these policies and procedures would have to require: (1) Receipt of the customer order before execution of the offsetting principal transaction, and (2) execution of the offsetting principal transaction at the same price as the customer order, exclusive of any markup or markdown, commission equivalent, or other fee and allocation to a riskless principal or customer account in a consistent manner and within 60 seconds of execution.

Members would have to have supervisory systems in place that produce records that enable the Member and the Exchange to reconstruct accurately, readily, and in a time-sequenced manner all orders on which a Member relies in claiming this exception.

ISO Exception

The proposed rule change would also exempt a Member from the obligation to execute a customer order in a manner consistent with Rule 12.6 with regard to trading for its own account when the Member routed an ISO in compliance with Rule 600(b)(30)(ii) of Regulation NMS if the customer order is received after the Member routed the ISO. If a Member routes an ISO to facilitate a customer order, and that customer has consented to not receiving the better

[5] A customer would retain the right to withdraw consent at any time. Therefore, a Member's reasonable conclusion that a customer has consented to the Member trading along with such customer's order is subject to further instruction and modification from the customer.

prices obtained by the ISO, the Member would also be exempt with respect to any trading for its own account that is the result of the ISO with respect to the consenting customer's order.

Odd Lot and Bona Fide Error Exception

The Exchange proposes to except a Member's proprietary trade that: (1) Offsets a customer odd lot order (i.e., an order less than one round lot, which is typically 100 shares), or (2) corrects a bona fide error. With respect to bona fide errors, the Member would be required to demonstrate and document the basis upon which a transaction meets the bona fide error exception. For purposes of this proposed Rule, the Exchange will adopt the definition of ''bona fide error'' found in Regulation NMS's exemption for error correction transactions.[6] Thus, a bona fide error is:

(i) The inaccurate conveyance or execution of any term of an order including, but not limited to, price, number of shares or other unit of trading; identification of the security; identification of the account for which securities are purchased or sold; lost or otherwise misplaced order tickets; short sales that were instead sold long or vice versa; or the execution of an order on the wrong side of a market; (ii) the unauthorized or unintended purchase sale or allocation of securities or the failure to follow specific client instructions; (iii) the incorrect entry of data into relevant systems, including reliance on incorrect cash positions, withdrawals, or securities positions reflected in an account; or (iv) a delay, outage, or failure of a communication system used to transmit market data prices or to facilitate the delivery or execution of an order. [7]

Minimum Price Improvement Standards

The proposed rule change establishes the minimum amount of price improvement necessary for a Member to execute an order on a proprietary basis when holding an unexecuted limit order in that same security without being required to execute the held limit order.

In addition, if the minimum price improvement standards set forth in proposed Interpretation and Policy .06, paragraphs (a) through (g) would trigger the protection of a pending customer limit order, any better-priced customer limit order(s) must also be protected under this Rule, even if those better-priced limit orders would not be directly triggered under these minimum price improvement standards.

Order Handling Procedures

The proposed rule change provides that a Member must make every effort to execute a marketable customer order that it receives fully and promptly. A Member holding a marketable customer order that has not been immediately executed would have to make every effort to cross such order with any other order received by the Member on the other side of the market, up to the size of such order at a price that is no less than the best bid and no greater than the best offer at the time that the subsequent order is received by the Member and that is consistent with the terms of the orders. If a Member were holding multiple orders on both sides of the market that have not been executed, the Member would have to make every effort to cross or otherwise execute such orders in a manner reasonable and consistent with the objectives of the proposed Rule and with the terms of the orders. A Member could satisfy the crossing requirement by contemporaneously buying from the seller and selling to the buyer at the same price.

Trading Outside Normal Market Hours

Under the proposed amendments to Rule 12.6, a Member generally could limit the life of a customer order to the period of normal market hours of 9:30 a.m. to 4:00 p.m. Eastern Time. However, if the customer and Member agreed to the processing of the customer's order outside normal market hours, the protections of amended Rule 12.6 would apply to that customer's order at all times the customer order is executable by the Member.

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act [8] in general, and furthers the objectives of Section 6(b)(5) of the Act [9] in particular, in that it is designed 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 Exchange believes that amending the rule to conform to FINRA Rule 5320 will contribute to investor protection by defining important parameters by which Members must abide when trading proprietarily while holding customer limit and market orders, and foster cooperation by harmonizing requirements across self-regulatory organizations. The Exchange also believes that including this rule will reinforce the importance of and ensure that Members are aware of these requirements.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act. To the contrary, the Exchange believes that the proposal enhances cooperation among markets and other trading venues to promote fair and orderly markets and to protect the interests of the public and of investors. Specifically, by aligning the Exchange's customer protection rules with those of FINRA and other exchanges,[10] the proposed rule change will reduce the complexity of the customer order protection rules for those Members that are also subject to the customer order protection rules of FINRA and other exchanges. As a result, the proposed rule will help assure the protection of customer orders without imposing undue regulatory costs on industry participants.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

The Exchange has neither solicited nor received written comments on the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 45 days of the date of publication of this notice in the **Federal Register** or within such longer period (i) as the Commission may designate up to

[6] Securities Exchange Act Release No. 55884 (June 8, 2007), 72 FR 32926, 32927 (June 14, 2007) (Order Exempting Certain Error Correction Transactions from Rule 611 of Regulation NMS under the Securities Exchange Act of 1934).

[7] *Id.*

[8] 15 U.S.C. 78f(b).

[9] 15 U.S.C. 78f(b)(5).

[10] *See, e.g.,* Securities Exchange Act Release No. 64418 (May 6, 2011), 76 FR 27735 (May 12, 2011) (SR–CHX–2011–08) (notice of filing and immediate effectiveness of proposed rule change of Chicago Stock Exchange, Inc. to adopt customer order protection language consistent with FINRA Rule 5320); Securities Exchange Act Release No. 65165 (August 18, 2011), 76 FR 53009 (August 24, 2011) (SR–NYSEAmex–2011–059) (notice of filing and immediate effectiveness of proposed rule change of NYSE Amex LLC (now known as NYSE MKT LLC) to adopt customer order protection language that is substantially the same as FINRA Rule 5320); and Securities Exchange Act Release No. 65166 (August 18, 2011), 76 FR 53012 (August 24, 2011) (SR–NYSEArca–2011–057) (notice of filing and immediate effectiveness of proposed rule change of NYSE Arca, Inc. to adopt customer order protection language that is substantially the same as FINRA Rule 5320).

90 days of such date 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 the 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–BATS–2013–056 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–BATS–2013–056. 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 such filing also will be available for inspection and copying at the principal offices 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–BATS–2013–056, and should be submitted on or before November 12, 2013.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[11]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2013–24655 Filed 10–21–13; 8:45 am]

BILLING CODE 8011–01–P

[11] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–70612; File No. SR–FINRA–2013–025]

Self-Regulatory Organizations; Financial Industry Regulatory Authority, Inc.; Notice of Filing of Amendment No. 1 and Order Instituting Proceedings To Determine Whether To Approve or Disapprove a Proposed Rule Change, as Modified by Amendment No. 1, To Adopt Rules Regarding Supervision in the Consolidated FINRA Rulebook

October 4, 2013.

I. Introduction

On June 21, 2013, the Financial Industry Regulatory Authority, Inc. (''FINRA'') filed with the Securities and Exchange Commission (''SEC'' or ''Commission''), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Exchange Act'' or ''Act'')[1] and Rule 19b–4 thereunder,[2] a proposed rule change to adopt consolidated FINRA supervision rules.[3] The proposed rule change was published for comment in the **Federal Register** on July 8, 2013.[4] The Commission received seventeen (17) individual comment letters in response to the proposed rule change and five hundred fifty five (555) submissions of a form comment letter (''Letter Type A'').[5] On August 22, 2013, FINRA extended the time period in which the Commission must approve the proposed rule change, disapprove the proposed rule change, or institute proceedings to determine whether to approve or disapprove the proposed rule change to October 4, 2013. On October 2, 2013, FINRA responded to the comments[6] and filed Amendment No. 1 to the proposed rule change. The Commission is publishing this notice

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] On June 10, 2011, FINRA filed with the SEC a proposed rule change to adopt the consolidated FINRA supervision rules (''Initial Filing''), which addressed the comments received in response to FINRA's Regulatory Notice 08–24. *See* Securities Exchange Act Release No. 64736 (June 23, 2011), 76 FR 38245 (June 29, 2011) (File No. SR–FINRA–2011–028). FINRA withdrew the Initial Filing on September 27, 2011. *See* Securities Exchange Act Release No. 65477 (October 4, 2011), 76 FR 62890 (October 11, 2011) (Notice of Withdrawal of File No. SR–FINRA–2011–028).

[4] *See* Exchange Act Release No. 69902 (July 1, 2013), 78 FR 40792 (July 8, 2013) (Notice of Filing of a Proposed Rule Change to Adopt Rules Regarding Supervision in the Consolidated FINRA Rulebook) (''Notice of Filing''). The comment period closed on July 29, 2013.

[5] Letters from Steven B. Caruso, Esq., Maddox Hargett Caruso, P.C., to Elizabeth M. Murphy, Secretary, SEC, dated July 12, 2013 (''Caruso''); Norman B. Arnoff, Esq., to Elizabeth M. Murphy, Secretary, SEC, dated July 19, 2013 (''Arnoff''); J.S. Brandenburger, Registered Principal, FSC Securities Corporation, to Elizabeth M. Murphy, Secretary, SEC, dated July 25, 2013 (''Brandenburger''); Steve Putnam, Financial Advisor, Raymond James Financial Services, to Elizabeth M. Murphy, Secretary, SEC, dated July 25, 2013 (''Putnam''); Nina Schloesser McKenna, General Counsel, Cetera Financial Group, Inc., to Elizabeth M. Murphy, Secretary, SEC, dated July 29, 2013 (''Cetera''); Scott Cook, Senior Vice President, Chief Compliance Officer, Charles Schwab & Co., Inc., to Elizabeth M. Murphy, Secretary, SEC, dated July 29, 2013 (''Schwab''); Clifford Kirsch and Eric A. Arnold, Sutherland Asbill & Brennan LLP, on behalf of the Committee of Annuity Insurers, to Elizabeth M. Murphy, Secretary, SEC, dated July 29, 2013 (''CAI''); David T. Bellaire, Esq., Executive Vice President & General Counsel, Financial Services Institute, to Elizabeth M. Murphy, Secretary, SEC, dated July 29, 2013 (''FSI''); Howard Spindel, Senior Managing Director, and Cassondra E. Joseph, Managing Director, Integrated Management Solutions USA, LLC, to Elizabeth M. Murphy, Secretary, SEC, dated July 29, 2013 (''IMS''); Tamara K. Salmon, Senior Associate Counsel, Investment Company Institute, to Elizabeth M. Murphy, Secretary, SEC, dated July 29, 2013 (''ICI''); Susanne Denby, Chief Compliance Officer, NFP Securities, Inc., to Elizabeth M. Murphy, Secretary, SEC, dated July 29, 2013 (''NFP''); A. Heath Abshure, President and Arkansas Securities Commissioner, North American Securities Administrators Association, Inc., to Elizabeth M. Murphy, Secretary, SEC, dated August 6, 2013 (''NASAA''); Scott C. Ilgenfritz, President, Public Investors Arbitration Bar Association, to Elizabeth M. Murphy, Secretary, SEC, dated July 29, 2013 (''PIABA''); Ira D. Hammerman, Senior Managing Director and General Counsel, Securities Industry and Financial Markets Association, to Elizabeth M. Murphy, Secretary, SEC, dated July 29, 2013 (''SIFMA''); Pamela Albanese, Legal Intern, and Christine Lazaro, Esq., Acting Director, Securities Arbitration Clinic of St. John's University School of Law, to Elizabeth M. Murphy, Secretary, SEC, dated July 29, 2013 (''St. John's''); Brian P. Sweeney, Law Office of Brian P. Sweeney, to Elizabeth M. Murphy, Secretary, SEC, dated July 29, 2013 (''Sweeney''); Robert J. McCarthy, Director of Regulatory Policy, Wells Fargo Advisors, LLC, to Elizabeth M. Murphy, Secretary, SEC, dated July 29 2013 (''Wells Fargo''); *see also* Memorandum from the Division of Trading and Markets, SEC, dated August 29, 2013 (memorializing an August 5, 2013 conference call between SEC staff and Gary Goldsholle and Michael Post of the Municipal Securities Rulemaking Board (''MSRB'') (''MSRB Memo'') to discuss FINRA's recently proposed rule change to adopt the proposed consolidated supervision rules).

[6] *See* Letter from Patricia Albrecht, Assistant General Counsel, FINRA, to Elizabeth M. Murphy, Secretary, Commission, dated October 2, 2013 (''Response'').

and order to solicit comments on Amendment No. 1 from interested persons and to institute proceedings pursuant to Section 19(b)(2)(B) of the Act[7] to determine whether to approve or disapprove the proposed rule change, as modified by Amendment No. 1.

Institution of proceedings does not indicate that the Commission has reached any conclusions with respect to the proposed rule change, nor does it mean that the Commission will ultimately disapprove the proposed rule change. Rather, as discussed below, the Commission seeks additional input from interested parties on the changes to the proposed rule change, as set forth in Amendment No. 1.

II. Description of the Proposed Rule Change and Summary of Comments

As further described in the Notice of Filing, FINRA proposes to adopt consolidated FINRA broker-dealer supervision rules. As part of the process of developing a new consolidated rulebook (''Consolidated FINRA Rulebook''),[8] the proposed rule change would (1) adopt FINRA Rules 3110 (Supervision) and 3120 (Supervisory Control System) to largely replace NASD Rules 3010 (Supervision) and 3012 (Supervisory Control System), respectively; (2) incorporate into FINRA Rule 3110 and its supplementary material the requirements of NASD IM–1000–4 (Branch Offices and Offices of Supervisory Jurisdiction), NASD IM–3010–1 (Standards for Reasonable Review), Incorporated NYSE Rule 401A (Customer Complaints), and Incorporated NYSE Rule 342.21 (Trade Review and Investigation); (3) replace NASD Rule 3010(b)(2) (often referred to as the ''Taping Rule'') with new FINRA Rule 3170 (Tape Recording of Registered Persons by Certain Firms); (4) replace NASD Rule 3110(i) (Holding of Customer Mail) with new FINRA Rule 3150 (Holding of Customer Mail); and (5) delete the following Incorporated NYSE Rules and NYSE Rule Interpretations: (i) NYSE Rule 342 (Offices—Approval, Supervision and Control) and related NYSE Rule Interpretations; (ii) NYSE Rule 343 (Offices—Sole Tenancy, and Hours) and related NYSE Rule Interpretations; (iii) NYSE Rule 351(e) (Reporting Requirements) and NYSE Rule Interpretation 351(e)/01 (Reports of Investigation); (iv) NYSE Rule 354 (Reports to Control Persons); and (v) NYSE Rule 401 (Business Conduct).

In general, the commenters to the Notice of Filing supported the proposal. Commenters, however, raised concerns regarding various aspects of the proposed rules, including, among others:

- References to MSRB rules;[9]
- the scope of the definition of the term ''covered accounts'';[10]
- application of a risk-based approach;[11]
- the conditions for establishing a one person office of supervisory jurisdiction (''OSJ'');[12]
- the requirements and presumptions relating to a single principal supervising multiple OSJs;[13]
- the documentation requirements relating to written and oral complaints;[14] and
- the lack of a cost benefit analysis.[15]

FINRA addressed many of these comments by modifying the proposed rules in Amendment No. 1, as described below. Additionally, FINRA responded to these and other comments in its Response.[16]

III. Description of Amendment No. 1

FINRA's proposed changes in response to comments, as set forth in Amendment No. 1 are summarized below.

First, FINRA is proposing to delete the references to MSRB rules in proposed FINRA Rules 3110(a), (b)(1), (b)(4), (b)(6), (b)(7), (c)(1), 3110.06, 3110.12, 3120(a)(1), 3150(c), and 3170(b)(3) in light of a member's separate obligation to comply with MSRB Rule G–27 (Supervision).

Second, FINRA is proposing to delete proposed FINRA Rule 3110.03 (One-Person OSJs), which expressly provided that the registered principal at a one-person OSJ (''on-site principal'') must be under the effective supervision and control of another appropriately registered principal (referred to as a ''senior principal'') who would be responsible for conducting on-site supervision of the one-person OSJ on a regular periodic schedule to be determined by the member.[17] The proposed supplementary material required that the designated senior principal be responsible for supervising the activities of the on-site principal at the one-person OSJ and conduct on-site supervision of the one-person OSJ on a regular periodic schedule to be determined by the member. FINRA believes that OSJs conduct critical functions and one-person OSJs present unique supervisory challenges. However, FINRA has decided the best course is to eliminate the proposed supplementary material from the proposed rule. Importantly, FINRA believes that one-person OSJ locations where the on-site principal engages in sales-related activities that trigger OSJ designation should be subject to scrutiny, and firms should conduct focused reviews of such locations because of the possible conflicts of interest that may arise.

Third, FINRA is proposing to revise proposed FINRA Rule 3110.03 (Supervision of Multiple OSJs by a Single Principal) to use the term ''on-site principal'' consistently throughout the provision. As originally proposed, FINRA Rule 3110.03 used the terms ''on-site supervisor'' and ''designated principal'' interchangeably throughout the provision; however, FINRA clarified in the rule filing that the two terms referred to one person. Also, FINRA is proposing to revise proposed FINRA Rule 3110.03 to replace the presumption that assigning one principal to be the on-site principal at more than two OSJs is unreasonable with a general statement that assigning a principal to more than one OSJ will be subject to scrutiny.

Fourth, FINRA is proposing to amend proposed FINRA Rule 3110.05 (Risk-based Review of Member's Investment Banking and Securities Business) to clarify that a member is not required to conduct detailed reviews of each transaction required to be reviewed pursuant to proposed FINRA Rule 3110(b)(2) (Review of Member's Investment Banking and Securities Business) if a member is using a reasonably designed risk-based review system that provides a member with sufficient information that permits the member to focus on the areas that pose

[7] 15 U.S.C. 78s(b)(2)(B).

[8] The current FINRA rulebook consists of: (1) FINRA Rules; (2) NASD Rules; and (3) rules incorporated from the New York Stock Exchange (''Incorporated NYSE Rules'') (together, the NASD Rules and Incorporated NYSE Rules are referred to as the ''Transitional Rulebook''). While the NASD Rules generally apply to all FINRA members, the Incorporated NYSE Rules apply only to those members of FINRA that are also members of the NYSE. The FINRA Rules apply to all FINRA members, unless such rules have a more limited application by their terms. For more information about the rulebook consolidation process, *see* Information Notice, March 12, 2008 (Rulebook Consolidation Process).

[9] ICI. *See also* MSRB Memo.

[10] Brandenburger, CAI, FSI, ICI, IMS, Letter Type A, Putnam, SIFMA.

[11] Cetera, ICI, IMS, SIFMA.

[12] Brandenburger, Cetera, IMS, Letter Type A, Putnam.

[13] CAI, Cetera, FSI, IMS, Wells Fargo.

[14] Caruso, NASAA, PIABA, St John's.

[15] Brandenburger, FSI, IMS, Letter Type A, Putnam.

[16] *See supra,* note 6.

[17] The deletion of this proposed supplementary material has resulted in a change in numbering of the remaining supplementary material to proposed FINRA Rule 3110. For ease of reference, the description of the proposed changes in Amendment No. 1 employs the new proposed numbers in all instances.

the greatest numbers and risks of violation.

Fifth, FINRA is proposing to replace the term ''correspondence with the public'' used in proposed FINRA Rules 3110(b)(4) (Review of Correspondence and Internal Communications), 3110.06 (Risk-based Review of Correspondence and Internal Communications), 3110.07 (Evidence of Review of Correspondence and Internal Communications), and 3110.08 (Delegation of Correspondence and Internal Communication Review Functions) with ''correspondence'' to be consistent with FINRA Rule 2210's (Communications with the Public) definition and use of the term ''correspondence.''

Sixth, FINRA is proposing to revise proposed FINRA Rule 3110(b)(6)(D) to clarify that the provision does not create a strict liability obligation requiring identification and elimination of all conflicts of interest with respect to an associated person being supervised by a member's supervisory personnel. As revised, proposed FINRA Rule 3110(b)(6)(D) requires that a member have procedures reasonably designed to prevent the supervisory system required pursuant to proposed FINRA Rule 3110(a) from being compromised due to the conflicts of interest that may be present with respect to the associated person being supervised, including the position of such person, the revenue such person generates for the firm, or any compensation that a supervisor may derive from an associated person being supervised.

Seventh, FINRA is proposing to revise proposed FINRA Rule 3110(c)(2)(D) to require a member to: (1) Identify in its written supervisory procedures *or* in the location's written inspection report the activities enumerated in FINRA Rule 3110(c)(2)(A) that the member does not engage in at a particular location; and (2) document in its written supervisory procedures *or* within that location's written inspection report that supervisory policies and procedures must be in place for those enumerated activities at that location before the member can engage in them. As initially proposed, members would have been required to identify such activities in a location's written inspection report; thus, the proposed revisions provide firms with additional flexibility in complying with proposed FINRA Rule 3110(c)(2)(D).

Eighth, FINRA is proposing to revise proposed FINRA Rule 3110(c)(3)(A) to clarify that the provision does not create a strict liability obligation requiring identification and elimination of all conflicts of interest with respect to a location's inspections. As revised, proposed FINRA Rule 3110(c)(3)(A) requires that a member have procedures reasonably designed to prevent the effectiveness of the inspections required pursuant to proposed FINRA Rule 3110(c)(1) from being compromised due to the conflicts of interest that may be present with respect to the location being inspected, including but not limited to, economic, commercial, or financial interests in the associated persons and businesses being inspected.

Ninth, FINRA is proposing to revise proposed FINRA Rules 3110.10 (Supervision of Supervisory Personnel) and 3110.14 (Exception to Persons Prohibited from Conducting Inspections) to delete the term ''only'' in both supplementary materials, to further clarify that the provisions provide non-exclusive examples of situations where the exceptions generally would apply.

Tenth, FINRA is proposing to revise the definition of ''covered account'' in proposed FINRA Rule 3110(d) (Transaction Review and Investigation) to align the definition with existing NYSE guidance. Under the revised definition, ''covered account'' would include any account introduced or carried by the member that is held by: (1) The spouse of a person associated with the member; (2) a child of the person associated with the member or such person's spouse, provided that the child resides in the same household as or is financially dependent upon the person associated with the member; (3) any other related individual over whose account the person associated with the member has control; or (4) any other individual over whose account the associated person of the member has control and to whose financial support such person materially contributes. FINRA also is proposing to revise proposed FINRA Rule 3110(d) to include the phrase ''reasonably designed'' to acknowledge more clearly that firms with different business models may adopt different procedures and practices. As amended, the proposed rule requires each member to ''include in its supervisory procedures a process for the review of securities transactions reasonably designed to identify trades that may violate the provisions of the Exchange Act, the rules thereunder, or FINRA rules prohibiting insider trading and manipulative and deceptive devices.''

Eleventh, proposed FINRA Rule 3120 (Supervisory Control System) requires a member to test and verify the member's supervisory procedures and prepare and submit to the member's senior management a report at least annually summarizing the test results and any necessary amendments to those procedures. The proposed rule also requires a member that reported $200 million or more in gross revenue on its FOCUS reports in the prior calendar year to include additional content in the report it submits to senior management. FINRA is proposing to revise proposed FINRA Rule 3120(b) to clarify that a member complying with the additional content requirement must include the additional content in its report only to the extent applicable to the member's business.

IV. Proceedings To Determine Whether To Approve or Disapprove SR–FINRA–2013–025 and Grounds for Disapproval Under Consideration

The Commission is instituting proceedings pursuant to Section 19(b)(2)(B) of the Act to determine whether the proposed rule change should be approved or disapproved.[18] Institution of such proceedings appears appropriate at this time in view of the legal and policy issues raised by the proposal. As noted above, institution of proceedings does not indicate that the Commission has reached any conclusions with respect to any of the issues involved. Rather, the Commission seeks and encourages interested persons to comment on the changes to the proposed rule change as set forth in Amendment No. 1 and provide the Commission with arguments to support the Commission's analysis as to whether to approve or disapprove the proposal, as amended.

Pursuant to Section 19(b)(2)(B) of the Exchange Act,[19] the Commission is providing notice of the grounds for disapproval under consideration. In particular, Section 15A(b)(6) of the Exchange Act[20] requires, among other things, that FINRA rules must be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, and, in general, to protect investors and the public interest. In addition, Section 15A(b)(9) of the Exchange Act[21] requires that FINRA rules not impose any unnecessary or inappropriate burden on competition.

[18] 15 U.S.C. 78s(b)(2). Section 19(b)(2)(B) of the Act provides that proceedings to determine whether to disapprove a proposed rule change must be concluded within 180 days of the date of publication of notice of the filing of the proposed rule change. The time for conclusion of the proceedings may be extended for up to an additional 60 days if the Commission finds good cause for such extension and publishes its reasons for so finding or if the self-regulatory organization consents to the extension.

[19] 15 U.S.C. 78s(b)(2)(B).

[20] 15 U.S.C. 78*o*–3(b)(6).

[21] 15 U.S.C. 78*o*–3(b)(9).

The Commission believes FINRA's proposed rule change, as amended, raises questions as to whether it is consistent with the requirements of Section 15A(b)(6) and 15A(b)(9) of the Exchange Act.

V. Request for Written Comments

The Commission requests that interested persons provide written submissions of their views, data, and arguments with respect to the changes to the proposed rule change as set forth in Amendment No. 1, as well as any others they may have identified with the proposed rule change, as amended. In particular, the Commission invites the written views of interested persons concerning whether the proposed rule change, as modified by Amendment No. 1, is inconsistent with Section 15A(b)(6) or any other provision of the Exchange Act, or the rules and regulations thereunder.

Although there do not appear to be any issues relevant to approval or disapproval which would be facilitated by an oral presentation of views, data, and arguments, the Commission will consider, pursuant to Rule 19b–4, any request for an opportunity to make an oral presentation.[22] Interested persons are invited to submit written data, views, and arguments by October 28, 2013 concerning Amendment No. 1 and regarding whether the proposed rule change, as modified by Amendment No. 1, should be approved or disapproved. Any person who wishes to file a rebuttal to any other person's submission must file that rebuttal by November 12, 2013. 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–FINRA–2013–025 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–FINRA–2013–025. 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 such filing also will be available for inspection and copying at the principle office of FINRA. 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 publicly available.

All submissions should refer to File Number SR–FINRA–2013–025 and should be submitted on or before October 28, 2013. If comments are received, any rebuttal comments should be submitted by November 12, 2013.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[23]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2013–24568 Filed 10–21–13; 8:45 am]

BILLING CODE 8011–01–P

[22] Section 19(b)(2) of the Exchange Act, as amended by the Securities Acts Amendments of 1975, Pub. L. 94–29, 89 Stat. 97 (1975), grants the Commission flexibility to determine what type of proceeding—either oral or notice and opportunity for written comments—is appropriate for consideration of a particular proposal by a self-regulatory organization. *See* Securities Acts Amendments of 1975, Report of the Senate Committee on Banking, Housing and Urban Affairs to Accompany S. 249, S. Rep. No. 75, 94th Cong., 1st Sess. 30 (1975).

[23] 17 CFR 200.30–3(a)(12); 17 CFR 200.30–3(a)(57).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–70638; File No. SR–NASDAQ–2013–107]

Self-Regulatory Organizations; The NASDAQ Stock Market LLC; Order Granting Approval of Proposed Rule Change Relating to the Listing and Trading of the Shares of the First Trust Global Tactical Commodity Strategy Fund of First Trust Exchange-Traded Fund VII

October 9, 2013.

I. Introduction

On August 16, 2013, The NASDAQ Stock Market LLC (''Exchange'' or ''Nasdaq'') filed with the Securities and Exchange Commission (''Commission''), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'' or ''Exchange Act'')[1] and Rule 19b–4 thereunder,[2] a proposed rule change to list and trade shares (''Shares'') of the First Trust Global Tactical Commodity Strategy Fund (''Fund'') under Nasdaq Rule 5735. The proposed rule change was published for comment in the **Federal Register** on August 30, 2013.[3] The Commission received no comments on this proposal. This order grants approval of the proposed rule change.

II. Description of the Proposed Rule Change

The Exchange proposes to list and trade Shares of the Fund pursuant to Nasdaq Rule 5735, which governs the listing and trading of Managed Fund Shares on the Exchange. The Shares will be offered by First Trust Exchange-Traded Fund VII (''Trust''), which is organized as a Massachusetts business trust and is registered with the Commission as an open-end investment company.[4] First Trust Advisors L.P. will be the investment adviser (''Adviser'') to the Fund. First Trust Portfolios L.P. will be the principal underwriter and distributor of the Fund's Shares. Brown Brothers Harriman & Co. (''BBH'') will act as the administrator, accounting agent, custodian, and transfer agent to the Fund. The Exchange states that the

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 70253 (August 26, 2013), 78 FR 53799 (''Notice'').

[4] The Trust is registered under the Investment Company Act of 1940 (''1940 Act''). *See* Registration Statement on Form N–1A for the Trust, dated November 13, 2012 (File Nos. 333–184918 and 811–22767) (''Registration Statement''). The Commission has issued an order granting certain exemptive relief to the Trust under the 1940 Act (''Exemptive Order''). *See* Investment Company Act Release No. 30029 (April 10, 2012) (File No. 812–13795).

Adviser is not a broker-dealer but is affiliated with a broker-dealer and that the Adviser has implemented a fire wall with respect to its broker-dealer affiliate regarding access to information concerning the composition of or changes to the Fund's portfolio.[5]

The Fund's investment objective will be to provide total return by providing investors with commodity exposure while seeking a relatively stable risk profile. The Fund will pursue its objective by seeking to invest through a wholly-owned subsidiary in a broadly diversified portfolio composed principally of commodity futures contracts.

Principal Investments

Fund's Investments

The Fund will be an actively managed exchange-traded fund (''ETF'') that will seek to achieve attractive risk adjusted returns by investing in exchange-traded commodity futures contracts and exchange-traded commodity linked instruments[6] (collectively, ''Commodities'') through a wholly-owned subsidiary controlled by the Fund and organized under the laws of the Cayman Islands (''First Trust Subsidiary''). The Fund will seek to gain exposure to the futures markets through investments in the First Trust Subsidiary. The Fund's investment in the First Trust Subsidiary may not exceed 25% of the Fund's total assets. The remainder of the Fund's assets will primarily be invested in: (1) Short-term investment grade fixed income securities that include U.S. government and agency securities,[7] sovereign debt obligations of non-U.S. countries, and repurchase agreements;[8] (2) money market instruments;[9] (3) ETFs and other investment companies registered under the 1940 Act; and (4) cash and other cash equivalents.

The Fund will not invest directly in Commodities. The Fund expects to gain exposure to these investments exclusively by investing in the First Trust Subsidiary.

The Fund will use the fixed-income securities as investments and to collateralize the First Trust Subsidiary's commodity exposure on a day-to-day basis. The Fund may also invest directly in ETFs[10] and other investment companies, including, to the extent permitted under the 1940 Act, exchange-traded closed-end funds that provide exposure to commodities, equity securities, and fixed income securities.[11]

According to the Exchange, the Fund's investment in the First Trust Subsidiary will be designed to help the Fund achieve exposure to commodity returns in a manner consistent with the federal tax requirements applicable to the Fund and other regulated investment companies.

First Trust Subsidiary's Investments

The First Trust Subsidiary will seek to make investments generally in Commodities while managing volatility, as measured by annualized standard deviation, to a more consistent range than statistically weighted commodity indices. The investment weightings of the underlying Commodities held by the First Trust Subsidiary will be rebalanced in an attempt to stabilize risk levels. According to the Exchange, the dynamic weighting process will result in a disciplined, systematic investment process which will be keyed off of the Adviser's volatility forecasting process.

The First Trust Subsidiary will be advised by the Adviser.[12] The Fund's investment in the First Trust Subsidiary is intended to provide the Fund with exposure to commodity markets within the limits of current federal income tax laws applicable to investment companies such as the Fund, which limit the ability of investment companies to invest directly in the derivative instruments. The First Trust Subsidiary will have the same investment objective as the Fund, but unlike the Fund, it may invest without limitation in Commodities. The First Trust Subsidiary's investments will provide the Fund with exposure to domestic and international markets.

The First Trust Subsidiary may have both long and short positions in Commodities. However, for a given Commodity, the First Trust Subsidiary will have a net long exposure. The First Trust Subsidiary will initially consider investing in specific exchange-traded[13]

[5] *See* Nasdaq Rule 5735(g). In the event (a) the Adviser becomes newly affiliated with a broker-dealer, or (b) any new adviser or sub-adviser is a registered broker-dealer or becomes affiliated with a broker-dealer, the Adviser, any new adviser, or any new sub-adviser will implement a fire wall with respect to its relevant personnel and the broker-dealer affiliate, if applicable, regarding access to information concerning the composition of or changes to the portfolio, and will be subject to procedures designed to prevent the use and dissemination of material non-public information regarding such portfolio.

[6] According to the Exchange, exchange-traded commodity linked instruments include: (1) ETFs that provide exposure to commodities as would be listed under Nasdaq Rules 5705 and 5735; and (2) pooled investment vehicles that invest primarily in commodities and commodity-related instruments as would be listed under Nasdaq Rules 5710 and 5711. Such pooled investment vehicles are commonly referred to as ''exchange traded funds,'' but they are not registered as investment companies because of the nature of their underlying investments.

[7] Such securities will include securities that are issued or guaranteed by the U.S. Treasury, by various agencies of the U.S. government, or by various instrumentalities that have been established or sponsored by the U.S. government. According to the Exchange, U.S. Treasury obligations are backed by the ''full faith and credit'' of the U.S. government. Securities issued or guaranteed by federal agencies, and U.S. government-sponsored instrumentalities may or may not be backed by the full faith and credit of the U.S. government.

[8] The Fund intends to enter into repurchase agreements only with financial institutions and dealers believed by the Adviser to present minimal credit risks in accordance with criteria approved by the Fund's Board of Trustees (''Board''). The Adviser will review and monitor the creditworthiness of such institutions. The Adviser will monitor the value of the collateral at the time the transaction is entered into and at all times during the term of the repurchase agreement.

[9] For the Fund's purposes, money market instruments will include: Short-term, high-quality securities issued or guaranteed by non-U.S. governments, agencies, and instrumentalities; non-convertible corporate debt securities with remaining maturities of not more than 397 days that satisfy ratings requirements under Rule 2a–7 of the 1940 Act; money market mutual funds; and deposits and other obligations of U.S. and non-U.S. banks and financial institutions. As a related matter, the Fund may invest in shares of money market mutual funds to the extent permitted by the 1940 Act.

[10] An ETF is an investment company registered under the 1940 Act that holds a portfolio of securities. Many ETFs are designed to track the performance of a securities index, including industry, sector, country, and region indexes. ETFs included in the Fund will be listed and traded in the U.S. on registered exchanges. Pursuant to exemptive orders obtained by other ETFs and their sponsors from the Commission, the Fund may invest in the securities of ETFs in excess of the limits imposed under the 1940 Act. The ETFs in which the Fund may invest include Index Fund Shares (as described in Nasdaq Rule 5705), Portfolio Depositary Receipts (as described in Nasdaq Rule 5705), and Managed Fund Shares (as described in Nasdaq Rule 5735). While the Fund may invest in inverse ETFs, the Fund will not invest in leveraged or inverse leveraged (*e.g.,* 2X or -3X) ETFs.

[11] The equity securities (including shares of ETFs and closed-end funds) in which the Fund may invest will be limited to securities that trade in markets that are members of the ISG, which includes all U.S. national securities exchanges, or are parties to a comprehensive surveillance sharing agreement with the Exchange.

[12] The First Trust Subsidiary will not be registered under the 1940 Act and will not be directly subject to its investor protections, except as noted in the Registration Statement. However, the First Trust Subsidiary will be wholly-owned and controlled by the Fund and will be advised by the Adviser. Therefore, according to the Exchange, the Fund's ownership and control of the First Trust Subsidiary will prevent the First Trust Subsidiary from taking action contrary to the interests of the Fund or its shareholders. The Exchange states that the Board will have oversight responsibility for the investment activities of the Fund, including its expected investment in the First Trust Subsidiary, and the Fund's role as the sole shareholder of the First Trust Subsidiary. The Adviser will receive no additional compensation for managing the assets of the First Trust Subsidiary. The First Trust Subsidiary will also enter into separate contracts for the provision of custody, transfer agency, and accounting agent services with the same or with affiliates of the same service providers that provide those services to the Fund.

[13] All of the exchanges are ISG members except for the London Metal Exchange (''LME''). According

Continued

futures contracts set forth in a table in the Notice.

As U.S. and London exchanges list additional contracts, as currently listed contracts on those exchanges gain sufficient liquidity, or as other exchanges list sufficiently liquid contracts, the Adviser will include those contracts in the list of possible investments of the First Trust Subsidiary. The list of commodities futures and commodities markets considered for investment can and will change over time.

Commodities Regulation

According to the Exchange, the Commodity Futures Trading Commission (''CFTC'') has recently adopted substantial amendments to CFTC Rule 4.5 relating to the permissible exemptions and conditions for reliance on exemptions from registration as a commodity pool operator. As a result of the instruments that will be indirectly held by the Fund, the Adviser has registered as a commodity pool operator [14] and is also a member of the National Futures Association (''NFA''). The Exchange states that the Fund and the First Trust Subsidiary are subject to regulation by the CFTC and NFA and to the additional disclosure, reporting, and recordkeeping rules imposed upon commodity pools.

Other Investments

The Fund may invest in certificates of deposit issued against funds deposited in a bank or savings and loan association. In addition, the Fund may invest in bankers' acceptances, which are short-term credit instruments used to finance commercial transactions.

The Fund may invest in bank time deposits, which are monies kept on deposit with banks or savings and loan associations for a stated period of time at a fixed rate of interest. In addition, the Fund may invest in commercial paper, which are short-term unsecured promissory notes, including master demand notes [15] issued by corporations to finance their current operations. The Fund may invest in commercial paper only if it has received the highest rating from at least one nationally recognized statistical rating organization or, if unrated, has been judged by the Adviser to be of comparable quality.

Investment Restrictions

The Fund may not invest more than 25% of the value of its total assets in securities of issuers in any one industry or group of industries. This restriction will not apply to obligations issued or guaranteed by the U.S. government or its agencies or instrumentalities or to securities of other investment companies.

The First Trust Subsidiary's shares will be offered only to the Fund, and the Fund will not sell shares of the First Trust Subsidiary to other investors. The Fund and the First Trust Subsidiary will not invest in any non-U.S. equity securities (other than shares of the First Trust Subsidiary). The Fund will not purchase securities of open-end or closed-end investment companies except in compliance with the 1940 Act.

Pursuant to the Exemptive Order, the Fund will not invest directly in options contracts, futures contracts, or swap agreements; however, this restriction will not apply to the First Trust Subsidiary.

The Fund may hold up to an aggregate amount of 15% of its net assets in illiquid securities (calculated at the time of investment), including Rule 144A securities deemed illiquid by the Adviser and master demand notes.[16] The Fund will monitor its portfolio liquidity on an ongoing basis to determine whether, in light of current circumstances, an adequate level of liquidity is being maintained and will consider taking appropriate steps in order to maintain adequate liquidity if, through a change in values, net assets, or other circumstances, more than 15% of the Fund's net assets are held in illiquid securities. Illiquid securities include securities subject to contractual or other restrictions on resale and other instruments that lack readily available markets as determined in accordance with Commission staff guidance.

The Fund intends to qualify for and to elect to be treated as a separate regulated investment company under Subchapter M of the Internal Revenue Code.[17]

Under the 1940 Act, the Fund's investment in investment companies will, subject to certain exceptions, be limited to: (i) 3% of the total outstanding voting stock of any one investment company, (ii) 5% of the Fund's total assets with respect to any one investment company, and (iii) 10% of the Fund's total assets with respect to investment companies in the aggregate.

The Fund's and the First Trust Subsidiary's investments will be consistent with the Fund's investment objective and will not be used to enhance leverage.

Additional information regarding the Fund and the Shares, including investment strategies, futures contracts and futures exchange information, risks, creation and redemption procedures, fees, Fund holdings disclosure policies, distributions, and taxes is included in the Notice and Registration Statement, as applicable.[18]

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 [19] and the rules and regulations thereunder applicable to a national securities exchange.[20] In particular, the Commission finds that the proposed rule change is consistent with Section 6(b)(5) of the Act,[21] 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 Fund and the Shares must comply with the requirements of Nasdaq Rule 5735 for the Shares 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,[22] 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 the Exchange, the LME falls under the jurisdiction of the United Kingdom Financial Conduct Authority (''FCA''). The Exchange states that the FCA is responsible for ensuring the financial stability of the exchange members' businesses, whereas the LME is largely responsible for the oversight of day-to-day exchange activity, including conducting the arbitration proceedings under the LME arbitration regulations.

[14] As defined in Section 1a(11) of the Commodity Exchange Act.

[15] Master demand notes are direct lending arrangements between the Fund and a corporation.

[16] In reaching liquidity decisions, the Adviser may consider the following factors: The frequency of trades and quotes for the security; the number of dealers wishing to purchase or sell the security and the number of other potential purchasers; dealer undertakings to make a market in the security; and the nature of the security and the nature of the marketplace trades (*e.g.,* the time needed to dispose of the security, the method of soliciting offers, and the mechanics of transfer).

[17] 26 U.S.C. 851.

[18] *See* Notice and Registration Statement, *supra* notes 3 and 4, respectively.

[19] 15 U.S.C. 78f.

[20] 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).

[21] 15 U.S.C. 78f(b)(5).

[22] 15 U.S.C. 78k–1(a)(1)(C)(iii).

to assure the availability to brokers, dealers, and investors of information with respect to quotations for, and transactions in, securities. According to the Exchange, quotation and last-sale information for the Shares will be available via Nasdaq proprietary quote and trade services, as well as in accordance with the Unlisted Trading Privileges and the Consolidated Tape Association plans for the Shares and any underlying exchange-traded products. In addition, the Intraday Indicative Value, available on the NASDAQ OMX Information LLC proprietary index data service, will be based upon the current value for the components of the Disclosed Portfolio and will be updated and widely disseminated by one or more major market data vendors and broadly displayed at least every 15 seconds during the Regular Market Session. On each business day, before commencement of trading in Shares in the Regular Market Session on the Exchange, the Fund will disclose on its Web site the Disclosed Portfolio, as defined in Nasdaq Rule 5735(c)(2), held by the Fund and the First Trust Subsidiary, which will form the basis for the Fund's calculation of net asset value (''NAV'') at the end of the business day.[23] The Fund's NAV will be determined as of the close of trading (normally 4:00 p.m. Eastern Time) on each day the New York Stock Exchange is open for business. Information regarding market price and volume of the Shares will be continually available on a real-time basis throughout the day on brokers' computer screens and other electronic services. The previous day's closing price and trading volume information for the Shares will be published daily in the financial section of newspapers. Intra-day, executable price quotations on the securities, Commodities, and other assets held by the Fund and the First Trust Subsidiary will be available from major broker-dealer firms or on the exchange on which they are traded, as applicable. Intra-day price information will also be available through subscription services, such as Bloomberg, Markit, and Thomson Reuters, which can be accessed by authorized participants and other investors. The Fund's Web site will include a form of the prospectus for the Fund and additional data relating to NAV and other applicable quantitative information.

The Commission further 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. The Commission notes that the Exchange will obtain a representation from the issuer of the Shares that the NAV per Share will be calculated daily and that the NAV and the Disclosed Portfolio will be made available to all market participants at the same time.[24] In addition, trading in the Shares will be subject to Nasdaq Rule 5735(d)(2)(D), which sets forth circumstances under which Shares of the Fund may be halted. The Exchange may halt trading in the Shares if trading is not occurring in the securities, Commodities, and other assets constituting the Disclosed Portfolio of the Fund and the First Trust Subsidiary or if other unusual conditions or circumstances detrimental to the maintenance of a fair and orderly market are present.[25] Further, the Commission notes that the Reporting Authority that provides the Disclosed Portfolio must implement and maintain, or be subject to, procedures designed to prevent the use and dissemination of material, non-public information regarding the actual components of the portfolio.[26] The Commission notes that the Financial Industry Regulatory Authority (''FINRA''), on behalf of the Exchange,[27] will communicate as needed regarding trading in the Shares, Commodities, and other exchange-traded securities and instruments held by the Fund and the First Trust Subsidiary 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, Commodities, and other exchange-traded securities and instruments held by the Fund and the First Trust Subsidiary from such markets and other entities. In addition, the Exchange may obtain information regarding trading in the Shares, Commodities, and other exchange-traded securities and instruments held by the Fund and the First Trust Subsidiary from markets and other entities that are members of ISG, which includes securities and futures exchanges,[28] or with which the Exchange has in place a comprehensive surveillance sharing agreement. The Exchange states that it has a general policy prohibiting the distribution of material, non-public information by its employees. The Exchange also states that the Adviser is not a broker-dealer but is affiliated with a broker-dealer, and that the Adviser has implemented a fire wall with respect to its broker-dealer affiliate regarding access to information concerning the composition of or changes to the portfolio.[29]

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) The Shares will be subject to Nasdaq Rule 5735, which sets forth the

[23] The Disclosed Portfolio will include, as applicable, the names, quantity, percentage weighting, and market value of securities, Commodities, and other assets held by the Fund and the First Trust Subsidiary and the characteristics of such assets. The Web site and information will be publicly available at no charge.

[24] *See* Nasdaq Rule 5735(d)(1)(B).

[25] *See* Nasdaq Rule 5735(d)(2)(C) (providing additional considerations for the suspension of trading in or removal from listing of Managed Fund Shares on the Exchange). With respect to trading halts, the Exchange may consider all relevant factors in exercising its discretion to halt or suspend trading in the Shares of the Fund. Nasdaq will halt trading in the Shares under the conditions specified in Nasdaq Rules 4120 and 4121, including the trading pauses under Nasdaq Rules 4120(a)(11) and (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.

[26] *See* Nasdaq Rule 5735(d)(2)(B)(ii).

[27] 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.

[28] With respect to the futures contracts held indirectly through the First Trust Subsidiary, not more than 10% of the weight of such futures contracts in the aggregate will consist of instruments 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.

[29] *See supra* note 5. An investment adviser to an open-end fund is required to be registered under the Investment Advisers Act of 1940 (''Advisers Act''). As a result, the Adviser and its related personnel are subject to the provisions of Rule 204A–1 under the Advisers Act relating to codes of ethics. This Rule requires investment advisers to adopt a code of ethics that reflects the fiduciary nature of the relationship to clients as well as compliance with other applicable securities laws. Accordingly, procedures designed to prevent the communication and misuse of non-public information by an investment adviser must be consistent with Rule 204A–1 under the Advisers Act. In addition, Rule 206(4)–7 under the Advisers Act makes it unlawful for an investment adviser to provide investment advice to clients unless such investment adviser has (i) adopted and implemented written policies and procedures reasonably designed to prevent violation, by the investment adviser and its supervised persons, of the Advisers Act and the Commission rules adopted thereunder; (ii) implemented, at a minimum, an annual review regarding the adequacy of the policies and procedures established pursuant to subparagraph (i) above and the effectiveness of their implementation; and (iii) designated an individual (who is a supervised person) responsible for administering the policies and procedures adopted under subparagraph (i) above.

initial and continued listing criteria applicable to Managed Fund Shares.

(2) The Exchange has appropriate rules to facilitate transactions in the Shares during all trading sessions.

(3) The Exchange represents that trading in the Shares will be subject to the existing trading surveillances, administered by both Nasdaq and 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 members in an Information Circular of the special characteristics and risks associated with trading the Shares. Specifically, the Information Circular will discuss the following: (a) The procedures for purchases and redemptions of Shares in Creation Units (and that Shares are not individually redeemable); (b) Nasdaq Rule 2111A, which imposes suitability obligations on Nasdaq members with respect to recommending transactions in the Shares to customers; (c) how information regarding the Intraday Indicative Value is disseminated; (d) the risks involved in trading the Shares during the Pre-Market and Post-Market Sessions when an updated Intraday Indicative Value will not be calculated or publicly disseminated; (e) the requirement that members deliver a prospectus to investors purchasing newly issued Shares prior to or concurrently with the confirmation of a transaction; and (f) trading information.

(5) For initial and continued listing, the Fund and the First Trust Subsidiary must be in compliance with Rule 10A–3 under the Exchange Act.[30]

(6) A minimum of 100,000 Shares will be outstanding at the commencement of trading on the Exchange.

(7) The Fund may hold up to an aggregate amount of 15% of its net assets in illiquid securities (calculated at the time of investment), including Rule 144A securities deemed illiquid by the Adviser and master demand notes.

(8) The equity securities (including shares of ETFs and closed-end funds) in which the Fund may invest will be limited to securities that trade in markets that are members of the ISG, which includes all U.S. national securities exchanges, or are parties to a comprehensive surveillance sharing agreement with the Exchange. The Fund and the First Trust Subsidiary will not invest in any non-U.S. equity securities (other than shares of the First Trust Subsidiary).

(9) The Fund will not invest directly in Commodities. The Fund expects to gain exposure to these investments exclusively by investing in the First Trust Subsidiary.

(10) The Fund's investment in the First Trust Subsidiary may not exceed 25% of the Fund's total assets.

(11) The Fund's and the First Trust Subsidiary's investments will be consistent with the Fund's investment objective and will not be used to enhance leverage. The Fund may invest in inverse ETFs, but it will not invest in leveraged or inverse leveraged ETFs.

(12) Pursuant to the Exemptive Order, the Fund will not invest directly in options contracts, futures contracts, or swap agreements. However, this restriction will not apply to the First Trust Subsidiary. With respect to the futures contracts held indirectly through the First Trust Subsidiary, not more than 10% of the weight of such futures contracts in the aggregate shall consist of instruments 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.

This approval order is based on all of the Exchange's representations and description of the Fund, including those set forth above and in the Notice.[31]

For the foregoing reasons, the Commission finds that the proposed rule change is consistent with Section 6(b)(5) of the Act[32] 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,[33] that the proposed rule change (SR–NASDAQ–2013–107) be, and it hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[34]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2013–24643 Filed 10–21–13; 8:45 am]

BILLING CODE 8011–01–P

[30] 17 CFR 240.10A–3.

[31] The Commission notes that it does not regulate the market for futures in which the Fund plans to take positions. Limits on the positions that any person may take in futures may be directly set by the CFTC or by the markets on which the futures are traded. The Commission has no role in establishing position limits on futures even though such limits could impact an exchange-traded product that is under the jurisdiction of the Commission.

[32] 15 U.S.C. 78f(b)(5).

[33] 15 U.S.C. 78s(b)(2).

[34] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–70636; File No. SR–Topaz–2013–05]

Self-Regulatory Organizations; Topaz Exchange, LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Related to PIM and Penny Pilot Periods

October 9, 2013.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the ''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on September 27, 2013, the Topaz Exchange, LLC (d/b/a ISE Gemini) (the ''Exchange'' or ''Topaz'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I and II below, which Items have been prepared by the 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 the Substance of the Proposed Rule Change

Topaz is proposing to amend its rules to correct date references related to two pilot programs being conducted on the Exchange: the PIM Pilot and Penny Pilot, each as defined below. The Exchange is also proposing to revise a provision describing how the Exchange notifies Members about which option classes are eligible to trade in the Penny Pilot. The text of the proposed rule change is available on the Exchange's Internet Web site at *http://www.ise.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 the Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The self-regulatory organization has prepared summaries, set forth in Sections A, B and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and the Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange is proposing to amend its rules to correct two incorrect date references related to the expiration of pilot programs currently being conducted on the Exchange. In particular, the Exchange proposes to amend the pilot periods specified for a pilot program related to the minimum size requirement for orders sent to the Exchange's Price Improvement Mechanism (''PIM Pilot''), and a pilot program permitting certain options classes to be quoted and traded in pennies (''Penny Pilot''). The Exchange's rules related to both of these pilot programs each mistakenly state a pilot period end date that was prior to Topaz's registration as a national securities exchange.[3]

With respect to the PIM Pilot, Topaz rules provide that during the specified pilot period there will be no minimum size requirement for orders to be eligible for the PIM. Supplementary Material .03 to Rule 723 states that this pilot was scheduled to expire on July 18, 2013, which is a date prior to the Exchange's registration as a national securities exchange. The Exchange notes that Supplementary Material .05 to Rule 723 currently references the correct pilot end date of July 18, 2014, which is consistent with the pilot period on the International Securities Exchange, LLC (''ISE'').[4] The Exchange is therefore proposing to update Supplementary Material .03 to extend the PIM Pilot through July 18, 2014 as was intended. The Exchange notes that by clarifying this date reference it is not making any substantive changes to the operation of the PIM Pilot, which will continue in its current form.

With respect to the Penny Pilot, Topaz rules provide that during the specified pilot period certain participating options classes may be quoted and traded in increments as low as $0.01.[5] Supplementary Material .01 to Rule 710 states that the Penny Pilot was scheduled to expire on June 30, 2013, which is a date prior to Exchange's registration as a national securities exchange. The Exchange notes that the second paragraph of Supplementary Material .01 to Rule 710 currently references the correct pilot end date of December 31, 2013, which is consistent with the pilot period on other options exchanges.[6] The Exchange is therefore proposing to update the first paragraph of Supplementary Material .01 to Rule 710 to extend the Penny Pilot through December 31, 2013. This filing does not propose any substantive changes to the Penny Pilot: all classes currently participating will remain the same and all minimum increments will remain unchanged.

With this proposed rule change, the Exchange also proposes to revise the provision describing how the Exchange specifies which option classes trade in the Penny Pilot. Currently, the rule requires that the Exchange specify which options trade in the Penny Pilot and in what increments in a Regulatory Information Circular that has been filed with the Commission pursuant to Rule 19b–4 under the Exchange Act and distributed to its Members. The Exchange now proposes to revise that provision to indicate that information regarding the option classes trading in the Penny Pilot will be communicated to Members through a Market Information Circular. The Exchange will also post on its Web site the replacement option classes that are selected for the Penny Pilot.[7] By revising this provision, the Exchange will eliminate the requirement to file a Regulatory Information Circular with the Commission pursuant to Rule 19b–4.

The Exchange notes that when it filed its application to be registered as a national securities exchange it represented that it would provide certain data to the Commission in connection with the PIM and Penny Pilots.[8] The Exchange will continue to provide such data to the Commission with respect to trading during the extended pilot periods. In addition, Topaz represents that it will provide the Commission with the same data that the ISE has agreed to provide with respect to any current or future pilot program conducted on the Exchange that is based on Topaz rules that are incorporated by reference to the rules of the ISE.

For example, the Exchange currently conducts a pilot program that eliminates position and exercise limits for physically-settled options on the SPDR S&P ETF Trust (''SPY Pilot''). When the ISE adopted the SPY Pilot it agreed to provide data to the Commission in a ''Pilot Report'' to be submitted within thirty (30) days of the end of the twelve (12) month time period following the adoption of the pilot program.[9] As this pilot program is being conducted on Topaz pursuant to rules incorporated by reference to ISE rules,[10] the Exchange will therefore be obligated to provide the same data to the Commission with respect to trading on Topaz.[11]

The Exchange also notes that it currently conducts another pilot program adopted in connection with the Plan to Address Extraordinary Market Volatility that suspends Rule 720 (Obvious and Catastrophic Errors) with respect to transactions executed during a Limit State or Straddle State (''Obvious Error Pilot'').[12] Although this pilot program is not incorporated by

[3] The Securities and Exchange Commission granted the Exchange's application for registration as a national securities exchange on July 26, 2013. *See* Securities Exchange Act Release No. Release No. [sic] 70050 (July 26, 2013), 78 FR 46622 (Aug. 1, 2013). The Exchange began trading on August 5, 2013.

[4] *See* Supplementary Material .03 to ISE Rule 723.

[5] In particular, the minimum price variation for all participating options classes, except for the Nasdaq-100 Index Tracking Stock (''QQQQ''), the SPDR S&P 500 Exchange Traded Fund (''SPY'') and the iShares Russell 2000 Index Fund (''IWM''), is $0.01 for all option series trading at less than $3 per contract and $0.05 for all option series trading at $3 per contract or greater. QQQQ, SPY and IWM are traded in $0.01 increments for all options series.

[6] *See, e.g.,* Supplementary Material .01 to ISE Rule 710; Chicago Board Options Exchange, Inc. Rule 6.42(3); NASDAQ OMX PHLX, LLC Rule 1034(a)(i)(B).

[7] This revision is consistent with rules at most of the other options exchanges participating in the Penny Pilot: ISE Rule 710, Supplementary Material .01; BATS Exchange, Inc. Rule 21.5, Interpretations and Policies .01; NASDAQ OMX BX, Inc. Chapter VI, Section 5(3); NASDAQ OMX PHLX, Inc. Rule 1034(a)(i)(B); The NASDAQ Stock Market LLC Chapter VI, Section 5; NYSE MKT LLC Rule 960NY, Commentary .02; and NYSE Arca, Inc. Rule 6.72, Commentary .02.

[8] *See* Exhibit B to Topaz Exchange Form 1 Application.

[9] *See* Securities Exchange Act Release No. 62300 (Oct. 5, 2012), 78 FR 62300 (Oct. 12, 2012) (SR–ISE–2012–81).

[10] Chapter 4 of the Rules of the ISE is incorporated by reference into the Topaz rulebook.

[11] The Pilot Report to be submitted by Topaz will detail the size and different types of strategies employed with respect to positions established as a result of the elimination of position limits in SPY. In addition, the report will note whether any problems resulted due to the no limit approach and any other information that may be useful in evaluating the effectiveness of the pilot program. The Pilot Report will compare the impact of the pilot program, if any, on the volumes of SPY options and the volatility in the price of the underlying SPY shares, particularly at expiration. In preparing the report the Exchange will utilize various data elements such as volume and open interest. In addition the Exchange will make available to Commission staff data elements relating to the effectiveness of the pilot program.

[12] Rule 720 provides a process by which a transaction may be busted or adjusted when the execution price of a transaction deviates from the option's theoretical price by a certain amount.

reference to ISE rules,[13] the Exchange believes that it should provide the Commission the same data elements for Topaz as is required to be provided by ISE regarding how Limit and Straddle States affect the quality of the options market.[14]

2. Statutory Basis

The basis under the Securities Exchange Act of 1934 (the ''Exchange Act'') for this proposed rule change is found in Section 6(b)(5), in that the proposed rule change is designed to promote just and equitable principles of trade, 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 Exchange believes that it is appropriate to correct the pilot dates referenced in its rules for the PIM and Penny Pilots so that Members and investors have a clear and accurate understanding of the Exchange's rules. The Exchange notes again that the pilot end dates being proposed here are consistent with other parts of the Exchange's rules, and with the rules of the ISE and other options exchanges.

In addition, the revision to how the Exchange will specify which options participate in the Penny Pilot promotes just and equitable principles of trade since it clarifies how Members and other market participants will be made aware of which option classes are trading in the Penny Pilot and eliminates a requirement that the Exchange specify which option classes are in the Penny Pilot through a Regulatory Information Circular that has been filed with the Commission pursuant to Rule 19b–4 under the Exchange Act. Eliminating the requirement to file the Regulatory Information Circular is appropriate because most other options exchanges do not require such a submission to the Commission.

B. Self-Regulatory Organization's Statement on Burden on Competition

The proposed rule changes are non-substantive corrections to the Exchange's rules and therefore do not implicate the competition analysis. The proposed rule change will serve to promote regulatory clarity and consistency, thereby reducing burdens on the marketplace and facilitating investor protection.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

The Exchange has not solicited, and does not intend to solicit, comments on this proposed rule change. The Exchange has not received any unsolicited written comments from members or other interested parties.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The Exchange believes that the foregoing proposed rule change may take effect upon filing with the Commission pursuant to Section 19(b)(3)(A)[15] of the Act and Rule 19b–4(f)(6) thereunder[16] because the foregoing proposed rule change does not (i) significantly affect the protection of investors or the public interest, (ii) impose any significant burden on competition, and (iii) become operative for 30 days after its filing date, or such shorter time as the Commission may designate.

The Exchange has asked the Commission to waive the 30-day operative delay so that the proposal may become operative immediately upon filing. The Commission believes that waiver of the operative delay is consistent with the protection of investors and the public interest because this rule change is not proposing any substantive changes. The proposed rule change is correcting certain inaccuracies in the Exchange's rules, conforming to how other exchanges provide notice of the options that trade in the Penny Pilot, and confirming that the Exchange will provide certain data to the Commission in connection with various pilot programs. These changes and clarifications should eliminate member confusion and provide clarity on how the rules apply. Therefore, the Commission designates the proposal operative upon filing.[17]

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is: (i) Necessary or appropriate in the public interest; (ii) for the protection of investors; or (iii) otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File No. SR–Topaz–2013–05 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 No. SR–Topaz–2013–05. 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 such filing also will be available for inspection and copying at the principal

[13] *See* Securities Exchange Act Release No. 69329 (April 5, 2013), 78 FR 21657 (April 11, 2013) (SR–ISE–2013–22).

[14] In particular, the Exchange represents that it will conduct its own analysis concerning the elimination of obvious error rule during Limit and Straddle States and agrees to provide the Commission with relevant data to assess the impact of this proposed rule change. As part of its analysis, the Exchange will evaluate the options market quality during Limit and Straddle States, assess the character of incoming order flow and transactions during Limit and Straddle States, and review any complaints from members and their customers concerning executions during Limit and Straddle States. The Exchange also agrees to provide to the Commission data requested to evaluate the impact of the elimination of the obvious error rule, including data relevant to assessing the various analyses noted above.

[15] 15 U.S.C. 78s(b)(3)(A).

[16] 17 CFR 240.19b–4(f)(6).

[17] For purposes only of waiving the 30-day operative delay, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

offices 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 No. SR–Topaz–2013–05, and should be submitted on or before November 12, 2013.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[18]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2013–24641 Filed 10–21–13; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–70655; File No. SR–BX–2013–054]

Self-Regulatory Organizations; NASDAQ OMX BX, Inc.; Notice of Filing of Proposed Rule Change To Amend the Fee Schedule Under Exchange Rule 7018(a) With Respect to Transactions in Securities Priced at $1 per Share or Greater

October 10, 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 September 27, 2013, NASDAQ OMX BX, Inc. (''BX'' or ''Exchange'') filed with the Securities and Exchange Commission (''SEC'' or ''Commission'') the proposed rule change as described in Items I, II, and III, below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend the fee schedule under Exchange Rule 7018(a) with respect to transactions in securities priced at $1 per share or greater. The Exchange will implement the proposed rule change on October 1, 2013.

The text of the proposed rule change is also available on the Exchange's Web site at *http://nasdaqomxbx.cchwallstreet.com,* at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange is proposing to amend the credit it pays with respect to routable orders that access liquidity on the Exchange (either before or after routing to other venues). Currently, the Exchange pays a credit of $0.0013 or $0.0011 per share executed for orders that execute at BX if the member achieves certain volume tiers and a credit of $0.0007 per share executed if such tiers are not reached. However, the Exchange pays a credit of $0.0014 per share executed with respect to routable orders (specifically, orders using the Exchange's BSTG, BSCN, BMOP, BTFY, BCRT, BDRK, or BCST routing strategies) if such orders execute at the Exchange. The Exchange is reducing this credit to $0.0011 per share executed, as a means of reducing costs in a period of persistent low trading volumes. The Exchange notes, however, that it is still providing an incentive for members to use the Exchange's routing functionality by paying a credit available to all members, regardless of their trading volumes, that exceeds the base credit of $0.0007 per share executed otherwise available.[3]

2. Statutory Basis

BX believes that the proposed rule change is consistent with the provisions of Section 6 of the Act,[4] in general, and Sections 6(b)(4) and (b)(5) of the Act,[5] in particular, because it provides for the equitable allocation of reasonable dues, fees and other charges among members and issuers and other persons using any facility or system that the Exchange operates or controls, and it does not unfairly discriminate between customers, issuers, brokers or dealers.

The proposed change is reasonable because it reflects a modest decrease of $0.0003 per share executed in the credit paid to members with routable orders that execute at the Exchange. The resulting credit is comparable to the credit that members receive if they provide an average daily volume of at least 25,000, but less than 1 million, shares of liquidity during the month, which is a higher rate than the base rate of $0.0007 per share executed. The change is consistent with an equitable allocation of fees and is not unfairly discriminatory because it makes the credits applicable to routable orders that execute at the Exchange more consistent with the credits paid with respect to other orders that execute at the Exchange. Although the credit exceeds the base rate of $0.0007, the difference is not unfairly discriminatory because the credit offered with respect to routable orders is still available to all members, regardless of volume levels, and is intended to provide an incentive for BX members to make use of the Exchange's optional routing functionality.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act, as amended.[6] BX notes that it operates in a highly competitive market in which market participants can readily favor competing venues if they deem fee levels at a particular venue to be excessive, or rebate opportunities available at other venues to be more favorable. In such an environment, BX must continually adjust its fees to remain competitive with other exchanges and with alternative trading systems that have been exempted from compliance with the statutory standards applicable to exchanges. Because competitors are free to modify their own fees in response, and because market participants may readily adjust their order routing practices, BX believes that the degree to which fee changes in this market may impose any burden on competition is extremely limited. In this instance, the decreased credit is intended to reduce the Exchange's costs, while still continuing to provide an incentive for

[18] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] The Exchange notes that the credits discussed above do not apply to orders that execute against midpoint pegged orders, since such orders receive price improvement in lieu of an Exchange-paid credit.

[4] 15 U.S.C. 78f.

[5] 15 U.S.C. 78f(b)(4) and (b)(5).

[6] 15 U.S.C. 78f(b)(8).

members to make use of its optional routing functionality. The reduced credit of $0.0011 per share executed continues to reflect a higher credit than the base credit of $0.0007 per share executed, and is available to all members, regardless of volume levels. Thus, it is intended to maintain an incentive for members to use BX's optional routing functionality. However, because there are numerous competitive alternatives to the use of this functionality, it is likely that BX will lose market share as a result of the changes if they are unattractive to market participants. Accordingly, BX does not believe that the proposed changes will impair the ability of members or competing order execution venues to maintain their competitive standing in the financial markets.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were either solicited or received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A)(ii) of the Act.[7] At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is: (i) Necessary or appropriate in the public interest; (ii) for the protection of investors; or (iii) otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–BX–2013–054 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–BX–2013–054. 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–BX–2013–054 and should be submitted on or before November 12, 2013.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[8]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2013–24653 Filed 10–21–13; 8:45 am]

BILLING CODE 8011–01–P

[7] 15 U.S.C. 78s(b)(3)(A)(ii).

[8] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–70625; File No. SR–EDGA–2013–29]

Self-Regulatory Organizations; EDGA Exchange, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Amend EDGA Rules 3.2, 13.3, and Adopt Rule 12.14, Front Running of Block Transactions To Conform With the Rules of Other Self-Regulatory Organizations

October 8, 2013.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the ''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on September 26, 2013, EDGA Exchange, Inc. (the ''Exchange'' or ''EDGA'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I and II below, which items have been prepared by the 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) Amend Rule 3.22, Proxy Voting; (ii) amend Rule 13.3, Forwarding of Issuer Materials; and (iii) adopt new Rule 12.14, Front Running of Block Transactions, to conform with the rules of the Financial Industry Regulatory Authority, Inc. (''FINRA'') for purposes of an agreement between the Exchange and FINRA pursuant to Rule 17d–2 under the Act.[3] All of the changes described herein are applicable to EDGA Members. The text of the proposed rule change is available on the Exchange's Internet Web site at *www.directedge.com,* at the Exchange's principal office, and at the Public Reference Room of the Commission.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The self-regulatory organization has

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 17 CFR 240.17d–2.

prepared summaries, set forth in sections A, B and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and the Statutory Basis for, the Proposed Rule Change

1. Purpose

Pursuant to Rule 17d–2 under the Act,[4] the Exchange and FINRA entered into an agreement to allocate regulatory responsibility for common rules (the ''17d–2 Agreement''). The 17d–2 Agreement covers common members of the Exchange and FINRA and allocates to FINRA regulatory responsibility, with respect to common members, for the following: (i) Examination of common members of the Exchange and FINRA for compliance with federal securities laws, rules and regulations and rules of the Exchange that the Exchange has certified as identical or substantially similar to FINRA rules; (ii) investigation of common members of EDGA and FINRA for violations of federal securities laws, rules or regulations, or Exchange rules that the Exchange has certified as identical or substantially identical to a FINRA rule; and (iii) enforcement of compliance by common members with the federal securities laws, rules and regulations, and the rules of the Exchange that the Exchange has certified as identical or substantially similar to FINRA rules.[5]

The 17d–2 Agreement included a certification by the Exchange that states that the requirements contained in certain Exchange rules are identical to, or substantially similar to, certain FINRA rules that have been identified as comparable. To conform with comparable FINRA rules for purposes of the 17d–2 Agreement, the Exchange proposes to: (i) Amend Rule 3.22, Proxy Voting; (ii) amend Rule 13.3, Forwarding of Issuer Materials; and (iii) adopt new Rule 12.14, Front Running of Block Transactions.

Rule 3.22, Proxy Voting and Rule 13.3, Forwarding of Issuer Materials

The Exchange proposes to amend Rules 3.22 and 13.3 concerning proxy voting and forwarding of proxy materials to align these rules with FINRA Rule 2251.[6] Section 957 of the Dodd-Frank Act amended Section 6(b) of the Act[7] to require the rules of each national securities exchange prohibit any member organization that is not the beneficial owner of a security registered under Section 12 of the Act[8] from granting a proxy to vote the security in connection with certain stockholder votes, unless the beneficial owner of the security has instructed the member organization to vote the proxy in accordance with the voting instructions of the beneficial owner. The stockholder votes covered by Section 957 include any vote with respect to: (i) The election of a member of the board of directors of an issuer (other than an uncontested election of a director of an investment company registered under the Investment Company Act); (ii) executive compensation; or (iii) any other significant matter, as determined by the Commission, by rule. The Exchange carries out the requirements of Section 957 of the Dodd-Frank Act under paragraph (a) to Exchange Rule 3.22 which prohibits a Member from giving a proxy to vote stock that is registered in its name, unless: (i) Such Member is the beneficial owner of such stock; (ii) such proxy is given pursuant to the written instructions of the beneficial owner; or (iii) such proxy is given pursuant to the rules of any national securities exchange or association of which it is a member provided that the records of the Member clearly indicate the procedure it is following.

Similarly, the Exchange proposes to add new paragraph (c) to Rule 3.22, based entirely on FINRA Rule 2251(d), to explicitly state that a Member may give a proxy to vote any stock registered in its name if such Member holds such stock as executor, administrator, guardian, trustee, or in a similar representative or fiduciary capacity with authority to vote. Proposed paragraph (c) would also state that a Member that has in its possession or within its control stock registered in the name of another Member and that desires to transmit signed proxies pursuant to the provisions of Rule 13.3, shall obtain the requisite number of signed proxies from such holder of record. Lastly, proposed paragraph (c) would also state that, notwithstanding the foregoing: (1) Any Member designated by a named Employee Retirement Income Security Act of 1974 (as amended) (''ERISA'') Plan fiduciary as the investment manager of stock held as assets of the ERISA Plan may vote the proxies in accordance with the ERISA Plan fiduciary responsibilities if the ERISA Plan expressly grants discretion to the investment manager to manage, acquire, or dispose of any plan asset and has not expressly reserved the proxy voting right for the named ERISA Plan fiduciary; and (2) any designated investment adviser may vote such proxies.

To promote consistency with FINRA Rule 2251, the Exchange proposes to add language to the existing text of Rule 13.3 to state that for beneficial owners, the proxy materials or other materials to be forwarded on behalf of an issuer can be sent to the beneficial owner's designated investment adviser, if applicable. In conjunction with this change, the Exchange proposes to adopt the definition of ''designated investment adviser'' set forth in FINRA Rule 2251(f) as Interpretation and Policy .01 to Rule 3.22.

The Exchange also proposes modifying the text of Rule 13.3, which currently would require forwarding of proxy material but which does not explicitly reference such material, to add such an explicit reference. The Exchange further proposes to modify the text of Rule 13.3 to reference ''security holders,'' rather than stockholders, in the initial sentence, to ensure that the coverage of the rule applies to all securities, including debt securities to the extent applicable, and not just equity securities. The Exchange also proposes to incorporate certain language from FINRA Rule 2251 that provides additional detail regarding the material that must be provided to beneficial owners in the event of a proxy solicitation. Specifically, Rule 13.3 as amended would state that in the event of a proxy solicitation, materials provided pursuant to the Rule shall include a signed proxy indicating the number of shares held for such beneficial owner and bearing a symbol identifying the proxy with proxy records maintained by the Member, and a letter informing the beneficial owner (or the beneficial owner's designated investment adviser) of the time limit and necessity for completing the proxy form and forwarding it to the person soliciting proxies prior to the expiration of the time limit in order for the shares to be represented at the meeting. The Rule would also require a Member to furnish a copy of the symbols to the person soliciting the proxies and shall also retain a copy thereof pursuant to the provisions of Exchange Act Rule 17a–4. Finally, the Exchange proposes

[4] 17 CFR 240.17d–2.

[5] *See* Securities and Exchange Release No. 61698 (March 12, 2010), 75 FR 13151 (March 18, 2010) (approving File No. 10–196).

[6] Similarly, on September 30, 2011, BATS Y-Exchange, Inc. (''BYX'') amended their Rule 13.3 to align it with FINRA Rule 2251. *See* Securities Exchange Act Release No. 65448 (September 30, 2011), 76 FR 62103 (October 6, 2011) (Notice of Filing and Order Granting Accelerated Approval of Proposed Rule Change to Amend BYX Rule 13.3 to Prohibit Members from Voting Uninstructed Shares on Certain Matters and to Align BYX Rule 13.3, Concerning the Forwarding of Proxy and Other Material and Proxy Voting, with FINRA Rule 2251).

[7] 15 U.S.C. 78f(b).

[8] 15 U.S.C. 78l.

to modify the title of Rule 13.3 to include a reference to proxy voting.

The Exchange believes that these changes will help to avoid confusion among Members of the Exchange that are also members of FINRA by further aligning the Exchange's rules with FINRA Rule 2251. The proposed changes to Rules 3.22 and 13.3 are designed to enable the Exchange to incorporate Rules 3.22 and 13.3 into the 17d–2 Agreement, further reducing duplicative regulation of Members that are also members of FINRA.

Rule 12.14, Front Running of Block Transactions

The Exchange proposes to adopt new Rule 12.14, Front Running of Block Transactions, which would require that Members and persons associated with a Member shall comply with FINRA Rule 5270 as if such Rule were part of the Exchange's Rules. The proposed rule text is substantially the same as IM–2110–3 of the Nasdaq Stock Market LLC (''Nasdaq''), which has been approved by the Commission.[9] FINRA Rule 5270 states that no FINRA member or person associated with a member shall cause to be executed an order to buy or sell a security or a related financial instrument [10] when such member or person associated with a member has material, non-public market information concerning an imminent block transaction [11] in that security, a related financial instrument or a security underlying the related financial instrument.

FINRA Rule 5270 includes exceptions to the general prohibitions of the rule where a member can demonstrate that a transaction is unrelated to the material, non-public market information received in connection with the customer order. The Supplementary Material to FINRA Rule 5270 includes an illustrative list of potentially permitted transactions as examples of transactions that, depending upon the circumstances, may be unrelated to the customer block order. These types of transactions may include: where the member has information barriers established to prevent internal disclosure of such information; actions in the same security related to a prior customer order in that security; transactions to correct bona fide errors; or transactions to offset odd-lot orders.

In addition, Rule 5270 does not preclude transactions undertaken for the purpose of fulfilling, or facilitating the execution of, the customer block order. However, when engaging in trading activity that could affect the market for the security that is the subject of the customer block order, the member must minimize any potential disadvantage or harm in the execution of the customer's order, must not place the member's financial interests ahead of those of its customer, and must obtain the customer's consent to such trading activity. A member may obtain its customers' consent through affirmative written consent or through the use of a negative consent letter. The negative consent letter must clearly disclose to the customer the terms and conditions for handling the customer's orders; if the customer does not object, then the member may reasonably conclude that the customer has consented and the member may rely on such letter for all or a portion of the customer's orders. In addition, a member may provide clear and comprehensive oral disclosure to and obtain consent from the customer on an order-by-order basis, provided that the member documents who provided such consent and such consent evidences the customer's understanding of the terms and conditions for handling the customer's order.

The Exchange also proposes to state in new Rule 12.14 that although the prohibitions in Rule 5270 are limited to imminent block transactions, the front running of other types of orders that place the financial interests of the Member or persons associated with a Member ahead of those of its customer or the misuse of knowledge of an imminent customer order may violate other Exchange rules, including Rule 3.1 and Rule 12.6, or provisions of the federal securities laws.

2. Statutory Basis

The Exchange believes that proposed rule change is consistent with Section 6(b)(5) of the Act,[12] 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, and to remove impediments to and perfect the mechanism of a free and open market and a national market system. The Exchange believes that the proposed rule change will further these requirements by eliminating duplicative and unnecessary rules and advancing the development of a more efficient and effective Exchange Rulebook. The proposed rule change would provide greater harmonization between Exchange and FINRA rules of similar purpose, resulting in greater uniformity and less burdensome and more efficient regulatory compliance. As such, the proposed rule change would foster cooperation and coordination with persons engaged in facilitating transactions in securities and would remove impediments to and perfect the mechanism of a free and open market and a national market system.

Rule 3.22, Proxy Voting and Rule 13.3, Forwarding of Issuer Materials

The Exchange believes that proposed amendments to Rules 3.22 and 13.3 are consistent with Section 6(b)(5) of the Act,[13] because they remove impediments to, and perfect the mechanism of, a free and open market and a national market system by providing for consistent regulation for Members of the Exchange that are members of other SROs with analogous rules.[14] The proposed changes to Rules 3.22 and 13.3 and proposed Interpretation and Policy .01 are consistent with FINRA Rule 2251. Accordingly, the Exchange believes that the proposal fosters cooperation because, to the extent the Exchange is able to incorporate Rule 13.3 into the 17d–2 Agreement as a rule in common between the Exchange and FINRA, then FINRA will conduct a review for compliance with the common rule to the extent a Member of the Exchange is also a member of FINRA, and the Exchange will not conduct a duplicative review of the same activity by that Member. Finally, the Exchange believes

[9] *See* Securities Exchange Act Release No. 53128 (January 13, 2006), 71 FR 3550 (January 23, 2006) (order approving Nasdaq's application for registration as a national securities exchange). *See also* Securities Exchange Act Release No. 58069 (June 30, 2008), 73 FR 39360 (July 9, 2008) (SR–Nasdaq–2008–054) (Notice of Filing and Immediate Effectiveness). Securities Exchange Act Release No. 34–67774 (September 4, 2012), 77 FR 55519 (September 12, 2012) (Approval Order).

[10] FINRA Rule 5270 defines the term ''related financial instrument'' as ''any option, derivative, security-based swap, or other financial instrument overlying a security, the value of which is materially related to, or otherwise acts as a substitute for, such security, as well as any contract that is the functional economic equivalent of a position in such security.''

[11] Under FINRA Rule 5270, a transaction involving 10,000 shares or more of a security, an underlying security, or a related financial instrument overlying such number of shares, is generally deemed to be a block transaction, although a transaction of fewer than 10,000 shares could be considered a block transaction. A block transaction that has been agreed upon does not lose its identity as such by arranging for partial executions of the full transaction in portions which themselves are not of block size if the execution of the full transaction may have a material impact on the market.

[12] 15 U.S.C. 78f(b)(5).

[13] *Id.*

[14] *See, e.g.,* FINRA Rule 2251, BYX Rule 13.3, ISE Rule 421, NYSE Arca Rule 9.4, and Nasdaq Rule 2251.

that the proposal will contribute to investor protection by defining important requirements to which Members must abide with respect to proxy solicitation, proxy voting and delivery of proxy materials.

Rule 12.14, Front Running of Block Transactions

The Exchange believes that new Rule 12.14 is consistent with Section 6(b)(5) of the Act [15] which requires, among other things, that the Exchange rules be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, and, in general, to protect investors and the public interest. By incorporating FINRA Rule 5270, new Rule 12.14 prohibits front running trading activity that the Exchange believes is inconsistent with just and equitable principles of trade while also ensuring that Members may continue to engage in transactions that do not present the risk of abusive trading practices that the rule is intended to prevent. The Exchange believes that Rule 12.14 would enhance the protection of customer orders by addressing various types of abusive trading that may be intended to take advantage of customer orders. As previously noted, the proposed rule text is substantially similar to Nasdaq's IM–2110–3, which has been approved by the Commission.[16] By adopting Rule 12.14, the Exchange believes that imminent customer block orders would be better protected and that the proposed rule change will prevent fraudulent and manipulative acts and practices, promote just and equitable principles of trade, and better protect investors and the public interest.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change would impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. The proposed rule change is not designed to address any competitive issues but rather is designed to provide greater harmonization among Exchange and FINRA rules of similar purpose, resulting in less burdensome and more efficient regulatory compliance for common members and facilitating FINRA's performance of its regulatory functions under the 17d–2 Agreement.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

The Exchange has neither solicited nor received written comments on the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing proposed rule change does not: (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 [17] and Rule 19b–4(f)(6) thereunder.[18]

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 Commission believes that waiving the 30-day operative delay is consistent with the protection of investors and the public interest because it will help foster consistency between the rulebooks of the self-regulatory organizations.[19] 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–EDGA–2013–29 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–EDGA–2013–29. 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–EDGA–2013–29 and should be submitted on or before November 12, 2013.

[15] 15 U.S.C. 78f(b)(5).

[16] *See* Securities Exchange Act Release No. 53128 (January 13, 2006), 71 FR 3550 (January 23, 2006) (order approving Nasdaq's application for registration as a national securities exchange). *See also* Securities Exchange Act Release No. 58069 (June 30, 2008), 73 FR 39360 (July 9, 2008) (SR-Nasdaq-2008–054) (Notice of Filing and Immediate Effectiveness). Securities Exchange Act Release No. 34–67774 (September 4, 2012), 77 FR 55519 (September 12, 2012) (Approval Order).

[17] 15 U.S.C. 78s(b)(3)(A).

[18] 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.

[19] 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).

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[20]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2013–24634 Filed 10–21–13; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–70688; File No. SR–NSCC–2013–02]

Self-Regulatory Organizations; National Securities Clearing Corporation; Notice of Filing Amendment No. 3 to a Proposed Rule Change, as Previously Modified by Amendment Nos. 1 and 2, To Institute Supplemental Liquidity Deposits to Its Clearing Fund Designed To Increase Liquidity Resources To Meet Its Liquidity Needs

October 15, 2013.

On March 21, 2013, National Securities Clearing Corporation (''NSCC'') filed with the Securities and Exchange Commission (''Commission'') proposed rule change SR–NSCC–2013–02 (''Proposed Rule Change'') pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Exchange Act'')[1] and Rule 19b–4 thereunder.[2] The Proposed Rule Change was published for comment in the **Federal Register** on April 10, 2013.[3] On April 19, 2013, NSCC filed with the Commission Amendment No. 1 to the Proposed Rule Change, which the Commission published for comment in the **Federal Register** on May 29, 2013 and designated a longer period for Commission action on the Proposed Rule Change, as amended.[4] On June 11, 2013, NSCC filed with the Commission Amendment No. 2 to the Proposed Rule Change, as previously modified by Amendment No. 1, which the Commission published for comment in the **Federal Register** on July 15, 2013, with an order instituting proceedings to determine whether to approve or disapprove the Proposed Rule Change (''Order Instituting Proceedings'').[5] On September 25, 2013, the Commission designated a longer period of review for Commission action on the Order Instituting Proceedings.[6] As of October 15, 2013, the Commission had received 22 comment letters on the proposal contained in the Proposed Rule Change and its related Advance Notice,[7] including NSCC's two responses to the comment letters received as of August 20, 2013.[8]

Pursuant to Section 19(b)(1) of the Exchange Act[9] and Rule 19b–4 thereunder,[10] notice is hereby given that on October 7, 2013, NSCC filed with the Commission Amendment No. 3 to the Proposed Rule Change, as previously modified by Amendment Nos. 1 and 2, as described in Items I and II below, which Items have been prepared primarily by NSCC. The Commission is publishing this notice to solicit comments on the Proposed Rule Change, as modified by Amendment No. 3, from interested persons.[11]

I. Clearing Agency's Statement of the Terms of Substance of the Proposed Rule Change

The Proposed Rule Change, as modified by Amendments No. 1, No. 2, and No. 3, is a proposal by NSCC to amend its Rules & Procedures (the ''NSCC Rules'') to provide for supplemental liquidity deposits to its Clearing Fund (the ''NSCC Clearing Fund'') to ensure that NSCC has adequate liquidity resources to meet its liquidity needs (the ''SLD Proposal'' or sometimes the ''Proposal''), as described below. NSCC filed Amendment No. 3 (this ''Amendment'') to the Proposed Rule Change, as previously modified by Amendment No. 1 and No. 2, in order to delete the provisions in the proposed Rule relating to Regular Activity Liquidity Obligations (as defined), to respond to concerns raised by Members. As a result the Proposal, as revised, would impose supplemental liquidity obligations on affected Members only with respect to activity relating to monthly options expiry periods (defined in the proposed Rule as ''Special Activity Liquidity Obligations'').

II. Clearing Agency's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, NSCC included statements concerning the purpose of and basis for the Proposed Rule Change, as modified by Amendment No. 3, 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. NSCC has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

(A) Clearing Agency's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Description of Change

Existing Proposal

As noted in the original proposal contained in the Proposed Rule Change, as modified by Amendments No. 1 and No. 2 (the ''Rule Filing''), the SLD Proposal would modify the NSCC Rules to add a new Rule 4(A), to establish a supplemental liquidity funding obligation designed to cover the liquidity exposure attributable to those Members and families of affiliated Members (''Affiliated Families'') that regularly incur the largest gross settlement debits over a settlement cycle during both times of normal trading activity (''Regular Activity Periods'') and times of increased trading and settlement activity that arise around monthly options expiration dates (''Options Expiration Activity Periods'').

Under the existing Proposal, the Liquidity Obligation of a Member or Affiliated Family with respect to a

[20] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4. NSCC also filed the proposal contained in the Proposed Rule Change as advance notice SR–NSCC–2013–802 (''Advance Notice''), as modified by Amendment No. 1, pursuant to Section 806(e)(1) of the Payment, Clearing, and Settlement Supervision Act of 2010 and Rule 19b–4(n)(1)(i) thereunder. *See* Release No. 34–69451 (Apr. 25, 2013), 78 FR 25496 (May 1, 2013). On May 20, 2013, the Commission extended the period of review of the Advance Notice, as modified by Amendment No. 1. Release No. 34–69605 (May 20, 2013), 78 FR 31616 (May 24, 2013). On June 11, 2013, NSCC filed Amendment No. 2 to the Advance Notice, as previously modified by Amendment No. 1. Release No. 34–69954 (Jul. 9, 2013), 78 FR 42127 (Jul. 15, 2013). On October 4, 2013, NSCC filed Amendment No. 3 to the Advance Notice, as previously modified by Amendment Nos. 1 and 2. Release No. 34–70689 (Oct. 15, 2013). The proposal in the Proposed Rule Change, as amended, and the Advance Notice, as amended, shall not take effect until all regulatory actions required with respect to the proposal are completed.

[3] Release No. 34–69313 (Apr. 4, 2013), 78 FR 21487 (Apr. 10, 2013).

[4] Release No. 34–69620 (May 22, 2013), 78 FR 32292 (May 29, 2013).

[5] Release No. 34–69951 (Jul. 9, 2013), 78 FR 42140 (Jul. 15, 2013).

[6] Release No. 34–70501 (Sep. 25, 2013), 78 FR 60347 (Oct. 1, 2013).

[7] *See* Comments Received on File Nos. SR–NSCC–2013–02 (*http://sec.gov/comments/sr-nscc-2013-02/nscc201302.shtml*) and SR–NSCC–2013–802 (*http://sec.gov/comments/sr-nscc-2013-802/nscc2013802.shtml*). Since the proposal contained in the Proposed Rule Change was also filed as an Advance Notice, *see* Release No. 34–69451, *supra* note 2, the Commission is considering all public comments received on the proposal regardless of whether the comments are submitted to the Proposed Rule Change, as amended, or the Advance Notice, as amended.

[8] NSCC also received a comment letter directly prior to filing the Proposed Rule Change and related Advance Notice with the Commission, which NSCC provided to the Commission in Amendment No. 1 to the filings. *See* Exhibit 2 to File No. SR–NSCC–2013–02 (*http://sec.gov/rules/sro/nscc/2013/34-69620-ex2.pdf*).

[9] 15 U.S.C. 78s(b)(1).

[10] 17 CFR 240.19b–4.

[11] Defined terms that are not defined in this notice are defined in Amended Exhibit 5 to the Proposed Rule Change, available at *http://sec.gov/rules/sro/nscc.shtml*, under File No. SR–NSCC–2013–02, Additional Materials.

Regular Activity Period (a ''Regular Activity Liquidity Obligation'') or an Options Expiration Activity Period (a ''Special Activity Liquidity Obligation'') would be imposed on the 30 Members or Affiliated Families who generate the largest aggregate liquidity needs over a settlement cycle that would apply in the event of a closeout (that is, over a period from date of default through the following three settlement days), based upon an historical look-back period. The calculations for both the Regular Activity Liquidity Obligation and the Special Activity Liquidity Obligation were designed so that NSCC has adequate liquidity resources to enable it to settle transactions, notwithstanding the default of one of these 30 largest Members or Affiliated Families during Regular Activity Periods, as well as during Options Expiration Activity Periods. The liquidity obligations imposed on Members of Affiliated Families would be apportioned among the Members in that Affiliated Family in proportion to the liquidity risk (or peak exposure) they present to NSCC. The Regular Activity Liquidity Obligation of an Unaffiliated Member or Affiliated Family that has a Regular Activity Liquidity Obligation (a Regular Activity Liquidity Provider) is satisfied by such Regular Activity Liquidity Provider making a Regular Activity Supplemental Deposit to the Clearing Fund in the amount of its Regular Activity Liquidity Obligation, offset by (i) the total amount (if any) of its commitment and the commitment of its ''Designated Lender'' under NSCC's committed line of credit (the ''Credit Facility'') and (ii) a share of the unallocated commitments of other lenders under the Credit Facility.

The cash deposit in respect of a Special Activity Liquidity Obligation (a ''Special Activity Supplemental Deposit'') is structured in the existing SLD Proposal to address any additional liquidity shortfalls (over and above NSCC's other available liquidity resources) that arise during the heightened activity period around monthly options expiration. As such, these additional Special Activity Supplemental Deposits would be required to be maintained on deposit with NSCC only through the completion of the related settlement cycle and for a few days thereafter.

Objections From Commenters

The key concerns raised by commenters with respect to the existing SLD Proposal were as follows:

First, commenters claimed that Members were not sufficiently consulted or involved during the development of the Proposal (even though NSCC management conducted significant Member outreach), so that the Proposal lacked input that could have potentially resulted in a less burdensome approach.

Second, commenters claimed that the Proposal was anticompetitive or discriminatory because the obligation to provide supplemental liquidity was imposed on only the 30 largest Unaffiliated Members or Affiliated Families (even though those Members collectively represent approximately 85% of NSCC's total membership by peak liquidity needs), rather than all Members of NSCC. This concern was raised in the context of Regular Activity Supplemental Deposits.

Third, commenters claimed that the existing Proposal was anticompetitive or discriminatory because, with respect to Regular Activity Supplemental Deposits, it gave a dollar for dollar credit for commitments made by Regular Activity Liquidity Providers or their Designated Lenders under the Credit Facility—supposedly favoring Regular Activity Liquidity Providers with affiliated banks.

NSCC believes that the proposed amendments and items described below address or mitigate all of these concerns.

Proposed Amendments

NSCC is proposing to amend the existing SLD Proposal by removing those provisions that, collectively, deal with the imposition of Regular Activity Liquidity Obligations, while maintaining the provisions relating to Special Activity Liquidity Obligations. The proposed Rule, as so revised, would thus impose only Special Activity Liquidity Obligations with respect to the heightened activity of Options Expiration Activity Periods (that is, the four days beginning with the Friday that precedes the monthly expiration date for stock options, and ending on the third settlement day following). Under the revised Proposal, as under the existing Proposal as it relates to Special Activity Liquidity Obligations, only those Unaffiliated Members or Affiliated Families among the top 30 whose activity during monthly Options Expiration Activity Periods generate liquidity needs in excess of NSCC's then available liquidity resources will be obligated to fund such additional amounts. That is, the allocation formula ratably applies the additional amount needed during the relevant Options Expiration Activity Period based upon the affected Member's Special Activity Peak Liquidity Exposure. To the extent that a Member's Special Activity Peak Liquidity Exposure is less than or equal to NSCC's then available liquidity resources, its share of the Special Activity Peak Liquidity Need will be zero.

In addition, under the revised SLD Proposal, as under the existing Proposal as it relates to Special Activity Liquidity Obligations, Unaffiliated Members and Affiliated Families, will be able to manage their exposures by making Special Activities Prefund Deposits where they project their own activity will increase their liquidity exposure. For example, if a Special Activity Liquidity Provider anticipates that its Special Activity Peak Liquidity Exposure at any time during a particular Options Expiration Activity Period will be greater than the amount calculated by NSCC, it can make an additional cash deposit to the Clearing Fund (in excess of its Required Deposit) that it designates as a ''Special Activity Prefund Deposit.'' However, to the extent that a Member fails to adequately prefund its activity, it may be subject to a Special Activity Liquidity Call in the same manner as provided in the existing Proposal.

With these changes, NSCC is removing those provisions of the existing SLD Proposal that generated most concern from commenters, while retaining those provisions that enable NSCC to collect additional liquidity resources to cover the heightened liquidity needs that arise during monthly Options Expiration Activity Periods. Every Unaffiliated Member and Affiliated Family among the top 30 whose activity causes a liquidity need in excess of NSCC's available liquidity resources will contribute ratably to such shortfall, so the Proposal fairly and equitably apportions the obligation among those Unaffiliated Members and Affiliated Families whose activity cause the need. The removal of those provisions relating to how commitments under the Credit Facility would be credited against the cash deposit obligations of Regular Activity Liquidity Providers render concerns about such allocation moot.

As indicated in NSCC's August 20, 2013 letter to the Commission, DTCC is separately establishing a standing member-based advisory group, the Clearing Agency Liquidity Council (''CALC''), as a forum for the discussion of liquidity and liquidity-related financing needs and trends. The CALC will initially focus on liquidity initiatives currently being considered by NSCC to address liquidity funding during periods of normal activity, including issues raised by commenters on the existing SLD Proposal. In response to commenters' more general concerns regarding NSCC's reliance on

the Credit Facility and related refinancing risk, NSCC will review with the CALC the financing options available to NSCC to supplement the Clearing Fund as a liquidity resource, and the related costs of those options. Any new initiatives proposed as a result of the CALC review that require regulatory approval will be addressed in a separate filing.

Reporting. As noted in the previous amendment to the Rule Filing, NSCC agrees that Members have to be able to plan for their liquidity obligations. At the same time, NSCC also believes it is critical that Members understand the risks that their own activity presents to NSCC, and be prepared to monitor their activity and alter their behavior if they want to minimize the liquidity risk they present to NSCC. Accordingly, NSCC will make available to each Member a daily report showing the amount of liquidity NSCC would need in the event of the default of such Member. Separately, NSCC will provide, and continue to discuss with Special Activity Liquidity Providers, the reports regarding their Special Activity Liquidity Obligations as currently provided in the proposed Rule.

Finally, the amendment makes certain technical corrections and clarifies the time period for when Special Activity Liquidity Calls must be satisfied.

Implementation Timeframe. The SLD Proposal will be implemented on February 1, 2014. As a result, the first time that Members will be obligated to fund any Special Activity Supplemental Deposits will be for the Options Expiration Activity Period in February 2014. NSCC Risk staff will provide to affected Members their Special Activity Peak Liquidity Exposures for the relevant Special Activity Lookback Period by no later than January 15, 2014.

2. Statutory Basis

The revised SLD Proposal contributes to NSCC's goal of ensuring that NSCC has adequate liquidity resources to meet its settlement obligations notwithstanding the default of an Unaffiliated Member or Affiliated Family that poses the largest aggregate liquidity exposure over the relevant settlement cycle, by providing a mechanism for satisfying the peak liquidity needs that occur during monthly Options Expiration Activity Periods. As such, the Proposal is consistent with the requirements of the Exchange Act, and the rules and regulations thereunder applicable to NSCC, as well as with PFMI Principle 7 as described in the Rule Filing.

(B) Comments on Competition

NSCC believes that the revised SLD Proposal will not impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Exchange Act. The Special Activity Liquidity Obligations imposed on Special Activity Liquidity Providers will ensure that all Unaffiliated Members and Affiliated Families whose activity present liquidity exposure to NSCC during periods of heightened activity during Options Expiration Activity Periods fairly and equitably contribute to NSCC's liquidity resources for settlement. NSCC believes the changes that have been made to the existing Proposal fully address the concerns raised by commenters, and eliminate any impact that the SLD Proposal might have on competition. To the extent there remains any perceived burden on competition caused by the Proposal, NSCC believes that such burden is not unreasonable or inappropriate to prevent systemic risk given that the Proposal contributes to the goal of financial stability in the event of Member default.

(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, including NSCC's formal response to the written comments, have been filed with the Commission and are available on the Commission's Web site.

III. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the Proposed Rule Change, as modified by Amendment No. 3, is consistent with the Section 17A [12] or any other provision of the Exchange Act, or the rules and regulations thereunder. 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 No. SR–NSCC–2013–02 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 No. SR–NSCC–2013–02. 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, as amended, that are filed with the Commission, and all written communications relating to the Proposed Rule Change, as amended, 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 such filings also will be available for inspection and copying at the principal office of NSCC and on NSCC's Web site at *http://dtcc.com/legal/rule_filings/nscc/2013.php.*

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 No. SR–NSCC–2013–02 and should be submitted on or before November 5, 2013.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[13]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2013–24681 Filed 10–21–13; 8:45 am]

BILLING CODE 8011–01–P

[12] 15 U.S.C. 78q–1.

[13] 17 CFR 200.30–3(a)(57).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–70684; File No. SR–C2–2013–035]

Self-Regulatory Organizations; C2 Options Exchange, Incorporated; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change Relating to Fees for the Complex Order Book Data Feed for C2 Listed Options

October 15, 2013.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the ''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on September 30, 2013, C2 Options Exchange, Incorporated (the ''Exchange'' or ''C2'') filed with the Securities and Exchange Commission (the ''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. The 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

C2 Options Exchange, Incorporated (the ''Exchange'' or ''C2'') proposes to amend the fee schedule of Market Data Express, LLC (''MDX''), an affiliate of C2, to establish fees for the Complex Order Book (''COB'') Data Feed for C2 listed options (''COB Data Feed'' or ''Data''). The text of the proposed rule change is available on the Exchange's Web site (*http://www.c2exchange.com/Legal/*), at the Exchange's Office of the Secretary, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The COB Data Feed is a real-time feed that consists of data regarding the Exchange's Complex Order Book and related complex order information. The COB Data Feed includes ''best bid and offer'' or ''BBO'' quotes and identifying information for all C2-traded complex order strategies, as well as all executed C2 complex order trades (and identifies whether the trade was a customer trade or whether a complex order in the COB is a customer order). The COB Data Feed is currently made available by MDX to all market participants free of charge.[3]

The Exchange proposes to establish fees for the COB Data Feed. MDX would charge Customers of the COB Data Feed $500 per month (''Data Fee''). A COB Data Feed ''Customer'' is any entity that receives the COB Data Feed, either directly from MDX's system or through a connection to MDX provided by an approved redistributor (*i.e.,* a market data vendor or an extranet service provider), and distributes it externally or uses it internally, except that an entity or person that receives the COB Data Feed from a Customer and only uses it internally is not a ''Customer'' if it receives the COB Data Feed from a Customer subject to a form of ''Subscriber Agreement'' that has been approved by MDX. The Data Fee for the COB Data Feed would be waived for Customers of the COB Data Feed who are also Customers of the C2 BBO Data Feed.[4] Customers of the C2 BBO Data Feed are currently charged $1,000 per month by MDX.[5] The proposed waiver of the Data Fee for the COB Data Feed would allow a Customer of the COB Data Feed who is also a Customer of the C2 BBO Data Feed to redistribute the COB Data Feed for no additional charge.[6]

In addition, MDX would charge a Customer ''User Fees'' of $25 per month per Device[7] or user ID for receipt of the data by ''Professional Users''[8] and $1 per month for receipt of the data by ''Non-Professional Users.''[9] User Fees would be subject to a cap of $500 per month, *i.e.,* a Customer would pay no more than $500 in User Fees in a month.

The Exchange also proposes to make several formatting and clean up changes to the MDX fee schedule. The Exchange proposes to create two separate sections on the MDX fee schedule for the C2 BBO Data Feed and the COB Data Feed and include the definitions applicable to each data feed within its respective section. The Exchange proposes to renumber the section on Systems Fees and move the definition of Port Fee within that section. Finally, the Exchange proposes to delete the Definitions section of the MDX fee schedule, including the provisions on invoicing and late payments which are included within MDX's written agreement for the data.

The proposed fees would be effective on October 1, 2013.

2. Statutory Basis

The Exchange believes the proposed rule change is consistent with the requirements of Section 6(b) of the Securities Exchange Act of 1934 (''Act'')[10] in general, and, in particular, with Section 6(b)(4) of the Act[11] in that it provides for the equitable allocation of reasonable dues, fees and other charges among users and recipients of

[3] *See* Securities Exchange Act Release No.70119 (August 5, 2013) (SR–C2–2013–025).

[4] The C2 BBO Data Feed is a real-time, low latency data feed that includes C2 BBO data, consisting of all outstanding quotes and standing orders at the best available price level on each side of the market, with aggregate size and last sale data. The C2 BBO Data Feed includes the data included in the COB Data Feed, among other data. *See* Securities Exchange Act Release No. 69400 (April 18, 2013), 78 FR 24285 (April 24, 2013).

[5] *Id.*

[6] Such Customers would still be subject to User Fees as described below.

[7] A ''Device'' means any computer, workstation or other item of equipment, fixed or portable, that receives, accesses and/or displays data in visual, audible or other form.

[8] A ''Professional User'' is any natural person recipient of the COB Data Feed who is not a Non-Professional User. User Fees for Professional Users are payable for both ''internal'' Professional Users (Devices or user IDs of employees of a Customer) and ''external'' Professional Users (Devices or user IDs of Professional Users who receive the Data from a Customer and are not employed by the Customer). (Non-Professional Users must be external since a person who uses the COB Data Feed for a commercial purpose cannot be a Non-Professional User.)

[9] A ''Non-Professional User'' is a natural person who uses the COB Data Feed only for personal purposes and not for any commercial purpose and who, if he or she works in the United States, is not: (i) Registered or qualified in any capacity with the Securities and Exchange Commission, the Commodities Futures Trading Commission, any state securities agency, any securities exchange or association, or any commodities or futures contract market or association; (ii) engaged as an ''investment adviser'' as that term is defined in Section 201(11) of the Investment Advisors Act of 1940 (whether or not registered or qualified under that Act); or (iii) employed by a bank or other organization exempt from registration under federal or state securities laws to perform functions that would require registration or qualification if such functions were performed for an organization not so exempt; or, if he or she works outside of the United States, does not perform the same functions as someone who would qualify as a Non-Professional User if he or she worked in the United States.

[10] 15 U.S.C. 78f(b).

[11] 15 U.S.C. 78f(b)(4).

the Data, and with Section 6(b)(5)[12] of the Act in that it is not designed to permit unfair discrimination between them. The Exchange believes the proposed Data Fee and User Fees are equitable and not unfairly discriminatory because they would apply equally to all Customers of the COB Data Feed except the Data Fee would be waived for Customers of the COB Data Feed who are also Customers of the C2 BBO Data Feed. The Exchange notes that the fee structure of differentiated professional and nonprofessional fees has long been used by other exchanges for their products and by the Options Price Reporting Authority (''OPRA'') Plan in order to reduce the price of data to retail investors and make it more broadly available.[13]

The Exchange believes the proposed waiver of the Data Fee is equitable and not unfairly discriminatory because it would apply equally to all Customers of the COB Data Feed who are also Customers of the C2 BBO Data Feed. Customers of the C2 BBO Data Feed already pay MDX $1,000 for the right to use and redistribute the data in the C2 BBO Data Feed. The C2 BBO Data Feed includes the data in the COB Data Feed. The proposed waiver of the Data Fee would allow a Customer of the COB Data Feed who is also a Customer of the C2 BBO Data Feed to redistribute the COB Data Feed for no additional charge, thereby incentivizing further redistribution of the data in the COB Data Feed. The Exchange notes other exchanges offer similar fee waivers.[14]

The Exchange also believes the proposed fees are equitable because the COB Data Feed is purely optional. Only those Customers that deem the product to be of sufficient overall value and usefulness would purchase it.

The Exchange believes the proposed fees are reasonable because they compare favorably to fees that other markets charge for similar products. For example, the Exchange believes The International Securities Exchange (''ISE'') offers a ''Spread Feed'', which like the COB Data Feed includes order and quote data for complex strategies. The Exchange believes ISE charges distributors of its Spread Feed $3,000 per month and a monthly controlled device fee of $25 per controlled device for Professionals.

The Exchange notes that the COB Data Feed also competes with products offered by NASDAQ OMX PHLX and NYSE. NASDAQ OMX PHLX offers a market data product entitled ''TOPO Plus Orders'', which like the COB Data Feed includes order and last sale information for complex strategies and other market data. NYSE offers market data products entitled ''NYSE ArcaBook for Amex Options'' and ''NYSE ArcaBook for Arca Options'' that include top-of-book and last sale data for complex strategies similar to the data in the COB Data Feed.

The Exchange believes that the proposed cap on User Fees is reasonable because it may encourage more vendors to choose to offer the COB Data Feed, thereby expanding the distribution of this market data for the benefit of investors.

The proposed formatting and clean-up changes to the MDX fee schedule will benefit Customers and users by making the fee schedule clearer and easier to understand.

For the reasons cited above, the Exchange believes the proposed fees for the COB Data Feed are equitable, reasonable and not unfairly discriminatory. In addition, the Exchange believes that no substantial countervailing basis exists to support a finding that the proposed fees for the COB Data Feed fails to meet the requirements of the Act.

B. Self-Regulatory Organization's Statement on Burden on Competition

In accordance with Section 6(b)(8) of the Act,[15] C2 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 existence of 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 Exchange believes competition provides an effective constraint on the market data fees that the Exchange, through MDX, has the ability and the incentive to charge. C2 has a compelling need to attract order flow from market participants in order to maintain its share of trading volume. This compelling need to attract order flow imposes significant pressure on C2 to act reasonably in setting its fees for market data, particularly given that the market participants that will pay such fees often will be the same market participants from whom C2 must attract order flow. These market participants include broker-dealers that control the handling of a large volume of customer and proprietary order flow. Given the portability of order flow from one exchange to another, any exchange that sought to charge unreasonably high data fees would risk alienating many of the same customers on whose orders it depends for competitive survival. C2 currently competes with eleven options exchanges (including C2's affiliate, Chicago Board Options Exchange) for order flow.[16]

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, Customers will not offer the COB Data Feed unless this product will help them maintain current users or attract new ones. For example, a broker-dealer will not choose to offer the COB Data Feed 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 the COB Data Feed from Customers 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

[12] 15 U.S.C. 78f(b)(5).

[13] *See, e.g.,* Securities Exchange Act Release No. 67589 (August 2, 2012), 77 FR 47459 (August 8, 2012) (revising OPRA's definition of the term ''Nonprofessional'').

[14] The Exchange believes the NASDAQ Options Market charges only one distributor fee to allow a subscriber access to its ''NASDAQ ITCH-to-Trade Options'' (ITTO) and ''Best of NASDAQ Options'' (BONO) products. The Exchange believes NASDAQ OMX BX charges only one distributor fee to allow a subscriber access to its ''BX Options Depth of Market'' (BX Depth) and ''BX Options Top of Market'' (BX Top) products.

[15] 15 U.S.C. 78f(b)(8).

[16] The Commission has previously made a finding that the options industry is subject to significant competitive forces. *See, e.g.,* Securities Exchange Act Release No. 59949 (May 20, 2009), 74 FR 25593 (May 28, 2009) (SR–ISE–2009–97) (order approving ISE's proposal to establish fees for a real-time depth of market data offering).

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.

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 options 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.

The Existence of Alternatives. C2 is constrained in pricing the COB Data Feed by the availability to market participants of alternatives to purchasing the COB Data Feed. C2 must consider the extent to which market participants would choose one or more alternatives instead of purchasing the exchange's data. Other options exchanges can and have produced their own complex strategies market data products, and thus are sources of potential competition for MDX. As noted above, ISE, NASDAQ OMX PHLX and NYSE offer market data products that compete with the COB Data Feed. 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.

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 trading decisions. The Exchange believes that the proposed waiver of the Data Fee and the cap on User Fees, which may permit wider distribution of the COB Data Feed at a lower cost to Customers with a large number of Professional and Non-professional Users, may encourage more users to demand and more Customers to choose to offer the COB Data Feed, thereby benefitting Professional and Non-professional Users, including public investors.

The existence of numerous alternatives to the Exchange's products, including 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.

The COB Data Feed is voluntary on the part of the Exchange, which is not required to offer such services, and voluntary on the part of prospective Customers that are not required to use it. The Exchange believes the COB Data Feed offered by MDX will help attract new users and new order flow to the Exchange, thereby improving the Exchange's ability to compete in the market for options order flow and executions.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

The Exchange neither solicited nor received comments on the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A) of the Act [17] and paragraph (f) of Rule 19b–4 [18] thereunder. At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission will institute proceedings to determine whether the proposed rule change should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

[17] 15 U.S.C. 78s(b)(3)(A).

[18] 17 CFR 240.19b–4(f).

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml);* or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–C2–2013–035 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–C2–2013–035. 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–C2–2013–035 and should be submitted on or before November 12, 2013.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[19]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2013–24675 Filed 10–21–13; 8:45 am]

BILLING CODE 8011–01–P

[19] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–70629; File No. SR–Phlx–2013–100]

Self-Regulatory Organizations; NASDAQ OMX PHLX LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Delay the Implementation of the Options Floor Broker Management System

October 8, 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 October 2, 2013, NASDAQ OMX PHLX LLC (''Phlx'' or ''Exchange'') filed with the Securities and Exchange Commission (''SEC'' or ''Commission'') the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of the Substance of the Proposed Rule Change

The Exchange proposes to delay the implementation of its new Options Floor Broker Management System.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The purpose of the proposal is to delay the implementation of the Exchange's enhancements to the Options Floor Broker Management System (''FBMS''). The Exchange received approval to implement the enhancements as of June 1, 2013,[3] and delayed implementation until July 2013[4] and again until September 2013.[5] At this time, the Exchange needs additional time in order to complete the applicable technology work. The delay is not as a result of major technology changes from the original proposal and no rule changes are being made; rather, the Exchange has been working to, generally, provide more useful interfaces for the ultimate user, the Floor Broker.

Accordingly, the Exchange seeks to be able to implement the changes by the end of December 2013; the Exchange will announce the specific date in advance through an Options Trader Alert.

Today, FBMS enables Floor Brokers and/or their employees to enter, route, and report transactions stemming from options orders received on the Exchange. FBMS also establishes an electronic audit trail for options orders represented by Floor Brokers on the Exchange. Floor Brokers can use FBMS to submit orders to Phlx XL, rather than executing the orders in the trading crowd.

With the new FBMS, all options transactions on the Exchange involving at least one Floor Broker would be required to be executed through FBMS. In connection with order execution, the Exchange will allow FBMS to execute two-sided orders entered by Floor Brokers, including multi-leg orders up to 15 legs, after the Floor Broker has represented the orders in the trading crowd. FBMS will also provide Floor Brokers with an enhanced functionality called the complex calculator that will calculate and display a suggested price of each individual component of a multi-leg order, up to 15 legs, submitted on a net debit or credit basis.

The Exchange still intends to implement these enhancements with a trial period of two to four weeks, to be determined by the Exchange, during which the new FBMS enhancements and related rules would operate along with the existing FBMS and rules. The Exchange will announce the beginning and end of the trial period in advance.

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b)

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] Securities Exchange Act Release No. 69471 (April 29, 2013), 78 FR 26096 (May 3, 2013) (SR–Phlx–2013–09).

[4] Securities Exchange Act Release No. 69811 (June 20, 2013), 78 FR 38422 (June 26, 2013) (SR–Phlx–2013–67).

[5] Securities Exchange Act Release No. 70141 (August 8, 2013), 78 FR 49565 (August 14, 2013) (SR–Phlx–2013–83).

of the Act[6] in general, and furthers the objectives of Section 6(b)(5) of the Act[7] in particular, in that it is 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, by enhancing FBMS to make the Exchange's markets more efficient, to the benefit of the investing public. Although the Exchange needs additional time to finalize the enhancements, the delay is expected to be short and will involve advance notice to the Exchange membership.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act. The Exchange continues to believe, as it stated when proposing these enhancements, that these enhancements to FBMS should result in the Exchange's trading floor operating in a more efficient way, which should help it compete with other floor-based exchanges and help the Exchange's Floor Brokers compete with floor brokers on other options exchanges.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were either solicited or received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing proposed rule change does not: (i) Significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, it has become effective pursuant to Section 19(b)(3)(A) of the Act[8] and subparagraph (f)(6) of Rule 19b–4 thereunder.[9]

A proposed rule change filed under Rule 19b–4(f)(6) normally does not become operative for 30 days after the date of filing.[10] 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.[11] The Exchange has requested that the Commission waive the 30-day operative delay so that the Exchange can implement the enhancements once they are ready from a technology perspective.

The Commission believes that the waiver of the 30-day operative delay is consistent with the protection of investors and the public interest as it will clarify that the delayed implementation of the FBMS will be effective and operative immediately. In addition, because the proposal only delays the implementation date of the FBMS and does not make any additional changes to the FBMS itself, it does not raise any novel regulatory issues. Therefore, the Commission designates the proposal operative upon filing.[12]

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is: (i) Necessary or appropriate in the public interest; (ii) for the protection of investors; or (iii) otherwise in furtherance of the purposes of the Act.[13] If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule change should be approved or disapproved.[14]

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–Phlx–2013–100 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–Phlx–2013–100. 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 such filing also will be available for inspection and copying at the principal offices 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–Phlx–2013–100, and should be submitted on or before November 12, 2013.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[15]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2013–24639 Filed 10–21–13; 8:45 am]

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[6] 15 U.S.C. 78f(b).

[7] 15 U.S.C. 78f(b)(5).

[8] 15 U.S.C. 78s(b)(3)(A).

[9] 17 CFR 240.19b–4(f)(6). In addition, Rule 19b–4(f)(6) requires a self-regulatory organization to give the Commission written notice of its intent to file the proposed rule change at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has satisfied this requirement.

[10] 17 CFR 240.19b–4(f)(6)(iii).

[11] *Id.*

[12] For purposes only of waiving the 30-day operative delay, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[13] 15 U.S.C. 78s(b)(3)(C).

[14] *Id.*

[15] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–70600; File No. SR–EDGA–2013–30]

Self-Regulatory Organizations; EDGA Exchange, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Relating to Amendments to the EDGA Exchange, Inc. Fee Schedule

October 2, 2013.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the ''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on September 30, 2013, EDGA Exchange, Inc. (the ''Exchange'' or ''EDGA'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I, II and III below, which items have been prepared by the 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 its fees and rebates applicable to Members [3] of the Exchange pursuant to EDGA Rule 15.1(a) and (c) (''Fee Schedule'') to decrease the rebate for orders yielding Flag RZ. The text of the proposed rule change is available on the Exchange's Internet Web site at *www.directedge.com,* at the Exchange's principal office, and at the Public Reference Room of the Commission.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The self-regulatory organization has prepared summaries, set forth in sections A, B and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and the Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend its Fee Schedule to decrease the rebate for orders yielding Flag RZ. In securities priced at or above $1.00, the Exchange currently provides a rebate of $0.0025 per share for Members' orders that yield Flag RZ, which routes to the BATS Exchange Inc. (''BATS'') and adds liquidity. The Exchange proposes to amend its Fee Schedule to decrease this rebate to $0.0020 per share for Members' orders that yield Flag RZ. The proposed change represents a pass through of the rate that Direct Edge ECN LLC (d/b/a DE Route) (''DE Route''), the Exchange's affiliated routing broker-dealer, is rebated for routing orders to BATS when it does not qualify for a volume tiered rebate. When DE Route routes to BATS, it is rebated a standard rate of $0.0020 per share.[4] DE Route will pass through this rate on BATS to the Exchange and the Exchange, in turn, will pass through this rate to its Members. The Exchange notes that the proposed change is in response to BATS's October 2013 fee change where BATS decreased the rebate it provides its customers, such as DE Route, from a rebate of $0.0025 per share to a rebate of $0.0020 per share that are routed to BATS.[5]

Implementation Date

The Exchange proposes to implement these amendments to its Fee Schedule on October 1, 2013.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with the objectives of Section 6 of the Act,[6] in general, and furthers the objectives of Section 6(b)(4),[7] in particular, as it is designed to provide for the equitable allocation of reasonable dues, fees and other charges among its Members and other persons using its facilities.

The Exchange believes that its proposal to decrease the pass through rebate for Members' orders that yield Flag RZ from $0.0025 to $0.0020 per share represents an equitable allocation of reasonable dues, fees, and other charges among Members and other persons using its facilities because the Exchange does not levy additional fees or offer additional rebates for orders that it routes to BATS through DE Route. Prior to BATS's October 2013 fee change, BATS provided DE Route a rebate of $0.0025 per share for orders yielding Flag RZ, which DE Route passed through to the Exchange and the Exchange passed through to its Members. In October 2013, BATS decreased the standard rebate it provides its customers, such as DE Route, from a rebate of $0.0025 per share to a rebate of $0.0020 per share for orders that are routed to BATS.[8] Therefore, the Exchange believes that the proposed change in Flag RZ from a rebate of $0.0025 per share to a rebate of $0.0020 per share is equitable and reasonable because it accounts for the pricing changes on BATS. In addition, the proposal allows the Exchange to continue to charge its Members a pass-through rate for orders that are routed to BATS. The Exchange notes that routing through DE Route is voluntary. Lastly, the Exchange also believes that the proposed amendment is non-discriminatory because it applies uniformly to all Members.

B. Self-Regulatory Organization's Statement on Burden on Competition

These proposed rule changes do not impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. The Exchange does not believe that any of these changes represent a significant departure from previous pricing offered by the Exchange or pricing offered by the Exchange's competitors. Additionally, Members may opt to disfavor EDGA's pricing if they believe that alternatives offer them better value. Accordingly, the Exchange does not believe that the proposed changes will impair the ability of Members or competing venues to maintain their competitive standing in the financial markets.

The Exchange believes that its proposal to pass through a rebate of $0.0020 per share for Members' orders that yield Flag RZ would increase intermarket competition because it offers customers an alternative means to route to BATS for the same price as entering orders on BATS directly. The Exchange believes that its proposal would not burden intramarket

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] The term ''Member'' is defined as ''any registered broker or dealer, or any person associated with a registered broker or dealer, that has been admitted to membership in the Exchange. A Member will have the status of a ''member'' of the Exchange as that term is defined in Section 3(a)(3) of the Act.'' *See* Exchange Rule 1.5(n).

[4] The Exchange notes that to the extent DE Route does or does not achieve any volume tiered discount on BATS, its rate for Flag RZ will not change.

[5] *See* BATS Exchange Pricing Effective October 1, 2013, *http://cdn.batstrading.com/resources/fee_schedule/2013/BATS-BZX-Exchange-Pricing-Effective-October-1-2013.pdf* (offering a standard, non-tiered rebate of $0.0020 per share).

[6] 15 U.S.C. 78f.

[7] 15 U.S.C. 78f(b)(4).

[8] *See* BATS Exchange Pricing Effective October 1, 2013, *http://cdn.batstrading.com/resources/fee_schedule/2013/BATS-BZX-Exchange-Pricing-Effective-October-1-2013.pdf* (offering a standard, non-tiered rebate of $0.0020 per share).

competition because the proposed rate would apply uniformly to all Members.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

The Exchange has not solicited, and does not intend to solicit, comments on this proposed rule change. The Exchange has not received any unsolicited written comments from Members or other interested parties.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A) of the Act [9] and Rule 19b–4(f)(2) [10] thereunder. 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.

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–EDGA–2013–30 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–EDGA–2013–30. 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–EDGA–2013–30 and should be submitted on or before November 12, 2013.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[11]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2013–24554 Filed 10–21–13; 8:45 am]

BILLING CODE 8011–01–P

[9] 15 U.S.C. 78s(b)(3)(A).

[10] 17 CFR 240.19b–4(f)(2).

[11] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–70626; File No. SR–EDGX–2013–36]

Self-Regulatory Organizations; EDGX Exchange, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Amend EDGX Rules 3.2, 13.3, and Adopt Rule 12.14, Front Running of Block Transactions To Conform With the Rules of Other Self-Regulatory Organizations

October 8, 2013.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the ''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on September 26, 2013, EDGX Exchange, Inc. (the ''Exchange'' or ''EDGX'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I and II below, which items have been prepared by the 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) Amend Rule 3.22, Proxy Voting; (ii) amend Rule 13.3, Forwarding of Issuer Materials; and (iii) adopt new Rule 12.14, Front Running of Block Transactions, to conform with the rules of the Financial Industry Regulatory Authority, Inc. (''FINRA'') for purposes of an agreement between the Exchange and FINRA pursuant to Rule 17d-2 under the Act.[3] All of the changes described herein are applicable to EDGX Members. The text of the proposed rule change is available on the Exchange's Internet Web site at *www.directedge.com,* at the Exchange's principal office, and at the Public Reference Room of the Commission.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The self-regulatory organization has prepared summaries, set forth in sections A, B and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and the Statutory Basis for, the Proposed Rule Change

1. Purpose

Pursuant to Rule 17d–2 under the Act,[4] the Exchange and FINRA entered into an agreement to allocate regulatory responsibility for common rules (the ''17d–2 Agreement''). The 17d–2 Agreement covers common members of the Exchange and FINRA and allocates to FINRA regulatory responsibility, with respect to common members, for the following: (i) examination of common members of the Exchange and FINRA for compliance with federal securities laws, rules and regulations and rules of the Exchange that the Exchange has certified as identical or substantially similar to FINRA rules; (ii) investigation of common members of EDGX and FINRA for violations of federal securities laws, rules or regulations, or Exchange rules that the Exchange has

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 17 CFR 240.17d–2.

[4] 17 CFR 240.17d–2.

certified as identical or substantially identical to a FINRA rule; and (iii) enforcement of compliance by common members with the federal securities laws, rules and regulations, and the rules of the Exchange that the Exchange has certified as identical or substantially similar to FINRA rules.[5]

The 17d–2 Agreement included a certification by the Exchange that states that the requirements contained in certain Exchange rules are identical to, or substantially similar to, certain FINRA rules that have been identified as comparable. To conform with comparable FINRA rules for purposes of the 17d–2 Agreement, the Exchange proposes to: (i) Amend Rule 3.22, Proxy Voting; (ii) amend Rule 13.3, Forwarding of Issuer Materials; and (iii) adopt new Rule 12.14, Front Running of Block Transactions.

Rule 3.22, Proxy Voting and Rule 13.3, Forwarding of Issuer Materials

The Exchange proposes to amend Rules 3.22 and 13.3 concerning proxy voting and forwarding of proxy materials to align these rules with FINRA Rule 2251.[6] Section 957 of the Dodd-Frank Act amended Section 6(b) of the Act[7] to require the rules of each national securities exchange prohibit any member organization that is not the beneficial owner of a security registered under Section 12 of the Act[8] from granting a proxy to vote the security in connection with certain stockholder votes, unless the beneficial owner of the security has instructed the member organization to vote the proxy in accordance with the voting instructions of the beneficial owner. The stockholder votes covered by Section 957 include any vote with respect to: (i) The election of a member of the board of directors of an issuer (other than an uncontested election of a director of an investment company registered under the Investment Company Act); (ii) executive compensation; or (iii) any other significant matter, as determined by the Commission, by rule. The Exchange carries out the requirements of Section 957 of the Dodd-Frank Act under paragraph (a) to Exchange Rule 3.22 which prohibits a Member from giving a proxy to vote stock that is registered in its name, unless: (i) Such Member is the beneficial owner of such stock; (ii) such proxy is given pursuant to the written instructions of the beneficial owner; or (iii) such proxy is given pursuant to the rules of any national securities exchange or association of which it is a member provided that the records of the Member clearly indicate the procedure it is following.

Similarly, the Exchange proposes to add new paragraph (c) to Rule 3.22, based entirely on FINRA Rule 2251(d), to explicitly state that a Member may give a proxy to vote any stock registered in its name if such Member holds such stock as executor, administrator, guardian, trustee, or in a similar representative or fiduciary capacity with authority to vote. Proposed paragraph (c) would also state that a Member that has in its possession or within its control stock registered in the name of another Member and that desires to transmit signed proxies pursuant to the provisions of Rule 13.3, shall obtain the requisite number of signed proxies from such holder of record. Lastly, proposed paragraph (c) would also state that, notwithstanding the foregoing: (1) any Member designated by a named Employee Retirement Income Security Act of 1974 (as amended) (''ERISA'') Plan fiduciary as the investment manager of stock held as assets of the ERISA Plan may vote the proxies in accordance with the ERISA Plan fiduciary responsibilities if the ERISA Plan expressly grants discretion to the investment manager to manage, acquire, or dispose of any plan asset and has not expressly reserved the proxy voting right for the named ERISA Plan fiduciary; and (2) any designated investment adviser may vote such proxies.

To promote consistency with FINRA Rule 2251, the Exchange proposes to add language to the existing text of Rule 13.3 to state that for beneficial owners, the proxy materials or other materials to be forwarded on behalf of an issuer can be sent to the beneficial owner's designated investment adviser, if applicable. In conjunction with this change, the Exchange proposes to adopt the definition of ''designated investment adviser'' set forth in FINRA Rule 2251(f) as Interpretation and Policy .01 to Rule 3.22.

The Exchange also proposes modifying the text of Rule 13.3, which currently would require forwarding of proxy material but which does not explicitly reference such material, to add such an explicit reference. The Exchange further proposes to modify the text of Rule 13.3 to reference ''security holders,'' rather than stockholders, in the initial sentence, to ensure that the coverage of the rule applies to all securities, including debt securities to the extent applicable, and not just equity securities. The Exchange also proposes to incorporate certain language from FINRA Rule 2251 that provides additional detail regarding the material that must be provided to beneficial owners in the event of a proxy solicitation. Specifically, Rule 13.3 as amended would state that in the event of a proxy solicitation, materials provided pursuant to the Rule shall include a signed proxy indicating the number of shares held for such beneficial owner and bearing a symbol identifying the proxy with proxy records maintained by the Member, and a letter informing the beneficial owner (or the beneficial owner's designated investment adviser) of the time limit and necessity for completing the proxy form and forwarding it to the person soliciting proxies prior to the expiration of the time limit in order for the shares to be represented at the meeting. The Rule would also require a Member to furnish a copy of the symbols to the person soliciting the proxies and shall also retain a copy thereof pursuant to the provisions of Exchange Act Rule 17a–4. Finally, the Exchange proposes to modify the title of Rule 13.3 to include a reference to proxy voting.

The Exchange believes that these changes will help to avoid confusion among Members of the Exchange that are also members of FINRA by further aligning the Exchange's rules with FINRA Rule 2251. The proposed changes to Rules 3.22 and 13.3 are designed to enable the Exchange to incorporate Rules 3.22 and 13.3 into the 17d–2 Agreement, further reducing duplicative regulation of Members that are also members of FINRA.

Rule 12.14, Front Running of Block Transactions

The Exchange proposes to adopt new Rule 12.14, Front Running of Block Transactions, which would require that Members and persons associated with a Member shall comply with FINRA Rule 5270 as if such Rule were part of the Exchange's Rules. The proposed rule text is substantially the same as IM–2110–3 of the Nasdaq Stock Market LLC (''Nasdaq''), which has been approved by the Commission.[9] FINRA Rule 5270

[5] *See* Securities and Exchange Release No. 61698 (March 12, 2010), 75 FR 13151 (March 18, 2010) (approving File No. 10–196).

[6] Similarly, on September 30, 2011, BATS Y-Exchange, Inc. (''BYX'') amended their Rule 13.3 to align it with FINRA Rule 2251. *See* Securities Exchange Act Release No. 65448 (September 30, 2011), 76 FR 62103 (October 6, 2011) (Notice of Filing and Order Granting Accelerated Approval of Proposed Rule Change to Amend BYX Rule 13.3 to Prohibit Members from Voting Uninstructed Shares on Certain Matters and to Align BYX Rule 13.3, Concerning the Forwarding of Proxy and Other Material and Proxy Voting, with FINRA Rule 2251).

[7] 15 U.S.C. 78f(b).

[8] 15 U.S.C. 78l.

[9] *See* Securities Exchange Act Release No. 53128 (January 13, 2006), 71 FR 3550 (January 23, 2006) (order approving Nasdaq's application for registration as a national securities exchange). *See*

states that no FINRA member or person associated with a member shall cause to be executed an order to buy or sell a security or a related financial instrument [10] when such member or person associated with a member has material, non-public market information concerning an imminent block transaction [11] in that security, a related financial instrument or a security underlying the related financial instrument.

FINRA Rule 5270 includes exceptions to the general prohibitions of the rule where a member can demonstrate that a transaction is unrelated to the material, non-public market information received in connection with the customer order. The Supplementary Material to FINRA Rule 5270 includes an illustrative list of potentially permitted transactions as examples of transactions that, depending upon the circumstances, may be unrelated to the customer block order. These types of transactions may include: where the member has information barriers established to prevent internal disclosure of such information; actions in the same security related to a prior customer order in that security; transactions to correct bona fide errors; or transactions to offset odd-lot orders.

In addition, Rule 5270 does not preclude transactions undertaken for the purpose of fulfilling, or facilitating the execution of, the customer block order. However, when engaging in trading activity that could affect the market for the security that is the subject of the customer block order, the member must minimize any potential disadvantage or harm in the execution of the customer's order, must not place the member's financial interests ahead of those of its customer, and must obtain the customer's consent to such trading activity. A member may obtain its customers' consent through affirmative written consent or through the use of a negative consent letter. The negative consent letter must clearly disclose to the customer the terms and conditions for handling the customer's orders; if the customer does not object, then the member may reasonably conclude that the customer has consented and the member may rely on such letter for all or a portion of the customer's orders. In addition, a member may provide clear and comprehensive oral disclosure to and obtain consent from the customer on an order-by-order basis, provided that the member documents who provided such consent and such consent evidences the customer's understanding of the terms and conditions for handling the customer's order.

The Exchange also proposes to state in new Rule 12.14 that although the prohibitions in Rule 5270 are limited to imminent block transactions, the front running of other types of orders that place the financial interests of the Member or persons associated with a Member ahead of those of its customer or the misuse of knowledge of an imminent customer order may violate other Exchange rules, including Rule 3.1 and Rule 12.6, or provisions of the federal securities laws.

2. Statutory Basis

The Exchange believes that proposed rule change is consistent with Section 6(b)(5) of the Act,[12] 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, and to remove impediments to and perfect the mechanism of a free and open market and a national market system. The Exchange believes that the proposed rule change will further these requirements by eliminating duplicative and unnecessary rules and advancing the development of a more efficient and effective Exchange Rulebook. The proposed rule change would provide greater harmonization between Exchange and FINRA rules of similar purpose, resulting in greater uniformity and less burdensome and more efficient regulatory compliance. As such, the proposed rule change would foster cooperation and coordination with persons engaged in facilitating transactions in securities and would remove impediments to and perfect the mechanism of a free and open market and a national market system.

Rule 3.22, Proxy Voting and Rule 13.3, Forwarding of Issuer Materials

The Exchange believes that proposed amendments to Rules 3.22 and 13.3 are consistent with Section 6(b)(5) of the Act,[13] because they remove impediments to, and perfect the mechanism of, a free and open market and a national market system by providing for consistent regulation for Members of the Exchange that are members of other SROs with analogous rules.[14] The proposed changes to Rules 3.22 and 13.3 and proposed Interpretation and Policy .01 are consistent with FINRA Rule 2251. Accordingly, the Exchange believes that the proposal fosters cooperation because, to the extent the Exchange is able to incorporate Rule 13.3 into the 17d-2 Agreement as a rule in common between the Exchange and FINRA, then FINRA will conduct a review for compliance with the common rule to the extent a Member of the Exchange is also a member of FINRA, and the Exchange will not conduct a duplicative review of the same activity by that Member. Finally, the Exchange believes that the proposal will contribute to investor protection by defining important requirements to which Members must abide with respect to proxy solicitation, proxy voting and delivery of proxy materials.

Rule 12.14, Front Running of Block Transactions

The Exchange believes that new Rule 12.14 is consistent with Section 6(b)(5) of the Act [15] which requires, among other things, that the Exchange rules be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, and, in general, to protect investors and the public interest. By incorporating FINRA Rule 5270, new Rule 12.14 prohibits front running trading activity that the Exchange believes is inconsistent with just and equitable principles of trade while also ensuring that Members may continue to engage in transactions that do not present the risk of abusive trading practices that the rule is intended to prevent. The Exchange believes that Rule 12.14 would enhance the protection of customer orders by addressing various types of abusive

also Securities Exchange Act Release No. 58069 (June 30, 2008), 73 FR 39360 (July 9, 2008) (SR–Nasdaq–2008–054) (Notice of Filing and Immediate Effectiveness). Securities Exchange Act Release No. 34–67774 (September 4, 2012), 77 FR 55519 (September 12, 2012) (Approval Order).

[10] FINRA Rule 5270 defines the term ''related financial instrument'' as ''any option, derivative, security-based swap, or other financial instrument overlying a security, the value of which is materially related to, or otherwise acts as a substitute for, such security, as well as any contract that is the functional economic equivalent of a position in such security.''

[11] Under FINRA Rule 5270, a transaction involving 10,000 shares or more of a security, an underlying security, or a related financial instrument overlying such number of shares, is generally deemed to be a block transaction, although a transaction of fewer than 10,000 shares could be considered a block transaction. A block transaction that has been agreed upon does not lose its identity as such by arranging for partial executions of the full transaction in portions which themselves are not of block size if the execution of the full transaction may have a material impact on the market.

[12] 15 U.S.C. 78f(b)(5).

[13] *Id.*

[14] *See, e.g.,* FINRA Rule 2251, BYX Rule 13.3, ISE Rule 421, NYSE Arca Rule 9.4, and Nasdaq Rule 2251.

[15] 15 U.S.C. 78f(b)(5).

trading that may be intended to take advantage of customer orders. As previously noted, the proposed rule text is substantially similar to Nasdaq's IM–2110–3, which has been approved by the Commission.[16] By adopting Rule 12.14, the Exchange believes that imminent customer block orders would be better protected and that the proposed rule change will prevent fraudulent and manipulative acts and practices, promote just and equitable principles of trade, and better protect investors and the public interest.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change would impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. The proposed rule change is not designed to address any competitive issues but rather is designed to provide greater harmonization among Exchange and FINRA rules of similar purpose, resulting in less burdensome and more efficient regulatory compliance for common members and facilitating FINRA's performance of its regulatory functions under the 17d-2 Agreement.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

The Exchange has neither solicited nor received written comments on the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing proposed rule change does not: (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[17] and Rule 19b–4(f)(6) thereunder.[18]

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 Commission believes that waiving the 30-day operative delay is consistent with the protection of investors and the public interest because it will help foster consistency between the rulebooks of the self-regulatory organizations.[19] 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–EDGX–2013–36 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–EDGX–2013–36. 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–EDGX–2013–36 and should be submitted on or before November 12, 2013.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[20]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2013–24635 Filed 10–21–13; 8:45 am]

BILLING CODE 8011–01–P

[16] *See* Securities Exchange Act Release No. 53128 (January 13, 2006), 71 FR 3550 (January 23, 2006) (order approving Nasdaq's application for registration as a national securities exchange). *See also* Securities Exchange Act Release No. 58069 (June 30, 2008), 73 FR 39360 (July 9, 2008) (SR-Nasdaq-2008–054) (Notice of Filing and Immediate Effectiveness). Securities Exchange Act Release No. 34–67774 (September 4, 2012), 77 FR 55519 (September 12, 2012) (Approval Order).

[17] 15 U.S.C. 78s(b)(3)(A).

[18] 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.

[19] 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).

[20] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

Self-Regulatory Organizations; Chicago Board Options Exchange, Incorporated; Notice of Filing of a Proposed Rule Change and Amendment No. 1 Thereto Relating to the Short Term Option Series Program

[Release No. 34–70685; File No. SR–CBOE–2013–096]

October 15, 2013. Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'')[1] and Rule 19b–4

[1] 15 U.S.C. 78s(b)(1).

thereunder,[2] notice is hereby given that on October 2, 2013, Chicago Board Options Exchange, Incorporated (''CBOE'' or ''Exchange'') filed with the Securities and Exchange Commission (''SEC'' or ''Commission'') the proposed rule change as described in Items I and II, below, which Items have been prepared by the Exchange. On October 15, 2013, the Exchange filed Amendment No. 1 to the proposal.[3] The Commission is publishing this notice to solicit comments on the proposed rule change, as modified by Amendment No. 1 thereto, from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of the Substance of the Proposed Rule Change

The Exchange is proposing to amend Exchange Rules 5.5(d) and 24.9(a)(2)(A) to allow the Exchange to list five Short Term Option Series at one time and to specify that new series of Short Term Option Series may be listed up to, and including on, the expiration date. The text of the proposed rule change is available on the Exchange's Web site (*http://www.cboe.com/AboutCBOE/CBOELegalRegulatoryHome.aspx*), at the Exchange's Office of the Secretary, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and the Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and the Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange is proposing to amend Exchange Rules 5.5(d) and 24.9(a)(2)(A). Currently the Exchange's Rules allow for the Exchange to list options in the Short Term Option Series Program (''Weeklys Program'' or ''Weekly option'') ''on each of the next five consecutive Fridays that are business days.''[4] The filing which gave the Exchange authority to list five Weekly option expirations specifically states that ''the total number of consecutive expirations will be five (5), including any existing monthly or quarterly expirations'' for the Weeklys Program.[5] The Exchange is now proposing to make explicit that the next five Weekly options may listed at one time, not including the monthly or quarterly options. The Exchange is also proposing to codify an existing practice by adding language stating that strikes may be listed up until and on the day of expiration.

As proposed, the Exchange will have the ability to list a total of five Weeklys and that count of five would not include monthly or quarterly option expirations. The Exchange notes that this proposal would restrict the five listed Weeklys to those closest to the Short Term Option Opening Date. For example, if a class of options has five Weeklys listed with expiration dates in July, the other two listed expiration dates may not be in December. The Exchange believes that allowing otherwise would undermine the purpose of the Short Term Option Program.

As examples of how this would work in practice, consider a situation in which a quarterly option expires week 1 and a monthly option expire week 3 from now, the proposal would allow the following expirations: week 1 quarterly option, week 2 Weekly option, week 3 monthly option, week 4 Weekly option, week 5 Weekly option, week 6 Weekly option, and week 7 Weekly option.[6] As another example, if a quarterly option expires week 3 and a monthly option expires week 5, the following expirations would be allowed: week 1 Weekly option, week 2 Weekly option, week 3 quarterly option, week 4 Weekly option, week 5 monthly option, week 6 Weekly option, week 7 Weekly option.[7]

Next, the Exchange is proposing to add language to Rules 5.5(d) and 24.9(a)(2)(A) to state that additional series of Weekly options may be added up to, and including on, the expiration date of the series.[8] Currently, Exchange rules state that the Exchange ''may open up to 20 initial series for each option class that participates in the Short Term Option Series Program'' and ''up to 10 additional series for each option class that participates in the Short Term Option Series Program'' however the Exchange's rules are silent on when series may be added.[9] In practice, however, the Exchange, along with the other exchanges, list additional series until the expiration day.[10] The Exchange believes that codifying this provision will clearly state authority which is not currently explicitly stated to add series up until the day of expiration which is in the current rules. In addition, given the short lifespan of Weeklys, the Exchange believes that the ability to list new series of options intraday is appropriate.

The Exchange notes that the Weeklys Program has been very well-received by market participants, in particular by retail investors. The Exchange believes that the current proposed revision to the Weeklys Program will permit the Exchange to meet increased customer demand and provide market participants with the ability to hedge in a greater number of option classes and series. In addition, the proposed changes will codify an existing practice in the Exchange's rules.

2. Statutory Basis

The Exchange believes the proposed rule change is consistent with the Securities Exchange Act of 1934 (the ''Act'') and the rules and regulations thereunder applicable to the Exchange and, in particular, the requirements of Section 6(b) of the Act.[11] Specifically, the Exchange believes the proposed rule change is consistent with the Section 6(b)(5)[12] requirements that the rules of an exchange be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling,

[2] 17 CFR 240.19b–4.

[3] In Amendment No. 1, the Exchange proposed to delete the phrase ''for each series'' in the proposed rule text for Rule 5.5(d) located on page three of the 19b–4 and page 19 of the *Exhibit 5* of the original filing and in the proposed rule text for Rule 24.9(a)(2)(A) located on page four of the 19b–4 and page 20 of the *Exhibit 5* of the original filing.

[4] *See* Exchange Rules 5.5(d) and 24.9(a)(2)(A).

[5] *See* Securities Exchange Act Release No. 68242 (November 15, 2012), 77 FR 69908 (November 21, 2012) (notice of SR–CBOE–2012–110 which was a rule filing based on based on an approved filings submitted by NYSE Arca, Inc. (''NYSE Arca'') and NYSE MKT, LLC (''NYSE MKT'')).

[6] The proposal would not allow, for example, for nothing to be listed week 7 but week 8 a Weekly option.

[7] *Id.*

[8] The Exchange is also proposing to add language stating that the proposed provisions in Rules 5.5(d)(4) and 24.9(a)(2)(A)(iv) will not contradict current provisions in CBOE Rules. More specifically, the proposed provisions would not contradict 5.5.04 and 24.9.01(c) respectively. The Exchange believes this addition will eliminate any confusion about when additional series may be added in the Weeklys Program in comparison to other Exchange listing programs.

[9] *See* Exchange Rules 5.5(d)(3), 5.5.(d)(4), 24.9(a)(2)(A)(iii), and 24.9(a)(2)(A)(iv).

[10] The Exchange notes that the Options Clearing Corporation (''OCC'') has the ability to accommodate series in the Weeklys Program added intraday.

[11] 15 U.S.C. 78f(b).

[12] 15 U.S.C. 78f(b)(5).

processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest. Additionally, the Exchange believes the proposed rule change is consistent with the Section 6(b)(5) [13] requirement that the rules of an exchange not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

In particular, the Exchange believes that expanding the Weeklys Program will result in a continuing benefit to investors by giving them more flexibility to closely tailor their investment decisions and hedging decisions in a greater number of securities. The Exchange also believes that expanding the Weeklys Program will provide the investing public and other market participants with additional opportunities to hedge their investment thus allowing these investors to better manage their risk exposure.

With regard to the impact of this proposal on system capacity, the Exchange has analyzed its capacity and represents that it and the Options Price Reporting Authority (''OPRA'') have the necessary systems capacity to handle any potential additional traffic associated with this current amendment to the Weeklys Program. The Exchange believes that its TPHs will not have a capacity issue as a result of this proposal. The Exchange also represents that it does not believe this expansion will cause fragmentation to liquidity.

B. Self-Regulatory Organization's Statement on Burden on Competition

CBOE does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. The Exchange believes this proposed rule change will benefit investors by providing additional methods to trade options on the liquid securities, and providing greater ability to mitigate risk in managing large portfolios. Specifically, the Exchange believes that investors would benefit from the introduction and availability of additional series by more series available as an investing tool. The Exchange also believes the proposed changes will provide investors with an additional tool for hedging risk in highly liquid securities. For all the reasons stated, the Exchange does not believe that the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act, and believes the proposed change will enhance competition.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

The Exchange neither solicited nor received comments on the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 45 days of the date of publication of this notice in the **Federal Register** or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the Exchange consents, the Commission shall: (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–CBOE–2013–096 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–CBOE–2013–096. 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 on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of such filing also will be available for inspection and copying at the principal offices 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–CBOE–2013–096, and should be submitted on or before November 12, 2013.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[14]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2013–24676 Filed 10–21–13; 8:45 am]

BILLING CODE 8011–01–P

[13] *Id.*

[14] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–70672; File No. SR–BOX–2013–47]

Self-Regulatory Organizations; BOX Options Exchange LLC; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Amend BOX Rule 8040

October 11, 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 October 2, 2013, BOX Options Exchange LLC (the ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I and II below, which Items have been prepared by the 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 BOX Rule 8040 (Obligations of Market Makers) to widen [sic] pre-opening

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

phase spread differential requirement imposed on Market Makers. The text of the proposed rule change is available from the principal office of the Exchange, at the Commission's Public Reference Room and also on the Exchange's Internet Web site at *http://boxexchange.com.*

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The self-regulatory organization has prepared summaries, set forth in Sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend BOX Rule 8040(a)(7) (Obligations of Market Makers) to widen the pre-opening phase spread differential requirement imposed on Market Makers.

The Exchange recently eliminated the pre-opening quoting obligations imposed on BOX Market Makers.[3] This rule was amended to put BOX Market Makers on par with market makers on other options exchanges that do not have pre-market continuous quoting obligations. In this filing, the Exchange did not adjust the corresponding pre-opening phase spread differential requirement for Market Makers in Rule 8040 (a)(7). The purpose of this filing is to remove the narrower pre-opening phase spread differential requirements imposed on Market Makers in Rule 8040(a)(7). Instead, Market Makers who choose to quote in the pre-opening phase will be required to quote within the standard bid ask-differential of $5. The Exchange believes that the narrower pre-opening phase spread differential requirements are no longer necessary now that Market Makers are not required to quote during the pre-opening. Additionally, applying the standard bid-ask differential requirement to both the pre-opening phase and the continuous trading phase will eliminate any potential for confusion about Market Maker obligations. Finally, this change could promote Market Maker quoting during the pre-opening and, therefore, expedite the opening of all options series on the Exchange promptly after the opening of the underlying security.

The Exchange further believes that applying the standard bid-ask differential to all phases of trading is appropriate because it will more closely align the Exchange's rules with the rules of other option exchanges that do not have pre-opening quoting requirements, specifically Nasdaq Stock Exchange Options Market (''NOM'').[4]

In addition, the Exchange proposes to remove an exception to the standard bid-ask differential requirement in Rule 8040(a)(7)(ii). Rule 8040(a)(7)(ii) is no longer necessary as the bids and asks for all indices are now disseminated to the Exchange by outside service providers.[5]

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act[6] in general, and furthers the objectives of Section 6(b)(5) of the Act[7] in particular, in that it is 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. With this proposal, BOX Maker Makers will no longer be required to comply with narrower spread differential requirements if they choose to quote in the pre-opening phase. The Exchange believes that removing this more burdensome obligation could result in more quoting during the pre-opening phase, thereby increasing liquidity on BOX. The Exchange also believes it is appropriate to make this amendment to its rules so that Participants and investors have a clear and accurate understanding of the Market Maker obligations required under the Exchange's rules. By removing the rule text, the Exchange is eliminating any potential for confusion about Market Maker obligations during the pre-opening phase.

Further, the proposed change conforms BOX's Market Maker obligations to the requirements of a competing exchange,[8] which will promote the application of consistent trading practices across markets that provide Market Makers with similar benefits.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act, but rather eliminates any investor confusion and could increase competition by attracting liquidity. In this regard and as indicated above, the Exchange notes that the rule change is being proposed as a competitive response to a recent filing submitted by NOM.[9]

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

The Exchange has neither solicited nor received comments on the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the proposed rule change does not (i) significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate if consistent with the protection of investors and the public interest, the proposed rule change has become effective pursuant to Section 19(b)(3)(A) of the Act[10] and Rule 19b–4(f)(6) thereunder.[11] 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.

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.

[3] *See* Securities Exchange Act Release No. 68412 (December 12, 2012), 77 FR 74902 (December 18, 2012) (SR–BOX–2012–022) (Notice of Filing and Immediate Effectiveness of a Proposed Rule Change to Eliminate Market Maker Pre-Opening Obligations on BOX).

[4] *See* Chapter VII, Section 6 of the NOM Rules.

[5] *See* IM–6010–1 to BOX Rule 6010.

[6] 15 U.S.C. 78f(b).

[7] 15 U.S.C. 78f(b)(5).

[8] *See supra,* note 4.

[9] *Id.*

[10] 15 U.S.C. 78s(b)(3)(A).

[11] 17 CFR 240.19b–4(f)(6). As required under Rule 19b–4(f)(6)(iii), the Exchange provided the Commission with written notice of its intent to file the proposed rule change, along with a brief description and the 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.

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–BOX–2013–47 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–BOX–2013–47. 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–BOX–2013–47 and should be submitted on or before November 12, 2013.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[12]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2013–24665 Filed 10–21–13; 8:45 am]

BILLING CODE 8011–01–P

[12] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–70676; File No. SR–FINRA–2013–042]

Self-Regulatory Organizations; Financial Industry Regulatory Authority, Inc.; Notice of Filing of Proposed Rule Change To Require Alternative Trading Systems To Report Volume Information to FINRA and Use Unique Market Participant Identifiers

October 11, 2013.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the ''Act'')[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on September 30, 2013, the Financial Industry Regulatory Authority, Inc. (''FINRA'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by FINRA. 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

FINRA is proposing to (i) adopt FINRA Rule 4552 to require each alternative trading system (''ATS'') to report to FINRA weekly volume information and number of trades regarding securities transactions within the ATS; and (ii) amend FINRA Rules 6160, 6170, 6480, and 6720 to require each ATS to acquire and use a single, unique market participant identifier (''MPID'') when reporting information to FINRA. FINRA will make the reported volume and trade count information for equity securities publicly available on its Web site.

The text of the proposed rule change is available on FINRA's Web site at *http://www.finra.org,* at the principal office of FINRA 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, FINRA 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. FINRA has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

FINRA is proposing a rule change to adopt new FINRA Rule 4552, which requires each ATS[3] to report to FINRA volume information regarding transactions within the ATS in securities (both equity and debt) subject to FINRA trade reporting obligations. As described below, each ATS will be required to report to FINRA the aggregate weekly volume of transactions and number of trades within the ATS by security, and FINRA will make the reported information for equity securities publicly available on a delayed basis. The proposed rule change also requires that each ATS use a single, unique MPID when reporting information to FINRA. The proposed rule change will enhance FINRA's regulatory and automated surveillance efforts by enabling it to obtain more granular information regarding activity conducted on or through individual ATSs as well as FINRA's ability to determine whether an ATS is subject to any provisions of Regulation ATS that are triggered by exceeding volume thresholds. The proposed rule change will also enhance transparency into the over-the-counter market.

(1) Background

Regulation ATS requires an ATS to provide to a national securities exchange or association for display the prices and sizes of orders at the ATS's highest buy price and lowest sell price for any NMS stock, displayed to more than one person in the ATS, with respect to which the ATS has had an average daily trading volume of 5% or more of the aggregate average daily share volume for such NMS stock during at least four of the preceding six

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] Regulation ATS defines an alternative trading system as ''any organization, association, person, group of persons, or system: (1) That constitutes, maintains, or provides a market place or facilities for bringing together purchasers and sellers of securities or for otherwise performing with respect to securities the functions commonly performed by a stock exchange within the meaning of [Exchange Act Rule 3b–16]; and (2) That does not: (i) Set rules governing the conduct of subscribers other than the conduct of such subscribers' trading on such organization, association, person, group of persons, or system; or (ii) Discipline subscribers other than by exclusion from trading.'' 17 CFR 242.300(a). The proposed rule change applies to any alternative trading system, as that term is defined in Regulation ATS, that has filed a Form ATS with the Commission.

calendar months.[4] Regulation ATS also requires any such ATS to provide broker-dealers with fair access to the ATS's services to effect a transaction in any such NMS stock.[5]

Regulation ATS requires each ATS to report to the SEC on a quarterly basis, via Form ATS–R, its total unit volume of transactions and total dollar volume of transactions, not for each particular security issue, but only for each category of securities covered by the rule.[6] Although the volume reporting is not on a security-by-security basis and is only based on quarterly volume, the Regulation ATS fair access requirement and the order display and execution access requirements are triggered on a security-by-security basis for equity securities[7] and are based on monthly volume numbers rather than quarterly volume numbers.[8] Consequently, the current ATS reporting obligations do not provide sufficient information on which to determine whether an ATS has exceeded the volume thresholds in Regulation ATS.

Current trade reporting data also does not provide a definitive way to assess whether an ATS has reached the volume thresholds in Regulation ATS. Although each over-the-counter securities transaction in which an ATS is involved must be reported under FINRA rules, a broker-dealer that operates an ATS may report trades executed within a particular ATS using the same MPID it uses for transactions it executes in other areas of its business (including other ATSs it operates). Current trade reporting data, therefore, is not dispositive in determining which trades were executed within an ATS as opposed to other areas of a broker-dealer's business, and FINRA is unable to rely solely on existing trade reporting data to surveil for compliance with the display obligations and the fair access requirements in Regulation ATS.

(2) Reporting Requirement

The proposed rule change creates a reporting obligation requiring each ATS that has filed a Form ATS with the SEC to report to FINRA its aggregate weekly volume information and number of trades, by security, in securities subject to FINRA trade reporting requirements. The reporting requirement would thus apply to any NMS stock,[9] OTC Equity Security,[10] or any debt security subject to FINRA's Trade Reporting and Compliance Engine (''TRACE'') rules (''TRACE-Eligible Securities'').[11] These reports would provide FINRA with information necessary to surveil for compliance with the display obligations and the fair access requirements in Regulation ATS for these securities.[12] The proposed rule change would require this information to be reported to FINRA on a security-by-security basis within seven business days after the end of each calendar week. Although the proposed rule change would impose new weekly reporting obligations, ATSs are already required to maintain this information pursuant to Regulation ATS.[13] Consequently, FINRA believes that seven business days provides sufficient time for ATSs to consolidate, review, and report the information.

The proposed rule change also specifies how ATSs should calculate their volumes to ensure consistency and to avoid potential over-counting of volume. Proposed Rule 4552 provides that, ''[w]hen calculating and reporting the volume of securities traded and the number of trades, an alternative trading system shall include only those trades executed within the alternative trading system. If two orders are crossed by the alternative trading system, the volume shall include only the number of shares or par value of bonds crossed as a single trade (e.g., crossing a buy order of 1,000 shares with a sell order of 1,000 shares would be calculated as a single trade of 1,000 shares of volume).'' Thus, for example, an ATS would only report trades executed within the ATS (not orders routed out of the ATS) and would only report the volume of each executed trade once (not separate or double counting for the buy and sell side of the trade).

In addition to benefitting FINRA's regulatory and surveillance efforts for compliance with Regulation ATS, the proposed rule change would also enhance the transparency of trading activity in the over-the-counter market.[14] As noted above, each individual ATS would be required to report to FINRA its aggregate weekly volumes and number of trades on a security-by-security basis.[15] Under the proposed rule change, FINRA would publish on its Web site the reported information in each equity security for each ATS, with appropriate disclosures that the information is based on ATS-submitted reports and not on reports produced or validated by FINRA. Based on feedback from firms and FINRA committees, FINRA is proposing to initially publish the aggregate reported information regarding NMS stocks in Tier 1 of the NMS Plan to

Address Extraordinary Market Volatility[16] on a two-week delayed basis.[17] FINRA is proposing to publish the information on all other NMS stocks and OTC Equity Securities subject to FINRA trade reporting requirements on

[4] 17 CFR 242.301(b)(3). For purposes of Regulation ATS, ''NMS stock'' is defined in Rule 300(g) of Regulation ATS and excludes a debt or convertible debt security. *See* 17 CFR 242.300(g). In 2009, the SEC proposed lowering the threshold from 5% to 0.25%; however, the SEC has not acted on this proposal. *See* Securities Exchange Act Release No. 60997 (November 13, 2009), 74 FR 61208 (November 23, 2009).

[5] *See* 17 CFR 242.301(b)(5). The fair access requirement also applies to other types of securities, including certain unlisted equity securities, municipal securities, and corporate debt securities. *See id.* Certain ATSs are excluded from the fair access requirement. *See* 17 CFR 242.301(b)(5)(iii).

[6] *See* 17 CFR 242.301(b)(9); SEC Form ATS–R.

[7] *See* Securities Exchange Act Release No. 40760 (December 8, 1998), 63 FR 70844, 70866, 70873 (December 22, 1998).

[8] *See* 17 CFR 242.301(b)(3)(i), (b)(5)(i).

[9] *See* FINRA Rule 6110.

[10] *See* FINRA Rule 6410.

[11] *See* FINRA Rules 6710, 6730(a).

[12] Although the order display and execution access requirements apply only to NMS stocks, the fair access requirements of Regulation ATS apply to multiple types of securities, including certain debt securities. *See* 17 CFR 242.301(b)(5)(i).

[13] Regulation ATS requires each ATS to maintain daily summaries of its trading activities, including (1) the identity of each security for which transactions have been executed; (2) transaction volumes (with respect to equity securities, this includes the total number of trades, the number of shares traded, and the total settlement value in U.S. dollars); and (3) time-sequenced records of order information. *See* 17 CFR 242.301(b)(8); 17 CFR 242.302.

[14] In 2009, the Commission noted that ''[t]he lack of information concerning the ATS on which trades are executed makes it difficult, if not impossible, for the public to assess ATS trading in real-time, and to reliably identify the volume of executions in particular stocks on individual ATSs.'' *See* Securities Exchange Act Release No. 60997 (November 13, 2009), 74 FR 61208 (November 23, 2009). This lack of transparency is still true. Although the proposed rule change would not affect real-time trade transparency, it will provide increased transparency into the volume of executions in particular stocks on individual ATSs.

[15] Under the proposed rule, every ATS, even one that has received an exemption from FINRA to permit its subscribers to report trades to FINRA, must submit a weekly volume report. An ATS is also required to submit a weekly report for weeks where the ATS has no volume. In these instances, the ATS would affirmatively indicate no volume on the report.

[16] Tier 1 NMS stocks include those NMS stocks in the S&P 500 Index or the Russell 1000 Index and certain ETPs. *See* NMS Plan to Address Extraordinary Market Volatility. FINRA will make changes to the Tier 1 NMS stocks in accordance with the Indices. Changes to the S&P 500 are made on an as needed basis and are not subject to an annual or semi-annual reconstitution. S&P typically does not add new issues until they have been seasoned for six to twelve months. Russell 1000 rebalancing typically takes places in June.

[17] Thus, for example, a typical reporting scenario (i.e., no federal holidays) would require ATSs to report the information for a given week by the second Tuesday following the week. FINRA would publish the information regarding Tier 1 NMS stocks no earlier than the following Monday. Information on all other equity securities subject to FINRA trade reporting requirements would be published two weeks following the publication of information for the Tier 1 NMS stocks.

a four-week delayed basis.[18] FINRA believes these delays are appropriate and are adequate to prevent any potential information leakage regarding sensitive trading activity, particularly in more illiquid securities.

The reporting obligations in the proposed rule change apply to transactions in NMS stocks, OTC Equity Securities, and TRACE-Eligible Securities. Although ATSs that trade TRACE-Eligible Securities would be subject to the self-reporting obligations, FINRA does not intend to begin publishing self-reported data for TRACE-Eligible Securities until it has had the opportunity to evaluate the data received from such ATSs and the differences between the existing trade reporting regimes applicable to equity and debt securities. Following implementation of Rule 4552, FINRA intends periodically to assess the reporting and publication of information to consider whether modifications to the scope of securities covered, the delay between the activity and publication, or the frequency of publication of the information are appropriate.

FINRA discussed the proposed rule change with several of its industry committees and a number of ATS operators. The consulted firms generally supported the proposed reporting requirements and publication of the transaction information. As noted above, following discussions with firms, FINRA is proposing a two-week delay before publishing the reported data on Tier 1 NMS stocks on FINRA's Web site and a four-week delay for all other NMS stocks and OTC Equity Securities. The firms also generally supported FINRA's decision to initially publish only data on equity securities.

Some consulted firms also indicated support for expanding the scope of the proposed rule change to include other, non-ATS over-the-counter trading information of broker-dealers. The proposed rule change does not currently contemplate applying the proposed rule change beyond ATSs, but FINRA requests comment on the benefits and burdens of future expansion of the proposal to require trading information for other over-the-counter executions of FINRA broker-dealers separate from ATS trade information, and making this information public in the same manner as is proposed for ATS trade information. This other over-the-counter execution information could include broker-dealer internalized executions, trades executed in the over-the-counter market by wholesale market makers trading with order entry brokers, and executions on broker crossing systems that have not filed a Form ATS with the Commission.

(3) MPID Requirement

In addition to the reporting requirements described above, the proposed rule change also requires that a member operating an ATS obtain for each such ATS a single, unique MPID that is designated for exclusive use for reporting each ATS's transactions. Members that operate multiple ATSs or engage in other lines of business requiring the use of MPIDs would therefore be required to obtain and use multiple MPIDs. FINRA currently has three rules permitting the use of multiple MPIDs on FINRA facilities: Rule 6160 (Multiple MPIDs for Trade Reporting Facility Participants), Rule 6170 (Primary and Additional MPIDs for Alternative Display Facility Participants), and Rule 6480 (Multiple MPIDs for Quoting and Trading in OTC Equity Securities). All three rules are permissive, and none of the rules currently requires the use of multiple MPIDs.

Rule 6160 provides that any Trade Reporting Facility Participant that wishes to use more than one MPID for purposes of reporting trades to a FINRA Trade Reporting Facility (''TRF'') must submit a written request, in the form required by FINRA, to, and obtain approval from, FINRA Market Operations for such additional MPIDs. In addition, Supplementary Material to the rule states that FINRA considers the issuance of, and trade reporting with, multiple MPIDs to be a privilege and not a right. A Trade Reporting Facility Participant must identify the purpose(s) and system(s) for which the multiple MPIDs will be used. If FINRA determines that the use of multiple MPIDs is detrimental to the marketplace, or that a Trade Reporting Facility Participant is using one or more additional MPIDs improperly or for other than the purpose(s) identified by the Participant, FINRA staff retains full discretion to limit or withdraw its grant of the additional MPID(s) to such Trade Reporting Facility Participant for purposes of reporting trades to a TRF.

Like Rule 6160, Rule 6480 provides that any member that wishes to use more than one MPID for purposes of quoting an OTC Equity Security or reporting trades to the OTC Reporting Facility (''ORF'') must submit a written request, in the form required by FINRA, to, and obtain approval from, FINRA Market Operations for such additional MPIDs. The rule also states that a member that posts a quotation in an OTC Equity Security and reports to a FINRA system a trade resulting from such posted quotation must utilize the same MPID for reporting purposes. In addition, Supplementary Material to the rule states that FINRA considers the issuance of, and trade reporting with, multiple MPIDs to be a privilege and not a right. When requesting an additional MPID(s), a member must identify the purpose(s) and system(s) for which the multiple MPIDs will be used. If FINRA determines that the use of multiple MPIDs is detrimental to the marketplace, or that a member is using one or more additional MPIDs improperly or for purposes other than the purpose(s) identified by the member, FINRA staff retains full discretion to limit or withdraw its grant of the additional MPID(s) to such member.

Rule 6170 governs the use of MPIDs on FINRA's Alternative Display Facility (''ADF'') and provides that a Registered Reporting ADF ECN may request additional MPIDs for displaying quotes and orders and reporting trades through the ADF for any ADF-Eligible Security. Among other things, Registered Reporting ADF ECNs are prohibited from using an additional MPID to accomplish indirectly what they are prohibited from doing directly through their Primary MPID. In addition, FINRA staff retains full discretion to determine whether a bona fide regulatory or business need exists for being granted an additional MPID privilege and to limit or withdraw the additional MPID display privilege at any time. The procedures for requesting, and the restrictions surrounding the use of,

[18] FINRA intends to establish a fee to recover costs that may be incurred in providing the information to professional users of the data; however, non-professional users could receive the data free of charge. At this time, FINRA intends to use substantially the same definitions for professionals and non-professionals as used under the TRACE data dissemination rules. *See* FINRA Rule 7730 (defining a ''Non-Professional'' as a natural person who uses TRACE transaction data solely for his or her personal, non-commercial use). It is anticipated that Non-Professional subscribers would be required to agree to certain terms of use of the data, including that he or she receives and uses the data solely for his or her personal, non-commercial use. FINRA anticipates establishing a flat, monthly subscription fee (with a yearly commitment term) for professional subscribers to access the published reports on an enterprise license basis. The entity would not be permitted to redistribute this information outside of the enterprise. In addition, FINRA is considering offering a monthly vendor enterprise license (with a yearly commitment term) to permit the redistribution of the reports. As with TRACE data, data vendors would be responsible for reporting entity usage as a result of their re-dissemination of the data and remitting payment for such usage. Vendors similarly would be subject to regular audits to ensure accurate and timely compliance with re-dissemination reporting and payment. The amount of the fees will be established pursuant to a separate proposed rule change filed with the Commission.

multiple MPIDs are set forth in supplementary material to the rule.

In 2010, FINRA also adopted amendments to Rule 6160 establishing a voluntary program to allow members operating an ATS dark pool to have their daily aggregate trading data published by the TRFs.[19] Under Rule 6160(c), members voluntarily participating in the program are required to obtain and use a separate MPID designated exclusively for the reporting of transactions executed within the ATS dark pool.[20] Because the proposed rule change would require the use of single, unique MPIDs for all ATSs, FINRA is proposing amendments to Rule 6160(c) to expand the MPID requirement to all ATSs but is maintaining the provisions specific to the ATS dark pool program in Supplementary Material .02 to Rule 6160 with some minor changes to incorporate defined terms and to adjust cross-references.

As noted above, the proposed rule change requires that a member that operates an ATS obtain for each such ATS a single, unique MPID that is designated for exclusive use for reporting each ATS's transactions. A firm would not be permitted to use multiple MPIDs for a single ATS, and if a firm operates multiple ATSs, each ATS would be required to have its own MPID. Firms are also required to notify FINRA before changing the usage of the MPID in any way (e.g., repurposing an MPID from reflecting ATS activity to other trading activity at the firm). After an ATS is provided its MPID, any reporting by the ATS (either reporting trades to a FINRA TRF, the ADF, the ORF, TRACE, or reporting orders to the Order Audit Trail System (''OATS'')) would need to include the MPID assigned to the particular ATS, and the member must use such separate MPID to report all transactions executed within the ATS to the appropriate reporting facility.[21]

The proposed rules prohibit a member from using a separate MPID assigned to an ATS to report any transaction that is not executed within the ATS and require members to have policies and procedures in place to ensure that trades reported with a separate MPID obtained under the rules are restricted to trades executed within the ATS. ATSs are already required ''to have in place safeguards and procedures to . . . separate alternative trading system functions from other broker-dealer functions, including proprietary and customer trading.'' [22] Consistent with this existing obligation, FINRA believes it is appropriate to require firms to address the use of unique MPIDs pursuant to the proposed rule in these procedures and that such a requirement should impose minimal burdens or costs on firms.

The proposed rule change, once implemented, would enable FINRA to rely on trade reports to determine whether an ATS has reached any of the volume thresholds in Regulation ATS by requiring each ATS to acquire and use a unique MPID for reporting to FINRA.[23] Because the proposed rule change would require the use of multiple MPIDs by some members, FINRA also is proposing that the current rules described above permitting multiple MPIDs, which currently operate on a pilot basis, be made permanent.[24] In addition to the surveillance benefits for Regulation ATS, a unique MPID requirement will also enable FINRA to surveil generally with far greater clarity and granularity the flow of orders and executions on ATSs. Moreover, requiring each ATS to use a single, unique MPID will allow FINRA to better surveil activity by ATSs on a more uniform basis, beginning at order receipt through execution or cancellation.

FINRA discussed the proposed requirement for ATSs to use single, unique MPIDs with several of its industry committees and a number of ATS operators. The consulted firms generally supported the proposed MPID requirement; however, several firms noted that requiring unique MPIDs could impose costs on some firms resulting from systems changes needed to incorporate multiple MPIDs. Other firms indicated that they already use a separate MPID for their ATS reporting and, therefore, such a requirement would not be burdensome. Finally, some firms suggested that FINRA consider alternative methods for identifying trading activity occurring on ATSs through, for example, the use of a trade report modifier or ATS ''flag.''

Although FINRA recognizes that some firms may incur costs associated with acquiring and using multiple MPIDs, FINRA believes that using a separate MPID for each ATS is feasible on an ongoing basis, and that the primary costs result from initial changeover costs. In fact, many members already voluntarily use separate MPIDs to report ATS transactions. However, given the potential systems changes required by the MPID requirement, FINRA will provide additional time for firms to implement the MPID requirement.

FINRA has also considered whether alternative methods exist that could achieve the benefits of unique MPIDs. After consideration, FINRA believes that alternative methods of identifying ATS transactions on an automated basis (e.g., using an ATS ''flag'' or other modifier on trade reports) will not provide FINRA with the same degree of comprehensive, reliable information as requiring unique MPIDs because MPIDs can be used consistently across multiple trade reporting systems as well as OATS and can immediately reflect the particular ATS associated with the order event or trade. Consequently, the proposed rule change continues to require that each ATS obtain and use a single, unique MPID for reporting to FINRA.

FINRA will announce the effective date of the proposed rule change in a *Regulatory Notice* to be published no later than 30 days following Commission approval. The effective date for the ATS reporting requirement will be no later than 90 days following publication of the *Regulatory Notice* announcing Commission approval. The effective date for the MPID requirement will be no later than 270 days following publication of the *Regulatory Notice* announcing Commission approval.

2. Statutory Basis

FINRA believes that the proposed rule change is consistent with the provisions of Section 15A(b)(6) of the Act,[25] which

[19] *See* Securities Exchange Act Release No. 61658 (March 5, 2010), 75 FR 11972 (March 12, 2010). To date, no member has voluntarily taken part in the program.

[20] The rule defines an ''ATS dark pool'' as ''an ATS that does not display quotations or subscribers' orders to any person or entity either internally within the ATS dark pool or externally beyond the ATS dark pool (other than employees of the ATS).'' *See* FINRA Rule 6160(c).

[21] OATS Reporting Members are required to include MPIDs on OATS reports. *See, e.g.,* FINRA Rule 7440(b)(3), (c)(1)(B), (c)(2)(A)(ii), (c)(2)(A)(iii). The proposed rule change does not include any changes to OATS rules; however, current OATS guidance provides that ''[a]n order that is transferred between two valid MPIDs within the same firm is also considered routed.'' *See OATS Reporting Technical Specifications,* at 4–3 (ed. December 11, 2012). Consequently, after the proposed rule change is implemented, an order routed to an ATS would require the submission of a Route Report, which must reflect the unique MPID of the ATS to which the order was routed. *See* FINRA Rule 7440(c).

[22] *See* Securities Exchange Act Release No. 40760 (December 8, 1998), 63 FR 70844, 70879 (December 22, 1998).

[23] After the MPID requirement is implemented, FINRA will be able to compare the trade reporting data to the data self-reported to FINRA by the ATSs to verify the consistency and accuracy of both. Once FINRA confirms the unique MPID requirement is functioning as intended, FINRA will determine whether to continue to require ATSs to self-report volume information.

[24] *See* FINRA Rules 6160, 6170, 6480.

[25] 15 U.S.C. 78*o*–3(b)(6).

requires, among other things, that FINRA rules must be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, and, in general, to protect investors and the public interest. FINRA believes that the weekly volume statistics reported by each ATS will significantly enhance FINRA's ability to surveil for compliance with the requirements of Regulation ATS, and publicly disseminating the ATS trading data for equity securities will provide enhanced transparency and understanding into trading activity by ATSs in the over-the-counter market. FINRA believes that requiring each ATS to use a single, unique MPID for reporting information to FINRA will significantly enhance FINRA's ability to surveil for compliance with the requirements of Regulation ATS as well as other SEC rules, the federal securities laws, and FINRA rules. In addition, the use of unique MPIDs by ATSs could eventually obviate the need for self-reporting of trading information to FINRA.

B. Self-Regulatory Organization's Statement on Burden on Competition

FINRA does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

As noted above, although the proposed rule change imposes a new weekly reporting obligation on ATSs, they are already required to maintain this information pursuant to Regulation ATS. Because of the existing recordkeeping obligations in Regulation ATS, FINRA does not believe that the weekly reporting requirements in the proposed rule change will impose significant costs on firms or will require firms to expend significant resources.

By standardizing the calculation of transaction volumes on ATSs, and mandating public reporting, the proposal will help ensure that ATSs are publishing standardized transaction statistics. This will support competition among ATSs by replacing the incomplete, inconsistent, or inaccurate ATS statistics currently made available with more reliable and standard statistics of market share in a security.

Although some members may incur costs associated with systems changes needed to incorporate a separate MPID for their ATS activity, following discussions with multiple firms and FINRA committees, FINRA believes that other members will incur relatively low costs in implementing the proposed rule change. In fact, many members already use unique MPIDs to report ATS transactions separately. FINRA also believes that, as noted above, alternative methods of identifying ATS transactions on an automated basis (e.g., using an ATS ''flag'' or other modifier on trade reports) will not provide FINRA with the same degree of comprehensive, reliable information as requiring unique MPIDs since MPIDs are used across FINRA trade reporting facilities and are used to report order information to OATS.

FINRA also believes that the proposal increases competition on a fair basis by enabling FINRA itself, in time, to calculate and disseminate trading statistics for ATSs on a standard, reliable basis. It also enables FINRA to monitor more closely order entry and execution on ATSs, which will promote consistent compliance with Regulation ATS and trading requirements by ATSs and their participants.

Some firms consulted said that the information reporting requirements could place ATSs at a competitive disadvantage to broker crossing systems that are not registered as ATSs. While FINRA asks for comment above regarding whether FINRA should require similar trading information to be provided by FINRA broker-dealers' securities trades in the over-the-counter market, FINRA does not view any potential disadvantage to ATSs from the proposed disclosures as sufficient to outweigh the value of presently making available for public information and regulatory analysis the trading information of regulated ATSs.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

Written comments were neither solicited nor received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 45 days of the date of publication of this notice in the **Federal Register** or within such longer period (i) as the Commission may designate up to 90 days of such date 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–FINRA–2013–042 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–FINRA–2013–042. 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 will also be available for inspection and copying at principal office of FINRA. 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 publicly available. All submissions should refer to File Number SR–FINRA–2013–042 and should be submitted on or before November 12, 2013.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[26]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2013–24668 Filed 10–21–13; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–70593; File No. SR–MSRB–2013–07]

Self-Regulatory Organizations; Municipal Securities Rulemaking Board; Notice of Filing of a Proposed Rule Change Consisting of Proposed MSRB Rule G–47, on Time of Trade Disclosure Obligations, Proposed Revisions to MSRB Rule G–19, on Suitability of Recommendations and Transactions, Proposed MSRB Rules D–15 and G–48, on Sophisticated Municipal Market Professionals, and the Proposed Deletion of Interpretive Guidance

October 1, 2013.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the ''Act'')[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on September 17, 2013 the Municipal Securities Rulemaking Board (the ''MSRB'' or ''Board'') filed with the Securities and Exchange Commission (the ''SEC'' or ''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the MSRB. 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 MSRB is filing with the Commission a proposed rule change consisting of proposed MSRB Rule G–47, on time of trade disclosure obligations, proposed revisions to MSRB Rule G–19, on suitability of recommendations and transactions,[3] proposed MSRB Rules D–15 and G–48, on sophisticated municipal market professionals, and the proposed deletion of interpretive guidance that is being superseded by these rule changes (the ''proposed rule change''). The MSRB requests an effective date for the proposed rule change of 60 days following the date of SEC approval.

The text of the proposed rule change is available on the MSRB's Web site at *www.msrb.org/Rules-and-Interpretations/SEC-Filings/2013-Filings.aspx,* at the MSRB's principal office, 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 MSRB included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The MSRB has prepared summaries, set forth in Sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

Summary of Proposed Rule Change

The MSRB has examined its interpretive guidance related to time of trade disclosures, suitability, and SMMPs and is proposing to consolidate this guidance and codify it into several rules: a new time of trade disclosure rule (proposed Rule G–47), a revised suitability rule (Rule G–19), and two new SMMP rules (proposed Rules D–15 and G–48). Additionally, the proposed revisions to Rule G–19 would harmonize the MSRB's suitability rule with Financial Industry Regulatory Authority's (''FINRA's'') suitability rule as recommended by the SEC in its 2012 Report on the Municipal Securities Market.[4]

Rule G–47 on Time of Trade Disclosures

MSRB Rule G–17 provides that, in the conduct of its municipal securities or municipal advisory activities, each broker, dealer, municipal securities dealer (''dealer''), and municipal advisor must deal fairly with all persons and may not engage in any deceptive, dishonest or unfair practice. The MSRB has interpreted Rule G–17 to require a dealer, in connection with a municipal securities transaction, to disclose to its customer, at or prior to the time of trade, all material information about the transaction known by the dealer, as well as material information about the security that is reasonably accessible to the market.[5] The MSRB has issued extensive interpretive guidance discussing this time of trade disclosure obligation in general, as well as in specific scenarios. Proposed Rule G–47 would consolidate most of this guidance[6] into rule language which the MSRB believes would ease the burden on dealers and other market participants who endeavor to understand, comply with and enforce these obligations. The proposed codification of the interpretive guidance on time of trade disclosure obligations is not intended to, and would not, substantively change the

[26] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] This also includes proposed technical revisions to MSRB Rule G–8, on books and records, to conform Rule G–8 with the proposed revisions to Rule G–19.

[4] *See http://www.sec.gov/news/studies/2012/munireport073112.pdf.*

[5] *See, e.g., MSRB Answers Frequently Asked Questions Regarding Dealer Disclosure Obligations Under MSRB Rule G–17* (November 30, 2011).

[6] The time of trade disclosure guidance that has been consolidated and condensed into proposed Rule G–47 was derived from the following Rule G–17 interpretive notices: *Guidance on Disclosure and Other Sales Practice Obligations to Individual and Other Retail Investors in Municipal Securities* (July 14, 2009), *MSRB Answers Frequently Asked Questions Regarding Dealer Disclosure Obligations Under MSRB Rule G–17* (November 30, 2011), *Interpretive Notice Regarding Rule G–17, on Disclosure of Material Facts* (March 18, 2002), *MSRB Reminds Firms of their Sales Practice and Due Diligence Obligations When Selling Municipal Securities in the Secondary Market* (September 20, 2010), *Application of MSRB Rules to Transactions in Auction Rate Securities* (February 19, 2008), *Bond Insurance Ratings—Application of MSRB Rules* (January 22, 2008), *Interpretive Reminder Notice Regarding Rule G–17, on Disclosure of Material Facts—Disclosure of Original Issue Discount Bonds* (January 5, 2005), *Notice of Interpretation of Rule G–17 Concerning Minimum Denominations* (January 30, 2002), *Transactions in Municipal Securities with Non-Standard Features Affecting Price/Yield Calculations* (June 12, 1995), *Educational Notice on Bonds Subject to ''Detachable'' Call Features* (May 13, 1993), *Notice Concerning Securities that Prepay Principal* (March 19, 1991), *Notice Concerning Disclosure of Call Information to Customers of Municipal Securities* (March 4, 1986), *Application of Board Rules to Transactions in Municipal Securities Subject to Secondary Market Insurance or Other Credit Enhancement Features* (March 6, 1984), and *Notice Concerning the Application of Board Rules to Put Option Bonds* (September 30, 1985); the following Rule G–15 interpretive notice: *Notice Concerning Stripped Coupon Municipal Securities* (March 13, 1989); the following Rule G–17 interpretive letters: *Description provided at or prior to the time of trade* (April 30, 1986), and *Put option bonds: safekeeping, pricing* (February 18, 1983); and the following Rule G–15 interpretive letters: *Disclosure of the investment of bond proceeds* (August 16, 1991), *Securities description: prerefunded securities* (February 17, 1998), *Callable securities: pricing to mandatory sinking fund calls* (April 30, 1986), and *Callable securities: pricing to call and extraordinary mandatory redemption features* (February 10, 1984). As discussed in more detail below, the guidance discussing time of trade disclosure obligations in connection with 529 college savings plans (''529 plans'') has not been incorporated into proposed Rule G–47. The MSRB may create a separate rule regarding time of trade disclosure obligations for 529 plans or a rule consolidating dealer obligations related to 529 plans. Until the MSRB adopts a rule specific to 529 plans, proposed Rule G–47 and all such interpretive guidance will continue to apply to 529 plans.

current obligations. Rather, the codification is an effort to consolidate the current obligations into streamlined rule language.

The structure of proposed Rule G–47 (rule language followed by supplementary material) is the same structure used by FINRA and other self-regulatory organizations (''SROs''). The MSRB intends generally to transition to this structure for all of its rules going forward in order to streamline the rules, harmonize the format with that of other SROs, and make the rules easier for dealers and municipal advisors to understand and follow.

A summary of proposed Rule G–47 is as follows:

General Disclosure Obligation

Proposed Rule G–47(a) sets forth the general time of trade disclosure obligation as currently set forth in the MSRB's interpretive guidance. The rule states that dealers cannot sell municipal securities to a customer, or purchase municipal securities from a customer, without disclosing to the customer, at or prior to the time of trade, all material information known about the transaction and material information about the security that is reasonably accessible to the market. The rule applies regardless of whether the transaction is unsolicited or recommended, occurs in a primary offering or the secondary market, and is a principal or agency transaction. The rule provides that the disclosure can be made orally or in writing.

Proposed Rule G–47(b) states that information is considered to be ''material information'' if there is a substantial likelihood that the information would be considered important or significant by a reasonable investor in making an investment decision. The rule defines ''reasonably accessible to the market'' as information that is made available publicly through ''established industry sources.'' Finally, the rule defines ''established industry sources'' as including the MSRB's Electronic Municipal Market Access (''EMMA''®) [7] system, rating agency reports, and other sources of information generally used by dealers that effect transactions in the type of municipal securities at issue.

Supplementary Material

In addition to stating the general disclosure obligation, proposed Rule G–47 includes supplementary material describing the disclosure obligation in more detail.

Supplementary material .01 provides general information regarding the manner and scope of required disclosures. Specifically, the supplementary material provides that dealers have a duty to give customers a complete description of the security which includes a description of the features that would likely be considered significant by a reasonable investor, and facts that are material to assessing potential risks of the investment. This section of the supplementary material further provides that the public availability of material information through EMMA, or other established industry sources, does not relieve dealers of their disclosure obligations. Section .01 of the supplementary material also provides that dealers may not satisfy the disclosure obligation by directing customers to established industry sources or through disclosure in general advertising materials. Finally, section .01 of the supplementary material states that whether the customer is purchasing or selling the municipal securities may be a consideration in determining what information is material.

Supplementary material .02 provides that dealers operating electronic trading or brokerage systems have the same time of trade disclosure obligations as other dealers.

Supplementary material .03 provides a list of examples describing information that may be material in specific scenarios and require disclosures to a customer. The guidance provides that the list is not exhaustive and other information may be material to a customer in these and other scenarios. This section describes the following scenarios: variable rate demand obligations; auction rate securities; credit risks and ratings; credit or liquidity enhanced securities; insured securities; original issue discount bonds; securities sold below the minimum denomination; securities with non-standard features; bonds that prepay principal; callable securities; put option and tender option bonds; stripped coupon securities; the investment of bond proceeds; issuer's intent to prerefund; and failure to make continuing disclosure filings.

Finally, supplementary material .04 provides that dealers must implement processes and procedures reasonably designed to ensure that material information regarding municipal securities is disseminated to registered representatives who are engaged in sales to and purchases from a customer.

Current Interpretive Guidance on Time of Trade Disclosure Obligations

The MSRB has identified two interpretive notices that were previously filed with the Commission and would be superseded in their entirety by the proposed time of trade disclosure rule and the MSRB proposes deleting these two notices.[8] Any statements in the remaining MSRB interpretative guidance referring to Rule G–17 for the time of trade disclosure principle should be read to refer to proposed Rule G–47.

Rule G–19, on Suitability of Recommendations and Transactions

The MSRB has conducted a review of Rule G–19, on suitability of recommendations and transactions, as well as the MSRB's interpretive guidance addressing suitability. As a result of this review, the MSRB is proposing the amendments described below to more closely harmonize Rule G–19 with FINRA's suitability rule,[9] and to incorporate elements of the MSRB's current interpretive guidance on suitability into Rule G–19.[10] The

[7] EMMA is a registered trademark of the MSRB.

[8] *Interpretive Notice Regarding Rule G–17, on Disclosure of Material Facts* (March 18, 2002) and *Notice of Interpretation of Rule G–17 Concerning Minimum Denominations* (January 30, 2002).

[9] *See* FINRA Rule 2111.

[10] The suitability guidance that has been consolidated and condensed into the proposed revisions to Rule G–19 was derived from the following Rule G–17 interpretive notices: *MSRB Reminds Firms of their Sales Practice and Due Diligence Obligations When Selling Municipal Securities in the Secondary Market* (September 20, 2010); *Guidance on Disclosure and Other Sales Practice Obligations to Individual and Other Retail Investors in Municipal Securities* (July 14, 2009); *Application of MSRB Rules to Transactions in Auction Rate Securities* (February 19, 2008); *Bond Insurance Ratings—Application of MSRB Rules* (January 22, 2008); *Reminder of Customer Protection Obligations in Connection with Sales of Municipal Securities* (March 30, 2007); *Interpretive Notice Regarding Rule G–17, on Disclosure of Material Facts* (March 18, 2002); *Notice Concerning Disclosure of Call Information to Customers of Municipal Securities* (March 4, 1986); the following Rule G–19 interpretive notices: *Notice Regarding Application of Rule G–19, on Suitability of Recommendations and Transactions, to Online Communications* (September 25, 2002); *Application of Suitability Requirements to Investment Seminars and Customer Inquiries Made in Response to a Dealer's Advertisements* (April 25, 1985); the following Rule G–19 interpretive letters: *Recommendations* (February 17, 1998); and *Recommendations: advertisements* (February 24, 1994); the following Rule G–15 interpretive notice: *Notice Concerning Stripped Coupon Municipal Securities* (March 13, 1989); the following Rule G–15 interpretive letter: *Securities description: prerefunded securities* (February 17, 1998); the following Rule G–21 interpretive notice: *Interpretation on General Advertising Disclosures, Blind Advertisements and Annual Reports Relating to Municipal Fund Securities under Rule G–21* (June 5, 2007); the following Rule G–21 interpretive letter: *Disclosure obligations* (May 21, 1998); and the following Rule G–32 interpretive notices: *Notice*

proposed revisions to Rule G–19 are aligned with a recommendation of the SEC in its 2012 Report on the Municipal Securities Market that the MSRB consider ''amending Rule G–19 (suitability) in a manner generally consistent with recent amendments by FINRA to its Rule 2111, including with respect to the scope of the term 'strategy'. . . .'' [11] Given the extensive interpretive guidance surrounding FINRA Rule 2111 and the impracticality and inefficiency of republishing each iteration of such FINRA guidance, substantively similar provisions of Rule G–19 will be interpreted in a manner consistent with FINRA's interpretations of Rule 2111. If the MSRB believes an interpretation should not be applicable to Rule G–19, it will affirmatively state that specific provisions of FINRA's interpretation do not apply. Additionally, the MSRB is proposing technical amendments to Rule G–8(a)(xi)(F) to conform it to the proposed revisions to Rule G–19.

A summary of the proposed revisions to Rule G–19 is as follows:

Account Information

Current MSRB Rule G–19(a) requires dealers to obtain certain customer information prior to completing a transaction in municipal securities for that customer account. The required customer information consists of, by cross-reference, the customer information required under MSRB Rule G–8(a)(xi), on books and records. A provision equivalent to current Rule G–19(a) is not included in proposed Rule G–19 since MSRB Rule G–8 already independently requires dealers to make and keep a record of this information for each customer. Additionally, deleting this provision streamlines the rule and more closely aligns it with FINRA's suitability rule, which does not have this specific requirement.[12]

Information Required for Suitability Determinations

The current MSRB suitability rule contains a list of customer information that dealers must obtain prior to recommending a transaction to a non-institutional account.[13] The proposed revisions to Rule G–19 would expand this list to include additional items from FINRA's suitability rule [14] such as: Age, investment time horizon, liquidity needs, investment experience and risk tolerance. The proposed revision also would delete Rule G–19(b) and replace it with rule language corresponding to FINRA's suitability rule. The MSRB believes that the items added to the rule generally are directly relevant for recommendations involving municipal securities and having such items explicitly identified will promote more consistent application of the suitability rule. The list of customer information that dealers must assess in the proposed rule also includes ''any other information the customer may disclose to the broker, dealer or municipal securities dealer in connection with such recommendation'' which is taken from the FINRA rule.[15] This is similar to the requirement in current MSRB Rule G–19(c)(ii) which states that, in recommending a transaction, a dealer shall have reasonable grounds ''based upon the facts disclosed by such customer or otherwise known about such customer for believing that the recommendation is suitable.'' Therefore, the proposal would delete section (c)(ii) of Rule G–19.

The current MSRB suitability rule also requires dealers to consider information available from the issuer of the security or otherwise in making suitability determinations.[16] Similarly, the supplementary material to FINRA's suitability rule establishes a reasonable-basis suitability obligation, which requires a broker-dealer to have a reasonable basis to believe, based on reasonable diligence, that the recommendation is suitable for at least some investors.[17] In order to perform a reasonable-basis suitability analysis, dealers must necessarily consider information available from the issuer of the security. The proposed revisions to Rule G–19 incorporate the reasonable-basis suitability terminology from FINRA Rule 2111 in supplementary material .05(a) and delete section (c)(i) of Rule G–19.

Discretionary Accounts

The current MSRB suitability rule includes a provision on discretionary accounts which provides that dealers cannot effect transactions in municipal securities with or for a discretionary account unless permitted by the customer's prior written authorization which has been accepted in writing by a municipal securities principal.[18] The MSRB proposes to delete this provision because there is a substantially similar provision already included in MSRB Rule G–8(a)(xi)(I) which requires that, for customer discretionary accounts, dealers must make and keep a record of the customer's written authorization to exercise discretionary power over the account, written approval of the municipal securities principal who supervises the account, and written approval of the municipal securities principal with respect to each transaction in the account stating the date and time of approval.

The current MSRB suitability rule also includes a provision stating that a dealer cannot effect a transaction in municipal securities with or for a discretionary account unless the dealer first determines that the transaction is suitable for the customer or the transaction is specifically directed by the customer and was not recommended by the dealer.[19] Similarly, the proposed suitability rule provides that a dealer must have a reasonable basis to believe that a recommended transaction or investment strategy is suitable for the customer. The suitability obligation is the same for discretionary and non-discretionary accounts and there is no reason to restate the obligation as it specifically relates to discretionary accounts. In addition, there is no corresponding provision in FINRA Rule 2111. For these reasons, the MSRB proposes deleting Rule G–19(d)(ii).

Churning

The proposed revisions to Rule G–19 retain the substance of the existing MSRB prohibition on churning,[20] but recast it using the current terminology of ''quantitative suitability'' used in FINRA's suitability rule.[21] The quantitative suitability requirement is included in proposed Rule G–19, supplementary material .05(c).

Investment Strategies

The proposed amendments to Rule G–19 incorporate the application of suitability to ''investment strategies.'' Specifically, proposed supplementary material .03 defines the phrase ''investment strategy involving a municipal security or municipal securities'' by stating that it is ''to be interpreted broadly and would include, among other things, an explicit

Regarding Electronic Delivery and Receipt of Information by Brokers, Dealers and Municipal Securities Dealers (November 20, 1998); and *Interpretation on the Application of Rules G–32 and G–36 to New Issue Offerings Through Auction Procedures* (March 26, 2001).

[11] *See http://www.sec.gov/news/studies/2012/munireport073112.pdf* at 141.

[12] *See* FINRA Rule 2111.

[13] *See* MSRB Rule G–19(b).

[14] *See* FINRA Rule 2111(a).

[15] *See* FINRA Rule 2111(b).

[16] *See* MSRB Rule G–19(c)(i).

[17] FINRA Rule 2111, Supplementary Material .05(a).

[18] *See* MSRB Rule G–19(d)(i).

[19] *See* MSRB Rule G–19(d)(ii).

[20] *See* MSRB Rule G–19(e).

[21] *See* FINRA Rule 2111, Supplementary Material .05(c).

recommendation to hold a municipal security or municipal securities.'' This definition is consistent with the definition of ''investment strategy involving a security or securities'' in FINRA's suitability rule.[22] The proposed MSRB suitability rule, like the FINRA rule, carves out communications of certain types of educational material as long as such communications do not recommend a particular municipal security or municipal securities.[23] The list of educational materials in proposed Rule G–19, supplementary material .03, differs in minor respects from the list of educational materials in FINRA's suitability rule [24] to account for unique attributes of the municipal securities market.

Institutional Accounts

Provisions in guidance to MSRB Rule G–17 and proposed MSRB Rules D–15 and G–48 (discussed below) exempt dealers from the duty to perform a customer-specific suitability determination for recommendations to SMMPs.[25] FINRA's suitability rule has similar provisions with respect to institutional accounts that is included as a provision in its suitability rule.[26] The MSRB SMMP exemption applies not only to Rule G–19, but also has applicability to MSRB Rules G–47, on time of trade disclosures, G–18, on transaction pricing, and G–13, on bona fide quotations. Therefore, the MSRB proposes to include the SMMP exemption in proposed Rules D–15 and G–48 instead of incorporating it into Rule G–19 and the other rules to which the SMMP exemption applies.

Proposed Technical Revisions to Rule G–8, on Books and Records

MSRB Rule G–8(a)(xi)(F) includes references to MSRB Rule G–19(c)(ii) and G–19(b). These referenced provisions are not codified as such in the proposed revisions to MSRB Rule G–19, but the concepts would remain in the proposed rule. Therefore, the MSRB proposes revising MSRB Rule G–8(a)(xi)(F) simply to include a reference to the entire MSRB Rule G–19.

Current Interpretive Guidance on Suitability

Over the years, the MSRB has issued guidance on suitability in connection with other issues under MSRB Rule G–17. This guidance provides that a dealer must take into account all material information that is known to the dealer or that is available through established industry sources in meeting its suitability obligations.[27] This is the same type of information that dealers are required to disclose to customers at the time of trade.[28] The Rule G–17 guidance also describes material information that dealers should consider in making suitability determinations in specific scenarios such as credit or liquidity enhanced securities,[29] auction rate securities,[30] and insured bonds.[31] Rather than listing information in the supplementary material to Rule G–19 that may be material to an investor, proposed Rule G–19, supplementary material .05(a) includes a general requirement for dealers to understand information about the municipal security or strategy and contains an explicit cross-reference to a dealer's obligations under proposed MSRB Rule G–47, on time of trade disclosure.[32] The remaining suitability obligations currently described in the Rule G–17 guidance [33] are incorporated into revised Rule G–19.[34]

The MSRB also has issued interpretive guidance under Rule G–19 that has been previously filed with the Commission and addresses online communications, investment seminars, and customers contacting a dealer in response to an advertisement.[35] This guidance would be superseded by revised Rule G–19 and the MSRB proposes deleting the guidance. The MSRB also has issued interpretations under Rules G–15,[36] G–21,[37] and G–32 [38] that nominally reference suitability obligations. Since these interpretations address areas other than suitability and are not inconsistent with the proposed revisions, the MSRB will leave these interpretations intact.

Rules D–15 and G–48 on SMMPs

Proposed Rules D–15 and G–48 on SMMPs (the ''proposed SMMP rules'') would streamline and codify the existing MSRB Rule G–17 guidance regarding the application of MSRB rules to transactions with SMMPs. The proposed SMMP rules would consist of a new definitional rule, D–15, defining an SMMP and a new general rule, G–48, on the regulatory obligations of dealers to SMMPs.

On May 25, 2012, the SEC approved an interpretive notice to Rule G–17 revising prior guidance on the application of MSRB rules to transactions with SMMPs.[39] The

[22] *See* FINRA Rule 2111, Supplementary Material .03.

[23] *Id.*

[24] *Id.*

[25] *See e.g.,* Interpretive Notice effective July 9, 2012, *Restated Interpretive Notice Regarding the Application of MSRB Rules to Transactions with Sophisticated Municipal Market Professionals; see also* MSRB Notice 2013–10, *Request for Comment on Proposed Sophisticated Municipal Market Professional Rules* (May 1, 2013).

[26] *See* FINRA Rule 2111(b).

[27] *See, e.g.,* Interpretive Notice dated September 20, 2010, *MSRB Reminds Firms of their Sales Practice and Due Diligence Obligations when Selling Municipal Securities in the Secondary Market.*

[28] *See, e.g.,* Interpretive Notice dated July 14, 2009, *Guidance on Disclosure and Other Sales Practice Obligations to Individual and Other Retail Investors in Municipal Securities.*

[29] *Id.*

[30] Interpretive Notice dated February 19, 2008, *Application of MSRB Rules to Transactions in Auction Rate Securities.*

[31] Interpretive Notice dated January 22, 2008, *Bond Insurance Ratings—Application of MSRB Rules.*

[32] FINRA Rule 2111 does not include a comparable provision.

[33] Interpretive Notice dated March 30, 2007, *Reminder of Customer Protection Obligations in Connection with Sales of Municipal Securities;* Interpretive Notice dated March 18, 2002, *Interpretive Notice Regarding Rule G–17, on Disclosure of Material Facts;* and Interpretive Notice dated March 4, 1986, *Notice Concerning Disclosure of Call Information to Customers of Municipal Securities.*

[34] This does not include suitability obligations with respect to 529 plans. The MSRB may create a separate rule regarding the suitability obligations for 529 plans. Until the MSRB adopts a rule specific to 529 plans, MSRB Rule G–19 and any related interpretive guidance will continue to apply to 529 plans.

[35] Interpretive Notice dated September 25, 2002, *Notice Regarding Application of Rule G–19, on Suitability of Recommendations and Transactions, to Online Communications* and Interpretive Notice dated April 25, 1985, *Application of Suitability Requirements to Investment Seminars and Customer Inquiries Made in Response to a Dealer's Advertisements; see* SEC Release No. 34–21990 (April 25, 1985), 50 FR 18602 (May 1, 1985) (File No. SR–MSRB–85–6). The latter notice, as currently published on the MSRB Web site, was non-substantially revised to reflect amendments to Rule G–19 that became effective on April 7, 1994 (File No. SR–MSRB–94–01), and those revisions were not made part of a rule filing.

[36] Interpretive Notice dated March 13, 1989, *Notice Concerning Stripped Coupon Municipal Securities;* and Interpretive Letter dated February 17, 1998, *Securities description: prerefunded securities.*

[37] Interpretive Notice dated June 5, 2007, *Interpretation on General Advertising Disclosures, Blind Advertisements and Annual Reports Relating to Municipal Fund Securities under Rule G–21;* and Interpretive Letter dated May 21, 1998, *Disclosure obligations.*

[38] Interpretive Notice dated November 20, 1998, *Notice Regarding Electronic Delivery and Receipt of Information by Brokers, Dealers and Municipal Securities Dealers;* and Interpretive Notice dated March 26, 2001, *Interpretation on the Application of Rules G–32 and G–36 to New Issue Offerings Through Auction Procedures.*

[39] Interpretive Notice effective July 9, 2012, *Restated Interpretive Notice Regarding the Application of MSRB Rules to Transactions with Sophisticated Municipal Market Professionals* (the ''restated SMMP notice''). At the time of issuance of the restated interpretive guidance, the MSRB noted that FINRA adopted Rule 2111, which included revised treatment of customer-specific suitability for institutional accounts, and that it generally considered it desirable from the standpoint of reducing the cost of dealer

proposed SMMP rules preserve the substance of this guidance but codify it into two proposed rules that define an SMMP and describe the application of the following obligations to SMMPs: (1) Time of trade disclosure; (2) transaction pricing; (3) suitability; and (4) bona fide quotations. The proposed SMMP rules do not change the substance of the restated SMMP notice except that the proposed definition of SMMP includes a reference to the term ''investment strategies'' to be consistent with inclusion of that term in the proposed suitability rule described above. The MSRB believes that the proposed definitional rule, together with the proposed general rule that describes the regulatory obligations of dealers working with SMMPs, will underscore the differences between dealers' obligations to non-SMMPs and SMMPs, while highlighting the eligibility standards for being an SMMP.

A summary of proposed Rules D–15 and G–48 is as follows:

Proposed Rule D–15 defines the term ''sophisticated municipal market professional'' or ''SMMP'' as a customer of a dealer that is a bank, savings and loan association, insurance company, or registered investment company; or an investment adviser registered with the Commission under Section 203 of the Investment Advisers Act of 1940 or with a state securities commission (or any agency or office performing like functions); or any other entity with total assets of at least $50 million. Additionally, the dealer must have a reasonable basis to believe that the customer is capable of evaluating investment risks and market value independently, both in general and with regard to particular transactions and investment strategies in municipal securities, and affirmatively indicates that it is exercising independent judgment in evaluating the recommendations of the dealer.

The supplementary material to proposed Rule D–15 addresses the reasonable basis analysis and the customer affirmation. Section .01 states that as part of the reasonable basis analysis, the dealer should consider the amount and type of municipal securities owned or under management by the customer. Section .02 states that a customer may affirm that it is exercising independent judgment either orally or in writing, and such affirmation may be given on a trade-by-trade basis, on a type-of-municipal-security basis, or on an account-wide basis.

compliance to maintain consistency with FINRA rules.

Proposed Rule G–48 describes the application of certain obligations to SMMPs. More specifically, the proposed rule provides that a dealer's obligations to a customer that it reasonably concludes is an SMMP are modified as follows: (1) With respect to the time of trade disclosure obligation in proposed Rule G–47, the dealer does not have any obligation to disclose material information that is reasonably accessible to the market; (2) with respect to transaction pricing obligations under Rule G–18, the dealer does not have any obligation to take action to ensure that transactions meeting certain conditions set forth in the proposed rule are effected at fair and reasonable prices; (3) with respect to the suitability obligation in Rule G–19, the proposed rule provides that the dealer does not have any obligation to perform a customer-specific suitability analysis; and (4) with respect to the obligation regarding bona fide quotations in Rule G–13, the dealer disseminating an SMMP's quotation which is labeled as such shall apply the same standards described in Rule G–13(b) for quotations made by another dealer.

Current Interpretive Guidance on SMMPs

There are two interpretive notices that were previously filed with the Commission that would be superseded in their entirety by the SMMP rule [40] and the MSRB proposes to delete these interpretive notices.

2. Statutory Basis

The MSRB believes that the proposed rule change is consistent with Section 15B(b)(2)(C) of the Act,[41] which provides that the MSRB's rules shall

> be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in municipal securities and municipal financial products, to remove impediments to and perfect the mechanism of a free and open market in municipal securities and municipal financial products, and, in general, to protect investors, municipal entities, obligated persons, and the public interest.

The proposed rule change is consistent with Section 15B(b)(2)(C) of the Act. The disclosure of material information about a transaction to investors and the performance of a meaningful suitability analysis is central to the role of a dealer in facilitating municipal securities transactions. Proposed Rule G–47, on time of trade disclosures, codifies current interpretive guidance and protects investors by requiring dealers to make disclosures to customers in connection with purchases and sales of municipal securities. These required disclosures are designed to prevent fraudulent and manipulative acts and practices by dealers, and promote just and equitable principles of trade, by requiring dealers to disclose information about a security and transaction that would be considered significant or important to a reasonable investor in making an investment decision. Similarly, the proposed revisions to Rule G–19, on suitability, furthers these purposes by requiring dealers and their associated persons to make only suitable recommendations to customers and fosters cooperation and coordination by harmonizing the rule with FINRA's suitability rule. Finally, the proposed SMMP rules codify current interpretive guidance that was approved by the SEC in 2012 [42] and these proposed rules do not change the substance of that guidance.

B. Self-Regulatory Organization's Statement on Burden on Competition

The MSRB does not believe that the proposed rule change would result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. As discussed above, the proposed time of trade disclosure rule and proposed SMMP rules codify current interpretive guidance, therefore, they do not add any burden on competition. The proposed revisions to the suitability rule codify current interpretive guidance and add new requirements that are largely harmonized with FINRA's suitability rule in response to a recommendation by the Commission to harmonize MSRB Rule G–19 with FINRA Rule 2111.[43] The MSRB believes that these changes will, in fact, ease burdens on dealers and promote competition by clarifying certain core dealer obligations and the relief available when transacting business with SMMPs.

[40] Interpretive Notice effective July 9, 2012, *Restated Interpretive Notice Regarding the Application of MSRB Rules to Transactions with Sophisticated Municipal Market Professionals* and Interpretive Notice dated April 30, 2002, *Interpretive Notice Regarding the Application of MSRB Rules to Transactions with Sophisticated Municipal Market Professionals.*

[41] 15 U.S.C. 78o–4(b)(2)(c).

[42] *See* SEC Release No. 34–67064 (May 25, 2012).

[43] *See http://www.sec.gov/news/studies/2012/munireport073112.pdf* at 141.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

Rule G–47 on Time of Trade Disclosures

On February 11, 2013, the MSRB requested comment on a draft of Rule G–47, on time of trade disclosures.[44] The time of trade disclosure notice generated eight comment letters.[45]

The comment letters are summarized by topic as follows:

• Support for the Proposal

COMMENTS: All of the commenters generally support the MSRB's initiative to clarify and codify the time of trade disclosure requirements. BDA states that the incorporation of interpretive notices into rules should help provide much desired clarity to market participants. Lumesis indicates that the proposed rule would provide greater clarity to market participants and support enhanced transparency and disclosure for the retail investor. Lumesis further states that the proposed rule is a significant step in clarifying the requirements for time of trade disclosures to retail investors. Schwab states that, generally speaking, it supports the MSRB's effort to consolidate years of interpretive guidance related to time of trade disclosure obligations into a rule. SIFMA comments that it generally supports the concept behind the MSRB's initial effort to provide clarity to regulated entities by reorganizing or eliminating certain interpretive guidance associated with MSRB Rule G–17 into new or revised rules highlighting core principles. TMC states that it supports the MSRB's efforts to more clearly define Rule G–17. Finally, WFA commends the MSRB's efforts to simplify dealer compliance with time of trade disclosure guidance and to harmonize the MSRB's rule structure with FINRA's rule structure.

MSRB RESPONSE: The MSRB believes these comments support the MSRB's statement on the burden on competition.

• Handling of Current Notices

COMMENT: SIFMA suggests that the MSRB should consolidate the existing time of trade disclosure guidance into a user friendly format similar to the format used when the MSRB reorganized guidance on Rule G–37, on political contributions and prohibitions on municipal securities business. SIFMA proposes preserving the text of the time of trade disclosure guidance, but consolidating it in one place since the guidance contains nuances that are easily lost in a short bullet point format.

MSRB RESPONSE: The MSRB believes the supplementary material incorporates the necessary information from the interpretive guidance and that it is not necessary to preserve the text of the current guidance or create a set of questions and answers similar to Rule G–37 at the present time. Moreover, to codify the existing interpretative guidance into a rule but preserve the text of the guidance would not advance the MSRB's goal to streamline its rulebook.

• SMMP Guidance

COMMENT: SIFMA states that, since the current SMMP guidance primarily relates to time of trade disclosures, Rule G–47 should affirm such guidance. Similarly, BDA states that the Rule G–17 SMMP guidance should apply to Rule G–47 and a reference to the exception should be added to the proposed rule or, at a minimum, the SMMP guidance should be revised to reference Rule G–47.

MSRB RESPONSE: The SMMP guidance does not primarily relate to time of trade disclosures as it addresses four separate areas: time of trade disclosures, transaction pricing, suitability, and bona fide quotations. The MSRB has proposed a draft SMMP rule that references proposed Rule G–47 and does not believe it is necessary or appropriate to reference this new SMMP rule in proposed Rule G–47 (and the other rules to which the SMMP guidance applies). Because the proposed SMMP rule references proposed Rule G–47, the MSRB has effectively addressed the comment that the SMMP guidance should, at a minimum, reference proposed Rule G–47.

• Electronic Trading Platforms

COMMENT: Schwab and SIFMA are concerned about the proposed deletion of the Interpretive Notice dated March 18, 2002 entitled ''Interpretive Notice Regarding Rule G–17, on Disclosure of Material Facts'' (the ''March 18, 2002 Notice''). Specifically, Schwab and SIFMA are concerned about deleting the following sentence:

> The MSRB believes that the provision of electronic access to material information to customers who elect to transact in municipal securities on an electronic platform is generally consistent with a dealer's obligation to disclose such information, but that whether such access is effective disclosure ultimately depends upon the particular facts and circumstances present.

SIFMA[46] states that its members have relied on this language in developing policies and procedures to provide time of trade disclosures to customers using electronic trading platforms. Similarly, Schwab states that dealers providing online access to customers have relied on this language for years and the absence of specific language that recognizes a dealer's ability to meet their time of trade disclosure obligations via electronic access could lead to confusion among dealers and disruption of disclosure processes across the industry. Additionally, BDA indicates that dealers believe access equals disclosure for online trading.

MSRB RESPONSE: The sentence quoted above was intentionally excluded from the proposed rule because the ability to use electronic disclosure is now so widely accepted and the qualifying phrase ''whether such access is effective disclosure ultimately depends upon the particular facts and circumstances present'' renders the guidance less definitive. Moreover, based on the comments received, some industry members appear to have misinterpreted this sentence to mean that ''access'' equals disclosure for online trading. This apparent misunderstanding of the guidance supports deletion of the sentence and highlights the importance of clarifying the time of trade disclosure guidance by codifying it into a short and easy to understand rule.

COMMENT: BDA encourages the MSRB to establish a separate section of the proposed rule addressing disclosure obligations in connection with online trading to provide more clarity.

MSRB RESPONSE: The codification of interpretive guidance in this rulemaking initiative is not intended to substantively change the time of trade disclosure obligation. The MSRB can consider adding provisions addressing online trading if the Board undertakes to amend the rule substantively in the future.

[44] *See* MSRB Notice 2013–04 (February 11, 2013) (the ''time of trade disclosure notice'').

[45] Comment letters were received from: (1) Bond Dealers of America (''BDA''); (2) Charles Schwab & Co., Inc. (''Schwab''); (3) Lumesis, Inc. (''Lumesis'') (Lumesis sent two separate comment letters, one on March 11, 2013 and a second letter on July 17, 2013 after the comment period was closed); (4) R.W. Smith & Associates, Inc. (''RWSA'') (RWSA's comment letter simply states that they contributed to and support the SIFMA comment letter and its positions in relation to codifying the time of trade disclosure obligation); (5) Securities Industry and Financial Markets Association (''SIFMA''); (6) TMC Bonds, L.L.C. (''TMC''); and (7) Wells Fargo Advisors, LLC (''WFA'').

[46] SIFMA states that the March 18, 2002 Notice should not be deleted because it is one of the few MSRB notices discussing a dealer's time of trade disclosure obligations that has been approved by the SEC. Proposed Rule G–47 and the related supplementary material which would supersede that Notice, however, are likewise being submitted to the SEC for approval.

• Electronic Trading Systems—Institutional Customers

COMMENT: TMC suggests that the proposed rule exempt institutional market professionals from the disclosure requirement.

MSRB RESPONSE: The proposed rule, in conjunction with the SMMP guidance and proposed SMMP rule, should address TMC's concerns by exempting dealers from the requirement to disclose to SMMPs material information that is reasonably accessible to the market. Therefore, the MSRB is not proposing any changes to the proposed rule based on these comments.

• Minimum Denominations

COMMENT: SIFMA believes that the Interpretive Notice dated January 30, 2002 entitled ''Notice of Interpretation of Rule G–17 Concerning Minimum Denominations'' should not be deleted because it is the only guidance concerning the disclosure obligation for securities sold below minimum denominations. SIFMA states that its members believe the background information in this notice is important.

MSRB RESPONSE: The proposed rule addresses disclosure obligations related to minimum denominations as described in the current Rule G–17 guidance. The MSRB does not believe that it is necessary to include the background information included in the guidance; however, in response to this comment, the MSRB has proposed a revision to Rule G–47, supplementary material .03(g), clarifying that the disclosure obligation relates to minimum denominations authorized by bond documents.

• Disclosure Obligations for Sales to Customers vs. Purchases From Customers

COMMENT: SIFMA argues that the rule should make a distinction between a dealer's disclosure obligation for sales to customers, as opposed to purchases from customers, and that the rule's failure to do so is inconsistent with current guidance. SIFMA states that existing guidance primarily focuses on disclosure obligations when a dealer is selling a bond to a customer and very limited guidance has been issued covering situations when a dealer is purchasing. SIFMA states that this proposed extension of the disclosure obligation is not warranted, as arguably the selling customer knows the features of the security that it owns and the potentially purchasing dealer is about to assume the risks of those features. SIFMA acknowledges, however, that knowledge professionally available to dealers, such as a ratings change that has not yet been noticed to EMMA, or a call at par announced minutes ago via a recognized information vendor, is material and should be disclosed. However, SIFMA argues that this new requirement could be harmful to customers and would also be unnecessarily burdensome for dealers.[47] SIFMA states that the MSRB should explicitly recognize that a substantially different time of trade disclosure obligation exists in these circumstances and that the specific scenarios in the proposed rule may not be applicable when a customer is selling. Finally, SIFMA states that, if the MSRB extends an undifferentiated obligation to customer sale transactions, a thorough cost benefit analysis should be undertaken. BDA also argues that the burden of applying this rule to sales of securities by customers outweighs any tangential value to customers. BDA urges the MSRB to apply the proposed rule to sales by customers in a narrow set of instances, such as when an issuer has made a tender offer for the bonds at a price that is higher than what the dealer is offering.

MSRB RESPONSE: Although recent time of trade disclosure guidance focuses on sales of municipal securities to customers, certain earlier guidance requires dealers to make disclosures in connection with both sales to and purchases from customers, and that guidance remains in effect. The MSRB believes, from a fair dealing perspective, that it is difficult to categorically exclude purchases from customers. Significantly, both SIFMA and BDA have pointed out instances where disclosure to a customer selling a bond would be appropriate. Therefore, the MSRB proposes to retain the disclosure requirement for purchases from customers. However, in response to this comment, the MSRB proposes to add the following sentence to the rule to clarify that whether the customer is purchasing or selling is a factor that can be considered in making the materiality determination: ''Whether the customer is purchasing or selling the municipal securities may be a consideration in determining what information is material.''

[47] For example, SIFMA states that a particular dealer may not have recommended or even sold the bond to the customer so researching and disclosing all material facts about the bond will delay the trade. Additionally, SIFMA states that when an estate has given a dealer instructions to liquidate an entire portfolio, the disclosure obligation could decrease liquidity while the dealer does its own diligence and increase the cost of the trade.

• Material, Non-Public Information

COMMENT: SIFMA and BDA propose that the MSRB modify the definition of ''material'' to exclude material non-public information.

MSRB RESPONSE: As discussed above, the MSRB is not proposing substantively to revise the current time of trade disclosure obligations but simply to codify them. While the MSRB understands the issue raised by the commenters, the MSRB can consider this comment if the Board undertakes to amend the rule substantively in the future.

• Access Equals Delivery for Time of Trade Disclosures

COMMENT: SIFMA states that the proposed rule seems to eviscerate recent MSRB access equals delivery initiatives. SIFMA states that, in connection with marketing new issues of municipal securities to customers, dealers have relied on MSRB guidance that providing a preliminary official statement (''POS'') to a customer ''can serve as a primary vehicle for providing the required time-of-trade disclosures under Rule G–17, depending upon the accuracy and completeness of the POS as of the time of trade.'' SIFMA believes that providing access to a POS, whether on EMMA or some other electronic platform, should continue to satisfy a dealer's time of trade obligation for new issues of municipal securities. SIFMA states that proposed Rule G–47, supplementary material .01(b) and (c), seem to prohibit activity recently championed by the MSRB and that the proposed new obligation could create a risk of having dealers misinterpret or inadequately summarize information in a POS.

MSRB RESPONSE: This comment does not sufficiently differentiate between Rule G–32, on disclosures in connection with primary offerings, and Rule G–17, which are two separate and distinct obligations. The guidance cited by SIFMA states that a POS can serve as a primary vehicle for *providing* the required time-of-trade disclosures but does not state that providing access to a POS would be sufficient. The MSRB has not stated that access to a POS, or to all material information regarding a security and transaction, is sufficient to satisfy the Rule G–17 time of trade disclosure obligation. Rather, the MSRB has explained that whether providing access to material information is effective disclosure is determined by the specific facts and circumstances. Supplementary material .01 (b) and (c) does not preclude the disclosure of material information by delivery of a

POS to the customer, assuming the POS contains all material information and assuming the means of disclosure are effective.

• General Advertising Materials

COMMENT: SIFMA requests further clarification of the types of ''disclosure of general advertising materials'' as referenced in proposed Rule G–47, supplementary material .01(c).

MSRB RESPONSE: The MSRB does not propose to provide further clarification on general advertising materials at this time since the Rule G–17 interpretive notices do not elaborate on this concept. The MSRB can consider providing additional guidance if the Board undertakes to amend proposed Rule G–47 substantively in the future.

• Established Industry Sources

COMMENT: Lumesis suggests that requiring market participants to disclose ''material information about the security that is reasonably accessible to the market'' should contemplate more than ''established industry sources'' as currently defined. Lumesis states that this would make the definition broad enough to encompass current or future technology and/or dissemination systems. Lumesis suggests that the MSRB remove the term ''established industry sources'' from the proposed rule or provide clarity to ensure that market participants focus on disclosing material information about the security that is reasonably accessible to the market. Similarly, TMC suggests that the proposed rule clarify what information is considered ''reasonably accessible to the market.''

MSRB RESPONSE: The proposed rule provides that dealers must disclose ''all material information known about the transaction, as well as material information about the security that is reasonably accessible to the market.'' The proposed rule further provides that '''[r]easonably accessible to the market' shall mean that the information is made available publicly through established industry sources'' and '''[e]stablished industry sources' shall *include* [EMMA], rating agency reports, and other sources of information relating to municipal securities transactions generally used by brokers, dealers, and municipal securities dealers that effect transactions in the type of municipal securities at issue.'' [Emphasis added] The definition of established industry sources is not limited to the particular sources listed, and the definition allows for evolving technologies and systems so long as such ''other sources'' are related and generally used as delineated by the proposed rule.

COMMENT: WFA states that the rule should acknowledge the role of information vendors in helping a dealer monitor established industry sources. WFA cites the Interpretive Notice dated November 30, 2011, *MSRB Answers Frequently Asked Questions Regarding Dealer Disclosure Obligations under MSRB Rule G–17,* which states:

> [T]he MSRB has noted that information vendors and other organizations may provide industry professionals with access to information that is generally used by dealers to effect transactions in municipal securities. The MSRB expects that, as technology evolves and municipal securities information becomes more readily available, new 'established industry sources' are likely to emerge.

More specifically, WFA requests that the final rule clarify that dealers may rely on vendors to help aggregate material information from established industry sources and monitor for ''emerging'' sources. Additionally, WFA states that the rule and guidance should recognize that established industry sources remain reliant on the quality of continuing and material event notifications provided by issuers.

MSRB RESPONSE: The MSRB believes the role that information aggregators may play in assisting dealers in compliance with the rule is widely known and recognized and that specifically addressing the use of aggregators in the proposed rule may imply that use of such services is encouraged or required.

• Rating Agency Reports

COMMENT: SIFMA requests that the MSRB clarify ''rating agency reports'' within the definition of ''established industry sources'' in the proposed rule. SIFMA states that the use of the term ''reports'' implies that dealers must distribute credit event-driven reports and that disclosure of the rating action alone is insufficient. SIFMA requests that the MSRB clarify that firms are under no obligation to distribute such reports.

Lumesis suggests that the definition of ''established industry sources'' should not include ''rating agency reports.'' Lumesis states that inclusion of the reference may be inconsistent with a focus on material information that is timely since these reports may be issued months or more before the trade triggering disclosure. Additionally, Lumesis states that the inclusion of reports may be construed as an implicit endorsement of a private, for-profit enterprise's offering as fulfilling the requirement. Lumesis also states that the inclusion of rating agency reports seems inconsistent with the Dodd-Frank Act which indicates that market participants using ratings or rating reports should not rely on them alone.

MSRB RESPONSE: As discussed previously, the MSRB is simply codifying the existing guidance in this rulemaking initiative. The current guidance does not address the meaning of the reference to ''rating agency reports'' for purposes of time of trade disclosure and, as discussed above, the definition of established industry sources is not limited to the particular sources listed. Therefore, the MSRB does not propose adding any additional interpretation to the meaning of ''rating agency reports'' or deleting this reference. However, the MSRB can consider revisions in this area if the Board undertakes to amend proposed Rule G–47 substantively in the future.

• Unsolicited Orders

COMMENT: TMC suggests that the requirement for dealers to disclose reasonably accessible information to a client placing an unsolicited order is unnecessary regulation given the ease of access to the internet.

MSRB RESPONSE: Current guidance provides that the time of trade disclosure obligation is the same whether the order is unsolicited or solicited. The goal of this rulemaking initiative is to codify current guidance in the new proposed Rule G–47.

• Location of Rule

COMMENT: TMC suggests that it might be beneficial to codify the time of trade disclosure rule as a subsection of Rule G–17 as opposed to creating a new rule so that participants would only have to view a single rule for fair dealing, as opposed to having to cross-reference similar rules and their corresponding comments.

MSRB RESPONSE: The MSRB does not propose to codify the provisions as suggested because, as a result of this rulemaking initiative, there will no longer be any time of trade disclosure guidance in Rule G–17.[48]

• Material Event Filings

COMMENT: SIFMA states that it would be helpful for the MSRB to explicitly address the concept that an event disclosed by an issuer or obligated person pursuant to an SEC Rule 15c2–12 continuing disclosure agreement does not necessarily constitute

[48] Rule G–17 will continue to include interpretive guidance related to time of trade disclosures for 529 plans. As indicated above, however, the MSRB may create a separate rule regarding time of trade disclosure obligations for 529 plans, in which case this guidance would likely be codified in a rule and deleted as part of any such rulemaking initiative.

''material information'' that would be required to be disclosed to investors and that, even if such information was material at the time it was disclosed, it does not remain material forever. SIFMA states that long-past credit ratings changes, or substitutions of trustees, or a continuing disclosure filing that was a few days late five years ago should not automatically be deemed material at the time of trade merely because they triggered a disclosure obligation at the time of occurrence. SIFMA suggests that a six-month look back would be a reasonable time limit for disclosing past information.

MSRB RESPONSE: There is nothing in the proposed rule indicating that events disclosed by an issuer or obligated person pursuant to Rule 15c2–12 are automatically material at the time of trade. The proposed rule states the well established definition that ''[i]nformation is considered to be material if there is a substantial likelihood that the information would be considered important or significant by a reasonable investor in making an investment decision.'' Therefore, the MSRB does not believe that any revisions are necessary or appropriate in response to this comment. In addition, there is no safe-harbor look back period under the existing guidance and thus a look back period is not included in the proposed rule, the purpose of which is only to codify existing obligations.

• Disclosure Obligations in Specific Scenarios

COMMENT: SIFMA states that the list of scenarios in the proposed rule that may be material under certain circumstances and require disclosure is too prescriptive for a principles-based rule and will become a de facto enforcement checklist for regulators. SIFMA also states that dealers may rely on the four corners of the notice and not consider other factors that may become material in the future. SIFMA suggests that the existing interpretive notices be reorganized by specific scenarios, as many of the listed specific scenarios are the subject of more than one interpretive notice.

MSRB RESPONSE: The proposed rule provides that the examples describe information that may be material in specific scenarios and that the list is not exhaustive. The MSRB does not propose to reorganize the existing interpretive guidance by specific scenarios since the MSRB plans to delete the Rule G–17 time of trade disclosure guidance.

COMMENT: Similarly, WFA states that a final rule should provide dealers with more clarity about the specific scenarios that trigger time of trade disclosure obligations for the types of information identified in the supplementary material.

MSRB RESPONSE: The MSRB believes that the supplementary material in the proposed rule provides dealers with sufficient clarity regarding time of trade disclosure obligations by providing a non-exhaustive list of examples describing information that may be material.

• Credit Risks and Ratings

COMMENT: SIFMA states that unlike many of the other specific scenarios addressed in the proposed rule, credit ratings are potentially more fluid. Therefore, SIFMA argues that it would be helpful to define a material look-back period for credit ratings changes.

MSRB RESPONSE: The MSRB does not propose making these changes since they are not in the current guidance but the MSRB can consider them if the Board undertakes to amend the proposed rule substantively in the future.

• Securities With Non-Standard Features

COMMENT: SIFMA states that the prior uses of the term ''non-standard features'' have been related to situations where the bonds pay interest annually, rather than semi-annually, a fact that affects yield calculations. SIFMA argues that this new usage seems to have no bounds, and adds the traditional interpretation as an afterthought. SIFMA states that it would be helpful to know what the MSRB considers to be standard features.

MSRB RESPONSE: The MSRB does not propose making any revisions to the proposed rule in response to this comment. The requirement in the proposed rule is drawn from current interpretive guidance on time of trade disclosure obligations, and while the discussion of non-standard features arose in the context of price/yield calculations, the basic principle, when limited by a materiality threshold, is appropriate for the proposed rule change.

• Issuer's Intent to Prerefund

COMMENT: SIFMA states that, unless an issuer's intent to prerefund has been publicly announced, it will not be known to established industry sources and would likely be material non-public information. (See the discussion above regarding the disclosure of material non-public information.)

MSRB RESPONSE: This requirement is drawn from the current interpretive guidance and the MSRB does not propose any changes in response to this comment.

• Failure to Make Continuing Disclosure Filings

COMMENT: WFA suggests that the proposed rule should provide guidance about how to interpret the potential materiality of issuer event reporting deficiencies. WFA believes that the rule should make clear that an issuer's failure to make continuing disclosure filings is a factor but is not determinative of the materiality of the issuer's disclosure deficiency. WFA also believes the MSRB should make clear that a dealer may consider subsequent disclosures and the curing of late filings as relevant in determining the significance of a prior or less severe disclosure deficiency. Finally, WFA believes the supplementary material should specify a window of time in which an issuer's late continuing disclosure filing would be regarded as a clerical or ministerial issue and thus not a material deficiency.

MSRB RESPONSE: Proposed Rule G–47, supplementary material .03(o) provides that discovery that an issuer has failed to make filings required under its continuing disclosure agreements may be material in specific scenarios and require time of trade disclosures to a customer. Therefore, this does not indicate that such a failure is always material requiring disclosure. The proposed rule, as noted, states the well established definition that ''[i]nformation is considered to be material if there is a substantial likelihood that the information would be considered important or significant by a reasonable investor in making an investment decision.'' Additionally, the MSRB does not propose to add the information requested by WFA relating to curing of late filings and a time window where it would be considered clerical. As discussed previously, the MSRB is simply codifying the existing guidance in this rulemaking initiative and the existing guidance does not provide for such a bright-line look back.

COMMENT: SIFMA states that the rule should make it clear that for secondary market trades the ''discovery'' by a dealer that an issuer has failed to make filings required by its continuing disclosure agreements is limited to a dealer's review of ''failure to file'' notices on EMMA pursuant to Rule 15c2–12.

MSRB RESPONSE: The interpretive guidance states that, ''if a firm discovers through its Rule 15c2–12 procedures *or otherwise* that an issuer has failed to make filings required under its continuing disclosure agreements, the

firm must take this information into consideration in meeting its disclosure obligations under MSRB Rule G–17 . . .'' [49] [Emphasis added]. Therefore, this requirement is not as narrow as SIFMA appears to interpret it and the MSRB does not propose to make any changes in response to this comment.

• Processes and Procedures

COMMENT: SIFMA argues that proposed Rule G–47, supplementary material .04 is an expansion of current regulatory requirements, is too narrow, and omits critical guidance as set forth in the Interpretive Notice dated November 30, 2011, *MSRB Answers Frequently Asked Questions Regarding Dealer Disclosure Obligations under MSRB Rule G–17.* The proposed rule states:

> Brokers, dealers, and municipal securities dealers must implement processes and procedures reasonably designed to ensure that material information regarding municipal securities is disseminated to registered representatives who are engaged in sales to and purchases from a customer.

The proposed rule does not include the following sentence contained in the guidance:

> It would be insufficient for a dealer to possess such material information, if there were no means by which a registered representative could access it and provide such information to customers.

SIFMA argues that a dealer that provides its registered representatives access to such information satisfies current MSRB guidance under Rule G–17 and should similarly be sufficient under the proposed rule. SIFMA also argues that incorporating this guidance into the proposed rule is an expansion of existing regulatory obligations as currently approved by the SEC and is not merely a codification of existing regulations. Therefore, SIFMA states that any enforcement against dealers for failing to disseminate or provide access to their registered representatives of material information regarding municipal securities should be applied solely prospectively.

MSRB RESPONSE: SIFMA appears to interpret the sentence in the guidance to mean that merely providing access is sufficient. The sentence states that dealer possession of information is insufficient if registered representatives lack access to it. This does not mean that the converse is true—that mere access to the information is sufficient. Beyond providing access, dealers must implement processes and procedures reasonably designed to ensure that material information is disseminated to registered representatives. The potential for misinterpretation of this sentence supports the MSRB's determination that it should not be included in the proposed rule. Additionally, proposed Rule G–47, supplementary material .04 is not an expansion of current regulatory requirements since this obligation is fairly and reasonably implied by current MSRB rules, as enunciated by the MSRB since November 30, 2011.[50]

COMMENT: WFA suggests that the proposed rule should make clear that a dealer with a reasonably designed system for the detection and disclosure of material information will be presumed to have complied with its time of trade disclosure obligations.

MSRB RESPONSE: The current guidance does not provide that a dealer will be presumed to have complied with its time of trade disclosure obligations by having a reasonably designed system. To do so in the proposed rule would significantly narrow dealers' current obligations.

• Ambiguity of Rule

COMMENT: BDA states that the proposed rule, like the interpretive guidance, is unnecessarily ambiguous. BDA believes that there should be at least a safe harbor or some additional clarity that allows dealers to comply with concrete rules rather than broad-based principles.

MSRB RESPONSE: The MSRB believes the new rule will be clear and easier for dealers to follow. As discussed above, the MSRB is simply codifying the guidance and can consider revisions to the proposed rule in the future.

• Harmonizing With FINRA Notice 10–41

COMMENT: BDA suggests that the MSRB should reconcile how the new proposed rule will be harmonized with FINRA Regulatory Notice 10–41 and exactly how the market should read the two in conjunction with one another.

MSRB RESPONSE: The MSRB's rules and guidance should be followed for all municipal securities transactions as FINRA's notice is simply its interpretation of MSRB rules and guidance.

• Enforcement

COMMENT: Lumesis comments that providing dealers that have made good faith efforts to comply with proposed Rule G–47 with ample notice and sufficient direction to take corrective actions would support the spirit and intent of the rule.

MSRB RESPONSE: The MSRB appreciates this comment; however, the approach to enforcement is beyond the scope of the proposal.

• Form of Disclosure

COMMENT: Lumesis suggests that as the MSRB contemplates refinements and changes to the proposed rule in the future the subject of ''form of disclosure'' be more fully addressed as many market participants struggle with what actions satisfy the time of trade disclosure obligation.

MSRB RESPONSE: The MSRB can consider this suggestion if the Board undertakes to revise the proposed rule in the future.

Rule G–19 on Suitability of Recommendations and Transactions

On March 11, 2013, the MSRB requested comment on proposed revisions to Rule G–19.[51] The suitability notice generated seven comment letters.[52]

The comment letters are summarized by topic as follows:

• Support for the Proposal

COMMENTS: All of the commenters generally support the MSRB's initiative to harmonize MSRB Rule G–19 with FINRA Rule 2111. BDA states that it is encouraged by many of the changes in proposed Rule G–19. FSI states that it supports the harmonization of MSRB

[49] Interpretive Notice dated September 20, 2010, *MSRB Reminds Firms of their Sales Practice and Due Diligence Obligations When Selling Municipal Securities in the Secondary Market.*

[50] *See* Interpretive Notice dated November 30, 2011, *MSRB Answers Frequently Asked Questions Regarding Dealer Disclosure Obligations under MSRB Rule G–17; see also* Interpretive Notice dated July 14, 2009, *Guidance on Disclosure and Other Sales Practice Obligations to Individual and Other Retail Investors in Municipal Securities.*

[51] *See* MSRB Notice 2013–07 (March 11, 2013) (the ''suitability notice'').

[52] Comment letters were received from: BDA; College Savings Foundation (''CSF'') (although CSF sent its own letter, the letter simply states that CSF endorses the comments made by the Investment Company Institute); College Savings Plans Network (''CSPN'') (although CSPN sent its own letter, the letter simply states that CSPN is supportive of the comments relating to 529 Plan suitability requirements submitted by the Investment Company Institute); Financial Services Institute (''FSI''); Investment Company Institute (''ICI''); SIFMA; and WFA. In addition to these seven comment letters submitted in response to the proposed revisions to Rule G–19, an additional comment letter was submitted by an investor on August 25, 2013. The substance of this letter is more germane to the MSRB's request for comment on adopting a ''best execution'' standard and this retail investor submitted a similar letter in response to that request for comment. *See,* MSRB Notice 2013–16, *Request for Comment on Whether to Require Dealers to Adopt a ''Best Execution'' Standard for Municipal Securities Transactions* (August 6, 2013). Therefore, this letter will be discussed in detail in connection with the best execution request for comment.

Rule G–19 with FINRA Rule 2111 and that it is a positive development that will provide significant benefits for broker-dealers and financial advisors.[53] ICI states that it supports the MSRB's proposal to harmonize its suitability rule with FINRA's suitability rule because it is in the best interests of investors and registrants. SIFMA comments that it supports the MSRB's efforts to harmonize MSRB Rule G–19 with FINRA Rule 2111 since such harmonization will promote more effective business practices and efficient compliance. Finally, WFA states that it applauds the MSRB's continuing effort to promote regulatory efficiency.

MSRB RESPONSE: These comments support the MSRB's statement on burden on competition.

• Application to SMMPs

COMMENTS: SIFMA comments that its members would prefer the MSRB to explicitly include the SMMP exemption in the proposed rule as with the institutional account exemption in FINRA Rule 2111(b) even though the MSRB is proposing separate rules codifying SMMP guidance. SIFMA states that the suitability rule should, at a minimum, cross reference the SMMP rules.

Similarly, WFA requests that the MSRB reconsider its plan to handle the SMMP exemption separately from the proposed rule. WFA requests that the MSRB adopt a structure parallel to FINRA's suitability rule to make clear that, under certain circumstances, a dealer has limited suitability obligations to institutional customers.

Additionally, WFA is concerned that the SMMP exemption continues to impose additional suitability requirements on dealers transacting with institutional clients beyond those required under FINRA's suitability rule. WFA states that dealers considering whether an institutional account is an SMMP must assess the factors required under Rule 2111(b) as well as additional criteria such as the institutional customer's ability to independently evaluate the ''market value'' of municipal securities and the ''amount and type of municipal securities owned [by] or under management'' of the institutional customer. WFA states that since some institutional clients may satisfy FINRA's exemptive criteria but not MSRB's, dealers will likely need to invest in costly technology enhancements and will likely be required to maintain separate policies and procedures. WFA is also concerned that the difference in rule structure will lead to regulatory confusion for clients and regulators.

BDA believes that omitting any reference to the SMMP exemption in the proposed rule undermines the goal of harmonizing it with FINRA's suitability rule. BDA is concerned that FINRA examiners will not be able to consistently apply the FINRA suitability rule as contrasted with the MSRB suitability rule, potentially causing confusion for application of the rules by FINRA examiners.

BDA states that, if the MSRB includes an exemption for SMMPs in the proposed rule, the supplementary material should be updated to make certain corresponding changes.

MSRB RESPONSE: The MSRB does not believe that it is appropriate or necessary to reference the SMMP exemption in Rule G–19. The SMMP exemption addresses four separate areas: time of trade disclosures, transaction pricing, suitability, and bona fide quotations and the exemption is not referenced in any of these separate rules. In connection with the proposed suitability rule, the MSRB has not proposed any revisions to the SMMP exemption and addresses WFA's comments in this area separately in response to the request for comment on the proposed SMMP rules set out below.[54]

• Exclusions From Recommended Strategies

COMMENTS: SIFMA states that the proposed rule omits important exclusions from recommended strategies that are present in FINRA's suitability rule including with respect to: Descriptive information about an employee benefit plan; asset allocation models such as investment analysis tools; and other interactive investment materials. SIFMA states that these omissions solely with respect to municipal securities will result in confusion. SIFMA believes that materials and output of this nature provide investors with valuable information when considering investment decisions and should be recognized by the MSRB as exclusions from Rule G–19. SIFMA notes that the SEC, in its 2012 Report on the Municipal Securities Market, expressly discusses amending Rule G–19 to be consistent with FINRA's Rule 2111 ''including with respect to the scope of the term strategy.''

SIFMA also recommends listing 529 plan education savings calculators and tools as a type of excluded ''general investment information.''

MSRB RESPONSE: The proposed rule does not include the following general financial and investment information from FINRA's suitability rule: (1) Dollar cost averaging; (2) compounded return; (3) tax deferred investment; (4) descriptive information about an employer-sponsored retirement or benefit plan, participation in the plan, the benefits of plan participation, and the investment options available under the plan; (5) asset allocation models that are (i) based on generally accepted investment theory, (ii) accompanied by disclosures of all material facts and assumptions that may affect a reasonable investor's assessment of the asset allocation model or any report generated by such model, and (iii) in compliance with Rule 2214 (Requirements for the Use of Investment Analysis Tools) if the asset allocation model is an ''investment analysis tool'' covered by Rule 2214; and (6) interactive investment materials that incorporate the above. These items are not included in the proposed rule because the MSRB chose to include the concepts that are most pertinent to the municipal securities market. With respect to the suggestion to add 529 calculators and tools to the list, the MSRB may create a separate rule or guidance to specifically address suitability obligations for 529 plans in the future and the MSRB can consider this comment at that time.

• 529 Plans

COMMENTS: ICI states that it is not clear whether the proposed rule is intended to apply to MSRB registrants selling 529 plans. However, ICI states that, from talking to MSRB staff, they understand that the proposed rule is intended to apply to such registrants' recommendations. ICI recommends that the MSRB revise the current proposal to add supplementary material to Rule G–19 that sets forth all additional suitability obligations imposed on registrants' recommendations of 529 plan securities. ICI also recommends that the MSRB rescind all suitability requirements and guidance that have been issued under other MSRB rules relating to recommendations involving 529 plan securities. If the MSRB follows this recommendation, ICI recommends that the MSRB publish a revised request for comment that includes any provisions designed to address 529 plans.

SIFMA states that the request for comment creates confusion about the

[53] FSI also notes that it has concerns with FINRA's suitability rule, but did not specify those concerns.

[54] MSRB Notice 2013–10, *Request for Comment on Proposed Sophisticated Municipal Market Professional Rules* (May 1, 2013).

applicability of the proposed rule to firms selling 529 plan securities and, in lieu of a separate suitability rule for 529 plans, SIFMA suggests that the MSRB consider incorporating existing interpretive guidance related to suitability assessments for 529 plans into the proposed rule, either by adding a sentence to the proposed rule specific to assessing the suitability of a 529 plan security, or by incorporating existing interpretive guidance into the supplementary material.

MSRB RESPONSE: The proposed rule is intended to apply to 529 plans. All MSRB rules and guidance apply to 529 plans unless specifically excluded, and the proposed rule does not exclude 529 plans. Additionally, the current guidance addressing suitability requirements for 529 plans continues to apply. The MSRB may decide to create a separate rule addressing 529 plans in the future; however, the proposed suitability rule and related guidance will apply to 529 plans until any such separate 529 plan rule is created.

- Applicability of FINRA's Guidance

COMMENT: ICI recommends that the MSRB confirm in the notice adopting the proposed revisions to Rule G–19 the MSRB's intent to interpret its rule in a manner that is consistent with FINRA's interpretation.

MSRB RESPONSE: The MSRB will interpret proposed Rule G–19 in a manner consistent with FINRA's interpretations of Rule 2111 except to the extent that the MSRB affirmatively states that specific provisions of FINRA's interpretations do not apply.

- Explicit vs. Passive Hold Recommendations

COMMENTS: WFA comments that the MSRB should provide guidance similar to FINRA's guidance that suitability obligations concerning hold recommendations cover only explicit hold recommendations.

BDA is concerned that there is a potential for confusion with respect to explicit versus passive hold recommendations. Specifically, proposed Rule G–19, supplementary material .03, Recommended Strategies, would apply the suitability obligation to investment strategies that include an explicit recommendation to hold a municipal security or municipal securities. BDA is concerned that this might lead to unnecessary and burdensome compliance documentation in certain instances. BDA encourages the MSRB to provide further guidance as to what constitutes an explicit hold recommendation for purposes of the rule and believes that the MSRB should have guidance, as FINRA does in Regulatory Notice 12–55, that ''implicit'' hold recommendations are not within the scope of the suitability rule.

MSRB RESPONSE: As noted, the MSRB will interpret Rule G–19 in a manner that is consistent with FINRA's interpretation of its suitability rule except to the extent that the MSRB affirmatively states that specific provisions of FINRA's interpretations do not apply.

- Effective Date

COMMENTS: SIFMA appreciates that the MSRB intends to file the time of trade disclosure, suitability, and SMMP proposals with the SEC at the same time.

SIFMA further requests that these three rules be implemented simultaneously with the same effective date.

SIFMA states that FINRA Rule 2111 was the result of a multi-year process, including an implementation period of approximately 19 months and that any regulatory scheme takes time to implement properly. SIFMA further states that municipal securities dealers that are not FINRA members, as well as FINRA members that only buy and sell municipal securities, will need a reasonable time to allow for a sufficient implementation period to develop, test, and implement supervisory policies and procedures, systems and controls, as well as training.

SIFMA also states that municipal securities dealers that are FINRA members will also need time, albeit less than non-FINRA members, to implement the proposed changes. SIFMA recommends an implementation period of no less than one year from approval by the SEC before the proposal becomes effective.

MSRB RESPONSE: The MSRB contemplated implementing the time of trade disclosure, suitability, and SMMP rules simultaneously with the same effective date. However, the MSRB believes that an implementation period of one year is unnecessary. The time of trade disclosure and SMMP rules simply codify existing guidance and the suitability rule is largely consistent with FINRA's suitability rule. Therefore, the MSRB proposes an effective date for the proposed rule change of 60 days following the date of SEC approval.

- Changes to Supplementary Material

COMMENTS: BDA suggests striking the word ''retirement'' from supplementary material .03, Recommended Strategies, item (iv). BDA suggests that the section should be rewritten to read ''estimates of future income needs'' as this would better align to FINRA's ''liquidity needs'' criteria to recognize that when purchasing a position, one might be looking for a period to help bridge income needs until they reach retirement and not solely for ''retirement income needs.''

MSRB RESPONSE: The language in the proposed rule regarding estimates of future retirement income needs is identical to the parallel language in FINRA's suitability rule relating to general financial and investment information. The MSRB does not propose to delete the word ''retirement'' since there is no unique aspect of the municipal securities market that would support adopting different language from FINRA's rule. Moreover, the MSRB does not believe that the phrase should be aligned to the non-parallel ''liquidity needs'' criterion in FINRA's rule relating to a customer's investment profile.

Rules D–15 and G–48 on SMMPs

On May 1, 2013, the MSRB requested comment on proposed Rules D–15 and G–48 on SMMPs.[55] The SMMP notice generated three comment letters.[56]

The comment letters are summarized by topic as follows:

- Support for the Proposal

COMMENTS: All of the commenters generally support the MSRB's initiative to codify the SMMP guidance into Rules D–15 and G–48. BDA states that, while it is supportive of the proposed rules, it seeks clarity on some items. SIFMA comments that it continues to support the efforts by the MSRB to provide clarity to regulated entities by reorganizing or eliminating certain interpretive guidance associated with Rule G–17 into new or revised rules. WFA states that it supports the MSRB's continued commitment to ''streamline'' its rules and guidance and its ongoing effort to align its rule format with that of other regulators.

MSRB RESPONSE: The MSRB believes these comments support the MSRB's statement on the burden on competition.

- SMMP Definition

COMMENTS: SIFMA comments that there is one group of customers that may be experienced municipal market participants yet does not fall within the current SMMP definition: Hedge funds with assets under management of less than $50 million. SIFMA states that the

[55] *See* MSRB Notice 2013–10 (May 1, 2013) (the ''SMMP notice'').

[56] Comment letters were received from: BDA; SIFMA; and WFA.

MSRB and FINRA should consider expanding the definition of institutional account holders and SMMPs in future rulemaking to include this type of customer.

Last year the MSRB harmonized (with slight distinctions) the SMMP definition and the process by which dealers confirm a customer's SMMP status with FINRA's suitability rule and institutional account definition. SIFMA suggests that hedge funds managing less assets than required by the MSRB and FINRA are nevertheless sophisticated and, therefore, should be covered by the MSRB and FINRA rules. By contrast, BDA indicated in its comment letter that it is comfortable with the $50 million threshold.

MSRB RESPONSE: As discussed in the SMMP notice, the codification of the interpretive guidance on SMMPs that is currently in Rule G–17 is intended to preserve the substance of the guidance approved by the Board. No substantive changes are intended. It would be beyond the scope of this initiative to determine whether small hedge funds are sufficiently sophisticated to warrant the relief to dealers in proposed Rule G–48.

• Cross References to SMMP Rules

COMMENTS: SIFMA and WFA comment that the rules under which a dealer's obligations to SMMPs are modified (proposed Rule G–47, and Rules G–19, G–13, and G–18) [57] should specifically include a reference to the definition of and the modified obligations to SMMPs delineated in the proposed rules.

MSRB RESPONSE: One of the benefits of adopting stand-alone rules is to make them more prominent and easier for dealers and other market participants to locate. The MSRB believes that a stand-alone SMMP definition and a stand-alone rule describing the relief available to dealers who do business with SMMPs will provide ample clarity to dealers regarding their obligations. Cross-references, therefore, are unnecessary. Moreover, if cross-references were used for rules impacting SMMPs, a consistent practice of including cross-references in other rules would tend to make the rulebook unmanageable. This comment was also made in response to the requests for comment on proposed Rule G–47 and the proposed revisions to Rule G–19. In response to the previous comments, the MSRB indicated that it does not believe it is necessary to reference the new SMMP rules in each of the rules to which the SMMP guidance applies.

• Effective Dates

COMMENT: SIFMA requests that the proposed revisions to Rule G–19, and proposed Rules G–47, G–48, and D–15 be implemented simultaneously with the same effective date.

MSRB RESPONSE: The MSRB agrees that it is appropriate to file these proposed rules simultaneously and for them to become effective together on the same date.

• Customer Affirmation

COMMENT: With regard to proposed Rule D–15, supplementary material .02, Customer Affirmation, BDA requests that the MSRB consider permitting alternate methods of affirming SMMP status in lieu of specifically obtaining customer affirmations under the proposed rule.[58]

MSRB RESPONSE: As BDA points out, the rule already provides flexibility with regard to the affirmation process, which is substantially similar to (and can be combined with) FINRA's process. It can be done orally or in writing, on a trade by trade, type of municipal security or account-wide basis. BDA's request to use the credit review process in lieu of an affirmation would be a substantial change in the process. The customer affirmation requirement in proposed Rule D–15, supplementary material .02 is taken directly from the 2012 SMMP Interpretation.[59] The proposed SMMP rules simply codify the existing guidance and it would be beyond the scope of this rulemaking initiative to make any substantive changes to the existing guidance.

• Reasonable Basis Analysis

COMMENTS: BDA expresses concern regarding the more stringent requirement in proposed Rule D–15, supplementary material .01, Reasonable Basis Analysis, which goes beyond FINRA's rules to state that a ''. . . dealer should consider the amount and type of municipal securities owned or under management by the customer.'' BDA states that FINRA does not require a consideration of the type of securities held by the customer for qualification under FINRA's institutional investor exemption. BDA also states that it is unaware of any feature unique to the municipal securities market that would justify the more burdensome requirement to consider both the amount and type of municipal securities owned or under management by the customer. BDA further states that this requirement might confuse examiners and allow for an uneven application of the proposed rule. BDA believes a determination by the dealer that the customer has total assets of at least $50 million and that the dealer has a reasonable basis to believe the customer is capable of evaluating investment risk and market value independently should be given deference.

MSRB RESPONSE: The MSRB believes this additional requirement that a dealer consider the amount and type of municipal securities owned or under management by the customer is appropriate since it provides some assurance that the dealer considered the investor's experience as a municipal securities investor in forming a reasonable basis for believing that the customer is capable of evaluating investment risks and market value independently. The MSRB believes the concern about misapplication in the regulatory examination process is misplaced, since the dealer need only evidence that it considered the municipal securities holdings of the customer in its analysis. The customer affirmation requirement in proposed Rule D–15, supplementary material .01 is taken directly from the 2012 SMMP Interpretation.[60] The proposed SMMP rules simply codify the existing guidance and do not make any changes to the guidance.

• Agency Transactions

COMMENTS: BDA requests further clarification as to how the MSRB defines ''agency transactions'' for purposes of Rule G–48(b)(1). Additionally, BDA states that, with respect to transaction pricing, the 2012 SMMP Interpretation included guidance that was particularly relevant to dealers operating alternative trading systems. BDA requests the MSRB to consider the application of this provision in the context of alternative trading systems and whether it would be appropriate to expand this exemption for transaction pricing under the proposed rule to include an alternative trading system ''which functions on a riskless principal basis disclosing all commissions in the same manner as it would if it were acting as agent.''

[57] Although not listed in SIFMA's letter, Rule G–18 obligations related to transaction pricing are also modified by proposed Rule G–48.

[58] As an example, BDA states that a dealer who has a process for and conducts a regular credit review of its SMMP customers should be able to use such credit review instead of obtaining an affirmation by the SMMP as long as the dealer determines there has been no change in the status of the SMMP based on the internal review of the customer's portfolio or other similar evaluation.

[59] *Restated Interpretive Notice Regarding the Application of MSRB Rules to Transactions with Sophisticated Municipal Market Professionals* (July 9, 2012) (the ''2012 SMMP Interpretation'').

[60] *Id.*

MSRB RESPONSE: The agency concept is taken directly from the current Rule G–17 guidance and relates to agency transactions as described in Rule G–18. The restated SMMP guidance in 2012 did not change this concept from the original notice in 2002. It has always been the case that fair pricing relief was limited to non-recommended secondary market agency trades. BDA suggests that the MSRB expand the relief to riskless principal transactions executed by alternative trading systems. While some such systems effect trades with their institutional customers on an agency basis, the MSRB understands that some are executed on a riskless principal basis and include a markup or markdown. The MSRB views BDA's requested change as substantive and worthy of consideration at a later date. As for the request for clarification of the definition of an agency transaction, we believe the concept is well-settled and understood by the market. Finally, the reference in the 2012 notice to commissions charged by ATSs was meant to remind dealers operating ATSs that their obligation to charge a fair and reasonable commission under Rule G–30(b) is independent of the fair and reasonable price obligation under Rule G–18 (and corresponding SMMP relief).

- Bona Fide Quotations

COMMENTS: BDA states that proposed Rule G–48(d), on bona fide quotations, provides that a ''. . . dealer disseminating an SMMP's 'quotation' as defined in Rule G–13, which is labeled as such, shall apply the same standards. . . .'' BDA states that it is unclear whether the MSRB intends that a quotation from an SMMP needs to be labeled as an ''SMMP quotation'' or if the MSRB is simply referring to a quotation that meets the requirements set forth under MSRB Rule G–13. BDA states that under the 2012 SMMP Interpretation it was clear that, if an SMMP makes a ''quotation'' and it is labeled as such, then it is presumed not to be a quotation made by the disseminating dealer. BDA states that, if proposed Rule G–48(d) is intended to codify the language from the 2012 SMMP Interpretation, they request that the MSRB consider modifying the language in the proposed rule to clarify that the clause ''which is labeled as such'' does not require the quotation to be specifically labeled as an SMMP quotation.

MSRB RESPONSE: BDA suggests that the proposed rule changes the standard for identifying quotes from SMMPs. Such is not the case. Since the original interpretation in 2002, dealers have been required to identify the quote as from an SMMP to take advantage of the relief in the guidance. To read the rule any other way would not make sense. BDA suggests it would be sufficient to simply label the SMMP quote as a quote, rather than an SMMP quote. This would not alert the disseminating dealer that the quote was from an SMMP. The MSRB does not propose to make any revisions in response to this comment. The language in the proposed rule tracks the language in the current Rule G–17 guidance [61] and, therefore, the clarification requested by BDA is not necessary.

- SMMP Definition vs. FINRA Institutional Investor Definition

COMMENTS: WFA expresses concern that dealers considering whether an institutional account is an SMMP must assess not only the factors required under FINRA Rule 2111(b), but also additional criteria such as the institutional customer's ability to independently evaluate the ''market value'' of municipal securities and the ''amount and type of municipal securities owned [by] or under management'' of the institutional customer. WFA states that the differences in duties owed under the SMMP rules and FINRA Rule 2111(b) may confuse clients and regulators. WFA believes that proposed Rule D–15 should not include these additional criteria.

MSRB RESPONSE: The second additional criterion regarding the amount and type of municipal securities was discussed previously. As for the first additional criterion, the MSRB believes that the phrase ''market value'' should be retained, since the relief goes beyond FINRA's suitability relief and extends to fair pricing. Although the SMMP definition does impose some obligations beyond those required by FINRA's suitability rule, proposed Rule D–15 simply codifies the current Rule G–17 SMMP guidance. The MSRB does not propose making any substantive changes to the proposed rules in response to this comment.

[61] The current Rule G–17 guidance states: ''If an SMMP makes a 'quotation' and it is labeled as such, then it is presumed not to be a quotation made by the disseminating dealer.'' Similarly, proposed Rule G–48(d) states ''The . . . dealer disseminating an SMMP's 'quotation' as defined in Rule G–13, which is labeled as such, shall apply the same standards regarding quotations described in Rule G–13(b) as if such quotations were made by another . . . dealer. . . .''

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 of 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–MSRB–2013–07 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–MSRB–2013–07. 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 such

filing also will be available for inspection and copying at the principal office of the MSRB. 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–MSRB–2013–07, and should be submitted on or before November 12, 2013.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[62]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2013–24549 Filed 10–21–13; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–70599; File No. SR–NYSEMKT–2013–77]

Self-Regulatory Organizations; NYSE MKT LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Amending Rule 341A To Specify Applicable Continuing Education Requirements, Amending the NYSE Amex Options Fee Schedule To Specify Corresponding CE Fees and To Specify Fees for the Series 56 Examination

October 2, 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 September 19, 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 and II below, which Items have been prepared by the self-regulatory organization. NYSE MKT has designated the proposed rule change as constituting a non-controversial rule change under Section 19(b)(3)(A)(iii)[4] of the Act and Rule 19b–4(f)(6)[5] thereunder, which renders the filing effective upon filing with the Commission. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

[62] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 15 U.S.C. 78a.

[3] 17 CFR 240.19b–4.

[4] 15 U.S.C. 78s(b)(3)(A)(iii).

[5] 17 CFR 240.19b–4(f)(6).

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend Rule 341A to specify applicable continuing education (''CE'') requirements, (ii) [sic] amend the NYSE Amex Options Fee Schedule (''Fee Schedule'') to specify corresponding CE fees, and (iii) amend the Fee Schedule to specify fees for the Series 56 examination. 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) amend Rule 341A to specify applicable CE requirements, (ii) amend the Fee Schedule to specify corresponding CE fees, and (iii) amend the Fee Schedule to specify fees for the Series 56 examination.

CE Requirements

Rule 341A(a) states that no member or member organization may permit any registered person to continue to, and no registered person may continue to, perform duties as a registered person unless such person has complied with the CE requirements of the rule. Rule 341A specifies the CE requirements for registered persons subsequent to their initial qualification and registration. The requirements consist of a Regulatory Element and a Firm Element.[6] The Regulatory Element is a computer-based education program administered by the Financial Industry Regulatory Authority, Inc. (''FINRA''), on behalf of the Securities Industry Council on Continuing Education, to help ensure that registered persons are kept up to date on regulatory, compliance, and sales practice matters in the industry.

There are currently three existing Regulatory Element programs: (1) The S201 (''S201 CE Program'') for registered principals (e.g., General Securities Principals and Limited Principals) and supervisors; (2) the S106 (''S106 CE Program'') for persons registered only as Investment Company Products/Variable Contracts Limited Representatives; and (3) the S101 (''S101 CE Program'') for all other registered persons (e.g., General Securities Representatives). The Exchange proposes to enumerate these existing programs in subsection (1) of Rule 341A(a).[7]

The Exchange also proposes to specify the new S501 (''S501 CE Program,'' and together with the S201, S106 and S101 CE Programs, ''CE Programs'') for persons registered only as Proprietary Traders.[8] This would include registered Proprietary Traders who have successfully completed the Proprietary Traders Examination (''Series 56 Examination'')[9] as well as registered Proprietary Traders who have completed the General Securities Registered Representative Examination (''Series 7 Examination''), but who have

[6] Currently, the Firm Element applies to any registered person who has direct contact with customers in the conduct of the member's or member organization's securities sales, trading or investment banking activities, and to the immediate supervisors of such persons (collectively called ''covered registered persons''). *See* Rule 341A(b)(1). The requirement stipulates that each member or member organization must maintain a continuing and current education program for its covered registered persons to enhance their securities knowledge, skills, and professionalism. Each member and member organization has the requirement to annually evaluate and prioritize its training needs and develop a written training plan. *See* Rule 341A(b)(2)(i).

[7] Rule 341A(a)(1) currently includes existing rule text. Rule 341A(a)(1)–(3) would therefore be renumbered as Rule 341A(a)(2)–(4), respectively.

[8] A Proprietary Trader is any person engaged in the purchase or sale of securities or other similar instruments for the account of a member or member organization with which he or she is associated, as an employee or otherwise, and who does not transact any business with the public. The term ''Proprietary Trader'' does not include a person who is required to be registered as a Market Maker in accordance with Rule 921NY or a Market Maker Authorized Trader in accordance with in Rule 921.1NY. *See* Commentary .01 to Rule 341.

[9] The Exchange previously amended its rules to prescribe the Series 56 Examination as the qualifying examination for registered Proprietary Traders. *See* Securities Exchange Act Release No. 66453 (February 23, 2012), 77 FR 12345 (February 29, 2012) (SR–NYSEAmex–2012–11). The Exchange stated in that proposal that it intended to submit a separate filing in the future to apply CE requirements to such persons. *See id.* at 12346, note 11.

only registered as Proprietary Traders.[10] Individuals who maintain any other registration would be subject to the CE Program associated with such other registration.

The S501 CE Program is a computer-based education program developed by many of the self-regulatory organizations (''Participating SROs'') [11] and administered by FINRA to ensure that registered persons are kept current on regulatory, compliance, and trading practice matters in the industry. Unlike the other CE Programs, the S501 CE Program is not part of the Uniform Continuing Education Program, which is developed and maintained by the Securities Industry Regulatory Council on Continuing Education. However, the S501 CE Program would logistically operate as the current CE Programs do. Specifically, registered persons would be required, through CRD, to complete the Regulatory Element of the S501 CE Program on the second anniversary of the base date and then every three years thereafter. In creating the S501 CE Program, the Participating SROs determined that the current procedures of the other CE Programs work well. The Securities Industry Regulatory Council on Continuing Education has tailored the process of the other CE Programs since their inception in a manner that has been successful. Thus, as proposed, the S501 CE Program would work in the same manner. In addition, consistency between the different programs would avoid creating confusion among the registered persons and FINRA.

As proposed, registered Proprietary Traders would also be required to complete the Firm Element outlined in Rule 341A(b). Although registered Proprietary Traders, including those who have passed the Series 56 Examination, do not interact with the public, the Exchange believes that this requirement is appropriate because it ensures that these registered Proprietary Traders continue to enhance their securities knowledge, skill, and professionalism. As stated in Rule 341A(b)(2)(ii), the program should be tailored to fit the business of the member or member organization. Thus, the Exchange believes that it is appropriate that registered Proprietary Traders also complete the Firm Element.

The introduction of the S501 CE Program would allow the Exchange to tailor its CE requirements more closely to those individuals who are registered only as Proprietary Traders. More specifically, the Exchange believes that the proposed rule change would allow persons registered only as Proprietary Traders to complete a CE Program separate from persons maintaining other registrations. For example, in comparison to the Series 7 Examination, the Series 56 Examination is more closely tailored to the practice of proprietary trading while the Series 7 Examination is more comprehensive. As such, the Exchange believes that the S501 CE Program should also be closely tailored to proprietary trading. If an individual remains registered in another capacity, such as a General Securities Representative, the Exchange believes that it is appropriate that such individual continue to be required to complete the more comprehensive CE Program (*i.e.,* the S101 CE Program). The Exchange anticipates that the other Participating SROs will adopt, or have adopted, rules requiring completion of the S501 CE Program for registered Proprietary Traders.[12]

CE Fees

The Exchange proposes to amend the Fee Schedule to specify the CRD session fees for the CE Programs described above, including the existing CE Programs and the proposed new S501 CE Program. Specifically, the Exchange proposes to specify the existing $100 session fee associated with the existing CE Programs (*i.e.,* the S201, S106 and S101 CE Programs) and a new $60 session fee associated with the new S501 CE Program.[13] The Exchange anticipates that other exchanges requiring completion of the S501 CE Program will similarly implement corresponding fees. As with existing CE Program session fees, only one $60 session fee would be charged through CRD for a registered person completing the S501 CE Program, even if such registered person's firm was a member of multiple exchanges.

The Exchange has determined that the $60 session fee is necessary to administer the S501 CE Program. Specifically, the $60 session fee will be used to fund the S501 CE Program administered to persons registered only as Proprietary Traders who are required to complete the S501 CE Program. The $60 session fee is less than the existing $100 session fee currently charged by FINRA through CRD for the existing CE Programs, including the S101 CE Program, because the fees associated with the existing CE Programs are utilized for both development and administration, whereas the $60 session fee for the S501 CE Program would only be used for the administration of the program. The costs associated with the development of the S501 CE Program are included in the Series 56 Examination fee. The Exchange anticipates that the other Participating SROs will adopt, or have adopted, the same $60 session fee applicable to completion of the S501 CE Program.[14]

Series 56 Examination Fees

The Exchange previously amended its rules to prescribe the Series 56 Examination as the qualifying examination for registered Proprietary Traders.[15] The Exchange hereby proposes to amend the Fee Schedule to specify a fee of $195 per registered

[10] For purposes of this filing, ''registration'' refers to the operational/functional registration status in FINRA's Central Registration Depository (''CRD®'') (e.g., Proprietary Trader or General Securities Representative), not the qualification examination(s) that a registered person has completed (*e.g.,* the Series 56 Examination or the Series 7 Examination).

Persons accepting orders from non-member customers (unless such customer is a broker-dealer registered with the Securities and Exchange Commission (''Commission'')) must successfully complete the Series 7 Examination. *See* Rule 920.06. However, an individual who has successfully completed the Series 7 Examination who does not conduct business with the public is permitted to register as a Proprietary Trader, either exclusively or concurrently with registration as a General Securities Representative, without successfully completing the Series 56 Examination, which would be redundant.

If a person initially qualified as a Proprietary Trader by taking the Series 7 Examination or otherwise previously maintained both Series 7 and Series 56 qualifications, but was only maintaining a Proprietary Trader registration when the CE requirement became due, then completion of the S501 CE Program by such person would satisfy his or her then-applicable CE requirement. However, upon re-registering thereafter as a General Securities Representative, such individual would be required to complete the S101 CE Program the next time he or she became subject to CE.

[11] The Participating SROs that have assisted with the development of, and plan to administer, the Series 56 Examination and S501 CE Program are the Exchange; C2 Options Exchange, Incorporated (''C2''); Chicago Board Options Exchange, Incorporated (''CBOE''); Chicago Stock Exchange, Inc. (''CHX''); New York Stock Exchange LLC (''NYSE''); NYSE Arca, Inc. (''NYSEArca''); The NASDAQ Stock Market LLC (''NASDAQ''); National Stock Exchange, Inc. (''NSX''); NASDAQ OMX BX, Inc. (''BX''); NASDAQ OMX PHLX LLC (''PHLX''); BATS Y-Exchange, Inc. (''BATS Y''); BATS Exchange, Inc. (''BATS''); EDGA Exchange, Inc. (''EDGA''); EDGX Exchange, Inc. (''EDGX''); International Securities Exchange, LLC (''ISE''); BOX Options Exchange, LLC (''BOX''); and Miami International Securities Exchange LLC (''MIAX'').

[12] *See, e.g.,* Securities Exchange Act Release No. 70027 (July 23, 2013), 78 FR 45584 (July 29, 2013) (SR–CBOE–2013–076).

[13] ''Session'' refers to a registered person sitting for the actual computer-based CE training. FINRA administers the CE Programs on behalf of the Exchange. ATP Holders pay the related fees directly to FINRA through CRD.

[14] *See, e.g.,* Securities Exchange Act Release No. 70064 (July 30, 2013), 78 FR 47469 (August 5, 2013) (SR–CBOE–2013–078).

[15] *See supra* note 9.

person that chooses to complete the Series 56 Examination.

The Fee Schedule does not currently set forth the examination fees for other qualification examinations required or accepted by the Exchange because these programs are within FINRA's jurisdiction. The Series 56 Examination, however, is a limited registration category that is not recognized by FINRA under its registration rules. However, as with existing non-FINRA examinations, FINRA administers the Series 56 Examination and collects the $195 fee through CRD on behalf of the SROs that developed and maintain the exam. Additionally, only one $195 fee would be charged through CRD for a registered person completing the Series 56 Examination, even if such registered person's firm was a member of multiple exchanges. The Exchange anticipates that the other Participating SROs will adopt, or have adopted, the same $195 fee applicable to completion of the Series 56 Examination.[16]

The proposed change is not otherwise intended to address any other issues relating to CE or related fees and the Exchange is not aware of any problems that ATP Holders or their registered persons would have in complying with the proposed change.

2. Statutory Basis

The proposed rule change is consistent with Section 6(c) of the Act,[17] in general, and furthers the objectives of Section 6(c)(3) of the Act,[18] in particular, which authorizes the Exchange to prescribe standards of training, experience and competence for registered persons of ATP Holders. The proposed rule change would specify the existing CE requirements for registered persons of ATP Holders while also specifying the new S501 CE Program requirement for registered Proprietary Traders of ATP Holders. The Exchange believes that the proposed rule change is reasonable and sets forth the applicable CE requirements for individuals required to register under Rule 341 and will therefore contribute to ensuring that registered persons of ATP Holders are properly trained. In this regard, the Exchange believes that the S501 CE Program is the appropriate CE Program for persons registered only as Proprietary Traders because the S501 CE Program is specifically tailored toward proprietary trading. Individuals who maintain any other registration would be required to complete the CE Program associated with such other registration, even if simultaneously registered as Proprietary Traders, because such other CE Program would be more comprehensive and correspond to the other, more comprehensive registration category. The Exchange also believes that the proposed rule change is reasonable because the other Participating SROs are anticipated to adopt, or have adopted, rules requiring completion of the S501 CE Program for registered Proprietary Traders.[19]

The Exchange also believes that the proposed rule change is consistent with Section 6(b) of the Act,[20] in general, and furthers the objectives of Sections 6(b)(4) and 6(b)(5) of the Act,[21] in particular, because it provides for the equitable allocation of reasonable dues, fees, and other charges among its members, issuers and other persons using its facilities and does not unfairly discriminate between customers, issuers, brokers or dealers. The Exchange believes that the proposed $60 session fee is reasonable. While it is less than the existing $100 session fee currently charged by FINRA through CRD for the existing CE Programs, including the S101 CE Program, the fees associated with the existing CE Programs are utilized for both development and administration, whereas the $60 session fee for the S501 CE Program would only be used for the administration of the program. The costs associated with the development of the S501 CE Program are included in the Series 56 Examination fee. The Exchange also believes that the fee is reasonable because the other Participating SROs are anticipated to adopt, or have adopted, the same $60 session fee applicable to completion of the S501 CE Program.[22] The Exchange also believes that the proposed rule change is reasonable because it will specify the existing $100 session fee applicable to registered persons of ATP Holders who are subject to CE requirements, which is collected by FINRA through CRD. Finally, the Exchange believes that the proposed rule change is equitable and not unfairly discriminatory because all registered persons of ATP Holders that are subject to CE requirements would be treated the same, as is currently the case. Therefore, any registered person of an ATP Holder that is required to complete the S501 CE Program would be subject to the corresponding $60 session fee.

The Exchange believes that it is reasonable to include the Series 56 Examination fee within the Fee Schedule to make the cost of this examination clear to ATP Holders. The proposed fee is reasonably designed to allow FINRA to cover its cost of administering the Series 56 Examination on behalf of the Exchange. The Exchange believes that the proposed $195 Series 56 Examination fee is also reasonable because it is designed to reflect the costs of maintaining and developing the Series 56 Examination, as well as the development of the S501 CE Program, and to ensure that the examination's content is, and continues to be, adequate for testing the competence and knowledge generally applicable to proprietary trading. The Exchange also believes that the fee is reasonable because the Exchange anticipates that the other Participating SROs will adopt, or have adopted, the same $195 fee applicable to completion of the Series 56 Examination.[23] Finally, the Exchange believes that the proposed rule change is equitable and not unfairly discriminatory because all registered persons of ATP Holders that wish to be registered as Proprietary Traders would be treated the same, as is currently the case.

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,[24] 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. Specifically, the Exchange does not believe that the proposed administrative changes (*i.e.,* specifying the existing CE Programs and related fees), the introduction of the S501 CE Program and related fee, or the introduction of the Series 56 Examination fee will affect intermarket competition because the Exchange anticipates that the other Participating SROs will similarly adopt, or have adopted, rules requiring completion of the S501 CE Program for registered Proprietary Traders, the same $60 session fee applicable to completion of the S501 CE Program and the same $195 fee applicable to completion of the Series 56 Examination.[25] In addition,

[16] *See, e.g.,* Securities Exchange Act Release No. 70163 (August 12, 2013), 78 FR 50120 (August 16, 2013) (SR–EDGA–2013–24).

[17] 15 U.S.C. 78f(c).

[18] 15 U.S.C. 78f(c)(3).

[19] *See supra* note 12.

[20] 15 U.S.C. 78f(b).

[21] 15 U.S.C. 78f(b)(4) and (5).

[22] *See supra* note 14.

[23] *See supra* note 16.

[24] 15 U.S.C. 78f(b)(8).

[25] *See supra* notes 12, 14 and 16.

the Exchange does not believe that the proposed rule change will affect intramarket competition because all similarly situated registered persons of ATP Holders, e.g., registered persons maintaining the same categories of registration, are required to complete the same CE Programs, the same qualification examinations, and are subject to the same fees.

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: (i) Significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, it has become effective pursuant to Section 19(b)(3)(A)(ii) of the Act [26] and subparagraph (f)(6) of Rule 19b–4 thereunder.[27]

The Exchange has requested that the Commission waive the 30-day operative delay. Waiver of the operative delay would allow the Exchange to modify its rules and implement the proposed rule change at once, enabling its Members to comply with their continuing education requirements in a timely manner, and thus is consistent with the protection of investors and the public interest. Therefore, the Commission designates the proposal operative upon filing.[28]

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is: (i) Necessary or appropriate in the public interest; (ii) for the protection of investors; or (iii) otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission will institute proceedings to determine whether the proposed rule change should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov*. Please include File Number SR–NYSEMkt–2013–77 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–NYSEMkt–2013–77. 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–2013–77 and should be submitted on or before November 12, 2013.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[29]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2013–24553 Filed 10–21–13; 8:45 am]

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[26] 15 U.S.C. 78s(b)(3)(a)(ii).

[27] 17 CFR 240.19b–4(f)(6). In addition, Rule 19b–4(f)(6) requires a self-regulatory organization to give the Commission written notice of its intent to file the proposed rule change at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has satisfied this requirement.

[28] For purposes only of waiving the 30-day operative delay, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[29] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–70568; File No. SR–BX–2013–047]

Self-Regulatory Organizations; NASDAQ OMX BX, Inc.; Order Approving a Proposed Rule Change To Assume Operational Responsibility for Certain Surveillance Activity Currently Performed by FINRA Under the Exchange's Authority and Supervision

September 30, 2013.

On July 31, 2013, NASDAQ OMX BX, Inc. (''BX'' or ''Exchange'') filed with the Securities and Exchange Commission (''Commission''), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'') [1] and Rule 19b–4 thereunder,[2] a proposed rule change to assume operational responsibility for certain surveillance activity currently performed by the Financial Industry Regulatory Authority (''FINRA'') under the Exchange's authority and supervision. The proposed rule change was published for comment in the **Federal Register** on August 16, 2013.[3] The Commission received no comments on the proposal.

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 [4] and, in particular, the requirements of Section 6(b)(5) of the Act.[5] Since its acquisition by The NASDAQ OMX Group, Inc., BX has contracted with FINRA through various regulatory services agreements to perform certain surveillance and other regulatory functions on its behalf. BX Rule 0150 requires that, unless the Exchange obtains prior Commission approval, the regulatory functions subject to the regulatory services agreement in effect at the time of its

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 70158 (August 12, 2013), 78 FR 50126 (August 16, 2013) (''Notice'').

[4] In approving this proposed rule change, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[5] 15 U.S.C. 78f(b)(5).

acquisition must continue to be performed by FINRA or an affiliate thereof or by another independent self-regulatory organization. BX now proposes to reallocate operational responsibility from FINRA to BX Regulation for a limited number of equities surveillance patterns and related review functions focused on: (1) Manipulation patterns that monitor solely BX activity, including patterns that monitor the opening and closing crosses on The NASDAQ Stock Market LLC (''NASDAQ'') and compliance with minimum bid listing requirements; and (2) monitoring of compliance by NASDAQ member firms with elements of the Commission's Regulation M[6] and NASDAQ Rule 4619 compliance, which will include data from BX.

In the Notice, the Exchange represents that it has the ability to conduct the surveillances and regulatory functions that it will assume. The Commission also notes that the Exchange represents that its expertise in its own market structure, along with its existing real-time monitoring of these activities, may enable the Exchange to better detect improper activities on its market. Moreover, these patterns, underlying rules, and analytical requirements are similar to patterns that BX regulatory personnel already monitor for affiliated options markets. The Exchange represents that NASDAQ's MarketWatch group, which already handles other real-time surveillance of the BX market, should be able to adequately and effectively handle the surveillances related to the instant proposed rule change.

In the Notice, the Exchange further represents that it will continue to refer potentially violative conduct to FINRA for further review and that FINRA will continue to perform most of the surveillance activity for BX's equity market. The Exchange also represents that FINRA will continue to perform examination and enforcement work, subject to BX's supervision and ultimate responsibility.

For the foregoing reasons, the Commission believes that the proposed rule change is consistent with the Act.

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,[7] that the proposed rule change (SR–BX–2013–047) be, and it hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[8]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2013–24542 Filed 10–21–13; 8:45 am]

BILLING CODE 8011–01–P

[6] 17 CFR 242.100 *et seq.*

[7] 15 U.S.C. 78s(b)(2).

[8] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–70574; File No. SR–C2–2013–036]

Self-Regulatory Organizations; C2 Options Exchange, Incorporated; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Amend the Fees Schedule

September 30, 2013.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the ''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on September 25, 2013, C2 Options Exchange, Incorporated (the ''Exchange'' or ''C2'') filed with the Securities and Exchange Commission (the ''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend its Fees Schedule. The text of the proposed rule change is available on the Exchange's Web site (*http://www.c2exchange.com/Legal/*), at the Exchange's Office of the Secretary, at the Commission's Public Reference Room, and on the Commission's Web site at *http://www.sec.gov*.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend its Fees Schedule. First, the Exchange proposes to remove the following language from Section 3 of its Fees Schedule:

Because C2 intends to cease listing of SPXPM following the closing of trading on Friday, February 15, 2013, for any Market-Maker Permit used in February 2013 solely to act as a Market-Maker in SPXPM, C2 will credit back to the Market-Maker a pro-rated amount (corresponding to the portion of the month during which SPXPM is not listed on C2) of the Market-Maker Permit cost. This language is obsolete and no longer relevant, as the month of February 2013 has ended and SPXPM is no longer traded on the Exchange.

The Exchange also proposes to make another amendment to Section 3 of its Fees Schedule. Currently, Section 3 states that ''Trading Permits will be renewed automatically for the next month unless the Trading Permit Holder submits written notification to the Registration Services Department by the 25th day of the prior month (or the preceding business day if the 25th is not a business day) to cancel the Trading Permit effective at or prior to the end of the applicable month.'' The Exchange proposes to amend this statement to give Trading Permit Holders (''TPHs'') until 4 p.m. on the second-to-last business day of the prior month to cancel a Trading Permit. This will give TPHs more time to cancel Trading Permits before such permits renew.[3]

Third, the Exchange proposes to adopt a one-time ''Responsible Person'' fee of $500 to the list of Application-Related Fees. A ''Responsible Person'' is an individual designated by an organization that is the holder of a Trading Permit to represent the organization with respect to that Trading Permit in all matters relating to the Exchange. The Responsible Person must be a United States-based officer, director or management-level employee of the Permit Holder, who is responsible for the direct supervision and control of

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] The proposed new language would read ''Trading Permits will be renewed automatically for the next month unless the Trading Permit Holder submits written notification to the Registration Services Department by 4 p.m. on the second-to-last business day of the prior month to cancel the Trading Permit effective at or prior to the end of the applicable month.''

Associated Persons of that Permit Holder.[4] Each organization that is the holder of a Trading Permit must designate an individual as the Responsible Person for the Permit Holder. The Responsible Person must be affiliated with the Permit Holder.[5] The Exchange conducts an investigation and review of each person who the holder of a Trading Permit has identified as the holder's Responsible Person. This investigation and review may include a fingerprint criminal background check and the individual's consent to the Exchange's jurisdiction over the individual. The Exchange proposes to assess this fee in order to cover the costs of this investigation and review. This fee will not be assessed for a Responsible Person who is also an Associated Person with the same Trading Permit Holder, as the same investigation and review is conducted for each Associated Person as is conducted for each Responsible Person. Since the investigation and review will not be conducted twice for a Responsible Person who is also an Associated Person, the Exchange does not propose to assess both fees in such a circumstance.

Effective April 1, 2012, the Exchange added a clause to the Fees Schedule that waived Renewal fees for six months.[6] The Renewal fee is assessed to organizations and sole proprietorships that were once C2 Trading Permit Holders but gave up their trading permits, and now want to return. The Exchange proposed waiving the Renewal fee for a six-month period beginning on April 1, 2012 in order to provide an incentive to former C2 Trading Permit Holders to return to C2. Because that six-month period ended on September 30, 2012, this language is now obsolete. The Exchange therefore proposes to delete the language stating ''These fees are waived for a six-month period beginning April 1, 2012'' that applies to the Renewal fees.

The Exchange also proposes to add the language ''after three months, all fees as assessed by the Exchange are considered final by the Exchange'' to the end of the Fees Schedule. This will serve to encourage Permit Holders to promptly review their Exchange invoices so that any disputed charges can be addressed in a timely manner while the information and data underlying those charges is still easily and readily available. Other exchanges include this language in their Fees Schedules.[7]

2. Statutory Basis

The Exchange believes the proposed rule change is consistent with the Act and the rules and regulations thereunder applicable to the Exchange and, in particular, the requirements of Section 6(b) of the Act.[8] Specifically, the Exchange believes the proposed rule change is consistent with the Section 6(b)(5)[9] requirements that the rules of an exchange be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest. Additionally, the Exchange believes the proposed rule change is consistent with Section 6(b)(4) of the Act,[10] which requires that Exchange rules provide for the equitable allocation of reasonable dues, fees, and other charges among its Trading Permit Holders and other persons using its facilities.

The Exchange believes that the proposed changes to remove obsolete language from the Fees Schedule will alleviate any potential investor confusion, thereby removing impediments to and perfecting the mechanism of a free and open market and a national market system, and, in general, protecting investors and the public interest.

The Exchange believes that the proposal to amend Section 3 of the Fees Schedule to give TPHs until 4 p.m. on the second-to-last business day of the prior month to cancel a Trading Permit is reasonable because it will give TPHs more time to determine whether to cancel a Trading Permit. The Exchange believes that the proposed change is equitable and not unfairly discriminatory because it will apply to all TPHs.

The Exchange believes the addition of the Responsible Person fee is reasonable because the amount of the fee is intended to cover the costs of the review and examination of Responsible Persons. The Exchange believes that this is equitable and not unfairly discriminatory because the fee will apply to all Responsible Person applicants (with the exception of those that are also Associated Person applicants.) The Exchange believes that it is equitable and not unfairly discriminatory to exempt Associated Person applicants with the same Permit Holder from the Responsible Person fee because the same investigation and review is conducted for each Associated Person as is conducted for each Responsible Person. Since the investigation and review will not be conducted twice for a Responsible Person who is also an Associated Person, the Exchange does not believe it would be equitable to assess both fees in such a circumstance.

The Exchange believes that the proposed addition of the language ''after three months, all fees as assessed by the Exchange are considered final by the Exchange'' to the end of the Fees Schedule is reasonable because this will serve to encourage Permit Holders to promptly review their Exchange invoices so that any disputed charges can be addressed in a timely manner while the information and data underlying those charges is still easily and readily available. The Exchange believes that this is equitable and not unfairly discriminatory because it will apply to all market participants. Further, other exchanges include this language in their Fees Schedules.[11]

B. Self-Regulatory Organization's Statement on Burden on Competition

C2 does not believe that the proposed rule change will impose any burden on intramarket competition that is not necessary or appropriate in furtherance of the purposes of the Act because the proposed changes apply to all qualifying market participants equally. C2 does not believe that the proposed rule change will impose any burden on intermarket competition that is not necessary or appropriate in furtherance of the purposes of the Act because the proposed changes are all specific to C2 operations, fees and the C2 Fees Schedule. To the extent that such changes may make C2 a more attractive market to market participants at other exchanges, such market participants may elect to become C2 market participants.

[4] *See* C2 Rule 1.1.

[5] *See* C2 Rule 3.8.

[6] *See* Securities Exchange Act Release No. 66651 (March 23, 2012) 77 FR 19041 (March 29, 2012) (SR–C2–2012–010).

[7] *See* Chicago Board Options Exchange, Incorporated (''CBOE'') Fees Schedule, Footnote 7.

[8] 15 U.S.C. 78f(b).

[9] 15 U.S.C. 78f(b)(5).

[10] 15 U.S.C. 78f(b)(4).

[11] *See* CBOE Fees Schedule, Footnote 7.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

The Exchange neither solicited nor received comments on the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A) of the Act [12] and paragraph (f) of Rule 19b–4 [13] thereunder. At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission will institute proceedings to determine whether the proposed rule change should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–C2–2013–036 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–C2–2013–036. 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–C2–2013–036 and should be submitted on or before November 12, 2013.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[14]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2013–24544 Filed 10–21–13; 8:45 am]

BILLING CODE 8011–01–P

[12] 15 U.S.C. 78s(b)(3)(A).

[13] 17 CFR 240.19b–4(f).

[14] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–70618; File No. SR–CBOE–2013–093]

Self-Regulatory Organizations; Chicago Board Options Exchange, Incorporated; Notice of Filing of a Proposed Rule Change To Amend Rule 6.42

October 7, 2013.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the ''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on September 27, 2013, Chicago Board Options Exchange, Incorporated (the ''Exchange'' or ''CBOE'') filed with the Securities and Exchange Commission (the ''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of the Substance of the Proposed Rule Change

The Exchange proposes to amend Rule 6.42. The text of the proposed rule change is available on the Exchange's Web site (*http://www.cboe.com/AboutCBOE/CBOELegalRegulatoryHome.aspx*), at the Exchange's Office of the Secretary, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend its Rule 6.42—Minimum Increments for Bids and The Exchange proposes to amend its Rule 6.42—Minimum Increments for Bids and Offers—regarding minimum increments of bids and offers for complex orders. Currently, Rule 6.42(4) states that bids and offers on complex orders may be expressed in any increment regardless of the minimum increments otherwise appropriate to the individual legs of the order. This language allows for complex order bids and offers to be expressed in any increment whatsoever. The Exchange believes that setting a minimum increment for bids and offers on complex orders of $0.01 will ensure that there is a lowest minimum increment for bids and offers that makes it simple to monitor and participate for all market participants (for example, many of the web-based services that public customers use to enter options orders do not permit the entry of orders in sub-penny increments, while other types of market participants may not face that limitation). Further, this $0.01 minimum increment will put the electronic and manual entry of complex orders on even footing (as the Exchange's Complex Order Book (''COB'') and Complex Order Auction

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

(''COA'') (both being electronic complex order execution systems) are not configured to permit quoting in sub-penny increments.[3]) Further, setting a minimum increment for bids and offers at $0.01 ensures that price improvement occurs at a meaningful increment. Without this minimum, it would be possible for a market participant to jump ahead of another market participant's quoted price by a *de minimis* amount, and the knowledge that this could occur could discourage competitive quoting.

As such, in order to limit the potential to express orders in any increment, the Exchange hereby proposes to state that bids and offers on complex orders, as defined in Interpretation and Policy .01 below, may be expressed in any net price increment (that may not be less than $0.01) that may be determined by the Exchange on a class-by-class basis and announced to the Trading Permit Holders (''TPHs'') via Regulatory Circular, regardless of the minimum increments otherwise appropriate to the individual legs of the order.

The Exchange proposes adding the parenthetical language which allows the Exchange to set minimum increments for bids and offers on complex orders on a class-by-class basis and announce such minimum increments to TPHs via Regulatory Circular in order to ensure uniformity of minimum bid and offer increments within a class (as the Exchange may already do for bids and offers on complex orders in options on the S&P 500 Index (''SPX''), p.m.-settled S&P 500 Index (''SPXPM'') or on the S&P 100 Index (''OEX'' and ''XEO'')). The proposed parenthetical language would allow the Exchange to set and vary minimum increments for bids and offers on complex orders for different classes in response to different market conditions in those classes and in order to encourage more trading in such classes.[4] This language will also ensure that TPHs are notified of such minimum increments via Regulatory Circular. For example, the Exchange could release a Regulatory Circular stating that the minimum increments for complex order bids and offers within a certain class would be $0.01, or $0.05.

This proposed change will ensure that there is a lowest minimum increment for bids and offers on complex orders that makes it simple to monitor and participate for all market participants and places market participants entering orders manually and electronically on an equal footing. This is simpler and more restrictive than the current rule, which permits the expression of bids and offers on complex orders in any increment (though only complex orders entered manually can be in sub-penny increments), which would allow more sophisticated market participants entering orders electronically [sic] [5] to express bids and offers in complex orders in infinitesimally small amounts.

2. *Statutory Basis*

The Exchange believes the proposed rule change is consistent with the Act and the rules and regulations thereunder applicable to the Exchange and, in particular, the requirements of Section 6(b) of the Act.[6] Specifically, the Exchange believes the proposed rule change is consistent with the Section 6(b)(5) [7] requirements that the rules of an exchange be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest. Additionally, the Exchange believes the proposed rule change is consistent with the Section 6(b)(5) [8] requirement that the rules of an exchange not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers. The Exchange believes that setting a minimum increment for bids and offers on complex orders of $0.01 will ensure that there is a lowest minimum increment for bids and offers in complex orders that makes it simple to monitor and participate for all market participants, thereby removing impediments to and perfecting the mechanism of a free and open market. Some market participants, such as public customers, may not have sophisticated enough order entry systems to quote in sub-penny increments, and this would ensure that they are placed on the same competitive footing as those that can do so. Further, the proposed change would place market participants bidding and offering electronically and manually on the same competitive footing, as well, since COB and COA both are not configured to permit quoting in sub-penny increments.[9] Moreover, setting a minimum increment for bids and offers at $0.01 ensures that price improvement occurs at a meaningful increment. Without this minimum, it would be possible for a market participant to jump ahead of another market participant's quoted price by a *de minimis* amount, and the knowledge that this could occur could discourage competitive quoting (which would be an impediment to a free and open market). The proposed minimum increment would apply to all CBOE market participants.

B. Self-Regulatory Organization's Statement on Burden on Competition

BOE does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. The Exchange believes that the proposed change will not impose an unnecessary burden on intramarket competition because it applies to minimum increments for bids and offers on complex orders from all market participants. The Exchange believes that the proposed change will not impose an unnecessary burden on intermarket competition because it applies only to CBOE. To the extent that setting the lowest possible minimum increment for bids and offers in complex orders at $0.01 (and the other changes proposed herein) may be attractive to market participants at other options exchange, such market participants are always welcome to become CBOE market participants.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

The Exchange neither solicited nor received comments on the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 45 days of the date of publication of this notice in the **Federal**

[3] *See* CBOE Rules 6.53C(c)(ii) *and* 6.53C(d)(iii)(1).

[4] The Exchange would not make changes to minimum increments for bids and offers on complex orders on an intra-day basis.

[5] The Commission notes that the word ''electronically'' here is a typographical error. In an email from CBOE to Commission staff on October 2, 2013, CBOE made clear that it meant ''manually'' where it presently says ''electronically.'' Accordingly, the sentence should read: ''This is simpler and more restrictive than the current rule, which permits the expression of bids and offers on complex orders in any increment (though only complex orders entered manually can be in sub-penny increments), which would allow more sophisticated market participants entering orders *manually* to express bids and offers in complex orders in infinitesimally small amounts.'' (emphasis added).

[6] 15 U.S.C. 78f(b).

[7] 15 U.S.C. 78f(b)(5).

[8] *Id.*

[9] *See* CBOE Rules 6.53C(c)(ii) *and* 6.53C(d)(iii)(1).

Register or within such longer period up to 90 days (i) as the Commission may designate if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the Exchange consents, the Commission will:

A. by order approve or disapprove such proposed rule change, or

B. institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–CBOE–2013–093 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–CBOE–2013–093. 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 20549–1090, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of such 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–CBOE–2013–093, and should be submitted on or before November 12, 2013.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[10]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2013–24630 Filed 10–21–13; 8:45 am]

BILLING CODE 8011–01–P

[10] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–70628; File No. SR–NYSE–2013–68]

Self-Regulatory Organizations; New York Stock Exchange LLC; Notice of Filing of Proposed Rule Change Amending Section 907.00 of the Listed Company Manual To Expand the Suite of Complimentary Products and Services That Are Offered to Certain Current and Newly Listed Companies

October 8, 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 October 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 Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend Section 907.00 of the Listed Company Manual to expand the suite of complimentary products and services that are offered to certain current and newly listed companies. 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.

[1] 15 U.S.C. 78s(b)(1).

[2] 15 U.S.C. 78a.

[3] 17 CFR 240.19b–4.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the 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 Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposed to amend Section 907.00 of the Manual to expand the suite of complimentary products and services that it offers to certain listed companies. All listed issuers receive some complimentary products and services through NYSE Market Access Center. Presently, the Exchange offers products and services in the following general categories to certain current and newly listed companies: Market surveillance, web-hosting, market analytics and news distribution. The available products and services have approximate commercial values ranging from $10,000 to $45,000 annually[4] and are offered to companies under a tiered system based on shares outstanding or global market value, as the case may be.

With respect to currently listed companies, the Exchange offers complimentary products and services based on the number of shares such company has issued and outstanding. Companies that have more than 270 million shares issued and outstanding (each a ''Tier One Company'') are offered (i) a choice of market surveillance or market analytics products and services, and (ii) web-hosting products and services on a complimentary basis. Companies that have between 160 million and 269.9 million shares issued and outstanding (each a ''Tier Two Company'') are offered a choice of market analytics or web-hosting products and services.

[4] The market surveillance products and services have a commercial value of approximately $45,000 annually, web-hosting products and services have a commercial value of approximately $12,000–$16,000 annually, market analytics products and services have a commercial value of approximately $20,000 annually and news distribution products and services have a commercial value of approximately $10,000 annually.

For newly listed companies, the Exchange offers different product and service options for an initial period of two years based on such company's global market value. A company with a global market value of $400 million or more (each a ''Tier A Company'') is offered (i) a choice of market surveillance products and services for a period of twelve months or market analytics products and services for a period of 24 months, and (ii) web-hosting and news distribution products and services for a period of 24 months. Newly-listed companies with a global market value of less than $400 million (each a ''Tier B Company'') are offered web-hosting and news distribution products and services for a period of 24 months.

The Exchange proposes to amend Section 907.00 of the Manual to add three additional categories of complimentary products and services that will be offered to certain current and newly listed companies. Specifically, the Exchange proposes to include corporate governance tools and advisory services with a commercial value of approximately $45,000 annually (the ''Enhanced Package''), corporate governance tools with a commercial value of approximately $20,000 annually (the ''Basic Package'') and data room services and virtual investor relation tools [5] (with a commercial value of approximately $15,000–$20,000 annually) to the list of complimentary products and services offered to certain listed companies. The Enhanced Package will be offered to Tier One Companies as a third alternative to the market surveillance and market analytics products they are already offered. The Basic Package will be offered to Tier Two Companies as a third alternative to the market analytics and web-hosting products they are already offered. The Basic Package will be offered to Tier A Companies as a second alternative to the market analytics products and services they are already offered. The data room services and virtual investor relation tools will be offered to all listed companies on an annual basis.

In an increasingly complex and constantly evolving regulatory environment, the management and boards of directors of listed companies are eager to understand corporate governance best practices and to adopt high quality corporate governance policies. To that end, the Exchange has seen a growing demand among listed companies for pragmatic tools that will enable them to develop comprehensive corporate governance policies. Due to this demand, the Exchange believes it is attractive and helpful to listed companies to add corporate governance tools to the suite of products and services that it offers to certain current and newly listed companies. The Exchange proposes to offer these tools through an affiliated service provider and may engage additional third-party providers in the future.

As discussed above, the Exchange proposes to offer two tiers of corporate governance products. The Basic Package, offered to Tier Two and Tier A Companies, will consist of a combination of governance, risk, compliance and board tools for company directors and executives. The Exchange expects that these tools will provide generic, easily implemented corporate governance advice and/or educational tools that are applicable to a wide range of listed companies.

The Enhanced Package, offered to Tier One Companies, will be an expanded version of the Basic Package. It will offer the same tools as the Basic Package but will also include access to advisory services. Such advisory services may include ongoing, periodic review of a company's corporate governance policies as well as benchmarking such polices against a company's peer group. The advisory services will offer companies a more individualized assessment of their corporate governance practices particular to the specific nature of their industry and organization.

The Exchange believes it is appropriate to offer the Enhanced Package to Tier One Companies. It is the Exchange's experience that Tier One Companies tend to be larger, more complex organizations. In many cases they have more divisions and product lines and operate across multiple jurisdictions thereby increasing their need for comprehensive corporate governance and compliance policies. Tier One Companies tend to be very large and complex organizations and the Exchange believes that such companies would benefit most from the individualized attention offered by the advisory services element of the Enhanced Package. By comparison, Tier Two and Tier A Companies tend to be mid-sized companies and therefore are smaller, less complex organizations than Tier One companies that can benefit from the general tools offered by the Basic Package. Given that most Tier B Companies are smaller and, less complex organizations than Tier Two and Tier A Companies, the Exchange believes they are unlikely to require the tools offered by the Basic Package.

The specific tools and services offered by these products will be developed by the Exchange or by third-party vendors. Companies that are offered these products are under no obligation to accept them and a company's listing on the Exchange is not conditioned upon acceptance of any product or service. The Exchange notes that, from time to time, companies elect to purchase products and services from other vendors at their own expense rather than accepting comparable products and services offered by the Exchange.

The proposed expansion of additional complimentary products and services will not benefit any category of listed companies over another one. The additional corporate governance packages discussed above will not increase the overall value of complimentary products and services offered to companies by the Exchange. The commercial value of the two corporate governance packages is approximately equal to the commercial value of other products already being offered to listed companies in each tier and are simply being offered as an additional alternative choice. Additionally, the data room services and virtual investor relation tools are being offered to all listed companies.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6(b) of the Act,[6] in general, and furthers the objectives of Sections 6(b)(4) [7] of the Act, in particular, in that it is designed to provide for the equitable allocation of reasonable dues, fees, and other charges among its members and issuers and other persons using its facilities. The Exchange also believes that the proposed rule change is consistent with Section 6(b)(5) [8] of the Act in that it is not designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

The Exchange believes that it is reasonable to offer complimentary products and services to attract new listings, retain currently listed issuers, and respond to competitive pressures. The Exchange faces competition in the market for listing services, and it competes in part by improving the quality of the services that it offers to

[5] A data room is a password-protected Web site used for document storage. It is typically used to store due diligence materials to be reviewed in connection with transactional activity. Virtual investor relations tools are Web sites used to present roadshows and other investor presentations on a short-term basis, typically in connection with a specific transaction.

[6] 15 U.S.C. 78f(b).

[7] 15 U.S.C. 78f(b)(4).

[8] 15 U.S.C. 78f(b)(5).

listed companies. By offering products and services on a complimentary basis and ensuring that it is offering the services most valued by its listed issuers, the Exchange will improve the quality of the services that listed companies receive. Because Tier B Companies are typically smaller organizations that pay lower listing fees to the Exchange than other categories of listed companies, the Exchange believes it is reasonable to keep the suite of complimentary products and services offered to Tier B Companies unchanged.

With respect to the addition of the two corporate governance packages, the Exchange believes that it is reasonable, equitable and not unfairly discriminatory to allow companies to choose whether they receive corporate governance products or one of the other complimentary products offered by the Exchange. With respect to the addition of the data room services and virtual investor relation tools, the Exchange believes it is reasonable, equitable and not unfairly discriminatory to offer an additional product to all listed companies. The Exchange further notes that the proposed rule change is equitable and not unfairly discriminatory because the criteria for satisfying the tiers are the same for all similarly situated companies. Companies are not forced or required to utilize the complimentary products and services as a condition of listing. All companies will continue to receive some level of free services.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. The proposed change simply expands the universe of products and services offered to certain listed companies. While the value of complimentary products and services offered by the Exchange will increase marginally, such increased value will be offered to all listed companies without regard to size or status. Accordingly, the Exchange does not believe that the proposed change will impose any burden on competition.

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

Within 45 days of the date of publication of this notice in the **Federal Register** or within such longer period (i) as the Commission may designate up to 90 days of such date 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 the 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–NYSE–2013–68 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–2013–68. 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–2013–68 and should be submitted on or before November 12, 2013.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[9]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2013–24637 Filed 10–21–13; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–70654; File No. SR–Phlx–2013–76]

Self-Regulatory Organizations; NASDAQ OMX PHLX LLC; Order Granting Approval to Proposed Rule Change Relating to the Discontinuation of the Differentiation of Price Improvement XL Orders of Less Than 50 Contracts

October 10, 2013.

I. Introduction

On August 16, 2013, NASDAQ OMX PHLX LLC (the ''Exchange'' or ''Phlx'') 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 end the different treatment of orders of less than 50 contracts entered into Phlx's Price Improvement XL auction (''PIXL,'' ''PIXL Auction,'' or ''Auction''). The proposed rule change was published for comment in the **Federal Register** on August 27, 2013.[3] The Commission received no comments on the proposal. This order approves the proposed rule change.

II. Description of the Proposal

Phlx Rule 1080(n) provides a price improvement mechanism in which a member (an ''Initiating Member'') may electronically submit for execution an order it represents as agent on behalf of

[9] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 70242 (August 21, 2013), 78 FR 52991 (August 27, 2013) (''Notice'').

a public customer, broker-dealer, or any other entity (the ''PIXL Order'') against principal interest or against any other order it represents as agent, provided that such Initiating Member submits the PIXL Order for electronic execution into the one-second long PIXL Auction. Phlx rules currently provide that if a PIXL Order [4] is a *public customer* order and is for *50 contracts or more,* the Initiating Member must stop the entire PIXL Order at a price that is equal to or better than the National Best Bid or Offer (''NBBO'') on the opposite side of the market from the PIXL Order, provided that such price must be at least one minimum price improvement increment (as determined by the Exchange but not smaller than one cent) better than any limit order on the limit order book on the same side of the market as the PIXL Order.[5] Phlx rules also provide that if the PIXL Order is for a *non-public customer* and is for *50 contracts or more,* the Initiating Member must stop the entire PIXL Order at a price that is the better of: (i) the PBBO price improved by at least one minimum price improvement increment on the same side of the market as the PIXL Order; or (ii) the PIXL Order's limit price (if the order is a limit order), provided in either case that such price is at or better than the NBBO.[6]

However, Phlx rules currently provide different treatment if the PIXL Order is for fewer than 50 contracts. Specifically, if the PIXL Order is a *public customer* order and is *less than 50 contracts,* the Initiating Member must stop the entire PIXL Order at a price that is the better of: (i) the PBBO price on the opposite side of the market from the PIXL Order, improved by at least one minimum price improvement increment; or (ii) the PIXL Order's limit price (if the order is a limit order), provided in either case that such price is at or better than the NBBO, and at least one price improvement increment better than any limit order on the book on the same side of the market as the PIXL Order.[7]

Phlx rules also provide that if the PIXL Order is for a *non-public customer* and is for *less than 50 contracts,* the Initiating Member must stop the entire PIXL Order at a price that is the better of: (i) the PBBO price improved by at least one minimum price improvement increment on the same side of the market as the PIXL Order; or (ii) the PIXL Order's limit price (if the order is a limit order), provided in either case that such price is at or better than the NBBO and at least one price improvement increment better than the PBBO on the opposite side of the market from the PIXL Order.[8]

The Exchange is proposing to discontinue the differentiation between PIXL Orders for less than 50 contracts and PIXL Orders for 50 contracts or greater.[9] As a result, all PIXL Orders, regardless of their size, will be treated the same as PIXL Orders that are 50 contracts or greater.[10] To initiate an Auction for public customer orders, the Initiating Member will be required to stop the entire PIXL Order at a price that is equal to or better than the NBBO on the opposite side of the market from the PIXL Order, provided that such price was at least one price improvement increment (no smaller than one cent) better than any limit order on the limit order book on the same side of the market as the PIXL Order. To initiate an Auction for non-public customer orders where the order is for the account of a broker-dealer or any other person or entity that is not a public customer, the Initiating Member will be required to stop the entire PIXL Order at a price that is the better of: (i) the PBBO price improved by at least one minimum price improvement increment on the same side of the market as the PIXL Order; or (ii) the PIXL Order's limit price (if the order is a limit order), provided that in either case that such price is at or better than the NBBO.

All public customers will continue to have priority at each price level in accordance with Phlx Rule 1080(n)(ii)(E).[11] Consistent with the current treatment of PIXL Orders of 50 contracts or greater in size, Phlx will consider resting quotes and orders for allocation at the end of the Auction with all prices that improve the stop price being considered first. At each given price point, Phlx will execute public customer interest in a price/time fashion such that all public customer interest that was resting on the order book is satisfied before any other interest that arrived after the Auction was initiated. After public customer interest at a given price point has been satisfied, remaining contracts will be allocated among all Exchange quotes, orders and Auction responses in accordance with the rules set forth in 1080(n)(ii)(E)(2) based on the manner in which the PIXL Order was submitted.

III. Discussion and Commission Findings

After carefully considering the proposal, 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 [12] and, in particular, the requirements of Section 6 of the Act.[13] Specifically, the Commission finds that the proposed rule change is consistent with Section 6(b)(5) of the Act,[14] which requires, among other things, that the rules of a national securities exchange be designed to promote just and equitable principles of trade, 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.

Under this proposal, a PIXL Order submitted to the PIXL Auction, regardless of its size, will be guaranteed an execution price of at least the NBBO and, moreover, will be given an opportunity to receive an execution at a price better than the NBBO. Public customer orders of fewer than 50 contracts will not, however, be guaranteed price improvement over the NBBO.

In the Notice, the Exchange explained that, when it first implemented PIXL, the differentiation provision ''was a means to ensure some level of price improvement for smaller orders.'' [15] Phlx now believes the differentiation provision ''is unnecessary and indeed is counterproductive to the [Exchange's] goal of treating all PIXL Orders equally regardless of PIXL Order size.'' [16] Phlx argued that, while the proposal removes the guarantee of price improvement for smaller initiating orders, it should benefit customers ''because it will encourage the entry of more orders into PIXL, thus it is more likely that such orders may receive price improvement.'' [17] Phlx asserted that its proposal is consistent with the

[4] Phlx Rule 1080(n)(1)(A)–(B) does not apply to Complex Orders. For Complex Orders, *see* Phlx Rule 1080(n)(i)(C).

[5] Phlx Rule 1080(n)(i)(A)(1).

[6] Phlx Rule 1080(n)(i)(B)(1)

[7] Phlx Rule 1080(n)(i)(A)(2)

[8] Phlx Rule 1080(n)(i)(B)(2).

[9] The Exchange is making conforming changes throughout subsection (n) of Rule 1080 to delete any rule text that differentiates PIXL procedures based on size.

[10] This proposal does not affect the pilot program established in Phlx Rule 1080(n)(vii) regarding no required minimum size for orders to be eligible for PIXL Auctions. The Exchange notes that it will continue periodically providing the pilot reports to the Commission through July 18, 2014, or as required pursuant to the subsection (n)(vii) pilot. *See* Notice, *supra* note 3, at 78 FR 52992, fn. 5.

[11] *See* Notice, *supra* note 3, at 78 FR 52992.

[12] 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).

[13] 15 U.S.C. 78f.

[14] 15 U.S.C. 78f(b)(5).

[15] Notice, *supra* note 3, at 78 FR 52992.

[16] *Id.*

[17] *Id.* at 52993.

Exchange Act because, among other things, Phlx ''believes strongly that it should encourage such price discovery, and the removal of the [d]ifferentiation [p]rovision would help to achieve this and more generally, benefit investors by offering more opportunities for customers and non-customers to receive price improvement.'' [18] Thus, Phlx believes that removing the differentiation provision ''will attract new order flow that might not currently be afforded any price improvement opportunity into PIXL.'' [19]

In further support of its proposal, Phlx noted that other exchanges, including the International Securities Exchange and the BOX Options Exchange, do not guarantee price improvement over the NBBO today, and that Phlx is at a competitive disadvantage in continuing the differentiation provision.[20] Phlx also cited to the BOX Options Exchange as having rules that do not differentiate price improvement opportunities based on the order size.[21]

While Phlx's proposal will eliminate the current guarantee of price improvement it provides to public customer orders of fewer than 50 contracts, the Commission notes that some other exchanges do not provide such benefit in their price improvement mechanisms.[22] Phlx asserts that removal of the differentiation provision may remove this competitive disadvantage and may increase the likelihood of members entering orders into PIXL, which can benefit such orders by exposing them for price improvement. For example, a member may only be willing to trade with a PIXL Order at the NBBO but not better than the NBBO. In that scenario, Phlx's proposal could remove the disincentive for such member to submit the order to a PIXL Auction, which ultimately could result in price improvement for the PIXL Order if a competitive responder to the Auction offers to trade with the PIXL Order at an improved price. The Commission therefore believes that, to the extent it may encourage greater submission of customer orders to the PIXL price improvement auction, Phlx's proposal is designed to promote just and equitable principles of trade and protect investors and the public interest.

The Commission notes that Phlx is not proposing to change any other provision of PIXL in this proposal. For example, orders entered into PIXL will continue to be exposed to all Phlx members before the initiating member can execute against the PIXL order. Further, Phlx is not proposing any changes to the fact that public customer orders are afforded priority at each price point in a PIXL Auction. Further, once an order is entered into PIXL, it may not be cancelled by the initiating member and thus is exposed for possible price improvement. In addition, the PIXL Order will still be guaranteed an execution price of at least the NBBO.

The Commission also notes that the proposal does not have any impact on the pilot program established in Phlx Rule 1080(n)(vii) regarding no required minimum size for orders to be eligible for the PIXL. Thus, the Commission and the Exchange will continue to have access to data that will help assess competition within the PIXL.

IV. Conclusion

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,[23] that the proposed rule change (SR–Phlx–2013–76) be, and hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[24]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2013–24649 Filed 10–21–13; 8:45 am]

BILLING CODE 8011–01–P

[18] *Id.*

[19] *Id.* at 52992.

[20] *See id.* at 52993.

[21] *See id.* at 52992.

[22] *See, e.g.,* BOX Rule 7150 and ISE Rule 723.

[23] 15 U.S.C. 78s(b)(2).

[24] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–70689; File No. SR–NSCC–2013–802]

Self-Regulatory Organizations; National Securities Clearing Corporation; Notice of Filing Amendment No. 3 to Advance Notice, as Previously Modified by Amendment Nos. 1 and 2, To Institute Supplemental Liquidity Deposits to Its Clearing Fund Designed To Increase Liquidity Resources To Meet Its Liquidity Needs

October 15, 2013.

On March 21, 2013, National Securities Clearing Corporation (''NSCC'') filed with the Securities and Exchange Commission (''Commission'') advance notice SR–NSCC–2013–802 (''Advance Notice'') pursuant to Section 806(e)(1) of the Payment, Clearing, and Settlement Supervision Act of 2010 (''Clearing Supervision Act'') [1] and Rule 19b–4(n)(1)(i) [2] thereunder.[3] On April 19, 2013, NSCC filed with the Commission Amendment No. 1 to the Advance Notice, which the Commission published for comment in the **Federal Register** on May 1, 2013.[4] On May 20, 2013, the Commission extended the period of review of the Advance Notice, as modified by Amendment No. 1.[5] On June 11, 2013, NSCC filed with the Commission Amendment No. 2 to the Advance Notice, as previously modified by Amendment No. 1, which the Commission published for comment in the **Federal Register** on July 15, 2013.[6] As of October 15, 2013, the Commission had received 22 comment letters on the proposal contained in the Advance Notice and its related Proposed Rule Change,[7] including NSCC's two responses to the comment letters received as of August 20, 2013.[8]

[1] 12 U.S.C. 5465(e)(1).

[2] 17 CFR 240.19b–4(n)(1)(i).

[3] NSCC also filed the proposal contained in the Advance Notice as proposed rule change SR–NSCC–2013–02 (''Proposed Rule Change'') under Section 19(b)(1) of the Securities and Exchange Act of 1934 (''Exchange Act'') and Rule 19b–4 thereunder. Release No. 34–69313 (Apr. 4, 2013), 78 FR 21487 (Apr. 10, 2013). On April 19, 2013, NSCC filed Amendment No. 1 to the Proposed Rule Change, which, on May 22, 2013, the Commission published notice of and designated a longer period of review for Commission action on the Proposed Rule Change, as modified by Amendment No. 1. Release No. 34–69620 (May 22, 2013), 78 FR 32292 (May 29, 2013). On June 11, 2013, NSCC filed Amendment No. 2 to the Proposed Rule Change, which the Commission published notice of with an order instituting proceedings to determine whether to approve or disapprove the Proposed Rule Change (''Order Instituting Proceedings''). Release No. 34–69951 (Jul. 9, 2013), 78 FR 42140 (Jul. 15, 2013). On September 25, 2013, the Commission designated a longer period of review for Commission action on the Order Instituting Proceedings. Release No. 34–70501 (Sep. 25, 2013), 78 FR 60347 (Oct. 1, 2013). On October 7, 2013, NSCC filed Amendment No. 3 to the Proposed Rule Change, of which the Commission published notice. Release No. 34–70688 (Oct. 15, 2013). The proposal in the Advance Notice, as amended, and the Proposed Rule Change, as amended, shall not take effect until all regulatory actions required with respect to the proposal are completed.

[4] Release No. 34–69451 (Apr. 25, 2013), 78 FR 25496 (May 1, 2013).

[5] Release No. 34–69605 (May 20, 2013), 78 FR 31616 (May 24, 2013).

[6] Release No. 34–69954 (Jul. 9, 2013), 78 FR 42127 (Jul. 15, 2013).

[7] *See* Comments Received on File Nos. SR–NSCC–2013–02 (*http://sec.gov/comments/sr-nscc-2013-02/nscc201302.shtml*) and SR–NSCC–2013–802 (*http://sec.gov/comments/sr-nscc-2013-802/nscc2013802.shtml*). Since the proposal contained in the Advance Notice was also filed as a Proposed Rule Change, *see* Release No. 34–69313, *supra* note 3, the Commission is considering all public comments received on the proposal regardless of whether the comments are submitted to the Advance Notice, as amended, or the Proposed Rule Change, as amended.

[8] NSCC also received a comment letter directly prior to filing the Advance Notice and related Proposed Rule Change with the Commission, which NSCC provided to the Commission in Amendment

Continued

Pursuant to Section 806(e)(1) of the Clearing Supervision Act [9] and Rule 19b–4(n)(1)(i) [10] thereunder, notice is hereby given that on October 4, 2013, NSCC filed with the Commission Amendment No. 3 to the Advance Notice, as previously modified by Amendment Nos. 1 and 2, as described in Item I, II and III below, which Items have been prepared primarily by NSCC. The Commission is publishing this notice to solicit comments on the Advance Notice, as modified by Amendment No. 3, from interested persons.[11]

I. Clearing Agency's Statement of the Terms of Substance of the Advance Notice

The Advance Notice, as modified by Amendments No. 1, No. 2, and No. 3, is a proposal by NSCC to amend its Rules & Procedures (the ''NSCC Rules'') to provide for supplemental liquidity deposits to its Clearing Fund (the ''NSCC Clearing Fund'') to ensure that NSCC has adequate liquidity resources to meet its liquidity needs (the ''SLD Proposal'' or sometimes the ''Proposal''), as described below. NSCC filed Amendment No. 3 (this ''Amendment'') to the Advance Notice, as previously modified by Amendment No. 1 and No. 2, in order to delete the provisions in the proposed Rule relating to Regular Activity Liquidity Obligations (as defined), to respond to concerns raised by Members. As a result the Proposal, as revised, would impose supplemental liquidity obligations on affected Members only with respect to activity relating to monthly options expiry periods (defined in the proposed Rule as ''Special Activity Liquidity Obligations'').

II. Clearing Agency's Statement of the Purpose of, and Statutory Basis for, the Advance Notice

In its filing with the Commission, NSCC included statements concerning the purpose of and basis for the Advance Notice, as modified by Amendment No. 3, and discussed any comments it received on the Advance Notice. The text of these statements may be examined at the places specified in Item IV below. NSCC has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

(A) Advance Notice Filed Pursuant to Section 806(e) of the Payment, Clearing and Settlement Supervision Act

1. Description of Change

Existing Proposal

As noted in the original proposal contained in the Advance Notice, as modified by Amendments No. 1 and No. 2, the SLD Proposal would modify the NSCC Rules to add a new Rule 4(A), to establish a supplemental liquidity funding obligation designed to cover the liquidity exposure attributable to those Members and families of affiliated Members (''Affiliated Families'') that regularly incur the largest gross settlement debits over a settlement cycle during both times of normal trading activity (''Regular Activity Periods'') and times of increased trading and settlement activity that arise around monthly options expiration dates (''Options Expiration Activity Periods'').

Under the existing Proposal, the Liquidity Obligation of a Member or Affiliated Family with respect to a Regular Activity Period (a ''Regular Activity Liquidity Obligation'') or an Options Expiration Activity Period (a ''Special Activity Liquidity Obligation'') would be imposed on the 30 Members or Affiliated Families who generate the largest aggregate liquidity needs over a settlement cycle that would apply in the event of a closeout (that is, over a period from date of default through the following three settlement days), based upon an historical look-back period. The calculations for both the Regular Activity Liquidity Obligation and the Special Activity Liquidity Obligation were designed so that NSCC has adequate liquidity resources to enable it to settle transactions, notwithstanding the default of one of these 30 largest Members or Affiliated Families during Regular Activity Periods, as well as during Options Expiration Activity Periods. The liquidity obligations imposed on Members of Affiliated Families would be apportioned among the Members in that Affiliated Family in proportion to the liquidity risk (or peak exposure) they present to NSCC. The Regular Activity Liquidity Obligation of an Unaffiliated Member or Affiliated Family that has a Regular Activity Liquidity Obligation (a Regular Activity Liquidity Provider) is satisfied by such Regular Activity Liquidity Provider making a Regular Activity Supplemental Deposit to the Clearing Fund in the amount of its Regular Activity Liquidity Obligation, offset by (i) the total amount (if any) if its commitment and the commitment of its ''Designated Lender'' under NSCC's committed line of credit (the ''Credit Facility'') and (ii) a share of the unallocated commitments of other lenders under the Credit Facility.

The cash deposit in respect of a Special Activity Liquidity Obligation (a ''Special Activity Supplemental Deposit'') is structured in the existing SLD Proposal to address any additional liquidity shortfalls (over and above NSCC's other available liquidity resources) that arise during the heightened activity period around monthly options expiration. As such, these additional Special Activity Supplemental Deposits would be required to be maintained on deposit with NSCC only through the completion of the related settlement cycle and for a few days thereafter.

Objections From Commenters

The key concerns raised by commenters with respect to the existing SLD Proposal were as follows:

First, commenters claimed that Members were not sufficiently consulted or involved during the development of the Proposal (even though NSCC management conducted significant Member outreach), so that the Proposal lacked input that could have potentially resulted in a less burdensome approach.

Second, commenters claimed that the Proposal was anticompetitive or discriminatory because the obligation to provide supplemental liquidity was imposed on only the 30 largest Unaffiliated Members or Affiliated Families (even though those Members collectively represent approximately 85% of NSCC's total membership by peak liquidity needs), rather than all Members of NSCC. This concern was raised in the context of Regular Activity Supplemental Deposits.

Third, commenters claimed that the existing Proposal was anticompetitive or discriminatory because, with respect to Regular Activity Supplemental Deposits, it gave a dollar for dollar credit for commitments made by Regular Activity Liquidity Providers or their Designated Lenders under the Credit Facility—supposedly favoring Regular Activity Liquidity Providers with affiliated banks.

NSCC believes that the proposed amendments and items described below address or mitigate all of these concerns.

Proposed Amendments

NSCC is proposing to amend the existing SLD Proposal by removing those provisions that, collectively, deal with the imposition of Regular Activity Liquidity Obligations, while

No. 1 to the filings. *See* Exhibit 2 to File No. SR–NSCC–2013–802 (*http://sec.gov/rules/sro/nscc/2013/34-69451-ex2.pdf*).

[9] 12 U.S.C. 5465(e)(1).

[10] 17 CFR 240.19b–4(n)(1)(i).

[11] Defined terms that are not defined in this notice are defined in Amended Exhibit 5 to the Advance Notice, available at *http://sec.gov/rules/sro/nscc.shtml*, under File No. SR–NSCC–2013–802, Additional Materials.

maintaining the provisions relating to Special Activity Liquidity Obligations. The proposed Rule, as so revised, would thus impose only Special Activity Liquidity Obligations with respect to the heightened activity of Options Expiration Activity Periods (that is, the four days beginning with the Friday that precedes the monthly expiration date for stock options, and ending on the third settlement day following). Under the revised Proposal, as under the existing Proposal as it relates to Special Activity Liquidity Obligations, only those Unaffiliated Members or Affiliated Families among the top 30 whose activity during monthly Options Expiration Activity Periods generate liquidity needs in excess of NSCC's then available liquidity resources will be obligated to fund such additional amounts. That is, the allocation formula ratably applies the additional amount needed during the relevant Options Expiration Activity Period based upon the affected Member's Special Activity Peak Liquidity Exposure. To the extent that a Member's Special Activity Peak Liquidity Exposure is less than or equal to NSCC's then available liquidity resources, its share of the Special Activity Peak Liquidity Need will be zero.

In addition, under the revised SLD Proposal, as under the existing Proposal as it relates to Special Activity Liquidity Obligations, Unaffiliated Members and Affiliated Families, will be able to manage their exposures by making Special Activities Prefund Deposits where they project their own activity will increase their liquidity exposure. For example, if a Special Activity Liquidity Provider anticipates that its Special Activity Peak Liquidity Exposure at any time during a particular Options Expiration Activity Period will be greater than the amount calculated by NSCC, it can make an additional cash deposit to the Clearing Fund (in excess of its Required Deposit) that it designates as a ''Special Activity Prefund Deposit.'' However, to the extent that a Member fails to adequately prefund its activity, it may be subject to a Special Activity Liquidity Call in the same manner as provided in the existing Proposal.

With these changes, NSCC is removing those provisions of the existing SLD Proposal that generated most concern from commenters, while retaining those provisions that enable NSCC to collect additional liquidity resources to cover the heightened liquidity needs that arise during monthly Options Expiration Activity Periods. Every Unaffiliated Member and Affiliated Family among the top 30 whose activity causes a liquidity need in excess of NSCC's available liquidity resources will contribute ratably to such shortfall, so the Proposal fairly and equitably apportions the obligation among those Unaffiliated Members and Affiliated Families whose activity cause the need. The removal of those provisions relating to how commitments under the Credit Facility would be credited against the cash deposit obligations of Regular Activity Liquidity Providers render concerns about such allocation moot.

As indicated in NSCC's August 20, 2013 letter to the Commission, DTCC is separately establishing a standing member-based advisory group, the Clearing Agency Liquidity Council (''CALC''), as a forum for the discussion of liquidity and liquidity-related financing needs and trends. The CALC will initially focus on liquidity initiatives currently being considered by NSCC to address liquidity funding during periods of normal activity, including issues raised by commenters on the existing SLD Proposal. In response to commenters' more general concerns regarding NSCC's reliance on the Credit Facility and related refinancing risk, NSCC will review with the CALC the financing options available to NSCC to supplement the Clearing Fund as a liquidity resource, and the related costs of those options. Any new initiatives proposed as a result of the CALC review that require regulatory approval will be addressed in a separate filing.

Reporting. As noted in the previous amendment to the Advance Notice, NSCC agrees that Members have to be able to plan for their liquidity obligations. At the same time, NSCC also believes it is critical that Members understand the risks that their own activity presents to NSCC, and be prepared to monitor their activity and alter their behavior if they want to minimize the liquidity risk they present to NSCC. Accordingly, NSCC will make available to each Member a daily report showing the amount of liquidity NSCC would need in the event of the default of such Member. Separately, NSCC will provide, and continue to discuss with Special Activity Liquidity Providers, the reports regarding their Special Activity Liquidity Obligations as currently provided in the proposed Rule.

Finally, the amendment makes certain technical corrections and clarifies the time period for when Special Activity Liquidity Calls must be satisfied.

Implementation Timeframe. The SLD Proposal will be implemented on February 1, 2014. As a result, the first time that Members will be obligated to fund any Special Activity Supplemental Deposits will be for the Options Expiration Activity Period in February 2014. NSCC Risk staff will provide to affected Members their Special Activity Peak Liquidity Exposures for the relevant Special Activity Lookback Period by no later than January 15, 2014.

2. Anticipated Effect on Management of Risk

As described in above, NSCC is proposing to amend the Advance Notice to address concerns raised by commenters, by removing provisions relating to Regular Activity Liquidity Obligations, while maintaining provisions relating to Special Activity Liquidity Obligations. NSCC believes that the SLD Proposal, as amended hereby, has been designed to mitigate any unintended impact on competition that may have been perceived by the existing SLD Proposal, while ameliorating liquidity risk by providing NSCC with a mechanism to cover peak liquidity needs relating to options expiry periods.

(B) Comments on Competition

NSCC believes that the revised SLD Proposal will not impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Securities and Exchange Act of 1934, as amended (''Exchange Act''). The Special Activity Liquidity Obligations imposed on Special Activity Liquidity Providers will ensure that all Unaffiliated Members and Affiliated Families whose activity present liquidity exposure to NSCC during periods of heightened activity during Options Expiration Activity Periods fairly and equitably contribute to NSCC's liquidity resources for settlement. NSCC believes the changes that have been made to the existing Proposal fully address the concerns raised by commenters, and eliminate any impact that the SLD Proposal might have on competition. To the extent there remains any perceived burden on competition caused by the Proposal, NSCC believes that such burden is not unreasonable or inappropriate to prevent systemic risk given that the Proposal contributes to the goal of financial stability in the event of Member default.

(C) Clearing Agency's Statement on Comments on the Advance Notice Received From Members, Participants, or Others

Written comments on the Advance Notice, including NSCC's formal response to the written comments, have

been filed with the Commission and are available on the Commission's Web site.

III. Date of Effectiveness of the Advance Notice and Timing for Commission Action

The clearing agency may implement the proposed change pursuant to Section 806(e)(1)(G) of the Clearing Supervision Act [12] if it has not received an objection to the proposed change within 60 days of the later of (i) the date that the Commission received the advance notice or (ii) the date the Commission receives any further information it requested for consideration of the notice. The clearing agency shall not implement the proposed change if the Commission has any objection to the proposed change.

The Commission may extend the period for review by an additional 60 days if the proposed change raises novel or complex issues, subject to the Commission providing the clearing agency with prompt written notice of the extension. A proposed change may be implemented in less than 60 days from the date of receipt of the advance notice, or the date the Commission receives any further information it requested, if the Commission notifies the clearing agency in writing that it does not object to the proposed change and authorizes the clearing agency to implement the proposed change on an earlier date, subject to any conditions imposed by the Commission. The clearing agency shall post notice on its Web site of proposed changes that are implemented.

The proposal shall not take effect until all regulatory actions required with respect to the proposal are completed.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the Advance Notice, as modified by Amendment No. 3, is consistent with the Clearing Supervision 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 No. SR–NSCC–2013–802 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 No. SR–NSCC–2013–802. 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 Advance Notice, as amended, that are filed with the Commission, and all written communications relating to the Advance Notice, as amended, 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 such filings also will be available for inspection and copying at the principal office of NSCC and on NSCC's Web site at *http://dtcc.com/legal/rule_filings/nscc/2013.php*. 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 No. SR–NSCC–2013–802 and should be submitted on or before November 5, 2013.

By the Commission.

Kevin M. O'Neill,

Deputy Secretary.

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[12] 12 U.S.C. 5465(e)(1)(G).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–70663; File No. SR–BYX–2013–036]

Self-Regulatory Organizations; BATS Y-Exchange, Inc.; Notice of Filing of a Proposed Rule Change To Amend Rule 12.6 To Conform to FINRA Rule 5320 Relating to Trading Ahead of Customer Orders

October 11, 2013.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the ''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on October 3, 2013, BATS Y-Exchange, Inc. (the ''Exchange'' or ''BYX'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange filed a proposal to amend Rule 12.6 to make it substantially the same as Financial Industry Regulatory Authority (''FINRA'') Rule 5320.

The text of the proposed rule change is available at the Exchange's Web site at *http://www.batstrading.com,* at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in Sections A, B, and C below, of the most significant parts of such statements.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend Rule 12.6, which limits trading ahead of customer orders by Members,[3] to make the rule substantially the same as FINRA Rule 5320.[4] As with FINRA Rule 5320, amended Rule 12.6 would prohibit Members from trading ahead of customer orders, subject to specified exceptions. The amended rule would include exceptions for large orders and institutional accounts, proprietary transactions effected by a trading unit of a Member with no knowledge of customer orders held by another trading unit of the Member, riskless principal transactions, intermarket sweep orders (''ISOs''), and odd lot and bona fide error transactions, discussed in detail below. Amended Rule 12.6 would also provide the same guidance as FINRA Rule 5320 on minimum price improvement standards, order handling procedures, and trading outside normal market hours.

Background

Current Rule 12.6, the customer order protection rule, generally prohibits Members from trading on a proprietary basis ahead of, or along with, customer orders that are executable at the same price as the proprietary order. The rule contains several exceptions that make it permissible for a Member to enter a proprietary order while representing a customer order that could be executed at the same price, including permitting transactions for the purposes of facilitating the execution, on a riskless principal basis, of one or more customer orders.

Proposal To Adopt Text of FINRA Rule 5320

To harmonize its rules with FINRA, the Exchange proposes to delete the current text of Rule 12.6 and its supplementary material and adopt the text and supplementary material of FINRA Rule 5320, with certain technical changes, as Rule 12.6. FINRA Rule 5320 generally provides that a FINRA member that accepts and holds an order in an equity security from its own customer, or a customer of another broker-dealer, without immediately executing the order is prohibited from trading that security on the same side of the market for its own account at a price that would satisfy the customer order, unless it immediately thereafter executes the customer order up to the size and at the same or better price at which it traded for its own account.

Exceptions

Amended Rule 12.6 would include exceptions to the prohibition against trading ahead of customer orders. That is, a Member that meets the conditions of an exception would be permitted to trade a security on the same side of the market for its own account at a price that would satisfy a customer order in certain circumstances. The exceptions are set out below.

Large Orders and Institutional Accounts

One exception would permit a Member to negotiate terms and conditions with respect to the acceptance of certain large-sized orders (orders of 10,000 shares or more unless such orders are less than $100,000 in value) or orders from institutional accounts. The term ''institutional account'' will be defined in accordance with FINRA Rule 4512(c). That is, an institutional account will be defined as the account of: (1) A bank savings and loan association, insurance company or registered investment company; (2) an investment adviser registered either with the SEC under Section 203 of the Investment Advisers Act or with a state securities commission (or any agency or office performing like functions); or (3) any other person (whether a natural person, corporation, partnership, trust or otherwise) with total assets of at least $50 million. This exception would require the Member to provide clear and comprehensive written disclosure to each customer at account opening and annually thereafter that: (a) States that the Member may trade proprietarily at prices that would satisfy the customer order, and (b) provides the customer with a meaningful opportunity to opt in to the Rule 12.6 protections with respect to all or any portion of its order. If a customer does not opt in to the protections with respect to all or any portion of its order, the Member may reasonably conclude that such customer has consented to the Member trading a security on the same side of the market for its own account at a price that would satisfy the customer's order.[5]

In lieu of providing written disclosure to customers at account opening and annually thereafter, the proposed rule would permit Members to provide clear and comprehensive oral disclosure to, and obtain consent from, a customer on an order-by-order basis. The Member would be required to document who provided such consent and that such consent evidences the customer's understanding of the terms and conditions of the order. If a customer opted in to the Rule 12.6 protections, a Member could still obtain consent on an order-by-order basis to trade ahead of or along with an order from that customer, provided that the Member documented who provided such consent and that such consent evidenced the customer's understanding of the terms and conditions of the order.

No-Knowledge Exception

The Exchange is also proposing to include in Interpretation and Policy .02 a ''no-knowledge'' exception to its customer order protection rule. The proposed exception would allow one trading unit of a Member to trade in a proprietary capacity and at prices that would satisfy customer orders held by another, separate trading unit of the Member. The No-Knowledge Exception would be applicable with respect to NMS stocks, as defined in Rule 600 of Regulation NMS under the Act.

To avail itself of the No-Knowledge Exception, a Member would be required to meet certain conditions. First, it would have to implement and utilize an effective system of internal controls (such as appropriate information barriers) that operate to prevent the proprietary trading unit from obtaining knowledge of the customer orders held by a separate trading unit. As proposed, Interpretation and Policy .02 will make clear that appropriate information barriers must, at a minimum, comply with the Exchange's existing requirements regarding the prevention of the misuse of material, non-public information, which are set forth in Exchange Rule 5.5. Second, the Member would have to provide, at account opening and annually thereafter, a written description of how it handles customer orders and the circumstances under which it may trade proprietarily, including in a market-making capacity, at prices that would satisfy the customer order. A Member must maintain records indicating which orders rely on the no-knowledge exception and produce these records to the Exchange upon request. The onus will be on the Member to produce sufficient documentation justifying reliance on the No-Knowledge Exception for any given trade. To ensure

[3] Members are registered brokers or dealers that have been admitted to membership at the Exchange. BYX Rule 1.5(n).

[4] *See* Securities Exchange Act Release No. 63895 (February 11, 2011), 76 FR 9386 (February 17, 2011) (SR–FINRA–2009–90).

[5] A customer would retain the right to withdraw consent at any time. Therefore, a Member's reasonable conclusion that a customer has consented to the Member trading along with such customer's order is subject to further instruction and modification from the customer.

clarity and transparency regarding this exception and others, the Exchange will be issuing a regulatory notice informing Members of these proposed rule changes. The Exchange will include in the regulatory notice the effective date for the rule as amended, which shall be at least 30 days after the approval of the amendments to Rule 12.6 in order to allow Members to make any necessary changes to their internal policies or processes.

Riskless Principal Exception

Amended Rule 12.6 would not apply to a proprietary trade made by the Member to facilitate the execution, on a riskless principal basis, of another order from a customer (whether its own customer or the customer of another broker-dealer). To take advantage of this exception, the Member would have to: (a) Submit a report, contemporaneously with the execution of the facilitated order, identifying the trade as riskless principal to the Exchange, and (b) have written policies and procedures to ensure that riskless principal transactions relied upon for this exception comply with applicable Exchange rules. At a minimum, these policies and procedures would have to require: (1) Receipt of the customer order before execution of the offsetting principal transaction, and (2) execution of the offsetting principal transaction at the same price as the customer order, exclusive of any markup or markdown, commission equivalent, or other fee and allocation to a riskless principal or customer account in a consistent manner and within 60 seconds of execution.

Members would have to have supervisory systems in place that produce records that enable the Member and the Exchange to reconstruct accurately, readily, and in a time-sequenced manner all orders on which a Member relies in claiming this exception.

ISO Exception

The proposed rule change would also exempt a Member from the obligation to execute a customer order in a manner consistent with Rule 12.6 with regard to trading for its own account when the Member routed an ISO in compliance with Rule 600(b)(30)(ii) of Regulation NMS if the customer order is received after the Member routed the ISO. If a Member routes an ISO to facilitate a customer order, and that customer has consented to not receiving the better prices obtained by the ISO, the Member would also be exempt with respect to any trading for its own account that is the result of the ISO with respect to the consenting customer's order.

Odd Lot and Bona Fide Error Exception

The Exchange proposes to except a Member's proprietary trade that: (1) Offsets a customer odd lot order (i.e., an order less than one round lot, which is typically 100 shares), or (2) corrects a bona fide error. With respect to bona fide errors, the Member would be required to demonstrate and document the basis upon which a transaction meets the bona fide error exception. For purposes of this proposed Rule, the Exchange will adopt the definition of ''bona fide error'' found in Regulation NMS's exemption for error correction transactions.[6] Thus, a bona fide error is:

(i) The inaccurate conveyance or execution of any term of an order including, but not limited to, price, number of shares or other unit of trading; identification of the security; identification of the account for which securities are purchased or sold; lost or otherwise misplaced order tickets; short sales that were instead sold long or vice versa; or the execution of an order on the wrong side of a market; (ii) the unauthorized or unintended purchase sale or allocation of securities or the failure to follow specific client instructions; (iii) the incorrect entry of data into relevant systems, including reliance on incorrect cash positions, withdrawals, or securities positions reflected in an account; or (iv) a delay, outage, or failure of a communication system used to transmit market data prices or to facilitate the delivery or execution of an order. [7]

Minimum Price Improvement Standards

The proposed rule change establishes the minimum amount of price improvement necessary for a Member to execute an order on a proprietary basis when holding an unexecuted limit order in that same security without being required to execute the held limit order.

In addition, if the minimum price improvement standards set forth in proposed Interpretation and Policy .06, paragraphs (a) through (g) would trigger the protection of a pending customer limit order, any better-priced customer limit order(s) must also be protected under this Rule, even if those better-priced limit orders would not be directly triggered under these minimum price improvement standards.

Order Handling Procedures

The proposed rule change provides that a Member must make every effort to execute a marketable customer order that it receives fully and promptly. A Member holding a marketable customer order that has not been immediately executed would have to make every effort to cross such order with any other order received by the Member on the other side of the market, up to the size of such order at a price that is no less than the best bid and no greater than the best offer at the time that the subsequent order is received by the Member and that is consistent with the terms of the orders. If a Member were holding multiple orders on both sides of the market that have not been executed, the Member would have to make every effort to cross or otherwise execute such orders in a manner reasonable and consistent with the objectives of the proposed Rule and with the terms of the orders. A Member could satisfy the crossing requirement by contemporaneously buying from the seller and selling to the buyer at the same price.

Trading Outside Normal Market Hours

Under the proposed amendments to Rule 12.6, a Member generally could limit the life of a customer order to the period of normal market hours of 9:30 a.m. to 4:00 p.m. Eastern Time. However, if the customer and Member agreed to the processing of the customer's order outside normal market hours, the protections of amended Rule 12.6 would apply to that customer's order at all times the customer order is executable by the Member.

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act [8] in general, and furthers the objectives of Section 6(b)(5) of the Act [9] in particular, in that it is designed 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 Exchange believes that amending the rule to conform to FINRA Rule 5320 will contribute to investor protection by defining important parameters by which Members must abide when trading proprietarily while holding customer limit and market orders, and foster

[6] Securities Exchange Act Release No. 55884 (June 8, 2007), 72 FR 32926, 32927 (June 14, 2007) (Order Exempting Certain Error Correction Transactions from Rule 611 of Regulation NMS under the Securities Exchange Act of 1934).

[7] *Id.*

[8] 15 U.S.C. 78f(b).

[9] 15 U.S.C. 78f(b)(5).

cooperation by harmonizing requirements across self-regulatory organizations. The Exchange also believes that including this rule will reinforce the importance of and ensure that Members are aware of these requirements.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act. To the contrary, the Exchange believes that the proposal enhances cooperation among markets and other trading venues to promote fair and orderly markets and to protect the interests of the public and of investors. Specifically, by aligning the Exchange's customer protection rules with those of FINRA and other exchanges,[10] the proposed rule change will reduce the complexity of the customer order protection rules for those Members that are also subject to the customer order protection rules of FINRA and other exchanges. As a result, the proposed rule will help assure the protection of customer orders without imposing undue regulatory costs on industry participants.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

The Exchange has neither solicited nor received written comments on the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 45 days of the date of publication of this notice in the **Federal Register** or within such longer period (i) as the Commission may designate up to 90 days of such date 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 the 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–BYX–2013–036 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–BYX–2013–036. 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 such filing also will be available for inspection and copying at the principal offices 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–BYX–2013–036, and should be submitted on or before November 12, 2013.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[11]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2013–24656 Filed 10–21–13; 8:45 am]

BILLING CODE 8011–01–P

[10] *See, e.g.,* Securities Exchange Act Release No. 64418 (May 6, 2011), 76 FR 27735 (May 12, 2011) (SR–CHX–2011–08) (notice of filing and immediate effectiveness of proposed rule change of Chicago Stock Exchange, Inc. to adopt customer order protection language consistent with FINRA Rule 5320); Securities Exchange Act Release No. 65165 (August 18, 2011), 76 FR 53009 (August 24, 2011) (SR–NYSEAmex–2011–059) (notice of filing and immediate effectiveness of proposed rule change of NYSE Amex LLC (now known as NYSE MKT LLC) to adopt customer order protection language that is substantially the same as FINRA Rule 5320); and Securities Exchange Act Release No. 65166 (August 18, 2011), 76 FR 53012 (August 24, 2011) (SR–NYSEArca–2011–057) (notice of filing and immediate effectiveness of proposed rule change of NYSE Arca, Inc. to adopt customer order protection language that is substantially the same as FINRA Rule 5320).

[11] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–70657; File No. SR–ISE–2013–51]

Self-Regulatory Organizations; International Securities Exchange, LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Amend the Schedule of Fees

October 10, 2013.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the ''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that, on September 30, 2013, the International Securities Exchange, LLC (the ''Exchange'' or the ''ISE'') filed with the Securities and Exchange 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 ISE proposes to amend its Schedule of Fees to permit ISE to exclude from its average daily volume calculations any trading day on which the Exchange is closed for trading due to early closing or a market-wide trading halt, and to correct a reference to ISE rules in the ''Flash Order'' definition. The text of the proposed rule change is available on the Exchange's Web site (*http://www.ise.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

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The self-regulatory organization has prepared summaries, set forth in sections A, B and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange is proposing to permit ISE to exclude from its average daily volume (''ADV'') calculations any trading day on which the Exchange is closed for trading due to a market-wide trading halt, and to correct a reference to ISE rules in the ''Flash Order'' definition.

The Exchange currently provides volume-based tiered rebates for Priority Customer complex orders when these orders trade with non-Priority Customer orders in the complex order book,[3] or trade with quotes and orders on the regular order book.[4] These complex order rebates are provided to members in six tiers in both Standard and Mini Options based on the Member's ADV in Priority Customer complex contracts.

The Exchange is proposing to modify its Schedule of Fees to permit the Exchange to exclude from its ADV calculation, when determining applicable rebate tiers, any day that the market is not open for the entire trading day. This would allow the Exchange to exclude days where the Exchange declares a trading halt in all securities or honors a market-wide trading halt declared by another market.[5] For example, this would have allowed the Exchange to exclude August 22, 2013 when trading was halted in Nasdaq-listed securities for three hours across all exchanges.[6] The Exchange will provide a notice, and post it on the Exchange's Web site, to inform Members of any day that is to be excluded from its ADV calculations in connection with this proposed rule change. The Exchange is not proposing any changes to the level of rebates currently being provided on the Exchange, or to the ADV thresholds required to achieve each rebate tier.

If the Exchange did not have the ability to exclude aberrant low volume days when calculating ADV for the month, as a result of the decreased trading volume, the numerator for the calculation (*e.g.,* trading volume) would be correspondingly lower, but the denominator for the threshold calculations (*e.g.,* the number of trading days) would not be decreased. This could result in an unintended cost increase. Absent the authority to exclude days that the market is not open for the entire trading day, Members will experience an effective decrease in rebates. The artificially low volumes of trading on such days could reduce the trading activity of Members both daily and monthly. Accordingly, excluding such days from the monthly calculation will diminish the likelihood of an effective increase in the cost of trading on the Exchange, a result that is unintended and undesirable to the Exchange and its Members.

The Exchange is also proposing to amend its Schedule of Fees to correct a reference to ISE rules. The preface to the Schedule of Fees currently defines a ''Flash Order'' as an order that is exposed at the National Best Bid or Offer by the Exchange to all members for execution, as provided under Supplementary Material .02 to ISE Rule 803. The Exchange recently modified its linkage rules referenced above, and in the process moved the relevant rule text from Supplementary Material .02 to ISE Rule 803 to Supplementary Material .02 to ISE Rule 1901.[7] The Exchange is therefore modifying the text of its Schedule of Fees to match the correct reference to Supplementary Material .02 to ISE Rule 1901. The Exchange notes that by clarifying this reference it is not making any substantive changes to the definition of a Flash Order, or to the fees and credits applicable to Flash Orders or responses to Flash Orders.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with the provisions of Section 6 of the Act,[8] in general, and Section 6(b)(4) of the Act,[9] in particular, in that it is designed to provide for the equitable allocation of reasonable dues, fees, and other charges among its members and other persons using its facilities.

The Exchange believes that it is equitable and reasonable to permit the Exchange to eliminate from the calculation days on which the market is not open the entire trading day because it preserves the Exchange's intent behind adopting volume-based pricing. The proposed change is non-discriminatory because it applies equally to all Members and to all volume tiers.

The Exchange further believes that it is appropriate to correct the outdated reference to ISE rules in the ''Flash Order'' definition so that Exchange members and investors have a clear and accurate understanding of the meaning of the Exchange's rules, which will reduce investor confusion.

B. Self-Regulatory Organization's Statement on Burden on Competition

In accordance with Section 6(b)(8) of the Act,[10] the Exchange does not believe that the proposed rule change will impose any burden on intermarket or intramarket competition that is not necessary or appropriate in furtherance of the purposes of the Act. With respect to ADV calculations for rebates, the Exchange notes that there are very few instances where the rule will actually be invoked, and when invoked, the Exchange believes the rule will have little or no impact on trading decisions or execution quality. To the contrary, the Exchange believes that the proposed modification to its ADV calculation is pro-competitive and will result in lower total costs to end users, a positive outcome of competitive markets. Moreover, other options exchanges have adopted rules that are substantially similar to the change in ADV calculation being proposed by the Exchange.[11] With respect to the ''Flash Order'' definition, the Exchange further believes that making a technical correction to an outdated reference here as proposed is non-substantive, and therefore does not implicate the competition analysis. The Exchange operates in a highly competitive market in which market participants can readily direct their order flow to competing venues. In such an environment, the Exchange must continually review, and consider adjusting, its fees and rebates to remain competitive with other exchanges. For

[3] The Exchange offers a rebate in Standard and Mini Options for Priority Customer complex orders in (i) Select Symbols (excluding SPY), (ii) SPY, and (iii) Non-Select Symbols, when these orders trade with non-Priority Customer orders in the complex order book.

[4] The Exchange offers a rebate in Standard and Mini Options for Priority Customer complex orders that trade with quotes and orders on the regular order book in (i) SPY, and (ii) other symbols excluding SPY.

[5] The Exchange will not be excluding days on which the Exchange closes early for holiday observance from its ADV calculation.

[6] Trading in Nasdaq-listed securities was halted across all markets on August 22, 2013 due to a systems issue experienced by the NASDAQ UTP SIP.

[7] *See* Securities Exchange Act Release No. 69396 (April 18, 2013) 78 FR 24273 (April 24, 2013) (SR–ISE–2013–18).

[8] 15 U.S.C. 78f.

[9] 15 U.S.C. 78f(b)(4).

[10] 15 U.S.C. 78f(b)(8).

[11] *See e.g.* Securities Exchange Act Release No. 70472 (September 23, 2013) (PHLX–2013–93); 70470 (Sept. 23, 2013) (NASDAQ–2013–117).

the reasons described above, the Exchange believes that the proposed fee changes reflect this competitive environment.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

The Exchange has not solicited, and does not intend to solicit, comments on this proposed rule change. The Exchange has not received any unsolicited written comments from members or other interested parties.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A)(ii) of the Act [12] and subparagraph (f)(2) of Rule 19b–4 thereunder,[13] because it establishes a due, fee, or other charge imposed by ISE.

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 to determine whether the proposed rule should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–ISE–2013–51 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–ISE–2013–51. 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–ISE–2013–51 and should be submitted on or before November 12, 2013.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[14]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2013–24654 Filed 10–21–13; 8:45 am]

BILLING CODE 8011–01–P

[12] 15 U.S.C. 78s(b)(3)(A)(ii).

[13] 17 CFR 240.19b–4(f)(2).

[14] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–70647; File No. SR–ISE–2013–50]

Self-Regulatory Organizations; International Securities Exchange, LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Amend the Schedule of Fees

October 9, 2013.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the ''Act''),[1] and Rule 19b-4 thereunder,[2] notice is hereby given that on September 30, 2013, the International Securities Exchange, LLC (the ''Exchange'' or the ''ISE'') filed with the Securities and Exchange 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 the Substance of the Proposed Rule Change

The ISE proposes to amend its Schedule of Fees. The text of the proposed rule change is available on the Exchange's Web site (*http://www.ise.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 these statements may be examined at the places specified in Item IV below. The self-regulatory organization has prepared summaries, set forth in sections A, B and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange is proposing to amend its Schedule of Fees to: (1) decrease the discount applicable to Market Makers [3] when they trade against Priority Customer [4] complex orders that are preferenced to them on the Exchange; (2) increase the fees that it charges for executions of Priority Customer orders in non-Early Adopter Foreign Currency (''FX'') Option Symbols to be equal to the fees charged for executions of orders in Early Adopter FX Option Symbols; and (3) increase the fees for Priority Customer orders routed to another exchange for execution.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] The term ''Market Makers'' refers to ''Competitive Market Makers'' and ''Primary Market Makers'' collectively. *See* ISE Rule 100(a)(25).

[4] A Priority Customer is defined in ISE Rule 100(a)(37A) as a person or entity that is not a broker/dealer in securities, and does not place more than 390 orders in listed options per day on average during a calendar month for its own beneficial account(s).

On January 29, 2013, the Commission approved [5] [sic] SR–ISE–2013–05, on a one-year pilot basis, with such fees being operative from January 17, 2013 (''Approval Order'')[sic].[6] Specifically, the Approval Order [sic] permits a $0.05 fee differential between Market Makers that receive preferenced complex orders and those that do not receive preferenced complex orders in classes that can be listed and traded on more than one options exchange.[7] The Exchange proposes to reduce the fee differential from $0.05 to $0.02 per contract, which was the applicable fee differential on the Exchange prior to the Approval Order [sic].[8] Accordingly, Market Makers that add or remove liquidity from the complex order book by trading against Priority Customer complex orders that are preferenced to them will be charged: (i) $0.37 per contract in Select Symbols (including SPY), i.e. the regular rate of $0.39 per contract with a $0.02 per contract discount; and (ii) $0.80 per contract in Non-Select Symbols, i.e. the regular rate of $0.82 per contract with a $0.02 per contract discount.

The Exchange is also proposing to amend its Schedule of Fees to increase the fees for Priority Customer orders in FX options. Currently, Priority Customers pay a fee in non-Early Adopter FX Option Symbols of $0.18 per contract for non-Crossing Orders and Crossing Orders, and $0.20 per contract for Responses to Crossing Orders. In Early Adopter FX Option Symbols, this fee is $0.40 per contract for non-Crossing Orders, Crossing Orders, and Responses to Crossing Orders. The Exchange is now proposing to increase the fee for Priority Customer orders for non-Early Adopter FX Option Symbols to $0.40 per contract to be in line with the fees currently charged for Priority Customer orders in Early Adopter FX Option Symbols.

The Exchange is further proposing to amend its Schedule of Fees to increase the route-out fee applicable to Priority Customers orders. The Exchange currently charges a fee of $0.38 per contract for executions of Priority Customer orders in Standard Options in all symbols that are routed to one or more exchanges in connection with the Options Order Protection and Locked/Crossed Market Plan. For Mini Options, this fee is currently $0.038 per contract. In order to offset costs associated with routing orders to other exchanges, the Exchange now proposes to increase the route-out fee for Priority Customer orders to $0.40 per contract for Standard Options and $0.040 per contract for Mini Options. The route-out fee offsets costs incurred by the Exchange in connection with using unaffiliated broker-dealers to access other exchanges for linkage executions, and is therefore appropriate.

2. *Statutory Basis*

The Exchange believes that its proposal to amend its Schedule of Fees is consistent with Section 6(b) of the Securities and Exchange Act of 1934 (the ''Act'') [9] in general, and furthers the objectives of Section 6(b)(4) of the Act [10] in particular, in that it is an equitable allocation of reasonable dues, fees and other charges among Exchange members and other persons using its facilities.

The Exchange believes that reducing the current discount applicable to Market Makers when they trade against Priority Customer complex orders that are preferenced to them from $0.05 to $0.02 per contact is reasonable, equitable, and not unfairly discriminatory because reducing the discount for preferenced orders will narrow the fee differential between Market Makers that receive preferenced orders and those that do not. The Exchange believes that it is reasonable, equitable and not unfairly discriminatory to continue to assess lower fees to preferenced Market Makers that add or remove liquidity from the complex order book by trading against Priority Customer orders that are preferenced to them because preferenced Market Makers are subject to heightened and burdensome quoting obligations that do not apply to non-preferenced Market Makers or to other market participants.[11]

The Exchange believes that its proposal to increase the fee for Priority Customer orders in non-Early Adopter FX Option Symbols to $0.40 per contract is reasonable and equitably allocated because the proposed fee is identical to the fee currently charged by the Exchange for Early Adopter FX Option Symbols. With this proposed rule change, Priority Customers will be charged the same fee regardless of whether they place orders in Early Adopter or non-Early Adopter FX Option Symbols.

The Exchange believes the proposed route-out fee is reasonable and equitable as it provides the Exchange the ability to recover costs associated with using unaffiliated broker-dealers to route Priority Customer orders to other exchanges for linkage executions. The Exchange also believes that the proposed fees are not unfairly discriminatory because these fees would be uniformly applied to all Priority Customer orders routed to other exchanges. As fees to access liquidity for Priority Customer orders have risen at other exchanges, it has become necessary for the Exchange to raise routing fees in order to recoup the higher costs. The Exchange notes that a number of other exchanges currently charge a variety of routing related fees associated with customer and non-customer orders that are subject to linkage handling. The Exchange also notes that the fees proposed herein are within the range of fees charged by some of the Exchange's competitors.[12]

The Exchange has determined to charge fees for regular orders in Mini Options at a rate that is 1/10th the rate of fees the Exchange currently provides for trading in Standard Options. The Exchange believes it is reasonable, equitable and not unfairly discriminatory to assess lower fees to provide market participants an incentive to trade Mini Options on the Exchange. The Exchange believes the proposed fees are reasonable and equitable in light of the fact that Mini Options have a smaller exercise and assignment value, specifically 1/10th that of a Standard Option contract, and, as such, is levying fees that are 1/10th of what market participants pay to trade Standard Options.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule will impose any

[5] The Commission notes that SR–ISE–2013–05 was immediately effective upon filing. Accordingly, the Commission did not approve SR–ISE–2013–05.

[6] *See* Securities Exchange Act Release No. 68760 (Jan. 29, 2013), 78 FR 7844 (Feb. 4, 2013) (SR–ISE–2013–05).

[7] Market Makers may be categorized as preferenced Market Makers when such Market Makers execute against a Priority Customer order preferenced to them for execution by an order flow provider. The current $0.05 per contract discount also applies to a group of symbols in which Market Makers can enter quotes in the complex order book (''Complex Quoting Symbols''). The discount applicable to the Complex Quoting Symbols is found on the Exchange's Schedule of Fees. *See* Section II. Complex Order Fees and Rebates, footnote 4. This proposed rule change also applies to the Complex Quoting Symbols.

[8] The Exchange notes that NASDAQ OMX PHLX, Inc. (''PHLX'') recently reduced its own differential back to $0.02 per contract from its prior rate of $0.05 per contract. *See* Securities Exchange Act Release No. 69768 (June 14, 2013), 78 FR 37250 (June 20, 2013) (SR–Phlx–2013–61).

[9] 15 U.S.C. 78f(b).

[10] 15 U.S.C. 78f(b)(4).

[11] Preferenced Market Makers are required to continuously quote at least 90% of the series of an options class, whereas non-preferenced market makers are required to quote only 60% of the series of an options class. *See* ISE Rule 804(e).

[12] *See* PHLX Fee Schedule, Section V, Routing Fees; and Chicago Board Options Exchange (''CBOE'') Fees Schedule, Linkage Fees.

burden on competition that is not necessary or appropriate in the furtherance of the purposes of the Exchange Act.

The Exchange is proposing to decrease the fee differential between Market Makers that receive preferenced orders and those that do not receive preferenced orders. The Exchange believes that decreasing this fee differential does not create an undue burden on competition. The differential is similar to the differential currently in place at the PHLX and furthermore reduces intra-market competition by reducing the differential between preferenced and non-preferenced market makers.

The Exchange believes the proposed fee for Priority Customer orders in non-Early Adopter FX Option Symbols does not impose a burden on competition because it will apply a uniform fee to Priority Customer orders in all FX Option symbols traded on the Exchange. Even though these options are solely listed on ISE, the Exchange operates in a highly competitive market, comprised of twelve exchanges, any of which can determine to trade similar products.[13]

With respect to increasing the Priority Customer route-out fee, the Exchange believes the proposed fee change does not impose a burden on competition because the proposed fee is consistent with fees charged by other exchanges and will uniformly apply to all Priority Customer orders in Standard Options and Mini Options that are routed out to other exchanges for linkage executions. The Exchange notes that Members can and do route these orders to other markets or specify that ISE not route orders away on their behalf.

The Exchange notes that it operates in a highly competitive market in which market participants can readily direct their order flow to competing venues. In such an environment, the Exchange must continually review, and consider adjusting, its fees and rebates to remain competitive with other exchanges. For the reasons described above, the Exchange believes that the proposed fee changes reflects this competitive environment.

[13] At least one other exchange currently trades foreign currency options. While PHLX World Currency Options® are not fungible with FX Options, they provide investors with a choice to trade in a competing product. *See* PHLX World Currency Options® at *http://www.nasdaqtrader.com/Micro.aspx?id=PHLXFOREXOptions*.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

The Exchange has not solicited, and does not intend to solicit, comments on this proposed rule change. The Exchange has not received any unsolicited written comments from members or other interested parties.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A)(ii) of the Act[14] and subparagraph (f)(2) of Rule 19b–4 thereunder,[15] because it establishes a due, fee, or other charge imposed by ISE.

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 to determine whether the proposed rule should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov*. Please include File Number SR–ISE–2013–50 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–ISE–2013–50. 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 such filing also will be available for inspection and copying at the principal offices 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–ISE–2013–50, and should be submitted on or before November 12, 2013.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[16]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2013–24646 Filed 10–21–13; 8:45 am]

BILLING CODE 8011–01–P

[14] 15 U.S.C. 78s(b)(3)(A)(ii).

[15] 17 CFR 240.19b–4(f)(2).

[16] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–70601; File No. SR–EDGX–2013–37]

Self-Regulatory Organizations; EDGX Exchange, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Relating to Amendments to the EDGX Exchange, Inc. Fee Schedule

October 2, 2013.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the ''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on September 30, 2013, EDGX Exchange, Inc. (the ''Exchange'' or ''EDGX'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I, II and III below, which items have been prepared by the self-regulatory organization. The

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend its fees and rebates applicable to Members[3] of the Exchange pursuant to EDGX Rule 15.1(a) and (c) (''Fee Schedule'') to: (i) Increase the discounted fee to remove and/or route under the Mega Tier 1 from $0.0015 per share to $0.0029 per share; (ii) add a discounted fee of $0.00295 per share to remove liquidity to the Mega Tier 3; (iii) add a new Market Depth Tier 2; (iv) rename the current Market Depth Tier as ''Market Depth Tier 1''; (v) increase the rebate provided by the Tape B Step Up Tier from $0.0025 per share to $0.0027 per share; (vi) lower the ADV threshold required to meet the MidPoint Match Volume Tier; and (vii) decrease the rebate for orders yielding Flag RZ. The text of the proposed rule change is available on the Exchange's Internet Web site at *www.directedge.com*, at the Exchange's principal office, and at the Public Reference Room of the Commission.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The self-regulatory organization has prepared summaries, set forth in sections A, B and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and the Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend its Fee Schedule to: (i) Increase the discounted fee to remove and/or route under the Mega Tier 1 from $0.0015 per share to $0.0029 per share; (ii) add a discounted fee of $0.00295 per share to remove liquidity to the Mega Tier 3; (iii) add a new Market Depth Tier 2; (iv) rename the current Market Depth Tier as ''Market Depth Tier 1''; and (v) increase the rebate provided by the Tape B Step Up Tier from $0.0025 per share to $0.0027 per share; (vi) lower the ADV threshold required to meet the MidPoint Match Volume Tier; and (vii) decrease the rebate for orders yielding Flag RZ.

Amendment to Mega Tier 1

The Exchange proposes to increase the fee to remove and or route under the Mega Tier 1 from $0.0015 per share to $0.0029 per share. To be eligible for the fees and rebates offered under the Mega Tier 1, Members must: (1) Add or route at least 4,000,000 shares of ADV prior to 9:30 a.m. or after 4:00 p.m.; (2) add a minimum of 35,000,000 shares of ADV on EDGX in total, including during both market hours and pre and post-trading hours; and (3) have an ''added liquidity'' to ''added plus removed liquidity'' ratio of at least 85%. The Exchange notes that the criteria necessary to achieve the tier would remain unchanged.

Amendment to Mega Tier 3

The Exchange proposes to add a discounted fee to remove liquidity to Mega Tier 3 of $0.00295 per share. To be eligible for the fees and rebates offered under the Mega Tier 3, Members must: (1) Add or route at least 1,500,000 shares of ADV prior to 9:30 a.m. or after 4:00 p.m.; and (2) add a minimum of 0.75% of the TCV on a daily basis measured monthly, including during both market hours and pre and post-trading hours. Mega Tier 3 does not currently provide a discounted fee to remove liquidity to Members that qualify for the tier. Instead, Members are charged the standard removal rate of $0.0030 per share for securities priced at or above $1.00 and 0.30% of the dollar value for securities priced below $1.00. The Exchange now proposes to provide Members that qualify for the Mega Tier 3 with a discounted removal fee of $0.00295 per share for securities priced at or above $1.00.

Addition of the Market Depth Tier 2

The Exchange proposes to add a new tier to Footnote 1 to its Fee Schedule named the Market Depth Tier 2. The Market Depth Tier 2 would provide a rebate of $0.0029 per share to Members that: (1) Add 10,000,000 shares in average daily volume (''ADV'') on a daily basis, measured monthly; and (2) add at least 1,000,000 shares as non-displayed orders that yield Flag HA (non-displayed orders that add liquidity (not including MidPoint Match orders[4])).

Amendment to Market Depth Tier

Due to the proposed addition of the Market Depth Tier 2, discussed above, the Exchange proposes to rename the current Market Depth Tier as ''Market Depth Tier 1.'' The Exchange notes that the criteria necessary to achieve the tier and the rebates offered by the tier would remain unchanged.

Amendment to Tape B Step-Up Tier

The Exchange proposes to increase the rebate provided under the Tape B Step Up Tier orders yielding flags B and 4 (adds liquidity to EDGX in Tape B securities) from $0.0025 per share to $0.0027 per share. To be eligible for the rebate offered under the Tape B Step Up Tier, Members must add 600,000 shares in ADV in Tape B securities more than the Member's August 2013 ADV in Tape B securities added to EDGX. The Exchange notes that the criteria necessary to achieve the tier would remain unchanged.

Amendment to the MidPoint Match Volume Tier

Footnote 3 of the Fee Schedule currently provides that Members may qualify for the MidPoint Match Volume Tier and not be charged a fee for orders that yield Flag MM on EDGX if they add and/or remove an ADV of at least 3,000,000 shares on a daily basis, measured monthly, on EDGX, yielding flags MM (adds liquidity to MPM using the Midpoint Match order type[5]) and/or MT (removes liquidity from MPM using MPM order type). The Exchange proposes to amend Footnote 3 of its Fee Schedule to decrease the ADV requirement of the MidPoint Match Volume Tier from 3,000,000 shares of ADV to 2,500,000 shares of ADV. The remainder of the criteria required to meet the tier as well as the rate offered by the tier would remain unchanged.

Flag RZ

In securities priced at or above $1.00, the Exchange currently provides a rebate of $0.0025 per share for Members' orders that yield Flag RZ, which routes to the BATS Exchange Inc. (''BATS'') and adds liquidity. The Exchange proposes to amend its Fee Schedule to decrease this rebate to $0.0020 per share for Members' orders that yield Flag RZ. The proposed change represents a pass through of the rate that Direct Edge ECN

[3] The term ''Member'' is defined as ''any registered broker or dealer, or any person associated with a registered broker or dealer, that has been admitted to membership in the Exchange. A Member will have the status of a ''member'' of the Exchange as that term is defined in Section 3(a)(3) of the Act.'' *See* Exchange Rule 1.5(n).

[4] *See* Exchange Rule 11.5(c)(7).

[5] As defined in Exchange Rule 11.5(c)(7), the Midpoint Match (''MPM'') order type is an order with an instruction to execute it at the midpoint of the NBBO.

LLC (d/b/a DE Route) (''DE Route''), the Exchange's affiliated routing broker-dealer, is rebated for routing orders to BATS when it does not qualify for a volume tiered rebate. When DE Route routes to BATS, it is rebated a standard rate of $0.0020 per share.[6] DE Route will pass through this rate on BATS to the Exchange and the Exchange, in turn, will pass through this rate to its Members. The Exchange notes that the proposed change is in response to BATS's October 2013 fee change where BATS decreased the rebate it provides its customers, such as DE Route, from a rebate of $0.0025 per share to a rebate of $0.0020 per share for orders that are routed to BATS.[7]

Implementation Date

The Exchange proposes to implement these amendments to its Fee Schedule on October 1, 2013.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with the objectives of Section 6 of the Act,[8] in general, and furthers the objectives of Section 6(b)(4),[9] in particular, as it is designed to provide for the equitable allocation of reasonable dues, fees and other charges among its Members and other persons using its facilities.

Amendment to Mega Tier 1

The Exchange believes that the proposal to increase the discounted fee to remove and/or route under the Mega Tier 1 from $0.0015 per share to $0.0029 per share represents an equitable allocation of reasonable dues, fees, and other charges among Members and other persons using its facilities because it will enable the Exchange to retain additional funds to offset increased administrative, regulatory, and other infrastructure costs associated with operating an exchange. The Exchange believes that it is reasonable to increase the discounted removal and/or routing fees using liquidity provision patterns. A discounted removal rate that is designed to incent fee sensitive liquidity takers to the Exchange, provided they are able to meet certain volume requirements. The proposed removal and/or routing rate is also similar to that provided by the Mega Tier 2 in Footnote 1 of the Fee Schedule.[10] Lastly, the Exchange believes that the proposed amendment to the Mega Tier 1 is non-discriminatory because it applies uniformly to all Members.

Amendment to Mega Tier 3

The Exchange believes that its proposal to add a discounted fee to remove liquidity to Mega Tier 3 of $0.00295 per share represents an equitable allocation of reasonable dues, fees, and other charges among Members and other persons using its facilities because the tier would further encourage Members to add liquidity to EDGX during pre- and post-trading hours. Fewer Members generally trade during pre- and post-trading hours because of the limited time parameters associated with these trading sessions, which generally results in less liquidity. In addition, liquidity received during pre- and post-trading hours is an important contributor to price discovery and acts as an important indication of price for the market as a whole considering the relative illiquidity of the pre- and post-trading hour sessions. The Exchange believes that offering a discounted removal fee would incentivize Members to provide liquidity during these trading sessions.

The Exchange also believes that discounted fee provided by the Mega Tier 3 is reasonable and equitably allocated because the increased liquidity that may result from Members attempting to achieve the tier would benefit all investors by deepening EDGX's liquidity pool and improving investor protection. Volume-based discounted fees such as the one proposed herein are widely utilized in the cash equities markets, and are equitable because they are open to all Members on an equal basis and provide incentives that are reasonably related to the value to an exchange's market quality associated with higher levels of market activity, such as higher levels of liquidity provision and opportunities for price improvement.

Lastly, the Exchange believes that the proposed amendment to the Mega Tier 3 is non-discriminatory because it applies uniformly to all Members.

Addition of Market Depth Tier 2

The Exchange believes that its proposal to add the Market Depth Tier 2 to its Fee Schedule represents an equitable allocation of reasonable dues, fees, and other charges among Members and other persons using its facilities because the tier would encourage Members to add liquidity to EDGX to qualify for a higher rebate. This tier would also recognize the contribution that non-displayed liquidity provides to the marketplace, including: (i) Adding needed depth to the EDGX market; (ii) providing price support/depth of liquidity; and (iii) increasing diversity of liquidity to EDGX. The increased liquidity would benefit all investors by deepening EDGX's liquidity pool, offering additional flexibility for all investors to enjoy cost savings, supporting the quality of price discovery, promoting market transparency and improving investor protection.

Furthermore, the Exchange believes that the criteria for the Market Depth Tier 2 represents an equitable allocation of reasonable dues, fees, and other charges because higher rebates are directly correlated with more stringent criteria. For example, for a Member to qualify for the current Market Depth Tier, and receive a rebate of $0.0033 per share for displayed liquidity, a Member must post at least 0.50% of the TCV in ADV on EDGX in total, where at least 1.8 million shares are non-displayed orders that add liquidity to EDGX yielding Flag HA. Based on a TCV of six (6) billion shares, this would amount to 30,000,000 shares for the Market Depth Tier while the Market Depth Tier 2 would require an ADV of 10,000,000 shares. Members seeking to achieve the Market Depth Tier would also be required to post at least 1.8 million shares of non-displayed orders that add liquidity to EDGX yielding Flag HA, whereas the Market Depth Tier 2 would require that Members post 1,000,000 shares of non-displayed orders that add liquidity to EDGX yielding Flag HA. The lower volume requirement necessary to achieve the Market Depth Tier 2 justifies its lower rebate. Lastly, the Exchange believes that the proposed addition of the Market Depth Tier is non-discriminatory because it applies uniformly to all Members.

Amendment to Market Depth Tier

The Exchange believes that changing the ''Market Depth Tier'' to the ''Market Depth Tier 1'' is reasonable because it conforms to the numbering of the proposed Market Depth Tier 2. The Exchange notes that the criteria necessary to achieve the tier and the rate offered by the tier would remain unchanged.

Amendment to the Tape B Step-Up Tier

The Exchange believes that increasing the rebate offered by the Tape B Step-

[6] The Exchange notes that to the extent DE Route does or does not achieve any volume tiered discount on BATS, its rate for Flag RZ will not change.

[7] *See* BATS Exchange Pricing Effective October 1, 2013, *http://cdn.batstrading.com/resources/fee_schedule/2013/BATS–BZX–Exchange-Pricing-Effective-October–1–2013.pdf* (offering a standard, non-tiered rebate of $0.0020 per share).

[8] 15 U.S.C. 78f.

[9] 15 U.S.C. 78f(b)(4).

[10] Members that qualify for the Mega Tier 2 are charged a discounted removal rate of $0.0029. *See* the Exchange's Fee Schedule, *available at http://www.directedge.com/Membership/FeeSchedule/EDGXFeeSchedule.aspx.*

Up Tier from $0.0025 per share to $0.0027 per share represents an equitable allocation of reasonable dues, fees, and other charges because it would encourage Members to add liquidity to EDGX to qualify for a higher rebate. The rebate of $0.0027 per share for the Tape B Step-Up Tier is reasonable when compared to the Step-Up Tier 1 in Tape B securities offered by NYSE Arca.[11] NYSE Arca currently offers a non-tiered rebate for adding liquidity in Tape B securities of $0.22 per share and a non-tiered fee for removing liquidity in Tape B securities of $0.30 per share. NYSE Arca's Step-Up Tier 1 provides for an add rebate of $0.23 per share and a removal fee of $0.28 per share for firms that add an excess of 0.20% in ADV in Tape B securities over a benchmark month, subject to a minimum increase of 20 million shares. The Tape B Step-Up Tier is similar to NYSE Arca's Step-Up Tier 1 in Tape B securities in that it provides Members with an increased rebate in exchange for increased volume in Tape B securities. The Exchange believes the increased rebate under the Tape B Step-Up Tier is reasonable in that it would encourage market participants to send additional liquidity in Tape B securities to EDGX in exchange for a higher rebate. Lastly, The Exchange believes that the proposed rate is non-discriminatory in that it applies uniformly to all Members.

Amendment to the MidPoint Match Volume Tier

The Exchange believes that lowering the ADV requirement in Flags MM and/or MT for the MidPoint Match Volume Tier represents an equitable allocation of reasonable dues, fees, and other charges because slightly lowering the threshold to achieve the tier encourages Members to add liquidity at the midpoint of the national best bid or offer (''NBBO'') to the EDGX Book[12] each month. Only the liquidity added at the midpoint of the NBBO in this tier is not charged a fee, while both added and removed liquidity in Flags MM and MT are counted towards achieving the tier's ADV threshold. The Exchange believes that Members utilizing MPM orders that add liquidity at the midpoint of the NBBO may receive the benefit of price improvement, and lowering the ADV requirement of the MidPoint Match Volume Tier and its associated lower rate would be a reasonable means by which to encourage the use of such orders. In addition, the Exchange believes that by encouraging the use of MPM orders, Members seeking price improvement would be more motivated to direct their orders to EDGX because they would have a heightened expectation of the availability of liquidity at the midpoint of the NBBO. In addition, the Exchange also believes that the proposed amendment to the MidPoint Match Volume Tier is non-discriminatory because it applies uniformly to all Members.

Flag RZ

The Exchange believes that its proposal to decrease the pass through rebate for Members' orders that yield Flag RZ from $0.0025 to $0.0020 per share represents an equitable allocation of reasonable dues, fees, and other charges among Members and other persons using its facilities because the Exchange does not levy additional fees or offer additional rebates for orders that it routes to BATS through DE Route. Prior to BATS's October 2013 fee change, BATS provided DE Route a rebate of $0.0025 per share for orders yielding Flag RZ, which DE Route passed through to the Exchange and the Exchange passed through to its Members. In October 2013, BATS decreased the standard rebate it provides its customers, such as DE Route, from a rebate of $0.0025 per share to a rebate of $0.0020 per share for orders that are routed to BATS.[13] Therefore, the Exchange believes that the proposed change in Flag RZ from a rebate of $0.0025 per share to a rebate of $0.0020 per share is equitable and reasonable because it accounts for the pricing changes on BATS. In addition, the proposal allows the Exchange to continue to charge its Members a pass-through rate for orders that are routed to BATS. The Exchange notes that routing through DE Route is voluntary. Lastly, the Exchange also believes that the proposed amendment is non-discriminatory because it applies uniformly to all Members.

B. Self-Regulatory Organization's Statement on Burden on Competition

These proposed rule changes do not impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. The Exchange does not believe that any of these changes represent a significant departure from previous pricing offered by the Exchange or pricing offered by the Exchange's competitors. Additionally, Members may opt to disfavor EDGX's pricing if they believe that alternatives offer them better value. Accordingly, the Exchange does not believe that the proposed changes will impair the ability of Members or competing venues to maintain their competitive standing in the financial markets.

Amendment to Mega Tier 1

The Exchange believes that increasing the removal fee under the Mega Tier 1 would not impact intermarket competition because it is similar to removal rates offered by the Exchange's Mega Tier 2 in Footnote 1 of its Fee Schedule[14] and other similar tiers on NYSE Arca.[15] The Exchange believes that the proposed tier would neither increase nor decrease intramarket competition because the proposed removal rate offered by the tier would apply uniformly to all Members that meet the requirements necessary to achieve the tier.

Amendment to Mega Tier 3

The Exchange believes that the proposed discounted removal rate for Mega Tier 3 would increase intermarket competition because it would encourage market participants to send additional liquidity to EDGX in exchange for a discounted removal rate. The Exchange believes that the proposed discounted removal rate would neither increase nor decrease intramarket competition because the discounted removal rate offered by the tier would apply uniformly to all Members that meet the requirements necessary to achieve the tier.

Addition of Market Depth Tier 2

The Exchange believes that the proposed addition of the Market Depth Tier 2 would increase intermarket competition because it would encourage market participants to send additional liquidity to EDGX in exchange for an increased rebate. The Exchange believes that the proposed tier would neither

[11] NYSE Arca Equities Trading Fees, *available at http://usequities.nyx.com/markets/nyse-arca-equities/trading-fees.*

[12] The EDGX Book is the System's electronic file of orders. *See* Exchange Rule 1.5(d).

[13] *See* BATS Exchange Pricing Effective October 1, 2013, *http://cdn.batstrading.com/resources/fee_schedule/2013/BATS-BZX-Exchange-Pricing-Effective-October-1-2013.pdf* (offering a standard, non-tiered rebate of $0.0020 per share).

[14] Members that qualify for the Mega Tier 2 are charged a discounted removal rate of $0.0029. *See* the Exchange's Fee Schedule, *available at http://www.directedge.com/Membership/FeeSchedule/EDGXFeeSchedule.aspx.*

[15] For example, the Mega Tier 3's proposed discounted removal rate of $0.0029 per share (from a standard rate of $0.0030 per share) is also reasonable because it is similar in concept to discounted removal rates offered by NYSE Arca, which offers a discounted removal rate of $0.0029 (from a standard rate of $0.0030 per share) to customers that qualify for its Tape C Step Up Tier. *See* NYSE Arca, Schedule of Fees and Charges for Exchange Services, *https://usequities.nyx.com/sites/usequities.nyx.com/files/nyse_arca_marketplace_fees__9.4.13.pdf.*

increase nor decrease intramarket competition because the increased rebate offered by the tier would apply uniformly to all Members that meet the requirements necessary to achieve the tier.

Amendment to Market Depth Tier

The Exchange believes that the proposed non-substantive change to the Market Depth Tier would neither affect intermarket nor intramarket competition because the change does not alter the criteria necessary to achieve the tier nor does it alter the rate offered by the tier.

Amendment to the Tape B Step-Up Tier

The Exchange believes that the proposed increased rebate under the Tape B Step-Up Tier would increase intermarket competition because it would encourage market participants to send additional liquidity in Tape B securities to EDGX in exchange for a higher rebate. The Exchange believes that the proposed increased rebate would neither increase nor decrease intramarket competition because the increased rebate offered by the tier would apply uniformly to all Members that meet the requirements necessary to achieve the tier.

Amendments to the MidPoint Match Volume Tier

The Exchange believes that its proposal to decrease the ADV requirement in Flags MM and/or MT in the MidPoint Match Volume Tier would increase intermarket competition because the lower ADV requirement would incentivize Members that could not previously meet the tier to send higher volume to the Exchange. The Exchange believes that its proposal would neither increase nor decrease intramarket competition because the MidPoint Match Volume Tier would continue to apply uniformly to all Members and the ability of some Members to meet the tier would only benefit other Members by contributing to increased liquidity at the midpoint of the NBBO and better market quality at the Exchange.

Flag RZ

The Exchange believes that its proposal to pass through a rebate of $0.0020 per share for Members' orders that yield Flag RZ would increase intermarket competition because it offers customers an alternative means to route to BATS for the same price as entering orders on BATS directly. The Exchange believes that its proposal would not burden intramarket competition because the proposed rate would apply uniformly to all Members.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

The Exchange has not solicited, and does not intend to solicit, comments on this proposed rule change. The Exchange has not received any unsolicited written comments from Members or other interested parties.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A) of the Act [16] and Rule 19b–4(f)(2) [17] thereunder. 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.

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–EDGX–2013–37 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–EDGX–2013–37. 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–EDGX–2013–37 and should be submitted on or before November 12, 2013.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[18]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2013–24555 Filed 10–21–13; 8:45 am]

BILLING CODE 8011–01–P

[16] 15 U.S.C. 78s(b)(3)(A).

[17] 17 CFR 240.19b–4(f)(2).

[18] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–70666; File No. SR–BYX–2013–034]

Self-Regulatory Organizations; BATS Y-Exchange, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Related to Fees for Use of BATS Y-Exchange, Inc.

October 11, 2013.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the ''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on September 30, 2013, BATS Y-Exchange, Inc. (the ''Exchange'' or ''BYX'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I, II and III below, which Items have been prepared by the Exchange. The Exchange has designated the proposed rule change as one establishing or changing a member due, fee, or other charge imposed by the Exchange under Section 19(b)(3)(A)(ii) of the Act [3] and Rule 19b–4(f)(2) thereunder,[4] which renders the

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 15 U.S.C. 78s(b)(3)(A)(ii).

[4] 17 CFR 240.19b–4(f)(2).

proposed rule change effective upon filing with the Commission. 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 the Substance of the Proposed Rule Change

The Exchange proposes to amend the fee schedule applicable to Members [5] and non-members of the Exchange pursuant to BYX Rules 15.1(a) and (c). Changes to the fee schedule pursuant to this proposal are effective upon filing.

The text of the proposed rule change is available at the Exchange's Web site at *http://www.batstrading.com*, at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in Sections A, B, and C below, of the most significant parts of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

Exchange proposes to modify its fee schedule effective September 30, 2013, in order to amend the way that the Exchange calculates rebates for removing liquidity from and fees for adding liquidity to the Exchange. Specifically, the Exchange is proposing to amend the methodology by which it determines the rebate that it will provide and fee it will charge to Members based on the Exchange's tiered pricing structure by excluding from the calculation of both ADV [6] and average daily TCV [7] any day that trading is not available on the Exchange for more than sixty (60) minutes during regular trading hours (i.e., 9:30 a.m. to 4:00 p.m. Eastern Time) but continues on other markets during such time (an ''Exchange Outage'').

The Exchange currently offers a tiered structure for determining the rebates that Members receive for executions that remove liquidity from the Exchange and the fees that Members are charged for executions that add liquidity to the Exchange. Under the tiered pricing structure, the Exchange provides different rebates and charges different fees to Members based on a Member's ADV as a percentage of average daily TCV. The Exchange notes that it is not proposing to modify any of the existing rebates or fees or the percentage thresholds at which a Member may qualify for certain rebates and fees pursuant to the tiered pricing structure. Rather, as mentioned above, the Exchange is proposing to modify its fee schedule in order to exclude trading activity occurring on any day that the Exchange experiences an Exchange Outage, defined as an outage lasting for more than sixty (60) minutes, from the calculation of ADV and average daily TCV. The Exchange believes that including trading activity on days when trading on the Exchange is unavailable for a significant portion of the day can unfairly skew the calculation of ADV and TCV. Thus, the Exchange believes that the most accurate and fair implementation of its tiered pricing structure is to exclude from the calculation of ADV and TCV all days where the Exchange experiences an Exchange Outage.

The Exchange believes that eliminating days where the Exchange experiences an Exchange Outage from the definition of ADV and TCV, and thereby eliminating that day from the calculation as it relates to rebates and fees based on trading activity on the Exchange, will help to eliminate significant uncertainty faced by Members as to their monthly ADV as a percentage of average daily TCV and the rebates and fees that this percentage will qualify for, providing Members with an increased certainty as to their monthly cost for trades executed on the Exchange.

The Exchange notes that it recently adopted changes to exclude the last Friday of June from the calculation of ADV and average daily TCV.[8] The last day of June is the day that Russell Investments reconstitutes its family of indexes (''Russell Reconstitution''), resulting in particularly high trading volumes, much of which the Exchange believes derives from market participants who are not generally as active entering the market to rebalance their holdings in-line with the Russell Reconstitution. Similar to the current proposal, the Exchange completely excludes Russell Reconstitution days from the calculation of ADV and average daily TCV.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder that are applicable to a national securities exchange, and, in particular, with the requirements of Section 6 of the Act.[9] Specifically, the Exchange believes that the proposed rule change is consistent with Section 6(b)(4) of the Act,[10] in that it provides for the equitable allocation of reasonable dues, fees and other charges among members and other persons using any facility or system which the Exchange operates or controls. The Exchange notes that it operates in a highly competitive market in which market participants can readily direct order flow to competing venues if they deem fee structures at a particular venue to be unreasonable and/or excessive.

With respect to the proposed changes to the tiered pricing structure for removing liquidity from the Exchange and adding liquidity to the Exchange, the Exchange believes that its proposal is reasonable because, as explained above, it will help provide Members with a greater level of certainty as to their level of rebates and costs for trading in any month where the Exchange experiences an Exchange Outage on one or more trading days. The Exchange also believes that its proposal is reasonable because it is not changing the thresholds to become eligible or the dollar value associated with the tiered rebates or fees and, moreover, by eliminating the inclusion of a trading day that would almost certainly lower a Member's ADV as a percentage of average daily TCV, it will make the majority of Members more likely to meet the minimum or higher tier thresholds, which will provide additional incentive to Members to increase their participation on the Exchange in order to meet the next tier. In addition, the Exchange believes that

[5] A Member is any registered broker or dealer that has been admitted to membership in the Exchange.

[6] As provided in the fee schedule, ''ADV'' means average daily volume calculated as the number of shares added or removed, combined, per day on a monthly basis; routed shares are not included in ADV calculation.

[7] As provided in the fee schedule ''TCV'' means total consolidated volume calculated as the volume reported by all exchanges and trade reporting facilities to a consolidated transaction reporting plan for the month for which the fees apply.

[8] Securities Exchange Act Release No. 69794 (June 18, 2013), 78 FR 37868 (SR–BYX–2013–021) (notice of filing and immediate effectiveness of proposed rule change to exclude the Russell Reconstitution day from the calculation of ADV and TCV for purposes of BYX tiered pricing).

[9] 15 U.S.C. 78f.

[10] 15 U.S.C. 78f(b)(4).

the proposed changes to fees are equitably allocated among Exchange constituents as the methodology for calculating ADV and TCV will apply equally to all Members. While, although unlikely, certain Members may have a higher ADV as a percentage of average daily TCV with their activity included from days where the Exchange has an Exchange Outage, the proposal will make all Members' cost of trading on the Exchange more predictable, regardless of how the proposal affects their ADV as a percentage of average daily TCV.

Volume-based tiers such as the liquidity removing and adding tiers maintained by the Exchange have been widely adopted in the equities markets, and are equitable and not unfairly discriminatory because they are open to all members on an equal basis and provide higher rebates or lower fees that are reasonably related to the value to an exchange's market quality associated with higher levels of market activity, such as higher levels of liquidity provision and introduction of higher volumes of orders into the price and volume discovery process. Accordingly, the Exchange believes that the proposal is equitably allocated and not unfairly discriminatory because it is consistent with the overall goals of enhancing market quality. Further, the Exchange believes that a tiered pricing model not significantly altered by a day of atypical trading behavior which allows Members to predictably calculate what their costs associated with trading activity on the Exchange will be is reasonable, fair and equitable and not unreasonably discriminatory as it is uniform in application amongst Members and should enable such participants to operate their business without concern of unpredictable and potentially significant changes in expenses.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act. The proposed changes will benefit intermarket competition in that they will help the Exchange to continue to incentivize higher levels of liquidity at a tighter spread while providing more stable and predictable costs to its Members. Further, the proposed changes will help to promote intramarket competition by avoiding a penalty to Members for days when trading on the Exchange is unavailable for a significant portion of the day. As stated above, the Exchange notes that it operates in a highly competitive market in which market participants can readily direct order flow to competing venues if the deem fee structures to be unreasonable or excessive.

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.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A) of the Act [11] and paragraph (f) of Rule 19b–4 thereunder.[12] 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–BYX–2013–034 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–BYX–2013–034. 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 such 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–BYX–2013–034 and should be submitted on or before November 12, 2013.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[13]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2013–24659 Filed 10–21–13; 8:45 am]

BILLING CODE 8011–01–P

[11] 15 U.S.C. 78s(b)(3)(A)(ii).

[12] 17 CFR 240.19b–4(f).

[13] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–70692; File No. SR–CBOE–2013–098]

Self-Regulatory Organizations; Chicago Board Options Exchange, Incorporated; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change Relating to Continuing Education

October 16, 2013.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the ''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on October 4, 2013, the Chicago Board Options Exchange, Incorporated (the ''Exchange'' or ''CBOE'') filed with the Securities and Exchange Commission (the ''Commission'') the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. The Exchange filed the proposal as a ''non-controversial'' proposed rule change pursuant to Section 19(b)(3)(A)(iii) of the Act [3] and Rule 19b–4(f)(6) thereunder,[4] which

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 15 U.S.C. 78s(b)(3)(A)(iii).

[4] 17 CFR 240.19b–4(f)(6).

renders the proposal effective upon filing with the Commission. 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 correct an administrative error in Rule 9.3A(c)(1) and add a reference to CBOE Rule 9.3A to the CBOE Stock Exchange, LLC (''CBSX'') Appendix A. The text of the proposed rule change is available on the Exchange's Web site (*http://www.cboe.com/AboutCBOE/CBOELegalRegulatoryHome.aspx*), at the Exchange's Office of the Secretary, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to make an administrative change to correct an inadvertent error in Exchange Rule 9.3A(c)(1). The Exchange proposes to make the proposed change so the text properly reflects the intention and practice of Rule 9.3A(c)(1). The Exchange also proposes to add a reference to CBOE Rule 9.3A to CBSX Appendix A. The Exchange believes that adding the reference to CBOE Rule 9.3A to CBSX Appendix A will more clearly put CBSX Trading Permit Holders (''TPHs'') on notice of their continuing education requirements.

In 2003, the Exchange filed a rule change, SR–CBOE–2003–01 to, among other things, amend CBOE's continuing education rule.[5] As part of that filing, a new paragraph (b) was added to Exchange Rule 9.3A, and the then current paragraph (b) was renumbered to paragraph (c).[6] In doing so, an inadvertent error was made in a reference to paragraph (b) in the new Rule 9.3A(c)(1). The error can be found in the first sentence of current CBOE Rule 9.3A(c)(1). A reference is made to ''paragraph (b)''; however, the intended reference is to ''paragraph (c).''

The intention of CBOE Rule 9.3A is to discuss the register [sic] persons subject to the Firm Element of the continuing education program. This intention is spelled out in the title of the paragraph which is, ''Persons Subject to the Firm Element.'' This intention is more explicitly spelled out in SR–CBOE–2003–01. More specifically, the filing states that the Firm Element requires, ''member and member organizations to provide to their registered employees having direct contact with customers ongoing training that is specifically tailored to their business.''[7] The Firm Element is described in paragraph (c) of current CBOE Rule 9.3A and not paragraph (b). Thus, the Exchange is now proposing to amend this error to more accurately describe the intention and practice of the rule.

Finally, the Exchange is proposing to add a reference to Rule 9.3A to CBSX Appendix A. CBSX Appendix A to Chapters 50 through 54 lists the rules in Chapters 1 through 29 that are applicable to trading on CBSX.[8] CBOE Rule 9.3A is applicable to CBSX members as well as outlined in current CBOE Rule 6.3A [sic] as incorporated into Appendix A. As such, CBOE Rule 3.6A.04 states that each individual registered under CBOE Rule 3.6A ''is required to satisfy the continuing education requirements set forth in Rule 9.3A and any other applicable continuing education requirements as prescribed by the Exchange.''[9] Thus, CBSX members are already on notice of their continuing education requirements under CBOE Rule 9.3A. To make these requirements more explicit, however, the Exchange is proposing to add a reference to CBOE Rule 9.3A in CBSX Appendix A. The Exchange believes this change will more clearly spell out continuing education requirements for CBSX registered persons.

2. Statutory Basis

The Exchange believes the proposed rule change is consistent with the Securities Exchange Act of 1934 (the ''Act'') and the rules and regulations thereunder applicable to the Exchange and, in particular, the requirements of Section 6(b) of the Act.[10] Specifically, the Exchange believes the proposed rule change is consistent with the Section 6(b)(5)[11] requirements that the rules of an exchange be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest. Additionally, the Exchange believes the proposed rule change is consistent with the Section 6(b)(5)[12] requirement that the rules of an exchange not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

Specifically, the proposed rule change is consistent with these provisions as it will more accurately describe the practice of the Exchange in the Exchange Rulebook. The same registered persons will be subject to the Firm Element of the continuing education requirements, and, thus, the current practices of the Exchange will remain the same. The Exchange believes the proposed rule change is necessary to accurately describe to the continuing education requirements for Exchange Trading Permit Holders. In addition, the Exchange believes that adding a reference to Rule 9.3A to CBSX Appendix A will more sufficiently put participants on CBSX of their continuing education requirements.

B. Self-Regulatory Organization's Statement on Burden on Competition

CBOE does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. The Exchange does not believe the proposed rule change imposes any burden on intramarket competition because it applies to all Trading Permit Holders. Additionally, the Exchange does not believe the proposed rule change will impose any burden on intermarket competition as it merely attempting to correct a typographical error and add an additional cross reference. There will be

[5] See Securities Exchange Act Release No. 47188 (January 17, 2003), 68 FR 3071 (January 22, 2003) (notice of [sic] immediate effectiveness of SR–CBOE–2003–01 which permitted the in-house delivery of the Regulatory Element of Continuing Education by member organizations).

[6] *Id.*

[7] *Id.*

[8] *See* Introduction to CBSX Rules, Chapters 50 through 54.

[9] *See* CBOE Rule 3.6A.04.

[10] 15 U.S.C. 78f(b).

[11] 15 U.S.C. 78f(b)(5).

[12] Id.

no substantive changes to the Exchange's operations nor its rules.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

The Exchange neither solicited nor received comments on the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing proposed rule change does not: (i) significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, the proposed rule change has become effective pursuant to Section 19(b)(3)(A) of the Act [13] and Rule 19b–4(f)(6) thereunder.

The Exchange has requested that the Commission waive the 30-day operative delay. The Commission notes that the rule change raises no novel issues. It corrects an inaccurate cross reference in Rule 9.3A and would more clearly set forth the continuing education requirements for associated persons of CBSX Trading Permit Holders. Waiver of the operative delay would be beneficial to associated persons of member firms by making the existing requirements clearer. Therefore, the Commission designates the proposal operative upon filing.[14]

At any time within 60 days of the filing of this proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission will institute proceedings to determine whether the proposed rule change should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–CBOE–2013–098 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–CBOE–2013–098. 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, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of such filing also will be available for inspection and copying at the principal office of the CBOE. 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–CBOE–2013–098 and should be submitted on or before November 12, 2013.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[15]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2013–24682 Filed 10–21–13; 8:45 am]

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[13] 15 U.S.C. 78s(b)(3)(A).

[14] For purposes only of waiving the 30-day operative delay, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[15] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–70598; File No. SR–NYSEARCA–2013–96]

Self-Regulatory Organizations; NYSE Arca, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Amending Rule 2.23 to Specify Applicable Continuing Education Requirements, Amending the NYSE Arca Options Fee Schedule to Specify Corresponding CE Fees and to Specify Fees for the Series 56 Examination

October 2, 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 September 19, 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 and II below, which Items have been prepared by the self-regulatory organization. NYSE ARCA has designated the proposed rule change as constituting a non-controversial rule change under Section 19(b)(3)(A)(iii) [4] of the Act and Rule 19b–4(f)(6) [5] thereunder, which renders the filing effective upon filing with the Commission. 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 Rule 2.23 to specify applicable continuing education (''CE'') requirements, (ii) [sic] amend the NYSE Arca Options Fee Schedule (''Fee Schedule'') to specify corresponding CE fees, and (iii) amend the Fee Schedule to specify fees for the Series 56 examination. 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.

[1] 15 U.S.C.78s(b)(1).

[2] 15 U.S.C. 78a.

[3] 17 CFR 240.19b–4.

[4] 15 U.S.C. 78s(b)(3)(A)(iii).

[5] 17 CFR 240.19b–4(f)(6).

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) amend Rule 2.23 to specify applicable CE requirements, (ii) amend the Fee Schedule to specify corresponding CE fees, and (iii) amend the Fee Schedule to specify fees for the Series 56 examination.

CE Requirements

Rule 2.23(d) states that no OTP Firm or OTP Holder may permit any registered person to continue to, and no registered person may continue to, perform duties as a registered person unless such person has complied with the CE requirements of the rule. Rule 2.23(d) specifies the CE requirements for registered persons subsequent to their initial qualification and registration. The requirements consist of a Regulatory Element and a Firm Element.[6] The Regulatory Element is a computer-based education program administered by the Financial Industry Regulatory Authority, Inc. (''FINRA''), on behalf of the Securities Industry Council on Continuing Education, to help ensure that registered persons are kept up to date on regulatory, compliance, and sales practice matters in the industry.

There are currently three existing Regulatory Element programs: (1) The S201 (''S201 CE Program'') for registered principals (e.g., General Securities Principals and Limited Principals) and supervisors; (2) the S106 (''S106 CE Program'') for persons registered only as Investment Company Products/Variable Contracts Limited Representatives; and (3) the S101 (''S101 CE Program'') for all other registered persons (e.g., General Securities Representatives). The Exchange proposes to enumerate these existing programs in subsection (A) of Rule 2.23(d)(1).[7]

The Exchange also proposes to specify the new S501 (''S501 CE Program,'' and together with the S201, S106 and S101 CE Programs, ''CE Programs'') for persons registered only as Proprietary Traders.[8] This would include registered Proprietary Traders who have successfully completed the Proprietary Traders Examination (''Series 56 Examination'')[9] as well as registered Proprietary Traders who have completed the General Securities Registered Representative Examination (''Series 7 Examination''), but who have only registered as Proprietary Traders.[10] Individuals who maintain any other registration would be subject to the CE Program associated with such other registration.

The S501 CE Program is a computer-based education program developed by many of the self-regulatory organizations (''Participating SROs'')[11] and administered by FINRA to ensure that registered persons are kept current on regulatory, compliance, and trading practice matters in the industry. Unlike the other CE Programs, the S501 CE Program is not part of the Uniform Continuing Education Program, which is developed and maintained by the Securities Industry Regulatory Council on Continuing Education. However, the S501 CE Program would logistically operate as the current CE Programs do. Specifically, registered persons would be required, through CRD, to complete the Regulatory Element of the S501 CE Program on the second anniversary of the base date and then every three years thereafter. In creating the S501 CE Program, the Participating SROs determined that the current procedures of the other CE Programs work well. The Securities Industry Regulatory Council on Continuing Education has tailored the process of the other CE Programs since their inception in a manner that has been successful. Thus, as proposed, the S501 CE Program would work in the same manner. In addition, consistency between the different programs would avoid creating confusion among the registered persons and FINRA.

As proposed, registered Proprietary Traders would also be required to complete the Firm Element outlined in Rule 2.23(d)(2). Although registered Proprietary Traders, including those who have passed the Series 56 Examination, do not interact with the public, the Exchange believes that this

[6] Currently, the Firm Element applies to any registered person who has direct contact with customers in the conduct of the OTP Firm's or OTP Holder's securities sales, trading or investment banking activities, and to the immediate supervisors of such persons (collectively called ''covered registered persons''). *See* Rule 2.23(d)(2)(A). The requirement stipulates that each OTP Firm and OTP Holder must maintain a continuing and current education program for its covered registered persons to enhance their securities knowledge, skills, and professionalism. Each OTP Firm and OTP Holder has the requirement to annually evaluate and prioritize its training needs and develop a written training plan. *See* Rule 2.23(d)(2)(B)(i).

[7] Rule 2.23(d)(1)(A) is currently ''reserved,'' but would reflect the proposed new rule text as a result of this proposed rule change.

[8] A Proprietary Trader is any person engaged in the purchase or sale of securities or other similar instruments for the account of a member or member organization with which he or she is associated, as an employee or otherwise, and who does not transact any business with the public. The term ''Proprietary Trader'' does not include a person who is required to be registered as a Market Maker in accordance with Rule 6.33 or a Market Maker Authorized Trader in accordance with Rule 6.34A. *See* Rule 2.23(b)(2)(C).

[9] The Exchange previously amended its rules to prescribe the Series 56 Examination as the qualifying examination for registered Proprietary Traders. *See* Securities Exchange Act Release No. 66452 (February 23, 2012), 77 FR 12347 (February 29, 2012) (SR–NYSEArca–2012–15). The Exchange stated in that proposal that it intended to submit a separate filing in the future to apply CE requirements to such persons. *See id.* at 12349, note 14.

[10] For purposes of this filing, ''registration'' refers to the operational/functional registration status in FINRA's Central Registration Depository (''CRD®'') (e.g., Proprietary Trader or General Securities Representative), not the qualification examination(s) that a registered person has completed (*e.g.,* the Series 56 Examination or the Series 7 Examination).

All traders of OTP Holders and OTP Firms must successfully complete the Series 7 Examination, except as provided in Rule 2.23(b)(2). *See* Rule 2.23(b)(1). However, an individual who has successfully completed the Series 7 Examination who does not conduct business with the public is permitted to register as a Proprietary Trader, either exclusively or concurrently with registration as a General Securities Representative, without successfully completing the Series 56 Examination, which would be redundant.

If a person initially qualified as a Proprietary Trader by taking the Series 7 Examination or otherwise previously maintained both Series 7 and Series 56 qualifications, but was only maintaining a Proprietary Trader registration when the CE requirement became due, then completion of the S501 CE Program by such person would satisfy his or her then-applicable CE requirement. However, upon re-registering thereafter as a General Securities Representative, such individual would be required to complete the S101 CE Program the next time he or she became subject to CE.

[11] The Participating SROs that have assisted with the development of, and plan to administer, the Series 56 Examination and S501 CE Program are the Exchange; C2 Options Exchange, Incorporated (''C2''); Chicago Board Options Exchange, Incorporated (''CBOE''); Chicago Stock Exchange, Inc. (''CHX''); New York Stock Exchange LLC (''NYSE''); NYSE MKT LLC (''NYSE MKT''); The NASDAQ Stock Market LLC (''NASDAQ''); National Stock Exchange, Inc. (''NSX''); NASDAQ OMX BX, Inc. (''BX''); NASDAQ OMX PHLX LLC (''PHLX''); BATS Y-Exchange, Inc. (''BATS Y''); BATS Exchange, Inc. (''BATS''); EDGA Exchange, Inc. (''EDGA''); EDGX Exchange, Inc. (''EDGX''); International Securities Exchange, LLC (''ISE''); BOX Options Exchange, LLC (''BOX''); and Miami International Securities Exchange LLC (''MIAX'').

requirement is appropriate because it ensures that these registered Proprietary Traders continue to enhance their securities knowledge, skill, and professionalism. As stated in Rule 2.23(d)(2)(B)(ii), the program should be tailored to fit the business of the OTP Holder or OTP Firm. Thus, the Exchange believes that it is appropriate that registered Proprietary Traders also complete the Firm Element.

The introduction of the S501 CE Program would allow the Exchange to tailor its CE requirements more closely to those individuals who are registered only as Proprietary Traders. More specifically, the Exchange believes that the proposed rule change would allow persons registered only as Proprietary Traders to complete a CE Program separate from persons maintaining other registrations. For example, in comparison to the Series 7 Examination, the Series 56 Examination is more closely tailored to the practice of proprietary trading while the Series 7 Examination is more comprehensive. As such, the Exchange believes that the S501 CE Program should also be closely tailored to proprietary trading. If an individual remains registered in another capacity, such as a General Securities Representative, the Exchange believes that it is appropriate that such individual continue to be required to complete the more comprehensive CE Program (*i.e.,* the S101 CE Program). The Exchange anticipates that the other Participating SROs will similarly adopt, or have adopted, rules requiring completion of the S501 CE Program for registered Proprietary Traders.[12]

CE Fees

The Exchange proposes to amend the Fee Schedule to specify the CRD session fees for the CE Programs described above, including the existing CE Programs and the proposed new S501 CE Program. Specifically, the Exchange proposes to specify the existing $100 session fee associated with the existing CE Programs (*i.e.,* the S201, S106 and S101 CE Programs) and a new $60 session fee associated with the new S501 CE Program.[13] The Exchange anticipates that other exchanges requiring completion of the S501 CE Program will similarly implement corresponding fees. As with existing CE Program session fees, only one $60 session fee would be charged through CRD for a registered person completing the S501 CE Program, even if such registered person's firm was a member of multiple exchanges.

The Exchange has determined that the $60 session fee is necessary to administer the S501 CE Program. Specifically, the $60 session fee will be used to fund the S501 CE Program administered to persons registered only as Proprietary Traders who are required to complete the S501 CE Program. The $60 session fee is less than the existing $100 session fee currently charged by FINRA through CRD for the existing CE Programs, including the S101 CE Program, because the fees associated with the existing CE Programs are utilized for both development and administration, whereas the $60 session fee for the S501 CE Program would only be used for the administration of the program. The costs associated with the development of the S501 CE Program are included in the Series 56 Examination fee. The Exchange anticipates that the other Participating SROs will adopt, or have adopted, the same $60 session fee applicable to completion of the S501 CE Program.[14]

Series 56 Examination Fees

The Exchange previously amended its rules to prescribe the Series 56 Examination as the qualifying examination for registered Proprietary Traders.[15] The Exchange hereby proposes to amend the Fee Schedule to specify a fee of $195 per registered person that chooses to complete the Series 56 Examination.

The Fee Schedule does not currently set forth the examination fees for other qualification examinations required or accepted by the Exchange because these programs are within FINRA's jurisdiction. The Series 56 Examination, however, is a limited registration category that is not recognized by FINRA under its registration rules. However, as with existing non-FINRA examinations, FINRA administers the Series 56 Examination and collects the $195 fee through CRD on behalf of the SROs that developed and maintain the exam. Additionally, only one $195 fee would be charged through CRD for a registered person completing the Series 56 Examination, even if such registered person's firm was a member of multiple exchanges. The Exchange anticipates that the other Participating SROs will adopt, or have adopted, the same $195 fee applicable to completion of the Series 56 Examination.[16]

The proposed change is not otherwise intended to address any other issues relating to CE or related fees and the Exchange is not aware of any problems that OTP Holders, OTP Firms or their registered persons would have in complying with the proposed change.

2. Statutory Basis

The proposed rule change is consistent with Section 6(c) of the Act,[17] in general, and furthers the objectives of Section 6(c)(3) of the Act,[18] in particular, which authorizes the Exchange to prescribe standards of training, experience and competence for registered persons of OTP Holders and OTP Firms. The proposed rule change would specify the existing CE requirements for registered persons of OTP Holders and OTP Firms while also specifying the new S501 CE Program requirement for registered Proprietary Traders of OTP Holders and OTP Firms. The Exchange believes that the proposed rule change is reasonable and sets forth the applicable CE requirements for individuals required to register under Rule 2.23 and will therefore contribute to ensuring that registered persons of OTP Holders and OTP Firms are properly trained. In this regard, the Exchange believes that the S501 CE Program is the appropriate CE Program for persons registered only as Proprietary Traders because the S501 CE Program is specifically tailored toward proprietary trading. Individuals who maintain any other registration would be required to complete the CE Program associated with such other registration, even if simultaneously registered as Proprietary Traders, because such other CE Program would be more comprehensive and correspond to the other, more comprehensive registration category. The Exchange also believes that the proposed rule change is reasonable because the other Participating SROs are anticipated to adopt, or have adopted, rules requiring completion of the S501 CE Program for registered Proprietary Traders.[19]

The Exchange also believes that the proposed rule change is consistent with Section 6(b) of the Act,[20] in general, and furthers the objectives of Sections 6(b)(4) and 6(b)(5) of the Act,[21] in

[12] *See, e.g.,* Securities Exchange Act Release No. 70027 (July 23, 2013), 78 FR 45584 (July 29, 2013) (SR–CBOE–2013–076).

[13] ''Session'' refers to a registered person sitting for the actual computer-based CE training. FINRA administers the CE Programs on behalf of the Exchange. OTP Holders and OTP Firms pay the related fees directly to FINRA through CRD.

[14] *See, e.g.,* Securities Exchange Act Release No. 70064 (July 30, 2013), 78 FR 47469 (August 5, 2013) (SR–CBOE–2013–078).

[15] *See supra* note 12.

[16] *See, e.g.,* Securities Exchange Act Release No. 70163 (August 12, 2013), 78 FR 50120 (August 16, 2013) (SR–EDGA–2013–24).

[17] 15 U.S.C. 78f(c).

[18] 15 U.S.C. 78f(c)(3).

[19] *See supra* note 10.

[20] 15 U.S.C. 78f(b).

[21] 15 U.S.C. 78f(b)(4) and (5).

particular, because it provides for the equitable allocation of reasonable dues, fees, and other charges among its members, issuers and other persons using its facilities and does not unfairly discriminate between customers, issuers, brokers or dealers. The Exchange believes that the proposed $60 session fee is reasonable. While it is less than the existing $100 session fee currently charged by FINRA through CRD for the existing CE Programs, including the S101 CE Program, the fees associated with the existing CE Programs are utilized for both development and administration, whereas the $60 session fee for the S501 CE Program would only be used for the administration of the program. The costs associated with the development of the S501 CE Program are included in the Series 56 Examination fee. The Exchange also believes that the fee is reasonable because the other Participating SROs are anticipated to adopt, or have adopted, the same $60 session fee applicable to completion of the S501 CE Program.[22] The Exchange also believes that the proposed rule change is reasonable because it will specify the existing $100 session fee applicable to registered persons of OTP Holders and OTP Firms who are subject to CE requirements, which is collected by FINRA through CRD. Finally, the Exchange believes that the proposed rule change is equitable and not unfairly discriminatory because all registered persons of OTP Holders and OTP Firms that are subject to CE requirements would be treated the same, as is currently the case. Therefore, any registered person of an OTP Holder or OTP Firm that is required to complete the S501 CE Program would be subject to the corresponding $60 session fee.

The Exchange believes that it is reasonable to include the Series 56 Examination fee within the Fee Schedule to make the cost of this examination clear to OTP Holders and OTP Firms. The proposed fee is reasonably designed to allow FINRA to cover its cost of administering the Series 56 Examination on behalf of the Exchange. The Exchange believes that the proposed $195 Series 56 Examination fee is also reasonable because it is designed to reflect the costs of maintaining and developing the Series 56 Examination, as well as the development of the S501 CE Program, and to ensure that the examination's content is, and continues to be, adequate for testing the competence and knowledge generally applicable to proprietary trading. The Exchange also believes that the fee is reasonable because the Exchange anticipates that the other Participating SROs will adopt, or have adopted, the same $195 fee applicable to completion of the Series 56 Examination.[23] Finally, the Exchange believes that the proposed rule change is equitable and not unfairly discriminatory because all registered persons of ATP Holders that wish to be registered as Proprietary Traders would be treated the same, as is currently the case.

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,[24] 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. Specifically, the Exchange does not believe that the proposed administrative changes (i.e., specifying the existing CE Programs and related fees), the introduction of the S501 CE Program and related fee, or the introduction of the Series 56 Examination fee will affect intermarket competition because the Exchange anticipates that the other Participating SROs will similarly adopt, or have adopted, rules requiring completion of the S501 CE Program for registered Proprietary Traders, the same $60 session fee applicable to completion of the S501 CE Program and the same $195 fee applicable to completion of the Series 56 Examination.[25] In addition, the Exchange does not believe that the proposed rule change will affect intramarket competition because all similarly situated registered persons of OTP Holders and OTP Firms, e.g., registered persons maintaining the same categories of registration, are required to complete the same CE Programs, the same qualification examinations, and are subject to the same fees.

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: (i) Significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, it has become effective pursuant to Section 19(b)(3)(A)(ii) of the Act[26] and subparagraph (f)(6) of Rule 19b–4 thereunder.[27]

The Exchange has requested that the Commission waive the 30-day operative delay. Waiver of the operative delay would allow the Exchange to modify its rules and implement the proposed rule change at once, enabling its Members to comply with their continuing education requirements in a timely manner, and thus is consistent with the protection of investors and the public interest. Therefore, the Commission designates the proposal operative upon filing.[28]

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is: (i) Necessary or appropriate in the public interest; (ii) for the protection of investors; or (iii) otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission will institute proceedings to determine whether the proposed rule change should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or

[22] *See supra* note 14.

[23] *See supra* note 16.

[24] 15 U.S.C. 78f(b)(8).

[25] *See supra* notes 12, 14 and 16.

[26] 15 U.S.C. 78s(b)(3)(a)(ii).

[27] 17 CFR 240.19b–4(f)(6). In addition, Rule 19b–4(f)(6) requires a self-regulatory organization to give the Commission written notice of its intent to file the proposed rule change at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has satisfied this requirement.

[28] For purposes only of waiving the 30-day operative delay, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

• Send an email to *rule-comments@sec.gov*. Please include File Number SR–NYSEArca–2013–96 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–2013–96. 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–2013–96 and should be submitted on or before November 12, 2013.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[29]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2013–24552 Filed 10–21–13; 8:45 am]

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[29] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–70652; File No. SR–NYSE–2013–66]

Self-Regulatory Organizations; New York Stock Exchange LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Amending Rule 2 To Specify That the Definition of an Approved Person Does Not Include a Governmental Entity and Amending Rule 304 To Provide That If a Governmental Entity Directly or Indirectly Owns a Member Organization, Then the Member Organization Must Identify Such Governmental Entity to The Exchange

October 10, 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 September 26, 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 Rule 2 to specify that the definition of an approved person does not include a governmental entity and amend Rule 304 to provide that if a governmental entity directly or indirectly owns a member organization, then the member organization must identify such governmental entity to the Exchange. 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 Rule 2 to specify that the definition of an approved person does not include a governmental entity and amend Rule 304 to provide that if a governmental entity directly or indirectly owns a member organization, then the member organization must identify such governmental entity to the Exchange.

Under Rule 2(b)(i), a ''member organization'' is defined as a registered broker-dealer that has been approved for membership on NYSE. To qualify as a member organization, a broker-dealer must be a member of either (i) the Financial Industry Regulatory Authority, Inc. (''FINRA'') or (ii) a registered securities exchange other than NYSE. Under Rule 2(c), an approved person of a member organization is defined as a person, other than a member, principal executive or employee of a member organization, who controls a member organization, is engaged in a securities or kindred business that is controlled by a member or member organization, or is a U.S.-registered broker-dealer under common control with a member organization. Under Rule 2(d), ''control'' means the power to direct or cause the direction of the management or policies of a person whether through ownership of securities, by contract or otherwise. A person is presumed to control another person if such person, directly or indirectly, (i) has the right to vote 25 percent or more of the voting securities, (ii) is entitled to receive 25 percent or more of the net profits, or (iii) is a director, general partner or principal executive (or person occupying a similar status or performing similar functions) of the other person.[4]

Rule 304 provides that a member organization must identify each approved person to the Exchange. Each approved person must execute a written consent to the jurisdiction of the Exchange and agree to (1) supply the Exchange with information relating to

[1] 15 U.S.C.78s(b)(1).

[2] 15 U.S.C. 78a.

[3] 17 CFR 240.19b–4.

[4] The Exchange notes that the approved person definition is an Exchange convention and is not intended to be identical to the definition of ''associated person'' pursuant to Section 3(a)(18) of the Act. *See* 15 U.S.C. 78c(a)(18).

the existence of any statutory disqualification to which the approved person or any person associated with the approved person may be subject, as defined in the Act; (2) abide by such provisions of the rules of the Exchange relating to approved persons as shall from time to time be in effect; and (3) permit examination by the Exchange, or any person designated by it, at any time or from time to time, of its books and records to verify the accuracy of the information required to be supplied herein and by the rules of the Exchange. Supplementary Material .10 to Rule 304 sets forth certain additional requirements for approved persons domiciled outside the United States.

The Exchange recently received a membership application for a broker-dealer that is an approved FINRA member; this broker-dealer has an owner that is a governmental entity that indirectly controls the broker-dealer and thus falls within the definition of approved person under the Exchange's rules. This is the first time that the Exchange has received a membership application presenting this ownership structure. The Exchange notes that a governmental entity could be either a direct or an indirect owner of a member organization, and by virtue of its control, fall within the Exchange's definition of approved person, although this result was not contemplated at the time the definition was created. The Exchange does not believe that the Exchange could, under conflict of laws, have jurisdiction over a governmental entity and therefore requiring a governmental entity that falls under the Exchange's definition of approved person to consent to jurisdiction, as required by Rule 304, would not be possible. In light of these conflicts and in the interest of providing better notice to member organizations, the Exchange proposes to amend Rule 2(c) to specifically exclude a governmental entity from the definition of approved person. The proposed rule text would define governmental entity as a sovereign nation, state, territory, or other political subdivision, agency, or instrumentality thereof. While it is unnecessary for a governmental entity to be deemed an approved person under the Exchange's rules, the Exchange nonetheless wishes to have all direct and indirect owners that control member organizations identified to the Exchange. Therefore, the Exchange proposes to add new Supplementary Material .20 to Rule 304 to specify that a member organization that is directly or indirectly controlled by a governmental entity as defined in Rule 2(c) is required to identify such governmental entity to the Exchange.[5]

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6(b) of the Act,[6] in general, and furthers the objectives of Sections 6(b)(5) of the Act,[7] in particular, because it is designed to foster cooperation and coordination with persons engaged in regulating 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. The Exchange believes that the proposed rule change would remove impediments to, and perfect the mechanisms of, a free and open market and a national market system because the Exchange does not have jurisdiction over governmental entities and therefore could not require a governmental entity to execute a written consent to the Exchange's jurisdiction and attempting to do so would serve no regulatory purpose. The proposed rule change would take such conflicts of law rules into account and provide better notice to member organizations about the operation of the Exchange's rules. The proposed rule change would protect investors and the public interest because a member organization would be required to identify to the Exchange any governmental entity that directly or indirectly controlled it. All other Exchange membership requirements would remain applicable as would any other Exchange rules that would apply to the member organization. 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,[8] 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. To the contrary, the Exchange would be at a competitive disadvantage in the absence of a proposed rule change. As noted above, the Exchange has a pending application for a member organization that has a governmental entity as a controlling indirect owner, and FINRA has already approved this broker-dealer for membership under FINRA rules. By amending its rules so that this governmental entity need not execute a written consent to jurisdiction under Rule 304, the Exchange can facilitate the approval of this broker-dealer as its member too. The Exchange has not identified any other self-regulatory organization that requires a direct or indirect owner of a broker-dealer to execute a written consent to jurisdiction.

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 Exchange has filed the proposed rule change pursuant to Section 19(b)(3)(A)(iii) of the Act[9] and Rule 19b–4(f)(6) thereunder.[10] Because the proposed rule change does not: (i) significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative prior to 30 days from the date on which it was filed, or such shorter time as the Commission may designate, if consistent with the protection of investors and the public interest, the proposed rule change has become effective pursuant to Section 19(b)(3)(A) of the Act and Rule 19b–4(f)(6)(iii) thereunder.

A proposed rule change filed under Rule 19b–4(f)(6)[11] normally does not become operative prior to 30 days after the date of the filing. However, pursuant to Rule 19b4(f)(6)(iii),[12] the Commission may designate a shorter time if such action is consistent with the protection of investors and the public interest. The Exchange has asked the Commission to waive the 30-day operative delay so that the proposal may become operative immediately upon filing.

At any time within 60 days of the filing of such proposed rule change, the Commission summarily may temporarily suspend such rule change if

[5] The Exchange notes that irrespective of the proposed rule change, under the Act, any person that directly or indirectly controls a broker-dealer falls within the Act's definition of an associated person, and that the Act defines the term ''person'' to include a government or political subdivision, agency, or instrumentality of a government. *See* 15 U.S.C. 78c(a)(9) and (18). Nonetheless, neither the Act nor any rule thereunder requires a direct or indirect owner of a broker-dealer to execute any type of written consent to jurisdiction; only the broker-dealer itself does so by virtue of executing and submitting the Form BD.

[6] 15 U.S.C. 78f(b).

[7] 15 U.S.C. 78f(b)(5).

[8] 15 U.S.C. 78f(b)(8).

[9] 15 U.S.C. 78s(b)(3)(A)(iii).

[10] 17 CFR 240.19b–4(f)(6).

[11] 17 CFR 240.19b–4(f)(6).

[12] 17 CFR 240.19b–4(f)(6)(iii).

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) [13] 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.shtm*l); or
- Send an email to *rule-comments@sec.gov*. Please include File Number SR–NYSE–2013–66 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–2013–66. 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 inspection and copying in the Commission's Public Reference Section, 100 F Street NE., Washington, DC 20549–1090. Copies of the filing will also be available for Web site viewing and printing at the NYSE's principal office and on its Internet Web site at *www.nyse.com.* 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–2013–66 and should be submitted on or before November 12, 2013.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[14]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2013–24647 Filed 10–21–13; 8:45 am]

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[13] 15 U.S.C. 78s(b)(2)(B).

[14] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–70674; File No. SR–NYSEMKT–2013–80]

Self-Regulatory Organizations; NYSE MKT LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Adding a New Rule To Adopt Price Protection Filters for Electronic Complex Orders

October 11, 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 October 3, 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 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 the Substance of the Proposed Rule Change

The Exchange proposes to add a new rule to adopt price protection filters for Electronic Complex Orders. 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 Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange is proposing to amend Rule 980NY-Electronic Complex Order Trading by establishing new Commentary .05 governing price protections filters applicable to electronically entered Complex Orders.[4]

As defined in Exchange Rule 980NY, which governs Electronic Complex Order trading, an ''Electronic Complex Order'' is a Complex Order that has been entered into the NYSE Amex Options System (''System''), which is routed to the Complex Matching Engine (''CME'') for possible execution. As set forth in Rule 980NY, the CME is the mechanism in which Electronic Complex Orders are executed against each other or against individual quotes and orders in the Consolidated Book. Electronic Complex Orders that are not immediately executed by the CME are routed to the Consolidated Book.

Electronic Complex Orders are entered into the System at a net debit/credit price for the entire strategy. Electronic Complex Orders do not include specified prices for any single series component (''leg'') of the Electronic Complex Order. Bids and offers on Electronic Complex Orders may be expressed in any decimal price, and the legs(s) of an Electronic Complex Order may be executed in one cent increments regardless of the minimum price variation (''MPV'') [5] otherwise applicable to the individual legs of the order. No leg of an Electronic Complex Order submitted to the System will be executed at a price outside the NYSE Amex Options best bid/offer for that leg. However Electronic Complex Orders may be executed without consideration of prices of the same Electronic Complex Order that might be available

[1] 15 U.S.C. 78s(b)(1).

[2] 15 U.S.C. 78a.

[3] 17 CFR 240.19b–4.

[4] Exchange Rule 900.3NY(e) defines a Complex Order as any order involving the simultaneous purchase and/or sale of two or more different option series in the same underlying security, for the same account, in a ratio that is equal to or greater than one-to-three (.333) and less than or equal to three-to-one (3.00) and for the purpose of executing a particular investment strategy.

[5] The minimum price variations (''MPV'') are equivalent to the Trading Differentials as prescribed in Rule 960NY(a).

on other exchanges. Individual legs of an Electronic Complex Order may be executed at a price without regard to the National Best Bid or Offer (''NBBO'') as disseminated by the Options Price Reporting Authority (''OPRA'') for that same leg.[6] In additional, neither Electronic Complex Orders nor the individual legs that comprise an Electronic Complex Order are eligible for routing to other exchanges.

The Exchange believes that while it is appropriate to exempt individual leg prices of Electronic Complex Orders from NBBO trade through liability, there is still need for some level of price protection for Complex Orders that are entered at a net debit/credit price that is greater (less) than the contra-side NBBO market for the Electronic Complex Order as a whole. The Exchange now proposes to enhance Complex Order processing by introducing a Price Protection Filter for Complex Orders (''Filter'') that will automatically reject an incoming Electronic Complex Order if the net debit/credit limit price of the order is greater (less) than the derived net debit/credit NBBO[7] for the contra-side of the same strategy by a set amount as specified by the Exchange (''Specified Amount''). Electronic Complex Orders will be subject to the Filter, and thus afforded price protection, provided OPRA is disseminating an NBBO market for each series component of the Electronic Complex Order at the time the order is received by the Exchange. The Exchange believes that the proposed price protection filters will help to prevent the execution of an incoming Electronic Complex Order which is priced so far away from the prevailing contra-side NBBO market for the same strategy, that the execution of such order could cause significant price dislocation in the market.

The Specified Amount is applicable to the net debit/credit price of the Electronic Complex Order and is not applicable to any single leg of the order. The Exchange proposes to specify the following amounts as the price protection settings for the Filter.

.10 for orders where the smallest MPV of any leg of the Electronic Complex Order is .01;

.15 for orders where the smallest MPV of any leg of the Electronic Complex Order is .05;

and .30 for orders where the smallest MPV of any leg of the Electronic Complex Order is .10.

For Electronic Complex Orders that are entered on a 1×1 ratio, the Filter will be applied by the Specified Amounts above (.10, .15, or .30).

For Electronic Complex Orders that are entered on an uneven ratio (2×3 for example) where the MPV on all legs is the same, the Filter will be applied by the Specified Amount multiplied by the smallest contract size leg of the ratio (.20, .30, or .60 on the 2×3 example).

For Electronic Complex Orders that are entered on an uneven ratio (2×3 for example) where the MPV of the legs are not the same (.10 and .05 for example), the Filter will be applied by taking the lesser of; the Specified Amount applicable to the smallest leg of the Electronic Complex Order and multiplied by the contract size of that leg (.60 in this example), or the Specified Amount of the largest leg of the Complex Order multiplied by the contract size of that leg (.45 in this example).

The price protection filter will work as described below.

Upon receipt by the Exchange of an Electronic Complex Order, the Filter will check the net debit/credit price of the order against the derived contra-side NBBO for the same strategy at the time of order entry to determine whether the order's limit price is within the specified price. The contra-side NBBO will be derived from the net debit/credit market for the same strategy by using the NBBO prices for the individual leg markets as disseminated by OPRA, that when aggregated create a derived NBBO for that same strategy.[8] The bid/ask of the individual leg markets comprising the derived contra-side NBBO may be as disseminated by one exchange, or comprised of a bid from one exchange and an offer from a different exchange. The Filter will always use the best bid and offer for each leg of the Electronic Complex Order when determining what the derived NBBO is for the contra-side of the same strategy. If the incoming Electronic Complex Order is priced at a net debit/credit such that an execution could occur on NYSE Amex Options at a price that was greater (less) than the derived NBBO by any amount exceeding the Specified Amount for that same strategy, the order would be rejected back to the ATP Holder with a reject code explaining the reason for the reject. This would hold true even if the proposed execution was within the Exchange's BBO.

By rejecting the aggressively priced Electronic Complex Order, the Filter prevents a possible execution from occurring at a price significantly worse than the derived NBBO.

Examples of Price Protection Filter

Example #1

This example shows how the Filter is applied to an Electronic Complex Order priced at a net debit with leg markets having the same MPV. Assume the following:

MPV = .05
Jan 20 calls NBBO 2.00–2.10
Jan 25 calls NBBO 1.05–1.20

The Exchange receives an incoming Electronic Complex Order to buy Jan 20 calls and sell Jan 25 calls on a 1×1 ratio, priced at a 1.25 debit. This would imply that the buyer would be willing to pay 1.25 for the strategy as a whole without regard to the prices of the individual leg markets. Upon receipt, this order would be sent to the CME for processing. Pursuant to this proposal, before routing the order to the CME the Filter will first check the derived NBBO net debit/credit market for the contra-side of the same strategy. In this case the contra-side NBBO market is offered at 1.05 (this price is established by selling one Jan 20 for 2.10 and buying one Jan 25 for 1.05). The Filter will then look at the NBBO price of smallest-priced leg of the Complex Order and apply the appropriate price protection amount as described above. Which for this example would be .15. Because the derived contra-side NBBO price of 1.05 is better than the limit price of the Complex Order by .20, which exceeds the Filter setting of .15, the System will not route the order to the CME for processing but will automatically reject the order back to the entering ATP Holder with a reject code explaining the reason for the rejection.

Example #2

This example shows how the Filter is applied to an Electronic Complex Order priced at a net debit with leg markets having different MPVs. Assume the following:

MPV = .10 and .05
Jan 20 calls NBBO 5.00–5.30
Jan 25 calls NBBO 2.10–2.20

The Exchange receives an incoming Electronic Complex Order to buy Jan 20 calls and sell Jan 25 calls on a 1x1 ratio, priced at a 3.60 debit. (This would imply that the buyer would be willing to pay 3.60 for the strategy as a whole without regard to the prices of the

[6] OPRA collects and disseminates the best bid and the best offer for all option series as submitted by each options exchange. The NBBO represents the consolidated best bid and the best offer for each series, as disseminated by OPRA. Pursuant to Rule 991NY(b)(7) Complex Trades are exempt from NBBO trade through liability.

[7] The Exchange will calculate the derived contra-side NBBO for a Complex Order using the prevailing markets for all individual legs of the order as disseminated by OPRA at the time the order is received by the Exchange.

[8] Markets for Complex Orders that may be available in the NYSE Amex Options Complex Order Book (''COB'') or in a competing exchanges complex order book, or spread book, are not disseminated by OPRA or included in NBBO calculations and will not be used by the Exchange to derive at the contra-side NBBO market for an Electronic Complex Order.

individual leg markets). Upon receipt, this order would be sent to the CME for processing. As proposed, before routing the Electronic Complex Order to the CME, the Filter will first check the derived NBBO net debit/credit market for the contra side of the same strategy. In this case, the contra-side NBBO market is offered at 3.20 (this price is established by selling one Jan 20 for 5.30 and buying one Jan 25 for 2.10). The Filter will then look at the NBBO price of smallest priced leg of the Electronic Complex Order and apply the appropriate price protection amount as described above. Which for this example would be .15. Because the derived contra-side NBBO price of 3.20 is better than the limit price of the Electronic Complex Order by .40, which exceeds the Filter setting of .15, the System would automatically reject the order back to the entering OTP Holder with a reject code explaining the reason for the rejection.

Example #3

This example shows how the Filter is applied to an Electronic Complex Order priced at a net credit with leg markets having the same MPV. Assume the following:

MPV = .01
Jan 20 calls NBBO 2.03–2.08
Jan 25 calls NBBO 1.00–1.01

The Exchange receives an incoming Electronic Complex Order to sell Jan 20 calls and buy Jan 25 calls on a 1x1 ratio, priced at a .90 credit. (This would imply that the seller would be willing to receive .90 for the strategy as a whole without regard to the individual leg markets). Upon receipt, this order would be sent to the CME for processing.

Pursuant to this proposal however, before routing the Electronic Complex Order to the CME the Filter will first check the derived NBBO net debit/credit market for the contra-side of the same strategy. In this case the contra-side NBBO market is priced at 1.02 (this price is established by buying one Jan 20 for 2.03 and selling one Jan 25 for 1.01). The Filter will then look at the NBBO price of smallest priced leg of the Electronic Complex Order and apply the appropriate price protection amount as described above. Which for this example would be .10. Because the derived contra-side NBBO price of 1.02 is better than the limit price of the Electronic Complex Order by .12, which exceeds the Filter setting of .10, the System would automatically reject the order back to the entering ATP Holder with a reject code explaining the reason for the rejection.

Example #4

This example shows how the Filter is applied to an Electronic Complex Order priced at a net credit on an uneven ratio with leg markets having the same MPV. Assume the following:

MPV = .01
Jan 20 calls NBBO 2.03–2.08
Jan 25 calls NBBO 1.00–1.02

The Exchange receives an incoming Electronic Complex Order to sell Jan 20 calls and buy Jan 25 calls, on a 2x3 ratio, priced at a .75 credit. This would imply that the seller would be willing to receive .75 for the strategy as a whole without regard to the prices of the individual leg markets.

As proposed, before routing the Electronic Complex Order to the CME the Filter will first check the derived NBBO net debit/credit market for the contra-side of the same strategy. In this case the contra-side NBBO market is priced at 1.00 (this price is established by buying two Jan 20s for 2.03 each and selling three Jan 25s for 1.02 each ($4.06 - 3.06 = 1.00$)). The Filter will then look at the NBBO price of smallest-priced leg of the Electronic Complex Order and apply the appropriate price protection amount as described above, which for this example would be .10. However, because this order was entered on a ratio where the smallest contract sized leg is greater than one contract, the Filter is applied to the aggregate of the small sized leg of the ratio, which in this case is .20 ($.10 \times 2$ contracts). Because the derived contra-side NBBO price of 1.00 is better than the limit price of the Electronic Complex Order by .25, which exceeds the Filter setting of .20, the Filter will automatically reject the order back to the entering ATP Holder with a reject code explaining the reason for the rejection.

Example #5

This example shows how the Filter is applied to an Electronic Complex Order priced at a net credit on an uneven ratio with leg markets having a different MPV. Assume the following:

MPV = .10 and .05
Jan 20 calls NBBO 4.10–4.20
Jan 25 calls NBBO 1.90–2.00

The Exchange receives an incoming Electronic Complex Order to sell Jan 20 calls and buy Jan 25 calls, on a 2×3 ratio, priced at a 1.50 credit. (This would imply that the seller would be willing to receive 1.50 for the strategy as a whole without regard to the prices of the individual leg markets).

As proposed, before routing the Electronic Complex Order to the CME, the Filter will first check the derived NBBO net debit/credit market for the contra side of same strategy. In this case the contra-side NBBO market is priced at 2.20 (this price is established by buying two Jan 20s for 4.10 each and selling three Jan 25s for 2.00 each ($8.20 - 6.00 = 2.20$)). The Filter will then look at two scenarios to determine what price protection level would apply. First, the Filter will look at the contra-side NBBO price of the leg of the Electronic Complex Order with the smallest contract size (Jan 20 leg) and determine the appropriate price protection amount. Which in this example would be .30. However, because the minimum contract size on the leg is greater than one, the price protection amount is applied to the aggregate contract size (2 contracts), which in this case would establish a Filter setting of .60 ($.30 \times 2$ contracts). Next, the Filter will look at the contra-side NBBO price of the leg of the order with the largest contract size (Jan 25 leg) and determine the appropriate price protection amount, which in this case would be .15. However, because the minimum contract size on the leg is greater than one, the price protection amount is applied to the aggregate contract size of the leg (3 contracts), which in this case would establish a Filter setting of .45 ($.15 \times 3$). The Filter will always apply the more conservative setting, which in this case is .45. Because the derived contra-side NBBO price of 2.20 is better than the limit price of the Electronic Complex Order by .70, which exceeds the Filter setting of .45, the Filter would automatically reject the order back to the entering ATP Holder.

The Filter is not intended to offer price protection to bids and offers at away markets, or to offer NBBO guaranteed pricing to Electronic Complex Orders submitted to NYSE Amex Options. Rather the proposed Filter would provide a level of protection to incoming Electronic Complex Orders that are entered at a price so far away from the prevailing contra-side NBBO market for the same strategy, that the execution of such order could cause price dislocation in the market. Accordingly, the Exchange does not propose to reject all orders with a limit price greater (less) than the contra-side NBBO, just those that are greater (less) by an amount as prescribed by the Exchange. The Exchange believes that rejecting such aggressively priced Electronic Complex Orders will help to ensure that market participants do not receive an execution at a price significantly inferior to the contra-side NBBO.

The Exchange recognizes that under certain market conditions the specified amounts prescribed by the Exchange, and applicable to the Filter, may be overly restrictive at times and there could be situations where the Exchange may need to temporarily widen the Filter settings to accommodate market conditions in a given class. This could happen because of, but not limited to, instances of extreme volatility, the dissemination of non-firm markets by competing exchanges, or some other condition that would lead the Exchange to believe that it would not be reasonable to expect that a market participant could receive an execution of an Electronic Complex Order at, or close to, the prevailing contra-side NBBO market for a given strategy. Therefore, the Exchange proposes that in the interest of a fair and orderly market, the Filter settings may be temporarily modified by a Trading Official to an amount greater than prescribed, on a class-by-class basis. Trading Officials are presently authorized to make similar determinations regarding such matters as position limits,[9] and quote-width differentials.[10] Permitting a Trading Official to temporarily modify the prescribed settings within the Filter is consistent with their ability to recommend and enforce rules and regulations relating to trading, access, order, decorum, health, safety and welfare on the Exchange which contributes to the Exchange's obligation to maintain a fair and orderly market. In the event a Trading Official were to temporarily modify the Filter setting, the Exchange will contemporaneously announce the new settings to all ATP Holders via a Trader Update.[11] Temporary modifications to Filter settings would be completed at the Exchange level. ATP Holders would not have to make any adjustments to proprietary systems to accommodate such modifications.

2. Statutory Basis

The statutory basis for the proposed rule change is Section 6(b)(5) of the Securities Exchange Act of 1934 (the ''Act''), in general, and furthers the objectives of Section 6(b)(5)[12] which requires the rules of an exchange 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. The proposed rule change also is designed to support the principles of Section 11A(a)(1)[13] of the Act in that it seeks to assure fair competition among brokers and dealers and among exchange markets. The Exchange believes that this proposal meets these requirements in that the proposed rule assists with the maintenance of fair and orderly market by helping to mitigate the potential risks associated with the entry of Electronic Complex Orders that are entered at a price greater than the prevailing NBBO market for the contra-side of same strategy, potentially resulting in executions at prices that are away from the best bid or offer, thereby protecting investors from receiving executions at inferior prices to what may be available at other market centers.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. The Exchange is proposing a market enhancement that provides greater protections from potentially erroneous executions and the attendant risks of such executions to market participants. Therefore, the Exchange believes that the proposal should provide an incentive for market participants to enter executable interest in the CME that can help foster price discovery and transparency thereby benefiting all market participants. The proposal is structured to offer the same enhancement to all market participants, regardless of account type, and will not impose a competitive burden on any participant. The Exchange does not believe that the proposed mechanism will impose a burden on competing options exchanges. Rather, the availability of this mechanism may foster more competition. Specifically, the Exchange notes that it operates in a highly competitive market in which market participants can readily favor competing venues. When an exchange offers enhanced functionality that distinguishes it from the competition and participants find it useful, it has been the Exchange's experience that competing exchanges will move to adopt similar functionality. Thus, the Exchange believes that this type of competition amongst exchanges is beneficial to the market place as a whole as it can result in enhanced processes, functionality, and technologies.

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:

(i) Significantly affect the protection of investors or the public interest;

(ii) impose any significant burden on competition; and

(iii) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, it has become effective pursuant to Section 19(b)(3)(A)[14] of the Act and Rule 19b–4(f)(6)[15] thereunder.

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)[16] of the Act to determine whether the proposed rule change should be approved or disapproved.[17]

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–2013–80 on the subject line.

[9] *See* Exchange Rule 904.05.

[10] *See* Exchange Rules 925NY(b)(5) and 925NY(c).

[11] Trader Updates are disseminated electronically to all ATP Holders and are posted on the Exchange's Web site.

[12] 15 U.S.C. 78f(b)(5).

[13] 15 U.S.C. 78k–1(a)(1).

[14] 15 U.S.C. 78s(b)(3)(A).

[15] 17 CFR 240.19b–4(f)(6). In addition, Rule 19b–4(f)(6) requires a self-regulatory organization to give the Commission written notice of its intent to file the proposed rule change, along with a brief description and text of the proposed rule change, at least five business days prior to the date of the filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has satisfied this requirement.

[16] 15 U.S.C. 78s(b)(2)(B).

[17] 15 U.S.C. 78s(b)(3)(C).

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–NYSEMKT–2013–80. 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 such 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–2013–80, and should be submitted on or before November 12, 2013.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[18]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2013–24666 Filed 10–21–13; 8:45 am]

BILLING CODE 8011–01–P

[18] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–70687; File No. SR–BATS–2013–055]

Self-Regulatory Organizations; BATS Exchange, Inc.; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change Related to Fees for Use of BATS Exchange, Inc.

October 15, 2013.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the ''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on October 1, 2013, BATS Exchange, Inc. (the ''Exchange'' or ''BATS'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I, II and III below, which Items have been prepared by the Exchange. The Exchange has designated the proposed rule change as one establishing or changing a member due, fee, or other charge imposed by the Exchange under Section 19(b)(3)(A)(ii) of the Act[3] and Rule 19b–4(f)(2) thereunder,[4] which renders the proposed rule change effective upon filing with the Commission. 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 filed a proposal to amend the fee schedule applicable to Members[5] and non-members of the Exchange pursuant to BATS Rules 15.1(a) and (c). Changes to the fee schedule pursuant to this proposal will be effective upon filing.

The text of the proposed rule change is available at the Exchange's Web site at *http://www.batstrading.com,* at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in Sections A, B, and C below, of the most significant parts of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange recently filed a proposal to establish a revenue sharing program with Interactive Data Corporation, acting by and through its division, Interactive Desktop Solutions, and its subsidiary, Interactive Data Online Properties, Inc. (collectively, ''IDC''), whereby the Exchange will make available, through IDC, private labeled versions of IDC's Market-Q and LiveCharts products.[6] In this proposal, the Exchange proposes to modify its fee schedule applicable to use of the Exchange effective October 1, 2013, in order to establish fees for these products.

Pursuant to a revenue sharing agreement between IDC and the Exchange, the private labeled products will be marketed by the Exchange by featuring and advertising them on the Exchange's Web site. Market–Q will be marketed under the private label name ''BATS Investor Pro'' and LiveCharts will be marketed under the private label name ''BATS Investor RT'' (BATS Investor Pro and BATS Investor RT, collectively, the ''Private Labeled Products'').

Under the agreement, IDC determines the price schedule for the Private Labeled Products, and has the right to change the price schedule at any time in its sole discretion upon prior notice to BATS; provided, however, that such changes to the price schedule will not become effective unless and until the applicable fees set forth in the price schedule have been filed with and/or approved by the Commission through a proposed rule change submitted by the Exchange in accordance with the Act.

The current price schedule charges subscribers a $125 monthly fee for BATS Investor Pro and a $24.95 monthly fee for BATS Investor RT. Subscribers of BATS Investor Pro and BATS Investor RT may, for an additional fee, supplement their subscriptions to include market data in addition to Exchange data. This fee is not included as part of the Exchange's revenue sharing program with IDC. As

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 15 U.S.C. 78s(b)(3)(A)(ii).

[4] 17 CFR 240.19b–4(f)(2).

[5] A Member is any registered broker or dealer that has been admitted to membership in the Exchange.

[6] *See* Securities Exchange Act Release No. 70264 (August 27, 2013), 78 FR 54338 (September 3, 2013) (SR–BATS–2013–045).

indicated above, should IDC determine to change the fees for the Private Labeled Products, the Exchange will submit a proposed rule change with the Commission in order to reflect those fee changes.

Under the agreement, the Exchange will receive 25% of the total monthly subscription fees received by IDC from parties who have registered to use the Private Labeled Products and who first subscribe as a result of the Exchange's marketing activities under the agreement, less certain fees and taxes. IDC will operate and maintain the Private Labeled Products and will provide first line technical support, accounting and contract administration services for the Private Labeled Products. The Exchange will not bill or contract with any subscriber directly.

The Exchange is not proposing any other changes to its market data fees at this time.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder that are applicable to a national securities exchange, and, in particular, with the requirements of Section 6 of the Act.[7] Specifically, the Exchange believes that the proposed rule change is consistent with Section 6(b)(4) of the Act,[8] in that it provides for the equitable allocation of reasonable dues, fees and other charges among members and other persons using any facility or system which the Exchange operates or controls.

In particular, the Exchange will make the Private Labeled Products uniformly available pursuant to a standard non-discriminatory price schedule offered by IDC. The Exchange also believes that the proposed fees for the Private Labeled Products described herein are reasonable in light of the benefits to data recipients.

Further, the Exchange notes that these products are completely optional in that no consumer is required to purchase any of them and only those consumers that deem such products to be of sufficient overall value and usefulness will purchase them. To the extent consumers do purchase the Private Labeled Products, the revenue generated will offset the Exchange's fixed costs of operating and regulating its trading platforms, including the continued operation of data feeds that will supply data to be used in the Private Labeled Products. It will also help the Exchange cover its costs in developing and running that platform, as well as ongoing infrastructure costs.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act, as amended. To the contrary, the Exchange believes that this proposal will promote competition through the offering of optional, additional market data products to similar market data products being offered by IDC containing data from other exchanges and market centers. In addition, the Exchange believes that the fees for these products (and, in turn, the Exchange's revenue share) are constrained by such competitive market data products offered by IDC, as well as other market data vendors.

Lastly, the revenue sharing program is not exclusive as between the Exchange and IDC. Any recipient of BATS data feeds is permitted to redistribute such data, whether through a revenue sharing arrangement with BATS or otherwise, or provide products and services similar to those being offered by IDC, provided that such recipient (including IDC) has entered into the required contractual arrangements with the Exchange.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

The Exchange has neither solicited nor received written comments on the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A) of the Act[9] and paragraph (f) of Rule 19b–4 thereunder.[10] 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 proposal 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 No. SR–BATS–2013–055 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 No. SR–BATS–2013–055. 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 such filing will also 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 No. SR–BATS–2013–055 and should be submitted on or before November 12, 2013.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[11]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2013–24677 Filed 10–21–13; 8:45 am]

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[7] 15 U.S.C. 78f.

[8] 15 U.S.C. 78f(b)(4).

[9] 15 U.S.C. 78s(b)(3)(A).

[10] 17 CFR 240.19b–4(f).

[11] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–70677; File No. SR–NYSEArca–2013–103]

Self-Regulatory Organizations; NYSE Arca, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Adding a New Rule To Adopt Price Protection Filters for Electronic Complex Orders

October 11, 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 October 3, 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 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 the Substance of the Proposed Rule Change

The Exchange proposes to add a new rule to adopt price protection filters for Electronic Complex Orders. 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 Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange is proposing to amend Rule 6.91-Electronic Complex Order Trading by establishing new Commentary .04 [sic] governing price protections filters applicable to electronically entered Complex Orders.[4]

As defined in NYSE Arca Rule 6.91, which governs Electronic Complex Order trading, an ''Electronic Complex Order'' is a Complex Order entered into the NYSE Arca System (''System''), which is routed to the Complex Matching Engine (''CME'') for possible execution. As set forth in Rule 6.91, the CME is the mechanism in which Electronic Complex Orders are executed against each other or against individual quotes and orders in the Consolidated Book. Electronic Complex Orders that are not immediately executed by the CME are routed to the Consolidated Book.

Electronic Complex Orders are entered into the System at a net debit/credit price for the entire strategy. Complex Orders do not include specified prices for any single series component (''leg'') of the Electronic Complex Order. Bids and offers on Electronic Complex Orders may be expressed in any decimal price, and the legs(s) of an Electronic Complex Order may be executed in one cent increments regardless of the minimum price variation (''MPV'') [5] otherwise applicable to the individual legs of the order. No leg of an Electronic Complex Order submitted to the System will be executed at a price outside the NYSE Arca best bid/offer for that leg. However, Electronic Complex Orders may be executed without consideration of prices for the same Electronic Complex Order that might be available on other exchanges. Individual leg(s) of an Electronic Complex Order may be executed at a price without regard to the National Best Bid or Offer (''NBBO'') as disseminated by the Options Price Reporting Authority (''OPRA'') for that same leg.[6] In additional, neither Electronic Complex Orders nor the individual legs that comprise an Electronic Complex Order are eligible for routing to other exchanges.

The Exchange believes that while it is appropriate to exempt individual leg prices of Electronic Complex Orders from NBBO trade through liability, there is still need for some level of price protection for Electronic Complex Orders that are entered at a net debit/credit price that is greater (less) than the NBBO market for the Electronic Complex Order as a whole. The Exchange now proposes to enhance the processing of Electronic Complex Order by introducing a Price Protection Filter for Electronic Complex Orders (''Filter'') that will automatically reject an incoming Electronic Complex Order if the net debit/credit limit price of the order is greater (less) than the derived net debit/credit NBBO [7] for the contra-side of the same strategy by a set amount as specified by the Exchange (''Specified Amount''). Electronic Complex Orders will be subject to the Filter, and thus afforded price protection, provided OPRA is disseminating an NBBO market for each series component of the Electronic Complex Order at the time the order is received by the Exchange. The Exchange believes that the proposed price protection filters will prevent the execution of an incoming Electronic Complex Orders which is priced so far away from the prevailing NBBO market for the contra-side of the same strategy, that an execution of such order could cause significant price dislocation in the market.

The Specified Amount is applicable to the net debit/credit price of the Electronic Complex Order and is not applicable to any single leg of the order. The Exchange proposes to specify the following amounts as the price protection settings for the Filter.

.10 for orders where the smallest MPV of any leg of the Electronic Complex Order is .01;

.15 for orders where the smallest MPV of any leg of the Electronic Complex Order is .05;

and .30 for orders where the smallest MPV of any leg of the Electronic Complex Order is .10.

For Electronic Complex Orders that are entered on a 1x1 ratio, the Filter will be applied by the Specified Amounts above (.10, .15, or .30).

For Electronic Complex Orders that are entered on an uneven ratio (2x3 for example) where the MPV on all legs is the same, the Filter will be applied by the Specified Amount multiplied by the smallest contract

[1] 15 U.S.C. 78s(b)(1).

[2] 15 U.S.C. 78a.

[3] 17 CFR 240.19b–4.

[4] Exchange Rule 6.62(e) defines a Complex Order as any order involving the simultaneous purchase and/or sale of two or more different option series in the same underlying security, for the same account, in a ratio that is equal to or greater than one-to-three (.333) and less than or equal to three-to-one (3.00) and for the purpose of executing a particular investment strategy.

[5] The minimum price variations (''MPV'') are equivalent to the Trading Differentials as prescribed in Rule 6.72(a).

[6] OPRA collects and disseminates the best bid, and the best offer for all option series as submitted by each options exchange. The NBBO represents the consolidated best bid and the best offer for each series, as disseminated by OPRA. Pursuant to Rule 6.94(b)(7), Complex Trades are exempt from NBBO trade through liability.

[7] The Exchange will calculate the derived contra-side NBBO for an Electronic Complex Order using the prevailing markets for all individual legs of the order as disseminated by OPRA at the time the order is received by the Exchange.

size leg of the ratio (.20, .30, or .60 on the 2x3 example).

For Electronic Complex Orders that are entered on an uneven ratio (2x3 for example) where the MPV of the legs are not the same (.10 and .05 for example), the Filter will be applied by taking the lesser of; the Specified Amount applicable to the smallest leg of the Electronic Complex Order and multiplied by the contract size of that leg (.60 in this example), or the Specified Amount of the largest leg of the Electronic Complex Order multiplied by the contract size of that leg (.45 in this example).

The price protection filter will work as described below.

Upon receipt by the Exchange of an Electronic Complex Order, the Filter will check the net debit/credit price of the order against the contra-side derived NBBO for the same strategy at the time of order entry to determine whether the order's limit is within the specified price. The contra-side NBBO will be derived from the net debit/credit market for the same strategy by using the NBBO prices for the individual leg markets as disseminated by OPRA that when aggregated create a derived NBBO for that same strategy.[8] The bid/ask of the individual leg markets comprising the derived NBBO may be as disseminated by one exchange, or comprised of a bid from one exchange and an offer from a different exchange. The Filter will always use the best bid and offer for each leg of the Electronic Complex Order when determining what the derived NBBO is for the same strategy. If the incoming Electronic Complex Order is priced at a net debit/credit such that an execution could occur on NYSE Arca Options at a price that was greater (less) than the derived contra-side NBBO by any amount exceeding the Specified Amount for that same strategy, the order would be rejected back to the OTP Holder with a reject code explaining the reason for the reject. This would hold true even if the proposed execution was within the Exchange's BBO.

By rejecting the aggressively priced Electronic Complex Order, the Filter prevents a possible execution from occurring at a price significantly worse than the derived contra-side NBBO.

Examples of Price Protection Filter

Example #1

This example shows how the Filter is applied to an Electronic Complex Order priced at a net debit with leg markets having the same MPV. Assume the following:

MPV = .05
Jan 20 calls—NBBO 2.00–2.10
Jan 25 calls—NBBO 1.05–1.20

The Exchange receives an incoming Electronic Complex Order to buy Jan 20 calls and sell Jan 25 calls, on a 1:1 ratio, priced at a 1.25 debit. This would imply that the buyer would be willing to pay 1.25 for the strategy as a whole without regard to the prices of the individual leg markets. Upon receipt, this order would be routed to the CME for processing.

Pursuant to this proposal, before routing the order to the CME the Filter will first check the derived contra-side NBBO net debit/credit market for the same strategy. In this case the NBBO market for the contra side of the same strategy is offered at 1.05 (this price is established by selling one Jan 20 for 2.10 and buying one Jan 25 for 1.05). The Filter will then look at the NBBO price of smallest-priced leg of the Electronic Complex Order and apply the appropriate price protection amount as described above. Which for this example .15. Because the derived contra-side NBBO price of 1.05 is better than the limit price of the Electronic Complex Order by .20, which exceeds the Filter setting of .15, the System will not route the order to the CME for processing but will automatically reject the order back to the entering OTP Holder with a reject code explaining the reason for the rejection.

Example #2

This example shows how the Filter is applied to an Electronic Complex Order priced at a net debit with leg markets having different MPVs.

Assume the following:

MPV = .10 and .05
Jan 20 calls—NBBO 5.00–5.30
Jan 25 calls—NBBO 2.10–2.20

The Exchange receives an incoming Electronic Complex Order to buy Jan 20 calls and sell Jan 25 calls, on a 1:1 ratio, priced at a 3.60 debit. (This would imply that the buyer would be willing to pay 3.60 for the strategy as a whole without regard to the prices of the individual leg markets). Upon receipt, this order would be routed to the CME for processing.

As proposed, before routing the Electronic Complex Order to the CME, the Filter will first check the derived NBBO net debit/credit market for the contra side of the same strategy. In this case, the contra-side NBBO for the same strategy is offered at 3.20 (this price is established by selling one Jan 20 for 5.30 and buying one Jan 25 for 2.10). The Filter will then look at the NBBO price of smallest priced leg of the Electronic Complex Order and apply the appropriate price protection amount as described above. Which for this example would be .15. Because the derived contra-side NBBO debit price of 3.20 is better than the limit price of the Electronic Complex Order by .40, which exceeds the Filter setting of .15, the System would automatically reject the order back to the entering OTP Holder with a reject code explaining the reason for the rejection.

Example #3

This example shows how the Filter is applied to an Electronic Complex Order priced at a net credit with leg markets having the same MPV. Assume the following:

MPV = .01
Jan 20 calls—NBBO 2.03–2.08
Jan 25 calls—NBBO 1.00–1.01

The Exchange receives an incoming Electronic Complex Order to sell Jan 20 call and buy Jan 25 call, priced at a .90 credit. (This would imply that the seller would be willing to receive .90 for the strategy as a whole without regard to the individual leg markets). Upon receipt, this order would be sent to the CME for processing.

Pursuant to this proposal however, before routing the Electronic Complex Order to the CME the Filter will first check the derived NBBO net debit/credit market for the contra side of the same strategy. In this case the contra-side NBBO market is priced at 1.02 (this price is established by buying one Jan 20 for 2.03 and selling one Jan 25 for 1.01). The Filter will then look at the NBBO price of smallest priced leg of the Electronic Complex Order and apply the appropriate price protection amount as described above. Which for this example would be .10. Because the derived contra-side NBBO price of 1.02 is better than the limit price of the Electronic Complex Order by .12, which exceeds the Filter setting of .10, the System would automatically reject the order back to the entering OTP Holder with a reject code explaining the reason for the rejection.

Example #4

This example shows how the Filter is applied to an Electronic Complex Order priced at a net credit on an uneven ratio with leg markets having the same MPV. Assume the following:

MPV = .01
Jan 20 calls—NBBO 2.03–2.08
Jan 25 calls—NBBO 1.00–1.02

The Exchange receives an incoming Electronic Complex Order to sell Jan 20 calls and buy Jan 25 calls, on a 2:3 ratio,

[8] Markets for Electronic Complex Orders that may be available in the NYSE Arca Complex Order Book ("COB") or in a competing exchanges complex order book, or spread book, are not disseminated by OPRA or included in NBBO calculations and will not be used by the Exchange to derive at an NBBO market for an Electronic Complex Order.

priced at a .75 credit. This would imply that the seller would be willing to receive .75 for the strategy as a whole without regard to the prices of the individual leg markets.

As proposed, before routing the Electronic Complex Order to the CME the Filter will first check the derived NBBO net debit/credit market for contra side of the same strategy. In this case the contra-side NBBO market is priced at 1.00 (this price is established by buying two Jan 20s for 2.03 each and selling three Jan 25s for 1.02 each (4.06 − 3.06 = 1.00)). The Filter will then look at the NBBO price of smallest-priced leg of the Electronic Complex Order and apply the appropriate price protection amount as described above. Which for this example would be .10. However, because this order was entered on a ratio where the smallest contract sized leg is greater than one contract, the Filter is applied to the aggregate of the small sized leg of the ratio, which in this case is .20 (.10 × 2 contracts). Because the derived contra-side NBBO price of 1.00 is better than the limit price of the Electronic Complex Order by .25, which exceeds the Filter setting of .20, the Filter will automatically reject the order back to the entering OTP Holder with a reject code explaining the reason for the rejection.

Example #5

This example shows how the Filter is applied to an Electronic Complex Order priced at a net credit on an uneven ratio with leg markets having a different MPV. Assume the following:

MPV = .10 and .05

Jan 20 calls—NBBO 4.10–4.20

Jan 25 calls—NBBO 1.90–2.00

The Exchange receives an incoming Electronic Complex Order to sell Jan 20 calls and buy Jan 25 calls, on a 2:3 ratio, priced at a 1.50 credit. (This would imply that the seller would be willing to receive 1.50 for the strategy as a whole without regard to the prices of the individual leg markets).

As proposed, before routing the Electronic Complex Order to the CME, the Filter will first check the derived NBBO net debit/credit market for the contra side of same strategy. In this case the contra-side NBBO market is priced at 2.20 (this price is established by buying two Jan 20s for 4.10 each and selling three Jan 25s for 2.00 each (8.20 − 6.00 = 2.20)). The Filter will then look at two scenarios to determine what price protection level would apply. First, the Filter will look at the NBBO price of the leg of the Electronic Complex Order with the smallest contract size (Jan 20 leg) and determine the appropriate price protection amount. Which in this example would be .30. However, because the minimum contract size on the leg is greater than one, the price protection amount is applied to the aggregate contract size (2 contracts), which in this case would establish a Filter setting of .60 (.30 × 2 contracts). Next, the Filter will look at the NBBO price of the leg of the order with the largest contract size (Jan 25 leg) and determine the appropriate price protection amount, which in this case would be .15. However, because the minimum contract size on the leg is greater than one, the price protection amount is applied to the aggregate contract size of the leg (3 contracts), which in this case would establish a Filter setting of .45 (.15 × 3). The Filter will always apply the more conservative setting, which in this case would be .45. Because the derived contra-side NBBO price of 2.20 is better than the limit price of the Electronic Complex Order by .70, which exceeds the Filter setting of .45, the Filter would automatically reject the order back to the entering OTP Holder or OTP Firm.

The Filter is not intended to either offer price protection to bids and offers at away markets, or to offer NBBO guaranteed pricing to Electronic Complex Orders submitted to NYSE Arca. Rather the proposed Filter would offer a level of protection to incoming Electronic Complex Orders that are entered at a price so far away from the prevailing contra-side NBBO market for the same strategy, that the execution of such order could cause price dislocation in the market. Accordingly, the Exchange does not propose to reject all orders with a limit price greater (less) than the contra-side NBBO, just those that are greater (less) by an amount as prescribed by the Exchange. The Exchange believes that rejecting such aggressively priced Electronic Complex Orders will help to ensure that market participants do not receive an execution at a price significantly inferior to the prevailing NBBO.

The Exchange recognizes that under certain market conditions the specified amounts prescribed by the Exchange, and applicable to the Filter, may be overly restrictive at times and there could be situations where the Exchange may need to temporarily widen the Filter settings to accommodate market conditions in a given class. This could happen because of, but not limited to, instances of extreme volatility, the dissemination of non-firm markets by competing exchanges, or some other condition that would lead the Exchange to believe that it would not be reasonable to expect that a market participant could receive an execution of an Electronic Complex Order at, or close to, the prevailing contra-side NBBO market for a given strategy. Therefore, the Exchange proposes that in the interest of a fair and orderly market, the Filter settings may be temporarily modified by a Trading Official to an amount greater than prescribed, on a class-by-class basis. Trading Officials are presently authorized to make similar determinations regarding such matters as position limits [9] and quote-width differentials.[10] Permitting a Trading Official to temporarily modify the price settings in the Filter is consistent with their ability to recommend and enforce rules and regulations relating to trading, access, order, decorum, health, safety and welfare on the Exchange which contributes to the Exchange's obligation to maintain a fair and orderly market. If a Trading Official were to temporarily modify the Filter settings, the Exchange will contemporaneously announce the new settings to all OTP Holders and OTP Firms via Trader Update.[11] Temporary modifications to Filter settings will be completed at the Exchange level. OTP Holders and OTP Firms will not have to make any adjustments to proprietary systems to accommodate such modifications.

2. Statutory Basis

The statutory basis for the proposed rule change is Section 6(b)(5) of the Securities Exchange Act of 1934 (the ''Act''), in general, and furthers the objectives of Section 6(b)(5) [12] which requires the rules of an exchange 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. The proposed rule change also is designed to support the principles of Section 11A(a)(1) [13] of the Act in that it seeks to assure fair competition among brokers and dealers and among exchange markets. The Exchange believes that this proposal meets these requirements in that the proposed rule assists with the maintenance of fair and orderly market by helping to mitigate the potential risks associated with the entry of Complex Orders that are entered at a price greater than the prevailing contra-side NBBO market for the same strategy, potentially

[9] *See* Exchange Rule 6.8.04.

[10] *See* Exchange Rule 6.37(b).

[11] Trader Updates are disseminated electronically to all OTP Holders and OTP Firms and posted to the Exchange's Web site.

[12] 15 U.S.C. 78f(b)(5).

[13] 15 U.S.C. 78k–1(a)(1).

resulting in executions at prices that are away from the best bid or offer, thereby protecting investors from receiving executions at inferior prices to what may be available at other market centers.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. The Exchange is proposing a market enhancement that provides greater protections from potentially erroneous executions and the attendant risks of such executions to market participants. Therefore, the Exchange believes that the proposal should provide an incentive for market participants to enter executable interest in the CME that can help foster price discovery and transparency thereby benefiting all market participants. The proposal is structured to offer the same enhancement to all market participants, regardless of account type, and will not impose a competitive burden on any participant. The Exchange does not believe that the proposed mechanism will impose a burden on competing options exchanges. Rather, the availability of this mechanism may foster more competition. Specifically, the Exchange notes that it operates in a highly competitive market in which market participants can readily favor competing venues. When an exchange offers enhanced functionality that distinguishes it from the competition and participants find it useful, it has been the Exchange's experience that competing exchanges will move to adopt similar functionality. Thus, the Exchange believes that this type of competition amongst exchanges is beneficial to the market place as a whole as it can result in enhanced processes, functionality, and technologies.

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:

(i) Significantly affect the protection of investors or the public interest;

(ii) impose any significant burden on competition; and

(iii) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, it has become effective pursuant to Section 19(b)(3)(A) [14] of the Act and Rule 19b–4(f)(6) [15] thereunder.

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) [16] of the Act to determine whether the proposed rule change should be approved or disapproved.[17]

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–2013–103 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–2013–103. 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 20549–1090, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of such 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–2013–103, and should be submitted on or before November 12, 2013.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[18]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2013–24669 Filed 10–21–13; 8:45 am]

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[14] 15 U.S.C. 78s(b)(3)(A).

[15] 17 CFR 240.19b–4(f)(6). In addition, Rule 19b–4(f)(6) requires a self-regulatory organization to give the Commission written notice of its intent to file the proposed rule change, along with a brief description and text of the proposed rule change, at least five business days prior to the date of the filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has satisfied this requirement.

[16] 15 U.S.C. 78s(b)(2)(B).

[17] 15 U.S.C. 78s(b)(3)(C).

[18] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–70665; File No. SR–BYX–2013–035]

Self-Regulatory Organizations; BATS Y-Exchange, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Related to Fees for Use of BATS Y-Exchange, Inc.

October 11, 2013.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the ''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on October 1, 2013, BATS Y-Exchange, Inc. (the ''Exchange'' or ''BYX'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I, II and III below, which Items have been prepared by the Exchange. The Exchange has designated the proposed rule change as one establishing or changing a member due, fee, or other charge imposed by the Exchange under Section 19(b)(3)(A)(ii)

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

of the Act [3] and Rule 19b–4(f)(2) thereunder,[4] which renders the proposed rule change effective upon filing with the Commission. 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 the Substance of the Proposed Rule Change

The Exchange proposes to amend the fee schedule applicable to Members [5] and non-members of the Exchange pursuant to BYX Rules 15.1(a) and (c). Changes to the fee schedule pursuant to this proposal are effective upon filing.

The text of the proposed rule change is available at the Exchange's Web site at *http://www.batstrading.com,* at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in Sections A, B, and C below, of the most significant parts of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to modify its fee schedule applicable to the use of the Exchange effective October 1, 2013, in order to modify pricing related to executions that occur on BATS Exchange, Inc. (''BZX'') through the Exchange's Destination Specific Order routing strategy.[6] BZX is implementing certain pricing changes effective October 1, 2013, including modification of the fee of $0.0029 per share when removing liquidity to a fee of $0.0030 per share when removing liquidity. To maintain a direct pass through of the applicable economics of Destination Specific Order executions at BZX, the Exchange proposes to charge $0.0030 per share for a Destination Specific Order executed on BZX, rather than the $0.0029 per share that it currently charges for such orders. The Exchange is not proposing any other changes to its routing fees at this time.

2. Statutory Basis

The [sic] Exchange believes that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder that are applicable to a national securities exchange, and, in particular, with the requirements of Section 6 of the Act.[7] Specifically, the Exchange believes that the proposed rule change is consistent with Section 6(b)(4) of the Act,[8] in that it provides for the equitable allocation of reasonable dues, fees and other charges among members and other persons using any facility or system which the Exchange operates or controls. The Exchange notes that it operates in a highly competitive market in which market participants can readily direct order flow to competing venues if they deem fee structures at a particular venue to be unreasonable and/or excessive. The Exchange believes that the proposed changes to the Exchange's routing fee for Destination Specific Orders executed on BZX are equitably allocated, fair and reasonable, and non-discriminatory in that they are equally applicable to all Members and are designed to mirror the fee applicable to the execution if such routed orders were executed directly by the Member at BZX.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act, as amended. Because the market for order execution is extremely competitive, Members may readily opt to disfavor the Exchange's routing services if they believe that alternatives offer them better value. For orders routed through the Exchange and executed at BZX through the Destination Specific Order strategy, the proposed fee change is designed to equal the fee that a Member would have received if such routed orders would have been executed directly by a Member at BZX.

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.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A) of the Act [9] and paragraph (f) of Rule 19b–4 thereunder.[10] 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–BYX–2013–035 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–BYX–2013–035. 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

[3] 15 U.S.C. 78s(b)(3)(A)(ii).

[4] 17 CFR 240.19b–4(f)(2).

[5] A Member is any registered broker or dealer that has been admitted to membership in the Exchange.

[6] As defined in BYX Rule 11.9(c)(12).

[7] 15 U.S.C. 78f.

[8] 15 U.S.C. 78f(b)(4).

[9] 15 U.S.C. 78s(b)(3)(A)(ii).

[10] 17 CFR 240.19b–4(f).

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 such 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–BYX–2013–035 and should be submitted on or before November 12, 2013

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[11]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2013–24658 Filed 10–21–13; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–70653; File No. SR–NYSEMKT–2013–79]

Self-Regulatory Organizations; NYSE MKT LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Amending Rule 2—Equities To Specify That the Definition of An Approved Person Does Not Include a Governmental Entity and Amending Rule 304—Equities To Provide That if a Governmental Entity Directly or Indirectly Owns a Member Organization, Then the Member Organization Must Identify Such Governmental Entity to the Exchange

October 10, 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 September 26, 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.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend Rule 2—Equities to specify that the definition of an approved person does not include a governmental entity and amend Rule 304—Equities to provide that if a governmental entity directly or indirectly owns a member organization, then the member organization must identify such governmental entity to the Exchange. 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 Rule 2—Equities to specify that the definition of an approved person does not include a governmental entity and amend Rule 304 to provide that if a governmental entity directly or indirectly owns a member organization, then the member organization must identify such governmental entity to the Exchange.

Under Rule 2(b)(i)—Equities, a ''member organization'' is defined as a registered broker-dealer that has been approved for membership on the Exchange. To qualify as a member organization, a broker-dealer must be a member of either (i) the Financial Industry Regulatory Authority, Inc. (''FINRA'') or (ii) a registered securities exchange other than the Exchange. Under Rule 2(c)—Equities, an approved person of a member organization is defined as a person, other than a member, principal executive or employee of a member organization, who controls a member organization, is engaged in a securities or kindred business that is controlled by a member or member organization, or is a U.S.-registered broker-dealer under common control with a member organization. Under Rule 2(d)—Equities, ''control'' means the power to direct or cause the direction of the management or policies of a person whether through ownership of securities, by contract or otherwise. A person is presumed to control another person if such person, directly or indirectly, (i) has the right to vote 25 percent or more of the voting securities, (ii) is entitled to receive 25 percent or more of the net profits, or (iii) is a director, general partner or principal executive (or person occupying a similar status or performing similar functions) of the other person.[4]

Rule 304—Equities provides that a member organization must identify each approved person to the Exchange. Each approved person must execute a written consent to the jurisdiction of the Exchange and agree to (1) supply the Exchange with information relating to the existence of any statutory disqualification to which the approved person or any person associated with the approved person may be subject, as defined in the Act; (2) abide by such provisions of the rules of the Exchange relating to approved persons as shall from time to time be in effect; and (3) permit examination by the Exchange, or any person designated by it, at any time or from time to time, of its books and records to verify the accuracy of the information required to be supplied herein and by the rules of the Exchange. Supplementary Material .10 to Rule 304—Equities sets forth certain additional requirements for approved persons domiciled outside the United States.

The Exchange recently received a membership application for a broker-dealer that is an approved FINRA member; this broker-dealer has an owner that is a governmental entity that indirectly controls the broker-dealer and thus falls within the definition of approved person under the Exchange's rules. This is the first time that the Exchange has received a membership application presenting this ownership structure. The Exchange notes that a governmental entity could be either a direct or an indirect owner of a member organization, and by virtue of its control, fall within the Exchange's definition of approved person, although this result was not contemplated at the time the definition was created. The

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[11] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C.78s(b)(1).

[2] 15 U.S.C. 78a.

[3] 17 CFR 240.19b–4.

[4] The Exchange notes that the approved person definition is an Exchange convention and is not intended to be identical to the definition of ''associated person'' pursuant to Section 3(a)(18) of the Act. *See* 15 U.S.C. 78c(a)(18).

Exchange does not believe that the Exchange could, under conflict of laws, have jurisdiction over a governmental entity and therefore requiring a governmental entity that falls under the Exchange's definition of approved person to consent to jurisdiction, as required by Rule 304, would not be possible. In light of these conflicts and in the interest of providing better notice to member organizations, the Exchange proposes to amend Rule 2(c) -Equities to specifically exclude a governmental entity from the definition of approved person. The proposed rule text would define governmental entity as a sovereign nation, state, territory, or other political subdivision, agency, or instrumentality thereof. While it is unnecessary for a governmental entity to be deemed an approved person under the Exchange's rules, the Exchange nonetheless wishes to have all direct and indirect owners that control member organizations identified to the Exchange. Therefore, the Exchange proposes to add new Supplementary Material .20 to Rule 304—Equities to specify that a member organization that is directly or indirectly controlled by a governmental entity as defined in Rule 2(c)—Equities is required to identify such governmental entity to the Exchange.[5]

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6(b) of the Act,[6] in general, and furthers the objectives of Sections 6(b)(5) of the Act,[7] in particular, because it is designed to foster cooperation and coordination with persons engaged in regulating 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. The Exchange believes that the proposed rule change would remove impediments to, and perfect the mechanisms of, a free and open market and a national market system because the Exchange does not have jurisdiction over governmental entities and therefore could not require a governmental entity to execute a written consent to the Exchange's jurisdiction and attempting to do so would serve no regulatory purpose. The proposed rule change would take such conflicts of law rules into account and provide better notice to member organizations about the operation of the Exchange's rules. The proposed rule change would protect investors and the public interest because a member organization would be required to identify to the Exchange any governmental entity that directly or indirectly controlled it. All other Exchange membership requirements would remain applicable as would any other Exchange rules that would apply to the member organization. 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,[8] 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. To the contrary, the Exchange would be at a competitive disadvantage in the absence of a proposed rule change. As noted above, the Exchange has a pending application for a member organization that has a governmental entity as a controlling indirect owner, and FINRA has already approved this broker-dealer for membership under FINRA rules. By amending its rules so that this governmental entity need not execute a written consent to jurisdiction under Rule 304—Equities, the Exchange can facilitate the approval of this broker-dealer as its member too. The Exchange has not identified any other self-regulatory organization that requires a direct or indirect owner of a broker-dealer to execute a written consent to jurisdiction.

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 Exchange has filed the proposed rule change pursuant to Section 19(b)(3)(A)(iii) of the Act[9] and Rule 19b–4(f)(6) thereunder.[10] Because the proposed rule change does not: (i) significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative prior to 30 days from the date on which it was filed, or such shorter time as the Commission may designate, if consistent with the protection of investors and the public interest, the proposed rule change has become effective pursuant to Section 19(b)(3)(A) of the Act and Rule 19b-4(f)(6)(iii) thereunder.

A proposed rule change filed under Rule 19b–4(f)(6)[11] normally does not become operative prior to 30 days after the date of the filing. However, pursuant to Rule 19b4(f)(6)(iii),[12] the Commission may designate a shorter time if such action is consistent with the protection of investors and the public interest. The Exchange has asked the Commission to waive the 30-day operative delay so that the proposal may become operative immediately upon filing.

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)[13] 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–2013–79 on the subject line.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary,

[5] The Exchange notes that irrespective of the proposed rule change, under the Act, any person that directly or indirectly controls a broker-dealer falls within the Act's definition of an associated person, and that the Act defines the term ''person'' to include a government or political subdivision, agency, or instrumentality of a government. *See* 15 U.S.C. 78c(a)(9) and (18). Nonetheless, neither the Act nor any rule thereunder requires a direct or indirect owner of a broker-dealer to execute any type of written consent to jurisdiction; only the broker-dealer itself does so by virtue of executing and submitting the Form BD.

[6] 15 U.S.C. 78f(b).

[7] 15 U.S.C. 78f(b)(5).

[8] 15 U.S.C. 78f(b)(8).

[9] 15 U.S.C. 78s(b)(3)(A)(iii).

[10] 17 CFR 240.19b–4(f)(6).

[11] 17 CFR 240.19b–4(f)(6).

[12] 17 CFR 240.19b–4(f)(6)(iii).

[13] 15 U.S.C. 78s(b)(2)(B).

Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–NYSEMKT–2013–79. 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 Section, 100 F Street NE., Washington, DC 20549–1090. Copies of the filing will also be available for inspection and copying at the NYSE's principal office and on its Internet Web site at *www.nyse.com.* 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–2013–79 and should be submitted on or before November 12, 2013.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[14]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2013–24648 Filed 10–21–13; 8:45 am]

BILLING CODE 8011–01–P

[14] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–70701]

Order Providing Broker-Dealers a Temporary Exemption From the Requirements of Certain New Amendments to the Financial Responsibility Rules for Broker-Dealers Under the Securities Exchange Act of 1934

October 17, 2013.

I. Background

On July 30, 2013, the Securities and Exchange Commission (''Commission'') voted to adopt 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),[3] and notification rule (Rule 17a–11)[4] promulgated under the Securities Exchange Act of 1934 (''Exchange Act''). The amendments are designed to address several areas of concern regarding the financial responsibility requirements for broker-dealers. The adopting release provided that the amendments are effective on October 21, 2013.[5]

Industry representatives have indicated through physical and telephonic meetings with Commission staff that, as broker-dealers have worked to meet the October 21, 2013 effective date, some have determined that they will be unable to complete by that date the significant operational and systems changes necessary to comply with certain of the final rule amendments. For example, broker-dealers that maintain custody of customer securities and cash (a ''carrying broker-dealer'') have said they are unable to comply with the requirements of paragraph (e)(5) of Rule 15c3–3 by the current effective date. This provision places restrictions on a carrying broker-dealer's ability to use cash bank deposits to meet customer or PAB reserve deposit requirements by excluding cash deposits held at an affiliated bank and limiting cash held at non-affiliated banks to an amount no greater than 15% of the bank's equity capital, as reported by the bank in its most recent Call Report.[6] These carrying broker-dealers indicated that it would be a challenge to open new reserve accounts and make the appropriate systems changes by October 21, 2013 because, in part, negotiating new reserve account deposit agreements and obtaining acknowledgement letters required by paragraph (f) of Rule 15c3–3 from new banks generally take significantly more time than the 60 days afforded under the final rule amendments.

Further, broker-dealers have indicated that 60 days is insufficient for implementing the system changes necessary for the customer account opening documentation and processes, as well as account notices and disclosures, required in connection with new requirements under paragraph (j)(2) to Rule 15c3–3 regarding the treatment of customers' free credit balances. Additionally, broker-dealer representatives have indicated that some broker-dealers may need additional time to completely and accurately document their market, credit, and liquidity risk management controls under new paragraph (a)(23) to Rule 17a–3.[7]

Therefore, the Commission has determined to provide a temporary exemption to broker-dealers from the requirements of the following new amendments to the broker-dealer financial responsibility rules adopted in Exchange Act Release No. 70072: (1) Rule 15c3–3, except paragraph (j)(1);[8] (2) Rule 15c3–3a; (3) Rule 17a–3; (4) Rule 17a–4; and (5) paragraph (c)(2)(iv)(E)(*2*) of Rule 15c3–1.[9] The

[1] 17 CFR 240.15c3–1.

[2] 17 CFR 240.15c3–3.

[3] 17 CFR 240.17a 3 and 17a 4.

[4] 17 CFR 240.17a 11. *Financial Responsibility Rules for Broker-Dealers,* Exchange Act Release No. 70072 (July 30, 2013), 78 FR 51824 (Aug. 21, 2013).

[5] *Financial Responsibility Rules for Broker-Dealers,* Exchange Act Release No. 70072 (July 30, 2013), 78 FR 51824 (Aug. 21, 2013).

[6] *See* paragraph (e)(5) of Rule 15c3–3, as adopted. *See also Financial Responsibility Rules for Broker-Dealers,* 78 FR at 51904. The final rules define 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. The term does not include an account that has been subordinated to the claims of creditors of the carrying broker or dealer. *See* paragraph (a)(16) of Rule 15c3–3, as adopted. *See also Financial Responsibility Rules for Broker-Dealers,* 78 FR at 51903.

[7] *See* paragraph (a)(23) of Rule 17a–3, as adopted and paragraph (e)(9) of Rule 17a–4, as adopted. *See also Financial Responsibility Rules for Broker-Dealers,* 78 FR at 51907.

[8] As adopted paragraph (j)(1) of Rule 15c3–3 incorporates certain requirements from Rule 15c3–2 (customers' free credit balances), including the requirement that broker-dealers inform customers of the amounts due to them and that such amounts are payable on demand. Rule 15c3–2 is being eliminated as a separate rule because it is largely irrelevant in light of the requirements in Rule 15c3–3. *See* paragraph (j)(1) of Rule 15c3–3, as adopted. *See also Financial Responsibility Rules for Broker-Dealers,* 78 FR at 51836–51837.

[9] As adopted paragraph (c)(2)(iv)(E)(*2*) of Rule 15c3–1 provides 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. *See* paragraph (c)(2)(iv)(E)(*2*) of Rule 15c3–1, as

temporary exemption will sunset on March 3, 2014. This will facilitate an orderly transition to the new requirements by providing broker-dealers with more time to make any necessary operational or systems changes. For example, industry representatives have indicated that many firms initiate freezes around the year end with respect to changing systems and codes. As a result of this temporary exemption, the Commission is directing the staff to delay from October 21, 2013 to March 3, 2014 the date for the withdrawal of the November 8, 1998 staff no-action letter that addresses the net capital treatment of proprietary accounts of introducing broker-dealers.[10]

The Commission is not granting a temporary exemption from the remaining new requirements adopted in Exchange Act Release No. 70072: (1) The requirement in paragraph (j)(1) of Rule 15c3–3; (2) the new requirements in Rule 15c3–1 (other than the requirement in paragraph (c)(2)(iv)(E)(*2*) of Rule 15c3–1); (3) and the new requirements in Rule 17a–11. Broker-dealers have not identified these requirements as presenting a challenge in terms of achieving compliance by October 21, 2013. In addition, this temporary exemption does not apply to any other requirements in Rule 15c3–3, Rule 15c3–3a, Rule 17a–3, Rule 17a–4, or Rule 15c3–1.

The effective date is quickly approaching, and granting a limited exemption until March 3, 2014 to broker-dealers from certain new requirements will help to facilitate an orderly implementation of the final rule amendments.

For the foregoing reasons, the Commission finds that this temporary exemption is necessary and appropriate in the public interest, and is consistent with the protection of investors.[11]

II. Conclusion

Accordingly, pursuant to Section 36 of the Exchange Act,

It is hereby ordered that broker-dealers are temporarily exempt until March 3, 2014 from the requirements of the following new amendments to the broker-dealer financial responsibility rules adopted in Exchange Act Release No. 70072: (1) Rule 15c3–3, except paragraph (j)(1); (2) Rule 15c3–3a; (3) Rule 17a–3; (4) Rule 17a–4; and (5) paragraph (c)(2)(iv)(E)(*2*) of Rule 15c3–1.

By the Commission.

Elizabeth M. Murphy,

Secretary.

[FR Doc. 2013–24609 Filed 10–21–13; 8:45 am]

BILLING CODE 8011–01–P

adopted. *See also Financial Responsibility Rules for Broker-Dealers,* 78 FR at 51831–51832.

[10] *See* Letter of 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). *See also Financial Responsibility Rules for Broker-Dealers,* 78 FR at 51828 (directing the staff to withdraw the no-action letter as of the effective date of the amendments).

[11] Section 36 of the Exchange Act authorizes the Commission, by rule, regulation, or order, to conditionally or unconditionally exempt any person from any rule under the Exchange Act, to the extent that the exemption is necessary or appropriate in the public interest and is consistent with the protection of investors. 15 U.S.C. 78mm.

SECURITIES AND EXCHANGE COMMISSION

[File No. 500–1]

China Ritar Power Corp., Order of Suspension of Trading

October 4, 2013.

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of China Ritar Power Corp. because China Ritar Power Corp. has not filed any periodic reports for any reporting period subsequent to the period ended September 30, 2010.

The Commission is of the opinion that the public interest and the protection of investors require a suspension of trading in securities of China Ritar Power Corp.

Therefore, it is ordered, pursuant to Section 12(k) of the Securities Exchange Act of 1934, that trading in the securities of China Ritar Power Corp. is suspended for the period from 9:30 a.m. EDT, October 4, 2013, through 11:59 p.m. EDT, on October 17, 2013.

By the Commission.

Jill M. Peterson,

Assistant Secretary.

Editorial Note: This document was received by the Office of the Federal Register on October 17, 2013.

[FR Doc. 2013–24605 Filed 10–21–13; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[File No. 500–1]

Pacific Clean Water Technologies, Inc.; Order of Suspension of Trading

October 11, 2013.

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of Pacific Clean Water Technologies, Inc. (''PCWT'') because of questions regarding the adequacy and accuracy of publicly disseminated information concerning, among other things, the company's business operations. PCWT is a Delaware corporation based in Irvine, California. It is quoted on OTC Link under the symbol PCWT.

The Commission is of the opinion that the public interest and the protection of investors require a suspension of trading in the securities of the above-listed company.

Therefore, it is ordered, pursuant to Section 12(k) of the Securities Exchange Act of 1934, that trading in the securities of the above-listed company is suspended for the period from 5:30 p.m. EDT on October 11, 2013 through 11:59 p.m. EDT, on October 24, 2013.

By the Commission.

Elizabeth M. Murphy,

Secretary.

[FR Doc. 2013–24610 Filed 10–21–13; 8:45 am]

BILLING CODE 8011–01–P

SMALL BUSINESS ADMINISTRATION

[License No. 09/79–0454]

Emergence Capital Partners SBIC, L.P.; Notice Seeking Exemption Under Section 312 of the Small Business Investment Act, Conflicts of Interest

Notice is hereby given that Emergence Capital Partners SBIC, L.P., 160 Bovet Road, Suite 300, San Mateo, CA 94402, a Federal Licensee under the Small Business Investment Act of 1958, as amended (''the Act''), in connection with the financing of a small concern, has sought an exemption under Section 312 of the Act and Section 107.730, Financings which Constitute Conflicts of Interest of the Small Business Administration (''SBA'') Rules and Regulations (13 CFR 107.730). Emergence Capital Partners SBIC, L.P. proposes to provide equity security financing to Bill.com, Inc., 3250 Ash Street, Palo Alto, CA 94306.

The financing is brought within the purview of § 107.730(a)(1) of the Regulations because the financing of Bill.com, Inc. by Emergence Capital Partners, Inc. will not occur at the same time, and on the same terms and conditions of the financing by Emergence Capital Partners, L.P. and Emergence Capital Associates, L.P., both Associates of Emergence Capital Partners SBIC, L.P., and therefore this transaction is considered a financing of an Associate requiring prior SBA approval.

Notice is hereby given that any interested person may submit written comments on the transaction, within fifteen days of the date of this publication, to the Associate Administrator for Investment, U.S. Small Business Administration, 409 Third Street SW., Washington, DC 20416.

Dated: September 25, 2013.

Pravina Raghavan,

Acting Associate Administrator for Investment.

[FR Doc. 2013–23970 Filed 10–21–13; 8:45 am]

BILLING CODE 8025–01–M

SMALL BUSINESS ADMINISTRATION

Interest Rates

The Small Business Administration publishes an interest rate called the optional ''peg'' rate (13 CFR 120.214) on a quarterly basis. This rate is a weighted average cost of money to the government for maturities similar to the average SBA direct loan. This rate may be used as a base rate for guaranteed fluctuating interest rate SBA loans. This rate will be 3.125 (3⅛) percent for the October–December quarter of FY 2014.

Pursuant to 13 CFR 120.921(b), the maximum legal interest rate for any third party lender's commercial loan which funds any portion of the cost of a 504 project (see 13 CFR 120.801) shall be 6% over the New York Prime rate or, if that exceeds the maximum interest rate permitted by the constitution or laws of a given State, the maximum interest rate will be the rate permitted by the constitution or laws of the given State.

Michael A. Simmons,

Acting Director, Office of Financial Assistance.

[FR Doc. 2013–24214 Filed 10–21–13; 8:45 am]

BILLING CODE 8025–01–P

SOCIAL SECURITY ADMINISTRATION

Agency Information Collection Activities: Proposed Request and Comment Request

The Social Security Administration (SSA) publishes a list of information collection packages requiring clearance by the Office of Management and Budget (OMB) in compliance with Public Law 104–13, the Paperwork Reduction Act of 1995, effective October 1, 1995. This notice includes revisions and extensions of OMB-approved information collections.

SSA is soliciting comments on the accuracy of the agency's burden estimate; the need for the information; its practical utility; ways to enhance its quality, utility, and clarity; and ways to minimize burden on respondents, including the use of automated collection techniques or other forms of information technology. Mail, email, or fax your comments and recommendations on the information collection(s) to the OMB Desk Officer and SSA Reports Clearance Officer at the following addresses or fax numbers.

(OMB), Office of Management and Budget, Attn: Desk Officer for SSA, Fax: 202–395–6974, Email address: *OIRA_Submission@omb.eop.gov.*

(SSA), Social Security Administration, DCRDP, Attn: Reports Clearance Director, 107 Altmeyer Building, 6401 Security Blvd., Baltimore, MD 21235, Fax: 410–966–2830, Email address: *OR.Reports.Clearance@ssa.gov.*

I. The information collections below are pending at SSA. SSA will submit them to OMB within 60 days from the date of this notice. To be sure we consider your comments, we must receive them no later than December 23, 2013. Individuals can obtain copies of the collection instruments by writing to the above email address.

1. *Requests for Self-Employment Information, Employee Information, Employer Information—20 CFR 422.120–0960–0508.* When SSA cannot identify Form W–2 wage data for an individual, we place the data in an earnings suspense file and contact the individual (and certain instances the employer) to obtain the correct information. If the respondent furnishes the name and Social Security number (SSN) information that agrees with SSA's records, or provides information that resolves the discrepancy, SSA adds the reported earnings to the respondent's Social Security record. We use Forms SSA–L2765, SSA–L3365, and SSA–L4002 for this purpose. The respondents are self-employed individuals and employees whose name and SSN information do not agree with their employer's and SSA's records.

Type of Request: Revision of an OMB-approved information collection.

Modality of completion	Number of respondents	Frequency of response	Average burden per response (minutes)	Estimated total annual burden (hours)
SSA–L2765	12,321	1	10	2,054
SSA–L3365	179,749	1	10	29,958
SSA–L4002	121,679	1	10	20,280
Totals	313,749			52,292

2. *Employer Reports of Special Wage Payments—20 CFR 404.428–404.429—0960–0565.* SSA collects information on the SSA–131 to prevent earnings-related overpayments and to avoid erroneous withholding of benefits. SSA field offices and program service centers also use Form SSA–131 for awards and post-entitlement events requiring special wage payment verification from employers. While we need this information to ensure the correct payment of benefits, we do not require employers to respond. The respondents are large and small businesses that make special wage payments to retirees.

Type of Request: Revision of an OMB-approved information collection.

Modality of completion	Number of respondents	Frequency of response	Average burden per response (minutes)	Estimated total annual burden (hours)
Paper Version: SSA–131 (without #6)	105,000	1	20	35,000
Paper Version: SSA–131 (#6 only)	1,050	1	2	35
Electronic Version: Business Services Online Special Wage Payments	26	1	5	2
Totals	106,076			35,037

3. *Work Activity Report (Self-Employment)—20 CFR 404.1520(b), 20 CFR 404.1571–404.1576, 20 CFR 404.1584–404.1593, and 20 CFR 416.971–416.976—0960–0598.* SSA uses Form SSA–820–U4 to determine initial or continuing eligibility for (1) Title II Social Security disability benefits or (2) Title XVI Supplemental Security Income (SSI) payments. Under Titles II and XVI of the Social Security Act, recipients receive disability benefits and SSI payments based on their inability to engage in substantial gainful activity (SGA) due to a physical or mental condition. Therefore, when the recipients resume work, they must report their work so SSA can evaluate and determine whether they continue to meet the disability requirements by law. SSA uses Form SSA–820–U4 to obtain information on self-employment activities of Social Security disability applicants and recipients. We use the data we obtain to evaluate disability claims, and to help us determine if the claimant meets current disability provisions under Titles II and XVI. Since applicants for disability benefits must prove an inability to perform any kind of SGA generally available in the national economy for which we expect them to qualify based on age, education, and work experience, any work an applicant performed until, or subsequent to, the date the disability allegedly began, affects our disability determination. The respondents are applicants and claimants for SSI or Social Security disability benefits.

Type of Request: Revision of an OMB-approved information collection.

Modality of completion	Number of respondents	Frequency of response	Average burden per response (minutes)	Estimated total annual burden (hours)
SSA–820–BK	100,000	1	30	50,000

4. *Private Printing and Modification of Prescribed Application and Other Forms—20 CFR 422.527—0960–0663.* 20 CFR 422.527 of the Code of Federal Regulations requires a person, institution, or organization (third-party entities) to obtain approval from SSA prior to reproducing, duplicating, or privately printing any application or other form the agency owns. SSA uses the information to ensure requests comply with the law and regulations. SSA uses the information to process requests from third-party entities who want to reproduce, duplicate, or privately print any SSA application or other SSA form. To obtain SSA's approval, entities must make their requests in writing, using their company letterhead, providing the required information set forth in the regulation. SSA employees review the requests and provide approval via email or mail to the third-party entities. The respondents are third-party entities who submit a request to SSA to reproduce, duplicate, or privately print an SSA-owned form.

Type of Request: Extension of an OMB-approved information collection.

Modality of completion	Number of respondents	Frequency of response	Average burden per response (minutes)	Estimated total annual burden (hours)
20 CFR422.527	15	15	8	30

5. *Methods for Conducting Personal Conferences When Waiver of Recovery of a Title II or Title XVI Overpayment Cannot Be Approved—20 CFR 404.506(e)(3), 404.506(f)(8), 416.557(c)(3), and 416.557(d)(8)—0960–0769.* SSA conducts personal conferences when we cannot approve a waiver of recovery of a Title II or Title XVI overpayment. We are required to give overpaid Social Security beneficiaries and SSI recipients the right to request a waiver of recovery and automatically schedule a personal conference if we cannot approve their request for waiver of overpayment. We conduct these conferences face-to-face, by telephone, or by video teleconference. Social Security beneficiaries and SSI recipients or their representatives may provide documents to demonstrate they are without fault in causing the overpayment and do not have the ability to repay the debt. They may submit these documents by Form SSA–632 (OMB No. 0960–0037), Request for Waive of Overpayment Recovery; SSA–795 (OMB No. 0960–0045), Statement of Claimant or Other Person; or personal statement submitted by mail, telephone, personal contact, or other suitable method, such as fax or email. This information collection

satisfies the requirements for request for waiver of recovery of an overpayment and allows individuals to pursue further levels of administrative appeal via personal conference. Respondents are Social Security beneficiaries and SSI recipients or their representatives seeking reconsideration of an SSA waiver decision.

Type of Request: Extension of an OMB-approved information collection.

Modality of completion	Number of respondents	Frequency of response	Average burden per response (minutes)	Estimated total annual burden (hours)
Personal conference 404.506(e)(3) and 404–506(f)(8) submittal of documents, additional mitigating financial information and verifications for consideration at personal conferences	40,000	1	30	20,000
Personal conference 416.557(c)(3) and 416–557(d)(8) submittal of documents additional mitigating financial information, and verifications for consideration at personal conferences	63,801	1	30	31,901
Totals	103,801			51,901

II. SSA submitted the information collections below to OMB for clearance. Your comments regarding the information collections would be most useful if OMB and SSA receive them 30 days from the date of this publication. To be sure we consider your comments, we must receive them no later than November 21, 2013. Individuals can obtain copies of the OMB clearance packages by writing to *OR.Reports.Clearance@ssa.gov.*

1. *Incorporation by Reference of Oral Findings of Fact and Rationale in Wholly Favorable Written Decisions (Bench Decision Regulation)—20 CFR 404.953 and 416.1453—0960–0694.* If an administrative law judge (ALJ) makes a wholly favorable oral decision that includes all the findings and rationale for the decision for a claimant of Title II or Title XVI payments at an administrative appeals hearing, the ALJ sends a Notice of Decision (Form HA–82), as the records from the oral hearing preclude the need for a written decision. We call this the incorporation-by-reference process. In addition, the regulations for this process state that if the involved parties want a record of the oral decision, they may submit a written request for these records. SSA collects identifying information under the aegis of Sections 20 CFR 404.953 and 416.1453 of the Code of Federal Regulations to determine how to send interested individuals written records of a favorable incorporation-by-reference oral decision made at an administrative review hearing. Since there is no prescribed form to request a written record of the decision, the involved parties send SSA their contact information and reference the hearing for which they would like a record. The respondents are applicants for disability insurance benefits and SSI payments or their representatives to whom SSA gave a wholly favorable oral decision under the regulations cited above.

Type of Request: Extension of an OMB-approved information collection.

Modality of completion	Number of respondents	Frequency of response	Average burden per response (minutes)	Estimated total annual burden (hours)
HA–82	2,500	1	5	208

2. *Request for Proof(s) from Custodian of Records—20 CFR 404.703, 404.704, 404.720, 404.721, 404.723, 404.725, & 404.728—0960–0766.* SSA sends Form SSA–L707, Request for Proof(s) from Custodian of Records, to records custodians on behalf of individuals who need help obtaining evidence of death, marriage, or divorce in connection with claims for benefits. SSA uses the information from the SSA–L707 to determine eligibility for benefits. The respondents are records custodians including statistics and religious entities, coroners, funeral directors, attending physicians, and State agencies.

Type of Request: Revision of an OMB-approved information collection.

Modality of completion	Number of respondents	Frequency of response	Average burden per response (minutes)	Estimated total annual burden (hours)
State or Local Government	501	1	10	84
Private Sector	99	1	10	17
Totals	600			101

Dated: October 17, 2013.

Faye Lipsky,

Reports Clearance Director, Social Security Administration.

[FR Doc. 2013–24595 Filed 10–21–13; 8:45 am]

BILLING CODE 4191–02–P

DEPARTMENT OF STATE

[Public Notice 8503]

Culturally Significant Object Imported for Exhibition Determinations: ''A Loan From the Vatican Museums: Madonna and Child With Saint John the Baptist and Saint Mary Magdalene''

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, I hereby determine that the object to be included in the exhibition ''A Loan from the Vatican Museums: Madonna and Child with Saint John the Baptist and Saint Mary Magdalene,'' imported from abroad for temporary exhibition within the United States, is of cultural significance. The object is imported pursuant to a loan agreement with the foreign owner or custodian. I also determine that the exhibition or display of the exhibit object at The Art Institute of Chicago, Chicago, Illinois, from on or about October 30, 2013, until on or about January 9, 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 description of the exhibit object, 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: October 15, 2013.

Evan M. Ryan,

Assistant Secretary, Bureau of Educational and Cultural Affairs, Department of State.

[FR Doc. 2013–24718 Filed 10–21–13; 8:45 am]

BILLING CODE 4710–05–P

DEPARTMENT OF TRANSPORTATION

Federal Motor Carrier Safety Administration

[Docket No. FMCSA–2013–0166]

Qualification of Drivers; Exemption Applications; Vision

AGENCY: Federal Motor Carrier Safety Administration (FMCSA), DOT.

ACTION: Notice of applications for exemptions; request for comments.

SUMMARY: FMCSA announces receipt of applications from 26 individuals for exemption from the vision requirement in the Federal Motor Carrier Safety Regulations. They are unable to meet the vision requirement in one eye for various reasons. The exemptions will enable these individuals to operate commercial motor vehicles (CMVs) in interstate commerce without meeting the prescribed vision requirement in one eye. If granted, the exemptions would enable these individuals to qualify as drivers of commercial motor vehicles (CMVs) in interstate commerce.

DATES: Comments must be received on or before November 21, 2013.

ADDRESSES: You may submit comments bearing the Federal Docket Management System (FDMS) Docket No. FMCSA–2013–0166 using any of the following methods:

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov*. Follow the on-line instructions for submitting comments.
- *Mail:* Docket Management Facility; U.S. Department of Transportation, 1200 New Jersey Avenue SE., West Building Ground Floor, Room W12–140, Washington, DC 20590–0001.
- *Hand Delivery:* West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal Holidays.
- *Fax:* 1–202–493–2251.

Instructions: Each submission must include the Agency name and the docket numbers for this notice. Note that all comments received will be posted without change to *http://www.regulations.gov,* including any personal information provided. Please see the Privacy Act heading below for further information.

Docket: For access to the docket to read background documents or comments, go to *http://www.regulations.gov* at any time or Room W12–140 on the ground level of the West Building, 1200 New Jersey Avenue SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The FDMS is available 24 hours each day, 365 days each year. If you want acknowledgment that we received your comments, please include a self-addressed, stamped envelope or postcard or print the acknowledgement page that appears after submitting comments on-line.

Privacy Act: Anyone may search the electronic form of all comments received into any of our dockets by the name of the individual submitting the comment (or of the person signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review DOT's Privacy Act Statement for the Federal Docket Management System (FDMS) published in the **Federal Register** on January 17, 2008 (73 FR 3316).

FOR FURTHER INFORMATION CONTACT: Elaine M. Papp, Chief, Medical Programs Division, (202) 366–4001, *fmcsamedical@dot.gov,* FMCSA, Department of Transportation, 1200 New Jersey Avenue SE., Room W64–224, Washington, DC 20590–0001. Office hours are from 8:30 a.m. to 5 p.m., Monday through Friday, except Federal holidays.

SUPPLEMENTARY INFORMATION:

Background

Under 49 U.S.C. 31136(e) and 31315, FMCSA may grant an exemption from the Federal Motor Carrier Safety Regulations for a 2-year period if it finds ''such exemption would likely achieve a level of safety that is equivalent to or greater than the level that would be achieved absent such exemption.'' FMCSA can renew exemptions at the end of each 2-year period. The 26 individuals listed in this notice have each requested such an exemption from the vision requirement in 49 CFR 391.41(b)(10), which applies to drivers of CMVs in interstate commerce. Accordingly, the Agency will evaluate the qualifications of each applicant to determine whether granting an exemption will achieve the required level of safety mandated by statute.

Qualifications of Applicants

Herbert R. Benner

Mr. Benner, age 44, has had amblyopia in his left eye since birth. The visual acuity in his right eye is 20/25, and in his left eye, 20/400. Following an examination in 2013, his optometrist noted, ''Most recently Mr. Benner presented with a list of criteria for him to keep his medical card needed to continue driving hazardous materials . . . It is my opinion that because Mr.

Benner has been monocular since birth, and his history of no work related vehicle incidents whatsoever, he should be a good example of why there are always exceptions to the rule. It would be a shame to not allow Mr. Benner to continue to drive and make a living hauling hazardous materials.'' Mr. Benner reported that he has driven straight trucks for 25 years, accumulating 1 million miles. He holds a Class B Commercial Driver's License (CDL) from Maine. His driving record for the last 3 years shows no crashes and one conviction for a moving violation in a CMV; he exceeded the speed limit by 18 mph.

Junior Chavarria

Mr. Chavarria, 31, has had amblyopia in his left eye since childhood. The visual acuity in his right eye is 20/20, and in his left eye, 20/60. Following an examination in 2013, his optometrist noted, ''In my medical opinion, I feel that Mr. Chavarria has sufficient vision to perform the driving tasks required to operate a commercial vehicle.'' Mr. Chavarria reported that he has driven tractor-trailer combinations for 3 years, accumulating 1,500 miles. He holds a Class A CDL from New Mexico. His driving record for the last 3 years shows no crashes and no convictions for moving violations in a CMV.

Albert M. DiVella

Mr. DiVella, 71, has had macular degeneration in his left eye since 2007. The visual acuity in his right eye is 20/20, and in his left eye, 20/50. Following an examination in 2013, his ophthalmologist noted, ''No change has occurred in Mr. DiVella's vision in over 7 years. No driving restrictions are necessary for this patient to safely operate a commercial motor vehicle.'' Mr. DiVella reported that he has driven buses for 8 years, accumulating 320,000 miles. He holds a Class B CDL from Nevada. His driving record for the last 3 years shows no crashes and no convictions for moving violations in a CMV.

Terry D. Elliot

Mr. Elliot, 58, has had amblyopia in his right eye since childhood. The visual acuity in his right eye is 20/80, and in his left eye, 20/20. Following an examination in 2013, his ophthalmologist noted, ''In my medical opinion he has sufficient vision to operate a commercial vehicle.'' Mr. Elliot reported that he has driven straight trucks for 12 years, accumulating 240,000 miles. He holds Class A CDL from Tennessee. His driving record for the last 3 years shows one crash, to which he contributed by improper backing and careless or erratic driving, and no convictions for moving violations in a CMV.

Bernard T. Gillette

Mr. Gillette, 45, has had a retinal detachment in his right eye since 1989. The visual acuity in his right eye is hand motion, and in his left eye, 20/25. Following an examination in 2013, his optometrist noted, ''In my medical opinion he does have sufficient vision to perform the driving tasks required to operate a commercial vehicle under the current driving regulations.'' Mr. Gillette reported that he has driven straight trucks for 40 years, accumulating 1.4 million miles, and tractor-trailer combinations for 38 years, accumulating 399,000. He holds a Class A CDL from Pennsylvania. His driving record for the last 3 years shows no crashes and no convictions for moving violations in a CMV.

James B. Grega

Mr. Grega, 30, has had amblyopia in his right eye since birth. The visual acuity in his right eye is counting fingers, and in his left eye, 20/20. Following an examination in 2012, his optometrist noted, ''In my medical opinion, he has sufficient vision to perform the driving tasks required to operate a commercial vehicle.'' Mr. Grega reported that he has driven straight trucks for 4 years, accumulating 4,000 miles, and tractor-trailer combinations for 4 years, accumulating 400 miles. He holds an operator's license from Pennsylvania. His driving record for the last 3 years shows no crashes and no convictions for moving violations in a CMV.

Steven M. Hoover

Mr. Hoover, 37, has a prosthetic right eye due to a traumatic incident in 1985. The visual acuity in his right eye is no light perception, and in his left eye, 20/15. Following an examination in 2013, his optometrist noted, ''Has vision capable of driving a commercial vehicle.'' Mr. Hoover reported that he has driven straight trucks for 20 years, accumulating 10,000 miles, and tractor-trailer combinations for 6 years, accumulating 90,000 miles. He holds a Class A CDL from Illinois. His driving record for the last 3 years shows no crashes and no convictions for moving violations in a CMV.

Gregory R. Johnson

Mr. Johnson, 45, has a retinal detachment in his right eye due to a traumatic incident in 1976. The visual acuity in his right eye is no light perception, and in his left eye, 20/20. Following an examination in 2012, his optometrist noted, ''It is my professional opinion that since Mr. Johnson has apparently had a flawless driving record over the past 3 years doing this work that he has sufficient vision to perform his required tasks. It should be noted that I have had many professional truck drivers over the past 40 years who had amblyopia, trauma et. al. to one of their eyes and there was never a problem of driving safety. Most had been driving for many, many years with flawless records.'' Mr. Johnson reported that he has driven straight trucks for 6 years, accumulating 90,000 miles. He holds an operator's license from South Carolina. His driving record for the last 3 years shows no crashes and no convictions for moving violations in a CMV.

Lewis J. Johnson

Mr. Johnson, 48, has a retinal detachment in his right eye due to a traumatic incident in 1998. The visual acuity in his right eye is 20/70, and in his left eye, 20/20. Following an examination in 2013, his optometrist noted, ''Bilateral vision is sufficient to operate commercial vehicle.'' Mr. Johnson reported that he has driven straight trucks for 28 years, accumulating 420,000 miles. He holds an operator's license from Pennsylvania. His driving record for the last 3 years shows no crashes and no convictions for moving violations in a CMV.

Carol Kelly

Ms. Kelly, 51, has had amblyopia in her left eye since birth. The visual acuity in her right eye is 20/20, and in her left eye, 20/200. Following an examination in 2013, her optometrist noted, ''In my opinion she has sufficient vision to perform the driving tasks required to operate a commercial vehicle.'' Ms. Kelly reported that she has driven straight trucks for 4 years, accumulating 223,200 miles, tractor-trailer combinations for 1 year, accumulating 24,000, and buses for 16 years, accumulating 2.95 million miles. She holds a Class B CDL from Indiana. Her driving record for the last 3 years shows no crashes and no convictions for moving violations in a CMV.

Jeremy W. Knott

Mr. Knott, 38, has had a retinal detachment in his right eye since 1998. The visual acuity in his right eye is 20/200, and in his left eye, 20/20. Following an examination in 2013, his optometrist noted, ''In my medical opinion, Jeremy has sufficient vision to operate commercial motor vehicles.'' Mr. Knott reported that he has driven

straight trucks for 14 years, accumulating 87,500 miles. He holds a Class A CDL from North Carolina. His driving record for the last 3 years shows no crashes and no convictions for moving violations in a CMV.

Chase L. Larson

Mr. Larson, 42, has had amblyopia in his left eye since birth. The visual acuity in his right eye is 20/25, and in his left eye, 20/80. Following an examination in 2013, his optometrist noted, ''In my professional opinion Mr. Larson has the vision sufficient to operate a commercial vehicle.'' Mr. Larson reported that he has driven straight trucks for 2 years, accumulating 115,000 miles, and tractor-trailer combinations for 1.5 years, accumulating 116,250 miles. He holds a Class A CDL from Washington. His driving record for the last 3 years shows no crashes and no convictions for moving violations in a CMV.

Ronald E. Loper

Mr. Loper, 58, has had amblyopia in his left eye since birth. The visual acuity in his right eye is 20/20, and in his left eye, 20/100. Following an examination in 2013, his optometrist noted, ''Mr. Loper has been a commercial truck driver for many years and I believe his visual function is adequate to continue driving a commercial vehicle.'' Mr. Loper reported that he has driven straight trucks for 37 years, accumulating 1.1 million miles, and tractor-trailer combinations for 37 years, accumulating 1.1 million miles. He holds an operator's license from Louisiana. His driving record for the last 3 years shows no crashes and no convictions for moving violations in a CMV.

James M. McCleary

Mr. McCleary, 39, has had amblyopia in his right eye since childhood. The visual acuity in his right eye is 20/400, and in his left eye, 20/25. Following an examination in 2012, his optometrist noted, ''For Federal Vision Exemption, he has sufficient vision if above conditions meets requirements and approval of the vision program to operate a commercial vehicle.'' Mr. McCleary reported that he has driven straight trucks for 2 years, accumulating 40,000 miles, and tractor-trailer combinations for 4 years, accumulating 100,000 miles. He holds a Class A CDL from Ohio. His driving record for the last 3 years shows one crash, to which he did not contribute and for which he was not cited, and no convictions for moving violations in a CMV.

Michael E. Miles

Mr. Miles, 67, has had a retinal detachment in his right eye since 1988. The visual acuity in his right eye is counting fingers, and in his left eye, 20/20. Following an examination in 2013, his optometrist noted, ''With my findings, Mr. Miles has sufficient vision to perform the driving tasks required to operate a commercial vehicle.'' Mr. Miles reported that he has driven straight trucks for 40 years, accumulating 1.2 million miles. He holds a Class AM CDL from Illinois. His driving record for the last 3 years shows no crashes and no convictions for moving violations in a CMV.

Jeremy L. Miller

Mr. Miller, 38, has had amblyopia in his right eye since childhood. The visual acuity in his right eye is 20/60, and in his left eye, 20/20. Following an examination in 2013, his optometrist noted, ''He has sufficient vision to operate a commercial vehicle.'' Mr. Miller reported that he has driven tractor-trailer combinations for 12.5 years, accumulating 937,500 miles. He holds a Class A CDL from Oregon. His driving record for the last 3 years shows no crashes and no convictions for moving violations in a CMV.

Ronald L. Newlin

Mr. Newlin, 65, has had amblyopia in his left eye since birth. The visual acuity in his right eye is 20/20, and in his left eye, counting fingers. Following an examination in 2013, his optometrist noted, ''In my opinion, as his eye doctor of 8 years, Ronald Newlin has sufficient vision to perform the driving tasks required to operate a commercial vehicle.'' Mr. Newlin reported that he has driven straight trucks for 48 years, accumulating 48,000 miles. He holds a Class B CDL from Illinois. His driving record for the last 3 years shows no crashes and no convictions for moving violations in a CMV.

Carlos A. Osollo

Mr. Osollo, 44, has had amblyopia in his left eye since birth. The visual acuity in his right eye is 20/20, and in his left eye, counting fingers. Following an examination in 2013, his optometrist noted, ''He has the sufficient vision necessary to perform the driving tasks required to operate a commercial vehicle.'' Mr. Osollo reported that he has driven straight trucks for 8 years, accumulating 240,000 miles, and tractor-trailer combinations for 8 years, accumulating 272,000 miles. He holds a Class A CDL from New Mexico. His driving record for the last 3 years shows no crashes and no convictions for moving violations in a CMV.

Steven J. Scesnewicz

Mr. Scesnewicz, 50, has had amblyopia in his right eye since childhood. The visual acuity in his right eye is 20/125, and in his left eye, 20/20. Following an examination in 2013, his optometrist noted, ''In my clinical opinion the patient has sufficient vision to perform the tasks required to operate a commercial driving vehicle.'' Mr. Scensnewicz reported that he has driven straight trucks for 20 years, accumulating 160,000 miles. He holds a Class A CDL from Illinois. His driving record for the last 3 years shows no crashes and no convictions for moving violations in a CMV.

Henry D. Smith

Mr. Smith, 51, has had a prosthetic left eye since childhood. The visual acuity in his right eye is 20/20, and in his left eye, no light perception. Following an examination in 2012, his optometrist noted, ''Mr. Smith, despite having a prosthetic left eye, has fully functional vision in his right eye. Because of this, and because of the fact that he has had a functional CDL with no problems for years, I feel that driving abilities are not compromised by his monocular vision.'' Mr. Smith reported that he has driven straight trucks for 17 years, accumulating 1.36 million miles. He holds a Class B CDL from North Carolina. His driving record for the last 3 years shows no crashes and no convictions for moving violations in a CMV.

Dennis R. Stockert

Mr. Stockert, 50, has a retinal detachment in his left eye due to a traumatic incident in 1987. The visual acuity in his right eye is 20/20, and in his left eye, light perception. Following an examination in 2013, his optometrist noted, ''In my opinion, Mr. Stockert sees well enough binocularly to perform the driving tasks required to operate a commercial vehicle.'' Mr. Stockert reported that he has driven straight trucks for 30 years, accumulating 900,000 miles. He holds an operator's license from Minnesota. His driving record for the last 3 years shows no crashes and no convictions for moving violations in a CMV.

Kolby W. Strickland

Mr. Strickland, 35, has had amblyopia in his right eye since birth. The visual acuity in his right eye is 20/60, and in his left eye, 20/15. Following an examination in 2013, his optometrist noted, ''In my opinion, Mr. Strickland's

vision will not impair his ability to operate a commercial vehicle.'' Mr. Strickland reported that he has driven straight trucks for 10 years, accumulating 3,500 miles. He holds a Class B CDL from Washington. His driving record for the last 3 years shows no crashes and no convictions for moving violations in a CMV.

Eric Taniguchi

Mr. Taniguchi, 54, has had Harada's disease in his left eye since 1984. The visual acuity in his right eye is 20/15, and in his left eye, no light perception. Following an examination in 2012, his ophthalmologist noted, ''It is my medical opinion that Mr. Taniguchi has sufficient vision to operate any vehicle or equipment.'' Mr. Taniguchi reported that he has driven straight trucks for 5 years, accumulating 50,000 mile, and tractor-trailer combinations for 23 years, accumulating 230,000. He holds an operator's license from Hawaii. His driving record for the last 3 years shows no crashes and no convictions for moving violations in a CMV.

Stephen G. Vermilya

Mr. Vermilya, 59, has had amblyopia in his left eye since childhood. The visual acuity in his right eye is 20/20, and in his left eye, 20/100. Following an examination in 2013, his optometrist noted, ''In my opinion, the patient has sufficient vision to continue performing the drive [sic] tasks required to operate a commercial vehicle.'' Mr. Vermilya reported that he has driven straight trucks for 40 years, accumulating 1.2 million miles, and tractor-trailer combinations for 40 years, accumulating 1.2 million miles. He holds a Class AM CDL from Pennsylvania. His driving record for the last 3 years shows no crashes and one conviction for a moving violation in a CMV; he disregarded a traffic lane signal.

Cesar Villa

Mr. Villa, 44, has had central scotoma in his left eye since 2009. The visual acuity in his right eye is 20/20, and in his left eye, counting fingers. Following an examination in 2013, his ophthalmologist noted, ''The patient presents with CNV to the left eye and presents stable and has sufficient vision to operate a commercial vehicle.'' Mr. Villa reported that he has driven straight trucks for 8 years, accumulating 440,000 miles, tractor-trailer combinations for 8 years, accumulating 520,000, and buses for 4 months, accumulating 6000 miles. He holds an operator's license from New Mexico. His driving record for the last 3 years shows no crashes and no convictions for moving violations in a CMV.

Dennis E. White

Mr. White, 58, has had strabismus in his right eye since childhood. The visual acuity in his right eye is 20/400, and in his left eye, 20/20. Following an examination in 2013, his optometrist noted, ''Mr. White's central peripheral vision is adequate to perform the driving tasks required to operate a commercial vehicle.'' Mr. White reported that he has driven straight trucks for 41 years, accumulating 1.64 million miles, and tractor-trailer combinations for 35 years, accumulating 875,000. He holds a Class A CDL from Pennsylvania. His driving record for the last 3 years shows no crashes and no convictions for moving violations in a CMV.

Request for Comments

In accordance with 49 U.S.C. 31136(e) and 31315, FMCSA requests public comment from all interested persons on the exemption petitions described in this notice. The Agency will consider all comments received before the close of business November 21, 2013. Comments will be available for examination in the docket at the location listed under the **ADDRESSES** section of this notice. The Agency will file comments received after the comment closing date in the public docket, and will consider them to the extent practicable.

In addition to late comments, FMCSA will also continue to file, in the public docket, relevant information that becomes available after the comment closing date. Interested persons should monitor the public docket for new material.

Submitting Comments

You may submit your comments and material online or by fax, mail, or hand delivery, but please use only one of these means. FMCSA recommends that you include your name and a mailing address, an email address, or a phone number in the body of your document so that FMCSA can contact you if there are questions regarding your submission.

To submit your comment online, go to *http://www.regulations.gov* and in the search box insert the docket number FMCSA–2013–0166 and click the search button. When the new screen appears, click on the blue ''Comment Now!'' button on the right hand side of the page. On the new page, enter information required including the specific section of this document to which each comment applies, and provide a reason for each suggestion or recommendation. If you submit your comments by mail or hand delivery, submit them in an unbound format, no larger than 8½ by 11 inches, suitable for copying and electronic filing. If you submit comments by mail and would like to know that they reached the facility, please enclose a stamped, self-addressed postcard or envelope.

We will consider all comments and material received during the comment period and may change this proposed rule based on your comments. FMCSA may issue a final rule at any time after the close of the comment period.

Viewing Comments and Documents

To view comments, as well as any documents mentioned in this preamble, To submit your comment online, go to *http://www.regulations.gov* and in the search box insert the docket number FMCSA–2013–0166 and click ''Search.'' Next, click ''Open Docket Folder'' and you will find all documents and comments related to the proposed rulemaking.

Issued on: September 27, 2013.

Larry W. Minor,

Associate Administrator for Policy.

[FR Doc. 2013–24748 Filed 10–21–13; 8:45 am]

BILLING CODE 4910–EX–P

DEPARTMENT OF TRANSPORTATION

Federal Motor Carrier Safety Administration

[Docket No. FMCSA–2011–0189]

Qualification of Drivers; Exemption Applications; Vision

AGENCY: Federal Motor Carrier Safety Administration (FMCSA), DOT.

ACTION: Notice of renewal of exemptions; request for comments.

SUMMARY: FMCSA announces its decision to renew the exemptions from the vision requirement in the Federal Motor Carrier Safety Regulations for 10 individuals. FMCSA has statutory authority to exempt individuals from the vision requirement if the exemptions granted will not compromise safety. The Agency has concluded that granting these exemption renewals will provide a level of safety that is equivalent to or greater than the level of safety maintained without the exemptions for these commercial motor vehicle (CMV) drivers.

DATES: This decision is effective October 31, 2013. Comments must be received on or before November 21, 2013.

ADDRESSES: You may submit comments bearing the Federal Docket Management System (FDMS) numbers: Docket No. [Docket No. FMCSA–2011–0189], using any of the following methods:

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov*. Follow the on-line instructions for submitting comments.
- *Mail:* Docket Management Facility; U.S. Department of Transportation, 1200 New Jersey Avenue SE., West Building Ground Floor, Room W12–140, Washington, DC 20590–0001.
- *Hand Delivery or Courier:* West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal Holidays.
- *Fax:* 1–202–493–2251.

Instructions: Each submission must include the Agency name and the docket number for this notice. Note that DOT posts all comments received without change to *http://www.regulations.gov*, including any personal information included in a comment. Please see the Privacy Act heading below.

Docket: For access to the docket to read background documents or comments, go to *http://www.regulations.gov* at any time or Room W12–140 on the ground level of the West Building, 1200 New Jersey Avenue SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The Federal Docket Management System (FDMS) is available 24 hours each day, 365 days each year. If you want acknowledgment that we received your comments, please include a self-addressed, stamped envelope or postcard or print the acknowledgement page that appears after submitting comments on-line.

Privacy Act: Anyone may search the electronic form of all comments received into any of our dockets by the name of the individual submitting the comment (or of the person signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review DOT's Privacy Act Statement for the Federal Docket Management System (FDMS) published in the **Federal Register** on January 17, 2008 (73 FR 3316).

FOR FURTHER INFORMATION CONTACT: Elaine M. Papp, Chief, Medical Programs Division, 202–366–4001, *fmcsamedical@dot.gov*, FMCSA, Department of Transportation, 1200 New Jersey Avenue, SE., Room W64–224, Washington, DC 20590–0001. Office hours are from 8:30 a.m. to 5 p.m. Monday through Friday, except Federal holidays.

SUPPLEMENTARY INFORMATION:

Background

Under 49 U.S.C. 31136(e) and 31315, FMCSA may renew an exemption from the vision requirements in 49 CFR 391.41(b)(10), which applies to drivers of CMVs in interstate commerce, for a two-year period if it finds ''such exemption would likely achieve a level of safety that is equivalent to or greater than the level that would be achieved absent such exemption.'' The procedures for requesting an exemption (including renewals) are set out in 49 CFR part 381.

Exemption Decision

This notice addresses 10 individuals who have requested renewal of their exemptions in accordance with FMCSA procedures. FMCSA has evaluated these 10 applications for renewal on their merits and decided to extend each exemption for a renewable two-year period. They are:

Darrell G. Anthony (TX)
Phillip M. Pridgen, Sr. (MD)
Gerald D. Stidham (CO)
Michael A. Lawson (KY)
Gary E. Butler (MT)
James E. Knarr, Sr. (NY)
Eric W. Schmidt (MO)
Stacey J. Buckingham (ID)
Harold L. Pearsall (PA)
Jeffrey A. Mueller (IL)

The exemptions are extended subject to the following conditions: (1) That each individual has a physical examination every year (a) by an ophthalmologist or optometrist who attests that the vision in the better eye continues to meet the requirements in 49 CFR 391.41(b)(10), and (b) by a medical examiner who attests that the individual is otherwise physically qualified under 49 CFR 391.41; (2) that each individual provides a copy of the ophthalmologist's or optometrist's report to the medical examiner at the time of the annual medical examination; and (3) that each individual provide a copy of the annual medical certification to the employer for retention in the driver's qualification file and retains a copy of the certification on his/her person while driving for presentation to a duly authorized Federal, State, or local enforcement official. Each exemption will be valid for two years unless rescinded earlier by FMCSA. The exemption will be rescinded if: (1) the person fails to comply with the terms and conditions of the exemption; (2) the exemption has resulted in a lower level of safety than was maintained before it was granted; or (3) continuation of the exemption would not be consistent with the goals and objectives of 49 U.S.C. 31136(e) and 31315.

Basis for Renewing Exemptions

Under 49 U.S.C. 31315(b)(1), an exemption may be granted for no longer than two years from its approval date and may be renewed upon application for additional two year periods. In accordance with 49 U.S.C. 31136(e) and 31315, each of the 10 applicants has satisfied the entry conditions for obtaining an exemption from the vision requirements (76 FR 55465). Each of these 10 applicants has requested renewal of the exemption and has submitted evidence showing that the vision in the better eye continues to meet the requirement specified at 49 CFR 391.41(b)(10) and that the vision impairment is stable. In addition, a review of each record of safety while driving with the respective vision deficiencies over the past two years indicates each applicant continues to meet the vision exemption requirements.

These factors provide an adequate basis for predicting each driver's ability to continue to drive safely in interstate commerce. Therefore, FMCSA concludes that extending the exemption for each renewal applicant for a period of two years is likely to achieve a level of safety equal to that existing without the exemption.

Request for Comments

FMCSA will review comments received at any time concerning a particular driver's safety record and determine if the continuation of the exemption is consistent with the requirements at 49 U.S.C. 31136(e) and 31315. However, FMCSA requests that interested parties with specific data concerning the safety records of these drivers submit comments by November 21, 2013.

FMCSA believes that the requirements for a renewal of an exemption under 49 U.S.C. 31136(e) and 31315 can be satisfied by initially granting the renewal and then requesting and evaluating, if needed, subsequent comments submitted by interested parties. As indicated above, the Agency previously published notices of final disposition announcing its decision to exempt these 10 individuals from the vision requirement in 49 CFR 391.41(b)(10). The final decision to grant an exemption to each of these individuals was made on the merits of each case and made only after careful consideration of the comments received to its notices of applications.

The notices of applications stated in detail the qualifications, experience, and medical condition of each applicant for an exemption from the vision requirements. That information is available by consulting the above cited **Federal Register** publications.

Interested parties or organizations possessing information that would otherwise show that any, or all, of these drivers are not currently achieving the statutory level of safety should immediately notify FMCSA. The Agency will evaluate any adverse evidence submitted and, if safety is being compromised or if continuation of the exemption would not be consistent with the goals and objectives of 49 U.S.C. 31136(e) and 31315, FMCSA will take immediate steps to revoke the exemption of a driver.

Submitting Comments

You may submit your comments and material online or by fax, mail, or hand delivery, but please use only one of these means. FMCSA recommends that you include your name and a mailing address, an email address, or a phone number in the body of your document so that FMCSA can contact you if there are questions regarding your submission.

To submit your comment online, go to *http://www.regulations.gov* and in the search box insert the docket numbers FMCSA–2011–0189 and click the search button. When the new screen appears, click on the blue ''Comment Now!'' button on the right hand side of the page. On the new page, enter information required including the specific section of this document to which each comment applies, and provide a reason for each suggestion or recommendation. If you submit your comments by mail or hand delivery, submit them in an unbound format, no larger than 8½ by 11 inches, suitable for copying and electronic filing. If you submit comments by mail and would like to know that they reached the facility, please enclose a stamped, self-addressed postcard or envelope.

We will consider all comments and material received during the comment period and may change this proposed rule based on your comments. FMCSA may issue a final rule at any time after the close of the comment period.

Viewing Comments and Documents

To view comments, as well as any documents mentioned in this preamble, To submit your comment online, go to *http://www.regulations.gov* and in the search box insert the docket number FMCSA–2011–0189 and click ''Search.'' Next, click ''Open Docket Folder'' and you will find all documents and comments related to the proposed rulemaking.

Issued on: September 24, 2013.

Larry W. Minor,

Associate Administrator for Policy.

[FR Doc. 2013–24687 Filed 10–21–13; 8:45 am]

BILLING CODE 4910–EX–P

DEPARTMENT OF TRANSPORTATION

Surface Transportation Board

[Docket No. EP 552 (Sub-No. 17)]

Railroad Revenue Adequacy—2012 Determination

AGENCY: Surface Transportation Board, DOT.

ACTION: Notice of decision.

SUMMARY: On October 17, 2013, the Board served a decision announcing the 2012 revenue adequacy determinations for the Nation's Class I railroads. Two carriers, Norfolk Southern Combined Railroad Subsidiaries and Union Pacific Railroad Company, were found to be revenue adequate.

DATES: *Effective Date:* This decision is effective on October 17, 2013.

FOR FURTHER INFORMATION CONTACT: Paul Aguiar, (202) 245–0323. Assistance for the hearing impaired is available through Federal Information Relay Service (FIRS) at (800) 877–8339.

SUPPLEMENTARY INFORMATION: The Board is required to make an annual determination of railroad revenue adequacy. A railroad is considered revenue adequate under 49 U.S.C. 10704(a) if it achieves a rate of return on net investment (ROI) equal to at least the current cost of capital for the railroad industry for 2012, determined to be 11.12% in *Railroad Cost of Capital—2012,* EP 558 (Sub-No. 16) (STB served Aug. 30, 2013). This revenue adequacy standard was applied to each Class I railroad except for BNSF Railway Company (BNSF).[1] Two carriers, Norfolk Southern Combined Railroad Subsidiaries and Union Pacific Railroad Company, were found to be revenue adequate for 2012.

The decision in this proceeding is posted on the Board's Web site at *www.stb.dot.gov.* Copies of the decision may be purchased by contacting the Office of Public Assistance, Governmental Affairs, and Compliance at (202) 245–0238. Assistance for the hearing impaired is available through FIRS at (800) 877–8339.

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

Decided: September 30, 2013.

By the Board, Chairman Elliott, Vice Chairman Begeman, and Commissioner Mulvey.

Jeffrey Herzig,

Clearance Clerk.

[FR Doc. 2013–24566 Filed 10–21–13; 8:45 am]

BILLING CODE 4915–01–P

[1] The Board has not calculated BNSF's 2012 revenue adequacy in this decision, because BNSF is due to refile its R–1 reports for 2010, 2011, and 2012 by October 23, 2013, in compliance with the Board's order in *Western Coal Traffic League—Petition for Declaratory Order,* FD 35506 (STB served July 25, 2013). Following receipt and verification of BNSF's revised R–1 reports, the Board will reissue BNSF's 2010 and 2011 revenue adequacy calculations, and will issue its 2012 calculation.

DEPARTMENT OF THE TREASURY

Submission for OMB Review; Comment Request

October 17, 2013.

The Department of the Treasury will submit the following information collection requests to the Office of Management and Budget (OMB) for review and clearance in accordance with the Paperwork Reduction Act of 1995, Public Law 104–13, on or after the date of publication of this notice.

DATES: Comments should be received on or before November 21, 2013 to be assured of consideration.

ADDRESSES: Send comments regarding the burden estimate, or any other aspect of the information collection, including suggestions for reducing the burden, to (1) Office of Information and Regulatory Affairs, Office of Management and Budget, Attention: Desk Officer for Treasury, New Executive Office Building, Room 10235, Washington, DC 20503, or email at *OIRA_Submission@OMB.EOP.gov* and (2) Treasury PRA Clearance Officer, 1750 Pennsylvania Ave. NW., Suite 8141–D, Washington, DC 20220, or email at *PRA@treasury.gov.*

FOR FURTHER INFORMATION CONTACT: Copies of the submission(s) may be obtained by calling (202) 622–1295, email at *PRA@treasury.gov,* or the entire information collection request may be found at *www.reginfo.gov.*

Financial Crimes Enforcement Network (FinCEN)

OMB Number: 1506–0036.

Type of Review: Extension without change of a currently approved collection.

Title: Imposition of Special Measure Against Commercial Bank of Syria,

Including its Subsidiary, Syrian Lebanese Commercial Bank, as a Financial Institution of Primary Money Laundering Concern.

Abstract: This information will be used to verify compliance by financial institutions with the requirements to notify their correspondent account holders.

Affected Public: Private Sector: Businesses or other for-profits.

Estimated Annual Burden Hours: 5,000.

OMB Number: 1506–0050.

Type of Review: Extension without change of a currently approved collection.

Title: Administrative Rulings.

Abstract: These sections address administrative rulings under the Bank Secrecy Act. They explain how to submit a ruling request (1010.711), how nonconforming requests are handled (1010.712), how oral communications are treated (1010.713), how rulings are issued (1010.715), how rulings are modified or rescinded (1010.716), and how information may be disclosed (1010.717).

Affected Public: Private Sector: Not-for-profit institutions; businesses or other for-profits.

Estimated Annual Burden Hours: 60.

Dawn D. Wolfgang,

Treasury PRA Clearance Officer.

[FR Doc. 2013–24628 Filed 10–21–13; 8:45 am]

BILLING CODE 4810–25–P

DEPARTMENT OF THE TREASURY

Submission for OMB Review; Comment Request

October 17, 2013.

The Department of the Treasury will submit the following information collection request to the Office of Management and Budget (OMB) for review and clearance in accordance with the Paperwork Reduction Act of 1995, Public Law 104–13, on or after the date of publication of this notice.

DATES: Comments should be received on or before November 21, 2013 to be assured of consideration.

ADDRESSES: Send comments regarding the burden estimate, or any other aspect of the information collection, including suggestion for reducing the burden, to (1) Office of Information and Regulatory Affairs, Office of Management and Budget, Attention: Desk Officer for Treasury, New Executive Office Building, Room 10235, Washington, DC 20503, or email at *OIRA_Submission@OMB.EOP.GOV* and (2) Treasury PRA Clearance Officer, 1750 Pennsylvania Ave. NW., Suite 8140, Washington, DC 20220, or email at *PRA@treasury.gov.*

FOR FURTHER INFORMATION CONTACT: Copies of the submission(s) may be obtained by calling (202) 927–5331, email at *PRA@treasury.gov,* or the entire information collection request may be found at *www.reginfo.gov.*

Terrorism Risk Insurance Program (TRIP)

OMB Number: 1505–0196.

Type of Review: Extension without change of a currently approved collection.

Title: Litigation Management—Information Collection Regarding Proposed Settlements.

Form: TRIP 03.

Abstract: Section 103(a) and 104 of the Terrorism Risk Insurance Act (TRIA) of 2002 (Pub. L. 107–297) authorize the Department of the Treasury to administer and implement the temporary Terrorism Risk Insurance Program established by the Act. Section 107 contains specific provisions designed to manage litigation arising out of or resulting from a certified act of terrorism. The Terrorism Risk Insurance Extension Act of 2005, Public Law 109–144, added § 107(a)(6) to TRIA, which provides that procedures and requirements established by the Secretary under 31 CFR 50.82 and 50.83, as in effect on the date of issuance of that section in final form [July 28, 2004], shall apply to any Federal cause of action described in section 107(a)(1). Section 50.82 of the regulations requires insurers to submit to Treasury for advance approval certain proposed settlements involving an insured loss, any part of the payment of which the insurer intends to submit as part of its claim for Federal payment under the Program. Section 50.83 of the regulations describes the form and content that insurers must submit to implement the settlement approval process prescribed by § 50.82.

Affected public: Private Sector: Businesses or other for-profits.

Estimated Annual Burden Hours: 5,141.

OMB Number: 1505–0197.

Type of Review: Extension without change of a currently approved collection.

Title: Recordkeeping Requirements for Insurers Compensated Under Terrorism Risk Insurance Program.

Abstract: Sections 103(a) and 104 of the Terrorism Risk Insurance Act of 2002 (Pub. L. 107–297) (as extended by the Terrorism Risk Insurance Extension Act of 2005, Pub. L. 109–144 and the Terrorism Risk Insurance Program Reauthorization Act of 2007, Pub. L. 110–160) authorize the Department of the Treasury to administer and implement the Terrorism Risk Insurance Program established by the Act. In Title 31 CFR part 50, subpart F (§§ 50.50–50.55) Treasury established requirements and procedures for insurers that file claims for payment of the Federal share of compensation for insured losses resulting from a certified act of terrorism under the Act. Section 50.60 allows Treasury access to records of an insurer pertinent to amounts paid as the Federal share of compensation for insured losses in order to conduct investigations, confirmations and audits. Section 50.61 requires insurers to retain all records as are necessary to fully disclose all material matters pertaining to insured losses. This collection of information is the recordkeeping requirement in § 50.61.

Affected public: Private Sector: Businesses or other for-profits.

Estimated Annual Burden Hours: 833.

Dawn D. Wolfgang,

Treasury PRA Clearance Officer.

[FR Doc. 2013–24638 Filed 10–21–13; 8:45 am]

BILLING CODE 4810–25–P

DEPARTMENT OF THE TREASURY

Debt Management Advisory Committee Meeting

Notice is hereby given, pursuant to 5 U.S.C. App. 2, § 10(a)(2), that a meeting will be held at the Hay-Adams Hotel, 16th Street and Pennsylvania Avenue, NW.,Washington, DC, on November 5, 2013 at 11:30 a.m. of the following debt management advisory committee:

Treasury Borrowing Advisory Committee of The Securities Industry and Financial Markets Association.

The agenda for the meeting provides for a charge by the Secretary of the Treasury or his designate that the Committee discuss particular issues and conduct a working session. Following the working session, the Committee will present a written report of its recommendations. The meeting will be closed to the public, pursuant to 5 U.S.C. App. 2, 10(d) and Public Law 103–202, § 202(c)(1)(B)(31 U.S.C. 3121 note).

This notice shall constitute my determination, pursuant to the authority placed in heads of agencies by 5 U.S.C. App. 2, 10(d) and vested in me by Treasury Department Order No. 101–05, that the meeting will consist of discussions and debates of the issues presented to the Committee by the Secretary of the Treasury and the making of recommendations of the

Committee to the Secretary, pursuant to Public Law 103–202,§ 202(c)(1)(B).Thus, this information is exempt from disclosure under that provision and 5 U.S.C. 552b(c)(3)(B). In addition, the meeting is concerned with information that is exempt from disclosure under 5 U.S.C. 552b(c)(9)(A). The public interest requires that such meetings be closed to the public because the Treasury Department requires frank and full advice from representatives of the financial community prior to making its final decisions on major financing operations. Historically, this advice has been offered by debt management advisory committees established by the several major segments of the financial community. When so utilized, such a committee is recognized to be an advisory committee under 5 U.S.C. App. 2, 3.

Although the Treasury's final announcement of financing plans may not reflect the recommendations provided in reports of the Committee, premature disclosure of the Committee's deliberations and reports would be likely to lead to significant financial speculation in the securities market. Thus, this meeting falls within the exemption covered by 5 U.S.C. 552b(c)(9)(A).

Treasury staff will provide a technical briefing to the press on the day before the Committee meeting, following the release of a statement of economic conditions and financing estimates. This briefing will give the press an opportunity to ask questions about financing projections. The day after the Committee meeting, Treasury will release the minutes of the meeting, any charts that were discussed at the meeting, and the Committee's report to the Secretary.

The Office of Debt Management is responsible for maintaining records of debt management advisory committee meetings and for providing annual reports setting forth a summary of Committee activities and such other matters as may be informative to the public consistent with the policy of 5 U.S.C. 552(b). The Designated Federal Officer or other responsible agency official who may be contacted for additional information is Fred Pietrangeli, Director for Office of Debt Management (202) 622–1876.

Dated: September 27, 2013.

Matthew S. Rutherford,

Assistant Secretary, (Financial Markets).

[FR Doc. 2013–24136 Filed 10–21–13; 8:45 am]

BILLING CODE 4810–25–P

DEPARTMENT OF THE TREASURY

Office of the Comptroller of the Currency

Agency Information Collection Activities; Proposed Collection; Comment Request; Company-Run Annual Stress Test Reporting Template and Documentation for Covered Institutions With Total Consolidated Assets of $10 Billion to $50 Billion Under the Dodd-Frank Wall Street Reform and Consumer Protection Act

AGENCY: Office of the Comptroller of the Currency, Treasury (OCC).

ACTION: Notice.

SUMMARY: The OCC, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to comment on this continuing information collection, as required by the Paperwork Reduction Act of 1995. Under the Paperwork Reduction Act, Federal agencies are required to publish notice in the **Federal Register** concerning each proposed collection of information and to allow 60 days for public comment in response to the notice. An agency may not conduct or sponsor, and a respondent is not required to respond to, an information collection unless it displays a currently valid Office of Management and Budget (OMB) control number.

The OCC is soliciting comment on a proposed new regulatory reporting requirement for national banks and Federal savings associations titled, ''Company-Run Annual Stress Test Reporting Template and Documentation for Covered Institutions with Total Consolidated Assets of $10 Billion to $50 Billion under the Dodd-Frank Wall Street Reform and Consumer Protection Act.'' The proposal describes the scope of reporting and the proposed reporting requirements.

DATES: Comments must be received by November 21, 2013.

ADDRESSES: Because paper mail in the Washington, DC area and at the OCC is subject to delay, commenters are encouraged to submit comments by email if possible. Comments may be sent to: Legislative and Regulatory Activities Division, Office of the Comptroller of the Currency, Attention: 1557–0311, 400 7th Street SW., Suite 3E–218, Mail Stop 9W–11, Washington, DC 20219. In addition, comments may be sent by fax to (571) 465–4326 or by electronic mail to *regs.comments@occ.treas.gov*. You may personally inspect and photocopy comments at the OCC, 400 7th Street SW., Washington, DC 20219. For security reasons, the OCC requires that visitors make an appointment to inspect comments. You may do so by calling (202) 649–6700. Upon arrival, visitors will be required to present valid government-issued photo identification and to submit to security screening in order to inspect and photocopy comments.

Additionally, please send a copy of your comments by mail to: OCC Desk Officer, 1557–0237, U.S. Office of Management and Budget, 725 17th Street NW., #10235, Washington, DC 20503, or by fax to (202) 395–6974.

FOR FURTHER INFORMATION CONTACT: You can request additional information from or a copy of the collection from Johnny Vilela or Mary H. Gottlieb, Clearance Officers, (202) 649–5490, Legislative and Regulatory Activities Division, Office of the Comptroller of the Currency, 400 7th Street SW., Suite 3E–218, Mail Stop 9W–11, Washington, DC 20219. In addition, copies of the templates referenced in this notice can be found on the OCC's Web site under Tools and Forms (*http://www.occ.gov/tools-forms/forms/bank-operations/stress-test-reporting.html*).

SUPPLEMENTARY INFORMATION: In compliance with 44 U.S.C. 3507, the OCC has submitted the following proposed collection of information to OMB for review and clearance.

Company-Run Annual Stress Test Reporting Template and Documentation for Covered Institutions With Total Consolidated Assets of $10 Billion to $50 Billion Under the Dodd-Frank Wall Street Reform and Consumer Protection Act

Section 165(i)(2) of the Dodd-Frank Wall Street Reform and Consumer Protection Act [1] (Dodd-Frank Act) requires certain financial companies, including national banks and Federal savings associations, to conduct annual stress tests [2] and requires the primary financial regulatory agency [3] of those financial companies to issue regulations implementing the stress test requirements.[4] A national bank or Federal savings association is a ''covered institution,'' and therefore subject to the stress test requirements if its total consolidated assets exceed $10 billion. Under section 165(i)(2), a covered institution is required to submit to the Board of Governors of the Federal Reserve System (Board) and to its primary financial regulatory agency a

[1] Public Law 111–203, 124 Stat. 1376, July 2010.

[2] 12 U.S.C. 5365(i)(2)(A).

[3] 12 U.S.C. 5301(12).

[4] 12 U.S.C. 5365(i)(2)(C).

report at such time, in such form, and containing such information as the primary financial regulatory agency may require.[5] On October 9, 2012, the OCC published in the **Federal Register** a final rule implementing the section 165(i)(2) annual stress test requirements.[6] This notice describes the reports and information required to meet the reporting requirements under section 165(i)(2) for covered institutions with average total consolidated assets between $10 and $50 billion. These information collections will be given confidential treatment (5 U.S.C. 552(b)(4)).

The OCC intends to use the data collected through this proposal to assess the reasonableness of the stress test results of covered institutions and to provide forward-looking information to the OCC regarding a covered institution's capital adequacy. The OCC also may use the results of the stress tests to determine whether additional analytical techniques and exercises could be appropriate to identify, measure, and monitor risks at the covered institution. The stress test results are expected to support ongoing improvement in a covered institution's stress testing practices with respect to its internal assessments of capital adequacy and overall capital planning.

The Dodd-Frank Act stress testing (DFAST) requirements apply to all covered institutions, but the OCC recognizes that many covered institutions with consolidated total assets of $50 billion or more have been subject to existing stress testing requirements under the Board's Comprehensive Capital Analysis and Review (CCAR). The OCC also recognizes that these institutions' stress tests will be applied to more complex portfolios and therefore warrant a broader set of reports to adequately capture the results of the company-run stress tests. These reports necessarily will require more detail than would be appropriate for smaller, less complex institutions. Therefore, the OCC has decided to specify separate reporting templates for covered institutions with total consolidated assets between $10 and $50 billion and for covered institutions with total consolidated assets of $50 billion or more.[7]

While the general reporting categories are the same (income statement, balance sheet and capital), the level of granularity for individual reporting items is less for $10 to $50 billion institutions. For example, accounting for provisions by category is not required, and less detail is required for commercial and industrial lending. Because smaller banks with assets of $10 to $50 billion generally have less complex balance sheets, the OCC believes that highly detailed reporting is not warranted, and so the OCC is not requiring supplemental schedules on such areas as retail balances, securities and trading, operational risk, and pre-provision net revenue (PPNR).

The OCC has worked closely with the Board and the Federal Deposit Insurance Corporation (FDIC) to make the agencies' respective rules implementing the annual stress testing requirements under the Dodd-Frank Act consistent and comparable by requiring similar standards for scope of application, scenarios, data collection and reporting forms. The OCC also has worked to minimize any potential duplication of effort related to the annual stress test requirements. Additionally, the agencies have coordinated to allow for a unified results submission process.

The proposed OCC DFAST 10–50 reporting templates for institutions with assets of $10 to $50 billion are described below.

Description of Reporting Results Templates for Institutions With $10 Billion to $50 Billion in Assets

The ''Dodd-Frank Annual Stress Test Reporting Results Template for Covered Institutions with Total Consolidated Assets Between $10 and $50 Billion'' ($10–$50 results template) includes data collection worksheets necessary for the OCC to assess the company-run stress test results for baseline, adverse and severely adverse scenarios as well as any other scenario specified in accordance with regulations issued by the OCC. The $10-$50B results template includes worksheets that collect information on the following areas:

1. Income Statement
2. Balance Sheet
3. Capital

Each $10 to $50 billion covered institution reporting to the OCC using this form will be required to submit results for each scenario provided to covered institutions in accordance with regulations implementing Section 165(i)(2) as specified by the OCC.

Worksheets: Income Statement

The income statement worksheet collects data for the quarter preceding the planning horizon and for each quarter of the planning horizon for the stress test on projected losses and revenues in the following categories:

1. Net charge-offs
2. Pre-provision net revenue
3. Provision for loan and lease losses
4. Realized gains (losses) on held to maturity (HTM) and available-for-sale (AFS) securities
5. All other gains (losses)
6. Taxes

Memoranda items:

7. Total other than temporary impairment (OTTI) losses

This worksheet provides information used to assess losses and revenues that covered institutions can sustain in baseline, adverse and severely adverse stress scenarios.

Worksheets: Balance Sheet

The balance sheet worksheet collects data for the quarter preceding the planning horizon and for each quarter of the planning horizon for the stress test on projected equity capital, as well as on assets and liabilities in the following categories:

1. Loans
2. HTM securities
3. AFS securities
4. Trading assets
5. Total intangible assets
6. Other real estate
7. All other assets
8. Retail funding (core deposits)
9. Wholesale funding
10. Trading liabilities
11. All other liabilities
12. Perpetual preferred stock and related surplus
13. Equity capital

The OCC intends to use this worksheet to assess the projected changes in assets and liabilities that a covered institution can sustain in baseline, adverse and severely adverse stress scenarios. This worksheet will also be used to assess the revenue and loss projections identified in the income statement worksheet.

Worksheets: Capital

The capital worksheet, which is appended to the balance sheet worksheet, collects data for the quarter preceding the planning horizon and for each quarter of the planning horizon for the stress test on the following areas:

1. Unrealized gains (losses) on AFS securities
2. Disallowed deferred tax asset
3. Tier 1 capital
4. Qualifying subordinated debt and redeemable preferred stock
5. Allowance includable in Tier 2 capital

[5] 12 U.S.C. 5365(i)(2)(B).

[6] 77 FR 61238, October 9, 2012.

[7] *See* 77 FR 49485 for the Paperwork Reduction Act Notice and the OCC Web site at *http://occ.gov/news-issuances/news-releases/2012/nr-occ-2012-121.html* for the reporting templates for covered institutions with total consolidated assets of $50 billion or more.

6. Tier 2 capital
7. Total risk-based capital
8. Total capital
9. Risk-weighted assets
10. Total assets for leverage purposes
11. Tier 1 risk-based capital ratio
12. Tier 1 leverage ratio
13. Total risk-based capital ratio

Memoranda:

14. Sale, conversion, acquisition or retirement of capital stock
15. Cash dividends declared on preferred stock
16. Cash dividends declared on common stock

Additionally, the Summary Schedule captures projections for regulatory capital ratios over the planning horizon by scenario.

The OCC intends to use these worksheets to assess the impact on capital of the projected losses and projected changes in assets that the covered institution can sustain in a stressed scenario. In addition to reviewing the worksheet in the context of the balance sheet and income statement projections, the OCC also intends to use this worksheet in assessing capital planning processes for each covered institution.

Description of DFAST Scenario Variables Template

To conduct the stress test required under this rule, a covered institution may need to project additional economic and financial variables to estimate losses or revenues for some or all of its portfolios. In such a case, the covered institution is required to complete the DFAST Scenario Variables template for each scenario where such additional variables are used to conduct the stress test. Each scenario worksheet collects the variable name (matching that reported on the Scenario Variable Definitions worksheet), the actual value of the variable during the third quarter of the reporting year, and the projected value of the variable for nine future quarters.

Description of Supporting Documentation

Covered institutions must submit clear documentation in support of the projections included in the worksheets to support efficient and timely review of annual stress test results by the OCC. The supporting documentation should be submitted electronically and is not expected to be reported in the workbooks used for required data reporting. This supporting documentation must describe the types of risks included in the stress test; describe clearly the methodology used to produce the stress test projections; describe the methods used to translate the macroeconomic factors into a covered institution's projections; and also include an explanation of the most significant causes for the changes in regulatory capital ratios. The supporting documentation also should address the impact of anticipated corporate events, including mergers, acquisitions or divestitures of business lines or entities, and changes in strategic direction, and should describe how such changes are reflected in stress test results, including the impact on estimates of losses, expenses and revenues, net interest margins, non-interest income items, and balance sheet amounts.

Where company-specific assumptions are made that differ from the broad macroeconomic assumptions incorporated in stress scenarios provided by the OCC, the documentation also must describe such assumptions and how those assumptions relate to reported projections. Where historical relationships are relied upon, the covered institutions must describe the historical data and provide the basis for the expectation that these relationships would be maintained in each scenario, particularly under adverse and severely adverse conditions.

Summary of Comments and Changes From Proposal

In the **Federal Register** of March 11, 2013 (78 FR 49488), OCC published a notice requesting comment on the templates and the collection of information. OCC received comments from seven groups on the notice. Five of the commenters were banking organizations, one was an industry group, and one was a financial services consulting firm. The OCC has made several changes to the OCC DFAST 10–50 results template in light of comments received. The OCC, the Board and the FDIC coordinated the changes made to each agency's templates in order to keep the templates identical and minimize the burden on affected institutions.

Some commenters expressed concern about having to submit stress testing results in a Call Report-type format, noting that their existing stress testing software was not developed with such a format in mind and asking for less detailed reporting forms. These commenters requested that the agencies consider further delaying implementation of the reporting requirements and/or limiting the report submissions to the OCC DFAST 10–50 summary schedule. The OCC has determined that using reporting templates modeled on the Call Report is the best solution because of familiarity with this format by the OCC, covered institutions and the public, particularly when mandatory public disclosure of summary results under the severely adverse scenario becomes effective in 2015. The OCC DFAST 10–50 results template, aligned to the Call Report, provides a format that is well understood and utilized by the industry. Therefore, the OCC believes that the reporting requirements will not place undue burden on institutions' ability to report stress test results. Using the Call Report format would also ensure a high level of consistency and facilitate assessment of the results. The OCC has already delayed the application of the stress testing rules for the $10–$50 billion covered institutions, in part so that they would have time to create the necessary infrastructure to submit the appropriate stress testing results.

Two commenters expressed concern about the differences among stress testing templates used to respond to different stress testing requirements and about the burden some banking organizations (companies with $50 billion or more in assets that control subsidiaries with $10–50 billion in assets) might face in having to prepare multiple sets of templates. The OCC notes that the final OCC DFA stress testing rule allows such subsidiaries to file the same template as filed by its parent. Per the final OCC DFA stress testing rule, ''any $10 to $50 billion covered institution that elects to apply the requirements of an over $50 billion covered institution shall remain subject to the requirements applicable to an over $50 billion covered institution until otherwise approved by the OCC.'' [8] Additionally, implementation of the stress test requirements has already been delayed for the $10–$50 billion companies and public disclosure is not required until 2015.

One commenter suggested the application of generalized, bank-developed loss assumptions for immaterial portfolios. The commenter also noted that an immaterial portfolio exception is allowed for firms with $50 billion or more assets in stress testing submissions. The OCC has considered the burden of calculating losses for immaterial portfolios for companies with $10–$50 billion in assets and determined that providing a safe harbor that defines immaterial portfolios, where no or little consideration of the risk of these portfolios is undertaken, would be contrary to the purpose of a company-run stress test and could unintentionally mask or cause

[8] 12 CFR 46.3(e)(2).

institutions to erroneously conclude that the aggregation of immaterial portfolios would always pose little or no risk to an institution. Although stress testing should be applied to all exposures, the OCC recognizes that the same level of rigor and analysis may not be necessary for lower-risk, immaterial portfolios.[9] For such portfolios, it may be appropriate for a company to use a less sophisticated approach for its stress test projections, assuming the results of that approach are conservative and well-documented. The OCC has therefore not established a reporting threshold for immaterial portfolios in the reporting requirements for the proposed OCC DFAST 10–50 results template. Institutions should refer to the proposed interagency supervisory guidance on implementing Dodd-Frank Act company-run stress tests for banking organizations with total consolidated assets of more than $10 billion but less than $50 billion for more information on estimates for immaterial portfolios.[10]

One commenter asked for clarification regarding the calculation and reporting of regulatory capital and risk-weighted assets (RWAs), noting the expectation that capital and RWA calculations and definitions would change over the planning horizon as new rules are implemented (specifically noting new definitions when the Basel III final rule is adopted). In addition, this commenter also requested clarification on the calculation of tier 1 non-common capital elements.

OCC staff acknowledges that tier 1 common equity and non-common capital elements for institutions with total assets of less than $50 billion were not defined by regulation or rule prior to the final rule recently adopted to implement Basel III.[11] There are three line items in the proposed OCC DFAST 10–50 results template that would be specifically affected by the capital framework that implements Basel III standards: Tier 1 common equity capital, non-common capital elements, and RWAs. Common equity tier 1 capital was recently defined in the Basel III final rule for all institutions and generally will not become effective for institutions with $10–$50 billion in assets until 2015. To effectively model alternative capital calculations more than halfway through the planning horizon for these banking organizations adds complexity and increases the potential or likelihood of erroneous calculations or assumptions. This complexity and increased risk of error could cause institutions to detract from the main purpose of conducting a company-run stress test; mainly to make a forward-looking assessment of capital planning processes and internal capital needs under various scenarios. Lastly, as the first required public disclosure will not commence until the 2014 stress test cycle with disclosure occurring in June of 2015, the additional burden of transitioning to a new capital calculation more than halfway through the 2013 stress test planning horizon will not provide the public with any insight into a firm's capital adequacy or planning process in this instance.

Accordingly, the OCC removed tier 1 common and non-common capital line items, and the associated equity ratios, from the DFAST 10–50 results template for the 2013 stress test cycle. The final template requires covered institutions to report capital and RWAs for the entire planning horizon using the regulatory capital rules and definitions that are applicable on the ''as of'' date of each report for this initial reporting submission. For the 2013 stress testing cycle institutions should use the OCC's applicable risk-based capital rules as they are effective as of September 30, 2013.

Two commenters argued that the level of detail demanded by the templates was excessive. These commenters stated that separating 1–4 family construction loans from all other construction loans would require more detailed reporting for the OCC DFAST 10–50 results template than what is required for firms subject to CCAR, and firms with $50 billion or more in assets that report the DFAST 14–A form. While the templates for firms with $50 billion or more in assets do not segment 1–4 family construction loans, that specific data item is required for these firms on both the FR Y–14Q and M input data reports. More importantly, the OCC believes this data item is particularly relevant to these smaller organizations which reported material concentrations in this product type and given that a significant amount of the industry's losses during the most recent economic downturn emanated from this product. These data would provide necessary information for the institutions to effectively manage risk and appropriately assess and plan for their capital needs.

One commenter also argued that requiring separate line items for retail and wholesale funding would add unnecessary complexity and burden. The OCC, however, believes it is necessary to maintain these separate items. The breakdown of deposits between retail and wholesale is easily facilitated through Call Report data and the proposed OCC DFAST 10–50 instructions indicate that institutions should use the Call Report segmentation definitions to project these line items. In addition, retail and wholesale funding have historically reacted differently under stressed economic conditions and projecting the retail and wholesale deposit structure throughout the planning horizon as proposed would provide useful information to the institutions and regulators with respect to how an institution internally assesses capital adequacy, plans for their capital needs, and manages risk.

One commenter stated that gathering available-for-sale (AFS) and held-to-maturity (HTM) balances for U.S. government obligations and obligations of government-sponsored entities (GSE) would require more detailed reporting for the OCC DFAST 10–50 templates than what is required for the DFAST 14A. Another commenter suggested separating GSE obligations from other government obligations on the OCC DFAST 10–50 balance sheet consistent with the treatment on the Call Report income statement. While the DFAST 14A collects only total AFS and HTM balances on the balance sheet worksheet, this reporting series requires more granular data than the OCC DFAST 10–50 on government securities through other schedules within the DFAST 14A report. The reporting requirements for the Call Report balance sheet require more detailed information on AFS and HTM GSE obligations relative to the reporting requirements for the OCC DFAST 10–50. Gathering AFS and HTM balances for U.S. government obligations and obligations of GSEs would provide relevant and required data to project net income and regulatory capital over the planning horizon.

Commenters also favored the elimination of several line items. Several commenters stated that the level of detail required by the balance sheet memoranda items were not informative or necessary to the loss estimation process, or entailed more detail than what was required by the DFAST 14A. Specific memoranda items cited by commenters included troubled debt restructurings and loans secured by 1–4 family in foreclosure. Based on this comment, the OCC also evaluated the utility of another balance sheet memoranda item: Loans and leases guaranteed by either U.S. government or GSE guarantees (i.e., non-FDIC loss sharing agreements). The OCC agrees that these memoranda data items are already captured within the OCC

[9] Immaterial portfolios are defined as those that would not present a consequential effect on capital adequacy under any of the scenarios provided.

[10] 78 FR 47217 (August 5, 2013).

[11] *http://www.federalreserve.gov/newsevents/press/bcreg/20130702a.htm.*

DFAST 10–50 reporting requirements for loans and leases and that eliminating these items from the reporting template would not affect an institution's ability to project pre-provision net revenue, net income, or regulatory capital in order to assess their capital needs under stressed conditions. Therefore, the OCC eliminated these three supplemental balance sheet memoranda reporting items.

Commenters also requested that common stock, retained earnings, surplus, and other equity components be reported as a single line item. The OCC agrees with this comment and has combined the aforementioned capital components into one line item to be reported as ''equity capital.''

One commenter noted that separately modeling average rates for each type of deposit would also involve a significant amount of work and potentially affect other company-run models. The OCC agrees that the average rate information is not a necessary data input needed for an institution to project losses, pre-provision net revenue, or capital. Further, the additional burden placed on institutions to calculate the projected average rates could unnecessarily distract institutions from the primary goal of the annual company-run stress test—to effectively estimate the possible impact of an economic downturn on a firm's capital position in order to plan for capital needs and identify and manage risk. Therefore, the OCC has removed all average rate memoranda items on the balance sheet. This change is consistent with the OCC's goal of making the DFAST 10–50 report similar to the Call Report and of reducing new burden on covered institutions.

Two commenters favored the elimination of the income statement item for Gains and Losses on Other Real Estate Owned (OREO). One commenter noted that this element could effectively be combined with forecasting of other OREO expenses. The other commenter stated that the level of detail for this element is more granular than what is required for the DFAST 14A template. The OCC notes that gains or losses on OREO are captured in the pre-provision net revenue metrics worksheet of the DFAST 14A template; therefore, this requirement would not be more burdensome for the $10–$50 billion firms. Nevertheless, the OCC has eliminated this item since gains and losses on OREO would already be captured within the non-interest income statement memoranda item ''itemize and describe amounts greater than 15% of non-interest income'' or in the ''itemize and describe amounts greater than 15% of non-interest expense'' when the amount meets the 15% threshold required by the proposed OCC DFAST 10–50 results template.

In response to a few technical comments received, the OCC has adjusted the templates and instructions accordingly. These changes include correction of formulaic errors; correction of Micro Data Reference Manual (MDRM) errors; clarified reporting instructions for income statement memoranda items; and more detailed technical reporting instructions, including the elimination of the contact information schedule as this information would be collected through the results template cover sheet and related data collection application.

Burden Estimates: OCC estimates the burden of this collection of information as follows:

Estimated Number of Respondents: 33.

Estimated Total Annual Burden: 15,312 hours.

The burden for each $10 to $50 billion covered institution that completes the DFAST 10–50 results template is estimated to be 440 hours for a total of 14,520 hours. This burden includes 20 hours to input these data and 420 hours for work related to modeling efforts. The estimated burden for each $10 to $50 billion covered institution that completes the annual DFAST scenarios variables template is estimated to be 24 hours for a total of 792 hours. Start up costs for new respondents are estimated to be 93,600 hours and ongoing revisions for existing firms, 4,160 hours.

Comments continue to be invited on:

(a) Whether the collection of information is necessary for the proper performance of the functions of the OCC, including whether the information has practical utility;

(b) The accuracy of the OCC's estimate of the 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 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.

Dated: October 1, 2013.

Michele Meyer,

Assistant Director, Legislative and Regulatory Activities Division.

[FR Doc. 2013–24721 Filed 10–21–13; 8:45 am]

BILLING CODE 4810–33–P

DEPARTMENT OF THE TREASURY

Office of Foreign Assets Control

Additional Designations, Foreign Narcotics Kingpin Designation Act

AGENCY: Office of Foreign Assets Control, Treasury.

ACTION: Notice.

SUMMARY: The U.S. Department of the Treasury 's Office of Foreign Assets Control (''OFAC'') is publishing the names of two individuals and one entity whose property and interests in property have been blocked pursuant to the Foreign Narcotics Kingpin Designation Act (''Kingpin Act'') (21 U.S.C. 1901–1908, 8 U.S.C. 1182).

DATES: The designation by the Director of OFAC of the two individuals and one entity identified in this notice pursuant to section 805(b) of the Kingpin Act is effective on September 30, 2013.

FOR FURTHER INFORMATION CONTACT: Assistant Director, Sanctions Compliance & Evaluation, Office of Foreign Assets Control, U.S. Department of the Treasury, Washington, DC 20220, Tel: (202) 622–2490.

SUPPLEMENTARY INFORMATION:

Electronic and Facsimile Availability

This document and additional information concerning OFAC are available on OFAC's Web site at *http://www.treasury.gov/ofac* or via facsimile through a 24-hour fax-on-demand service at (202) 622–0077.

Background

The Kingpin Act became law on December 3, 1999. The Kingpin Act establishes a program targeting the activities of significant foreign narcotics traffickers and their organizations on a worldwide basis. It provides a statutory framework for the imposition of sanctions against significant foreign narcotics traffickers and their organizations on a worldwide basis, with the objective of denying their businesses and agents access to the U.S. financial system and the benefits of trade and transactions involving U.S. companies and individuals.

The Kingpin Act blocks all property and interests in property, subject to U.S. jurisdiction, owned or controlled by significant foreign narcotics traffickers as identified by the President. In addition, the Secretary of the Treasury, in consultation with the Attorney General, the Director of the Central Intelligence Agency, the Director of the Federal Bureau of Investigation, the Administrator of the Drug Enforcement Administration, the Secretary of

Defense, the Secretary of State, and the Secretary of Homeland Security may designate and block the property and interests in property, subject to U.S. jurisdiction, of persons who are found to be: (1) materially assisting in, or providing financial or technological support for or to, or providing goods or services in support of, the international narcotics trafficking activities of a person designated pursuant to the Kingpin Act; (2) owned, controlled, or directed by, or acting for or on behalf of, a person designated pursuant to the Kingpin Act; or (3) playing a significant role in international narcotics trafficking.

On September 30, 2013, the Director of OFAC designated the following two individuals and one entity whose property and interests in property are blocked pursuant to section 805(b) of the Kingpin Act.

Individuals

1. PADRO PASTOR, Alvaro; DOB 09 Nov 1975; nationality Spain; R.F.C. PAPA751109870 (Mexico); C.U.R.P. PAPA751109HNEDSL04 (Mexico) (individual) [SDNTK] (Linked To: CASA V; Linked To: PISCILANEA, S.A. DE C.V.).
2. VALLARTA ESCALANTE, Luis Francisco, Calle Chilam Balam No. 279, Supermanzana 50, Manzana 14, Lote 17, Residencial San Angel, Cancun, Quintana Roo, Mexico; DOB 24 Nov 1979; POB Torreon, Coahuila de Zaragoza, Mexico; R.F.C. VAEL791124NXA (Mexico); C.U.R.P. VAEL791124HCLLSS07 (Mexico) (individual) [SDNTK] (Linked To: GRUPO IMPERGOZA, S.A. DE C.V.; Linked To: SOCIALIKA RENTAS Y CATERING, S.A. DE C.V.).

Entity

1. CASA V, Av. Vallarta 1339, Colonia Americana, Guadalajara, Jalisco, Mexico [SDNTK].

Dated: September 30, 2013.

Adam J. Szubin,

Director, Office of Foreign Assets Control.

[FR Doc. 2013–24692 Filed 10–21–13; 8:45 am]

BILLING CODE 4810–AL–P

DEPARTMENT OF THE TREASURY

Office of Foreign Assets Control

Unblocking of Specially Designated Nationals and Blocked Persons Pursuant to the Foreign Narcotics Kingpin Designation Act

AGENCY: Office of Foreign Assets Control, Treasury.

ACTION: Notice.

SUMMARY: The Department of the Treasury's Office of Foreign Assets Control (''OFAC'') is publishing the names of three individuals and three entities whose property and interests in property have been unblocked pursuant to the Foreign Narcotics Kingpin Designation Act (''Kingpin Act'') (21 U.S.C. 1901–1908, 8 U.S.C. 1182).

DATES: The unblocking and removal from the list of Specially Designated Nationals and Blocked Persons (''SDN List'') of three individuals and three entities identified in this notice whose property and interests in property were blocked pursuant to the Kingpin Act, is effective on September 26, 2013.

FOR FURTHER INFORMATION CONTACT: Assistant Director, Sanctions Compliance & Evaluation, Department of the Treasury, Office of Foreign Assets Control, Washington, DC 20220, Tel: (202) 622–2420.

SUPPLEMENTARY INFORMATION:

Electronic and Facsimile Availability

This document and additional information concerning OFAC are available from OFAC's Web site at *www.treasury.gov/ofac* or via facsimile through a 24-hour fax-on demand service at (202) 622–0077.

Background

On December 3, 1999, the Kingpin Act was signed into law by the President of the United States. The Kingpin Act provides a statutory framework for the President to impose sanctions against significant foreign narcotics traffickers and their organizations on a worldwide basis, with the objective of denying their businesses and agents access to the U.S. financial system and to the benefits of trade and transactions involving U.S. persons and entities.

The Kingpin Act blocks all property and interests in property, subject to U.S. jurisdiction, owned or controlled by significant foreign narcotics traffickers as identified by the President. In addition, the Secretary of the Treasury consults with the Attorney General, the Director of the Central Intelligence Agency, the Director of the Federal Bureau of Investigation, the Administrator of the Drug Enforcement Administration, the Secretary of Defense, the Secretary of State, and the Secretary of Homeland Security when designating and blocking the property or interests in property, subject to U.S. jurisdiction, of persons or entities found to be: (1) materially assisting in, or providing financial or technological support for or to, or providing goods or services in support of, the international narcotics trafficking activities of a person designated pursuant to the Kingpin Act; (2) owned, controlled, or directed by, or acting for or on behalf of, a person designated pursuant to the Kingpin Act; and/or (3) playing a significant role in international narcotics trafficking.

On September 26, 2013, the Director of OFAC removed from the SDN List the three individuals and three entities listed below, whose property and interests in property were blocked pursuant to the Kingpin Act:

Individuals:

1. DESME HURTADO, Maximo Zadi (a.k.a. DESME, Zadi), c/o AVIANDINA S.A.C., Lima, Peru; c/o SISTEMA DE DISTRIBUCION MUNDIAL S.A.C., Lima, Peru; Cerro Alto De La Posada 58, Los Andes, Chile; DOB 21 Aug 1958; LE Number 06367724 (Peru) (individual) [SDNTK].
2. RODRIGUEZ ROMERO, Martha Ines, c/o AGROPECUARIA SERRO S.A.S., Bogota, Colombia; c/o FERTILIZANTES LIQUIDOS DE LA SABANA LTDA., Bogota, Colombia; Calle 109 No. 21–41 Apto. 403, Bogota, Colombia; Calle 109 No. 21–01 Apto. 401, Bogota, Colombia; DOB 18 May 1953; POB Bogota, Colombia; Cedula No. 41590271 (Colombia) (individual) [SDNTK].
3. SERRALDE RODRIGUEZ, Carlos Hernan, c/o AGROPECUARIA SERRO S.A.S., Bogota, Colombia; c/o ASOCIACION COLOMBIANA DE CRIADORES DE GANADO LIMOUSIN, Bogota, Colombia; Calle 152 No. 58–51 Apto. 501—Torre 5, Bogota, Colombia; DOB 08 Oct 1975; POB Bogota, Colombia; Cedula No. 79689496 (Colombia) (individual) [SDNTK].

Entities:

1. AGROPECUARIA SERRO S.A.S. (a.k.a. AGROSERRO), Carrera 14A No. 101–11 Of. 403, Bogota, Colombia; Finca Criadero Las Palmas, Guaymaral, Cundinamarca, Colombia; NIT # 890935433–8 (Colombia) [SDNTK].
2. ASOCIACION COLOMBIANA DE CRIADORES DE GANADO LIMOUSIN (a.k.a. ASOLIMOUSIN), Carrera 14A No. 101–11 Of. 403, Bogota, Colombia; NIT # 800099351–8 (Colombia) [SDNTK].
3. FERTILIZANTES LIQUIDOS DE LA SABANA LTDA. (a.k.a. FERTILISA LTDA.), Calle 98 Bis No. 57–66, Bogota, Colombia; Calle 98 Bis No. 71A–66, Bogota, Colombia; Via Siberia-Cota Km. 6, Vereda Rozo, Finca Ancon, Cota, Cundinamarca,

Colombia; NIT # 860536101–7 (Colombia) [SDNTK].

Dated: September 26, 2013.

Barbara C. Hammerle,

Acting Director, Office of Foreign Assets Control.

[FR Doc. 2013–24131 Filed 10–21–13; 8:45 am]

BILLING CODE 4810–AL–P

DEPARTMENT OF THE TREASURY

Office of Foreign Assets Control

Unblocking of Specially Designated Nationals and Blocked Persons Pursuant to Executive Order 12978

AGENCY: Office of Foreign Assets Control, Treasury.

ACTION: Notice.

SUMMARY: The Department of the Treasury's Office of Foreign Assets Control (''OFAC'') is publishing the names of seven individuals and three entities whose property and interests in property have been unblocked pursuant to Executive Order 12978 of October 21, 1995, ''Blocking Assets and Prohibiting Transactions With Significant Narcotics Traffickers''.

DATES: The unblocking and removal from the list of Specially Designated Nationals and Blocked Persons (''SDN List'') of seven individuals and three entities identified in this notice whose property and interests in property were blocked pursuant to Executive Order 12978 of October 21, 1995, is effective on September 26, 2013.

FOR FURTHER INFORMATION CONTACT: Assistant Director, Sanctions Compliance & Evaluation, Department of the Treasury, Office of Foreign Assets Control, Washington, DC 20220, Tel: (202) 622–2490.

SUPPLEMENTARY INFORMATION:

Electronic and Facsimile Availability

This document and additional information concerning OFAC are available from OFAC's Web site (*www.treasury.gov/ofac*) or via facsimile through a 24-hour fax-on demand service at (202) 622–0077.

Background

On October 21, 1995, the President, invoking the authority, *inter alia,* of the International Emergency Economic Powers Act (50 U.S.C. §§ 1701–1706) (''IEEPA''), issued Executive Order 12978 (60 Fed. Reg. 54579, October 24, 1995) (the ''Order''). In the Order, the President declared a national emergency to deal with the threat posed by significant foreign narcotics traffickers centered in Colombia and the harm that they cause in the United States and abroad.

Section 1 of the Order blocks, with certain exceptions, all property and interests in property that are in the United States, or that hereafter come within the United States or that are or hereafter come within the possession or control of United States persons, of: (1) the foreign persons listed in an Annex to the Order; (2) any foreign person determined by the Secretary of Treasury, in consultation with the Attorney General and the Secretary of State: (a) to play a significant role in international narcotics trafficking centered in Colombia; or (b) to materially assist in, or provide financial or technological support for or goods or services in support of, the narcotics trafficking activities of persons designated in or pursuant to the Order; and (3) persons determined by the Secretary of the Treasury, in consultation with the Attorney General and the Secretary of State, to be owned or controlled by, or to act for or on behalf of, persons designated pursuant to the Order.

On September 26, 2013, the Director of OFAC removed from the SDN List seven individuals and three entities listed below, whose property and interests in property were blocked pursuant to the Order:

Individuals:

1. CEDENO HERRERA, Luis Mario, c/o COMPANIA AGROPECUARIA DEL SUR LTDA., Bogota, Colombia; c/o INVERSIONES AGROINDUSTRIALES DEL OCCIDENTE LTDA., Bogota, Colombia; c/o AGROPECUARIA LINDARAJA S.A., Cali, Colombia; c/o INVERSIONES BRASILAR S.A., Bogota, Colombia; nationality Colombia; citizen Colombia; Cedula No. 16637213 (Colombia) (individual) [SDNT].
2. GONZALEZ SANCLEMENTE, Alejandro, c/o IMERCO LTDA., San Pedro, Valle, Colombia; DOB 26 Feb 1960; POB Buga, Valle, Colombia; Cedula No. 14882775 (Colombia) (individual) [SDNT].
3. GONZALEZ SANCLEMENTE, Fernando, Colombia; DOB 16 Jul 1963; Cedula No. 14884862 (Colombia) (individual) [SDNT].
4. GONZALEZ SANCLEMENTE, Jose Alberto, c/o AGROINDUSTRIAS JORDANES S.A., Cali, Colombia; c/o FEGO CANA E.U., Cali, Colombia; c/o IMERCO LTDA., San Pedro, Valle, Colombia; DOB 10 Sep 1971; alt. DOB 09 Oct 1971; POB Buga, Valle, Colombia; Cedula No. 14894820 (Colombia) (individual) [SDNT].
5. RODRIGUEZ OREJUELA DE GIL, Amparo; DOB 13 Mar 1949; Cedula No. 31218703 (Colombia); Passport AC342062 (Colombia) (individual) [SDNT] (Linked To: LABORATORIOS BLAIMAR DE COLOMBIA S.A.; Linked To: DISTRIBUIDORA MIGIL LTDA.; Linked To: DEPOSITO POPULAR DE DROGAS S.A.; Linked To: LABORATORIOS KRESSFOR DE COLOMBIA S.A.; Linked To: LABORATORIOS BLANCO PHARMA S.A.; Linked To: RADIO UNIDAS FM S.A.; Linked To: DISTRIBUIDORA DE DROGAS CONDOR LTDA.; Linked To: D'CACHE S.A.; Linked To: LABORATORIOS Y COMERCIALIZADORA DE MEDICAMENTOS DROBLAM S.A.; Linked To: AQUILEA S.A.).

Entities:

1. AGROINDUSTRIAS JORDANES S.A. (a.k.a. JORDANES PARRILLA ARGENTINA), Calle 8 No. 25–46, Cali, Colombia; Calle 9A Norte No. 4N–23, Oficina 101E, Cali, Colombia; Calle 18N No. 9–07, Cali, Colombia; Carrera 98 No. 16–200, Local R6, Cali, Colombia; Carrera 105 Calle 15D, Loc. 5 y 6, Cali, Colombia; NIT #900092924–9 (Colombia) [SDNT].
2. FEGO CANA E.U., Calle 11A No. 116–40 Casa 3, Cali, Colombia; NIT #830500953–0 (Colombia); Matricula Mercantil No 680975–15 (Colombia) [SDNT].
3. IMERCO LTDA., Calle Ruta Buga—Tulua 4 Kilometros despues de San Pedro, San Pedro, Valle, Colombia; NIT #810004154–2 (Colombia) [SDNT].

Dated: September 26, 2013.

Barbara Hammerle,

Acting Director, Office of Foreign Assets Control.

[FR Doc. 2013–24130 Filed 10–21–13; 8:45 am]

BILLING CODE 4810–AL–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Proposed Collection; Comment Request for 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 Escrow Funds and Other Similar Funds.

DATES: Written comments should be received on or before December 23, 2013 to be assured of consideration.

ADDRESSES: Direct all written comments to Yvette Lawrence, Internal Revenue Service, Room 6129, 1111 Constitution Avenue NW., Washington, DC 20224.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of regulation the form and instructions should be directed to Kerry Dennis at Internal Revenue Service, Room 6129, 1111 Constitution Avenue NW., Washington DC 20224, or through the Internet, at *Kerry.Dennis@irs.gov*.

SUPPLEMENTARY INFORMATION:

Title: Escrow Funds and Other Similar Funds.

OMB Number: 1545–1631.

Regulation Project Number: REG–209619–93.

Abstract: These regulations would amend the final regulations for qualified settlement funds (QFSs) and would provide new rules for qualified escrows and qualified trusts used in deferred section 1031 exchanges; pre-closing escrows; contingent at-closing escrows; and disputed ownership funds.

Current Actions: There is no change to this existing regulation.

Type of Review: Extension of a currently approved collection.

Affected Public: Individuals or households, business or other for-profit organizations, not-for-profit institutions and Federal, state, local or tribal governments.

Estimated Number of Respondents: 9,300.

Estimated Time per Respondent: 30 minutes.

Estimated Total Annual Burden Hours: 3,720.

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: September 30, 2013.

R. Joseph Durbala,

IRS Reports Clearance Officer.

[FR Doc. 2013–24334 Filed 10–21–13; 8:45 am]

BILLING CODE 4830–01–P

FEDERAL REGISTER

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Part II

The President

Presidential Determination No. 2014–02 of October 10, 2013—Provision of U.S. Drug Interdiction Assistance to the Government of Brazil

Federal Register
Vol. 78, No. 204
Tuesday, October 22, 2013

Presidential Documents

Title 3

The President

Presidential Determination No. 2014–02 of October 10, 2013

Provision of U.S. Drug Interdiction Assistance to the Government of Brazil

Memorandum for the Secretary of State [and] the Secretary of Defense

By the authority vested in me as President by section 1012 of the National Defense Authorization Act for fiscal year 1995, as amended (22 U.S.C. 2291–4), I hereby certify, with respect to Brazil, that (1) interdiction of aircraft reasonably suspected to be primarily engaged in illicit drug trafficking in that country's airspace is necessary because of the extraordinary threat posed by illicit drug trafficking to the national security of that country; and (2) that country has appropriate procedures in place to protect against innocent loss of life in the air and on the ground in connection with such interdiction, which shall at a minimum include effective means to identify and warn an aircraft before the use of force is directed against the aircraft.

The Secretary of State is authorized and directed to publish this determination in the *Federal Register* and to notify the Congress of this determination.

THE WHITE HOUSE,
Washington, October 10, 2013.

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Federal Register

Vol. 78, No. 204

Tuesday, October 22, 2013

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The United States Government Manual	**741–6000**
Other Services	
Electronic and on-line services (voice)	**741–6020**
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FEDERAL REGISTER PAGES AND DATE, OCTOBER

60177–60652 1
60653–61152 2
61153–61802 3
61803–61936 4
61937–61948 7
61949–61982 8
61983–61988 9
61989–62004 10
62005–62292 11
62293–62304 15
62305–62328 16
62329–62334 17
62335–62356 18
62357–62416 21
62417–62954 22

CFR PARTS AFFECTED DURING OCTOBER

At the end of each month the Office of the Federal Register publishes separately a List of CFR Sections Affected (LSA), which lists parts and sections affected by documents published since the revision date of each title.

1 CFR

Proposed Rules:
51 60784

3 CFR

Proclamations:
9024 60177
9025 60179
9026 61151
9027 61803
9028 61805
9029 61807
9030 61809
9031 61811
9032 61813
9033 61815
9034 62305
9035 62307
9036 62309
9037 62311
9038 62313
9039 62315
9040 62335
9041 62337
9042 62339

Executive Orders
13652 61817

Administrative Orders
Memorandums:
Memo. of September 27, 2013 62413
Notices:
Notice of October 16, 2013 62341
Presidential Determinations:
No. 2014–01 of October 2, 2013 62415
No. 2014–02 of October 10, 2013 62953

5 CFR

532 ..... 60181, 60182
890 60653
2641 61153

7 CFR

205 61154

10 CFR

Proposed Rules:
429 62472
430 ..... 62488, 62494
431 62472

12 CFR

3 62018
5 62018
6 62018
165 62018
167 62018
208 62018
217 62018
225 62018
324 62417
1002 60382
1024 60382
1026 60382

13 CFR

121 61114
124 61114
125 61114
126 61114
127 61114

14 CFR

39 ..... 60182, 60185, 60186, 60188, 60656, 60658, 60660, 60667, 60670, 60673, 60676, 60679, 60681, 61161, 61164, 61168, 61171, 61173, 61177
71 ..... 60683, 61179

Proposed Rules:
25 62495
39 ..... 60798, 60800, 60804, 60807, 61220
71 ..... 60235, 60236, 60237, 62498
73 60238

15 CFR

730 61744
732 61744
734 ..... 61744, 61874
736 61744
738 ..... 61744, 61874
740 ..... 61744, 61874
742 ..... 61744, 61874
743 61744
744 61744
746 61744
748 ..... 61744, 61874
750 ..... 61744, 61874
756 61744
758 61744
762 61744
764 61744
770 61744
772 ..... 61744, 61874
774 ..... 61744, 61874

17 CFR

232 60684

Proposed Rules:
229 60560
230 61222
239 61222
249 60560

19 CFR

10 60191
24 60191
162 60191
163 60191

178 60191
351 62417
354 62417
356 62417
Proposed Rules:
351 60240

20 CFR

718 60686
725 60686

21 CFR

Proposed Rules:
1308 ....61991, 62500

22 CFR

120 61750
121 61750
123 61750
126 61750

24 CFR

3282 60193

26 CFR

1 ....62418, 62426

27 CFR

9 ....60686, 60690, 60693

29 CFR

552 60454
4022 62426

30 CFR

250 60208

31 CFR

Ch. 11 60695

32 CFR

199 62427
236 62430
706 62438
Proposed Rules:
199 62506

33 CFR

100 62329
117 ....61180, 62439
165 ....60216, 60218, 60220, 60222, 60698, 61183, 61185, 61937, 62293
Proposed Rules:
165 61223

37 CFR

Ch. I 61185
1 62368
3 62368
11 62368

38 CFR

17 62441

40 CFR

9 62443
49 60700
51 62451
52 ....60225, 60704, 61188, 62455, 62459
80 62462
81 ....60704, 62459
180 ....60707, 60709, 60715, 60720
300 60721
721 62443
Proposed Rules:
49 62509
52 62523
300 60809

42 CFR

412 ....61191, 61197
413 61202
424 61202
482 61197
485 61197
489 61197
Proposed Rules:
121 60810

44 CFR

Proposed Rules:
206 61227

47 CFR

87 61203
Proposed Rules:
64 61250
73 61251

49 CFR

107 ....60726, 60745
109 60755
130 60745
171 60745
172 60745
173 ....60745, 60763, 60766
174 60745
177 60745
178 60745
179 60745
180 60745
350 60226
381 60226
383 60226
384 60226
385 60226
386 60226
387 60226
392 60226
Proposed Rules:
Ch. VI 61251

50 CFR

17 ....60608, 60766, 61004, 61208, 61452, 61506
229 61821
622 ....61826, 61827, 61939, 61989
648 ....61828, 61838, 62331, 62471
679 ....61990, 62005
Proposed Rules:
17 ....60813, 61046, 61082, 61273, 61293, 61622, 61764, 62523, 62529, 62560
622 62579

LIST OF PUBLIC LAWS

Note: No public bills which have become law were received by the Office of the Federal Register for inclusion in today's **List of Public Laws**.

Last List October 18, 2013

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